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Integration Through Law

Europe and the American Federal Experience

A Series under the General Editorship of

Mauro Cappelletti · Monica Seccombe · Joseph Weiler

Volume 1

Methods, Tools and Institutions

Book 1

A Political, Legal and Economic Overview

edited by

Mauro Cappelletti · Monica Seccombe · Joseph Weiler

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Foreword to the Florence Integration Project Series

The Florence Integration Project can certainly be characterized as a highly pluralistic research endeavor, not only because its enquiry into what we consider to be one of the most important phenomena in contemporary legal evolution is the product of the efforts of close to forty contributors from many countries in three continents, with almost every contribution being, in its turn, the joint product of a team, but also because pluralism of ideas and approaches has been, more than accepted, encouraged and praised. Thus, next to authors whose vision of the role and scope of the European Community, and generally of integration, federalism and transnationalism, tends to be primarily norm-oriented, there are others who have greater confidence in a more spontaneous, decentralized, indirect development, based more on non-legal incentives and self-imposed codes of conduct than on federal or Community "legislation"; next to those who have a center-oriented vision of the federal government, there are others who tend to see the federal role as merely the exception vis-à-vis the role of local and member state governments; next to those who would prefer "dual federalism," in which most powers and competences tend to be divided neatly between federal and local governments, are juxtaposed others who prefer a more pregnant and flexible type of "cooperative federalism," in which most powers and competences are treated as, in principle, concurrent, *i.e.,* shared by the various levels of government, on the assumption that only an empirical approach can, for instance, indicate whether a particular topic or area in a given time and place is more properly regulated centrally or peripherally.[1] And yet, almost as an exercise in intellectual federalism, all through the project there was an effort of coordination aimed at making of an inherently and proudly pluralistic product, a coherent research effort united in its most basic vision and rationales. It is the primary purpose of this *Foreword* to outline such vision and rationales, leaving to the following *Introduction* a more elaborated survey of the Project and the analysis of its central organization, themes, and ideas.

Let me start by saying that the project stems from one simple belief – a "working hypothesis," if one prefers, but one which has been borne out by

[1] At the conference of all participants in the Integration Project which was held at the European University Institute in December, 1981, to discuss jointly the draft contributions to the Project, US federalism was characterized as "cooperative" and contrasted with a European (EC) brand of "dual federalism." This, of course, was merely intended to be a rough approximation, yet one rooted in a real fact – the difficulty for Europeans, due to a history of centralized national governments (not, however, an ancient history, *see infra* notes 17–25 and accompanying text), to "think federal" in the fullest significance of the word.

a wealth of comparative and historical research on a number of topics.[2] It is the belief that in our era of unprecedented, tremendously accelerated movement and change, a degree of *convergence* in at least some aspects of human behavior basic to social life is a *sine qua non* for productive and peaceful coexistence of peoples, indeed for their very survival. Static, isolated societies can certainly survive, even flourish, in divergence. Languages, dialects, mores, religions, ideologies, social norms and structures are – in static eras – like monads existing in a (more or less) splendid isolation; each monad's diversities can not only persist but even increase with no unbearable societal costs. From the very initial drafting of the Project outline, however, it was our submission that this can no longer be true in an era in which transformations are occurring at a rate immensely more rapid than in any previous period of human history. As described by a leading sociologist and social psychologist,

> [c]hange has been ubiquitous in history, but the speed of change throughout most of human experience was so slow that large parts of humanity had no basis for sensing it. By contrast, the modern era is not only one of rapid change, but of extraordinary acceleration in the rate of change. In this century the world's population has grown at a rate 1,000 times more rapid than that prevailing through most of human habitation of the earth. In speed of movement in ordinary travel a few generations saw us shift from 6 miles to 60, to 600 m.p.h., and this was actually one of the less dramatic accelerations. In concentration of destructive power we made a giant leap from the largest bombs of World War II, boastfully called blockbusters, to the atom bomb which could bust a city, and then to the hydrogen bomb capable of destroying a whole region. Less grim and more promising for mankind are the accelerations in our ability to carry and move information, in which our capacity doubles every year, so that we can now put up to 100 thousand transistors on a single thumb-nail sized silicon chip, and a chip which will include almost half a million transistors is being developed.[3]

Divergence in basic human approaches, if it moved at the rate in which transformations occur in our era, would quickly result in chaos. Diversities would grow and expand in all directions at such a speed as to look like the fragmented particles of an exploding universe, making societies unmanageable and coexistence impossible; the "beauty" of diversity would be largely overcome by its tremendous dangers and costs.

To be sure, an objection could be made to the explosion metaphor. Change in human attitudes and behavior, one might say, has not been moving at the same speed as change in the material environment – in technologies, in production and movement of factors, in growth and transfer of populations. And indeed, it might be true that "genetically" the man of today is not different from that of many thousands of years ago, or that the power of the human mind is

[2] Illustrations of converging trends in contemporary legal systems can be found in many areas of both public and private law. *See, e.g.*, the volume NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE, referred to *infra* note 31 and accompanying text.

[3] Alex Inkeles, *Social Psychology in an Era of Transformation*, 46 SOCIAL PSYCHOLOGY Q. 56 (1983).

no "greater" today than at the time of, say, Bracton, Cicero, or Socrates. But this is not the point. The point is that profound changes in the environment inevitably bring about equally profound changes in habits and needs, instincts and expectations;[4] and that, while dramatic diversities in other eras were able to cause, at times, even disastrous and devastating but never ultimate tensions, conflicts and wars, the "crusades" of our century have brought about ravages and destructions which have been incomparably more unbearable than those of any other time – and those of tomorrow might bring about the very end of human kind. Differences in technologies and tools and, more generally, in the material environment, economic and otherwise, are no longer merely differences in quantity, such as the degree of industrialization or the amount of production and consumption; rather, they have become of the essence in behavioral attitudes. And the potential conflict of tomorrow is of a totally different kind than that of yesterday.

Fortunately – and this might be seen as yet another belief or working hypothesis which, in my opinion at least, lies at the roots of this Project – inherent in human nature is a fundamental wisdom. This wisdom, which ultimately coincides with the instinct of survival, includes a natural tendency toward assimilation through interchange. The growth of population and movement of peoples and information has been bringing about an unprecedented rate of interchange. Conflicting attitudes tend, then, to be attenuated. Whereas litigation and war are the main models for conflict resolution among "aliens," compromise and conciliation, say anthropologists and sociologists, is the prevailing conflict resolution model among those who are forced to live together in

[4] In a paper first published in 1930 and collected in his celebrated *Essays in Persuasion*, J.M. Keynes, after having observed that "from the earliest times of which we have record... down to the beginning of the eighteenth century, there was no very great change in the standard of life of the average man living in the civilised centers of the earth," and having noted that this situation of relative stability no longer existed during the last two centuries, prophesied a time, "not so very remote," when "the greatest change which has ever occurred in the material environment of life for human beings in the aggregate" would happen, with "ever larger and larger classes and groups of people" no longer having "problems of economic necessity." But he also asked himself: "Will this be a benefit?" And his answer was that, "If one believes at all in the real values of life, the prospect at least opens up the possibility of benefit. *Yet I think with dread of the readjustment of the habits and instincts of the ordinary man, bred into him for countless generations, which he may be asked to discard within a few decades*" (italics added). J.M. Keynes, *Economic Possibilities for Our Grandchildren*, in Essays in Persuasion, 9 The Collected Writings of John Maynard Keynes 321–32, 322, 327, 331 (Cambridge, MacMillan, St. Martin's Press for the Royal Economic Society, 1972). A similar answer comes from the social psychologist. After having described some of the most profound changes in the material environment in our epoch, Inkeles asks himself: "Can all this be happening without some profound transformation in the human psyche?" The reply is obvious enough. Inkeles, *supra* note 3, at 58.

lasting interrelationship.[5] If the forces which impose relationship and interchange are stronger and more lasting than those which produce division, as they tend to be in a shrinking world, then individuals and peoples will eventually know each other better: they will learn from each other, and will, in the proper ethimological meaning of the word, *assimilate*. Historians tell us that this is what resulted from the mixing up of, for instance, "Romans" and "Barbarians"[6] during the Dark Ages[7] – and the end result was that magnificent revival of civilization after the year 1,000 A.D. which brought about the genius of the Romanesque and Gothic and later the Renaissance styles, and the splendors of Florence and Venice, of Aix and Avignon, of Augsburg and Cologne and many of the other cities which still today make the beauty and glory of Western Europe.

Convergence, then, seems to be a fundamental and vital exigency of our epoch. But convergence does not necessarily mean dull or indeed oppressive uniformization and centralization. If a basic need for convergence was the first working hypothesis of the project, its conceptualization through the project has been attempted in what we have called the "twin ideas" of *integration* and of *pluralistic, participatory federalism*. These concepts are amply analyzed in the *Introduction* and in other Project studies and will not be discussed here, except to emphasize the two assumptions which have been shared, I think, although with a great variety in degree, by those who have participated in this large research adventure. The first assumption is that integration can and indeed shall be seen not as an absolute or a *per se* value and aim, but as a flexible, *instrumental* value and aim, an approach in which the "beauty" of diversity maintains its place and value any time it is not dangerously divisive. And the second assumption is that the brand of "federalism" which can be envisaged for Europe is the exact opposite to a unitary, centralized system of government; it is a system in which power is shared by local and central "sovereignties," and the – limited – central sovereignty is but the "participatory" combination of the local ones.

Needless to say, "integration" and "participatory federalism" would represent a remarkable evolution in a continent which, at least over the last couple of centuries or more, has been characterized by a process of absolutization of the nation-state, both vis-à-vis higher governmental entities – with the rejection of the idea of the state being the constituent unit of a larger com-

[5] *See, e.g.*, Nader & Shugart, *Old Solutions for Old Problems*, in NO ACCESS TO LAW. ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 76–77 *et passim* (Laura Nader ed., New York, Academic Press, 1980).

[6] It might be worth a reminder that the original meaning of the Greek word *bárbaros*, and the Latin word *barbarus*, was: foreign, non-Hellenic, non-Roman.

[7] *See generally, e.g.*, H. PIRENNE, UNE HISTOIRE DE L'EUROPE DES INVASIONS AU XVI[e] SIÈCLE (8th ed., Paris, Alcan, 1936); *id.*, MAHOMET ET CHARLEMAGNE (10th ed., Paris/Brussels, Alcan/Nouvelle Société d'Editions, 1937); and more specifically on the inter-penetration of Germanic and Roman elements and the "encounter of two civilizations," 1 F. CALASSO, MEDIO EVO DEL DIRITTO 105–37 (Milan, Giuffrè, 1954).

munity of peoples[8] – and within the governmental structure of the state itself. Notwithstanding theories and proclamations to the contrary, "separation of powers," in its pregnant meaning that every governmental power shall be limited and controlled – "checked and balanced" – was thus lost both horizontally and vertically. It was lost horizontally, as is evidenced, first, by the fact that it took one full century following the French Revolution before it became institutionally accepted in France, Germany, Italy, etc., that executive power was not in fact absolute but subject to review by a body or bodies independent of the executive and, more generally, of the "political branch"; and second, by the fact that it took almost another century before a growing number of European nations gave up the concept of the absolute character of the legislative power and accepted the subjection of such power to the control of yet another kind of independent reviewer – constitutional courts and the like – called upon to enforce a law superior to the will of the national legislator – hence in some way, potentially at least, a supranational law.[9] "Separation of powers" was lost vertically as well, because the absolutization of the state as the only source of law and sole keeper of public order had an internal, in addition to an external, significance. It meant virtual denial of any meaningful local governmental autonomy and destruction of "*corps intermediaires*"[10] – a phenomenon which so deeply differentiated Tocqueville's France vis-à-vis America[11] – at

[8] *But see*, on the more ancient heritage of Europe, *infra* notes 18–25 and accompanying text.

[9] *See, e.g.*, COURS CONSTITUTIONNELLES EUROPÉENNES ET DROITS FONDAMENTAUX (L. Favoreau ed., Paris/Aix-en-Provence, Economica/Presses Universitaires d'Aix-Marseille, 1982).

[10] "With eighteenth century Enlightenment the individualizing view of society began to be preponderant. In the French Revolution the new ideology became official.... The state was now clearly conceived to be composed of individual citizens. The intermediate groups of manor, guild, estate, province were swept away." Rheinstein, *The Family and the Law*, in 4 INT'L ENC. COMP. L. ch. 1, at 3, 13. This tradition has not entirely disappeared in Continental Europe. Even today, according to a noted public law authority, "French law looks with mistrust at the groups: the old execration by Rousseau vis-à-vis the intermediate societies – which disrupt the relationship between the Sovereign and the citizens and impede the formation of the *volonté générale* – joins with the fear by the state of seeing the groups compete with its activities and create new feudalities." De Soto, *L'individualisme dans la jurisprudence du Conseil d'Etat*, in 2 MÉLANGES OFFERTS À MARCEL WALINE: LE JUGE ET LE DROIT PUBLIC 759, 771 (Paris, Librairie Générale de Droit et de Jurisprudence, 1974).

[11] "In no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects, than in America.... In aristocratic nations, the body of the nobles and the wealthy are in themselves natural associations, which check the abuses of power. In countries where such associations do not exist, if private individuals cannot create an artificial and temporary substitute for them, I can see no permanent protection against the most galling tyranny; and a great people may be oppressed with impunity by a small faction, or by a single individual." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. 11, at 71, 74 (H. Reeve transl., New York, Washington Square Press, 1972). "Whenever, at the head of some new

the same time that it meant rejection of the idea of a transnational *communitas gentium*.

Integration within the scheme of pluralistic, participatory federalism means, then, a radical departure from these absolutizations of the state, both external and internal. It does not mean, however, an abrupt departure, or a departure which is merely theorized, almost in an exercise in futile wishful thinking, by the Project with no roots in the reality of Europe. On the contrary, the process has already been going on for many years, as is witnessed on the one hand by the history of *justice administrative* all through the nineteenth century and *justice constitutionnelle* during this century, and on the other hand by the emergence of two parallel trends, *transnationalism* – as illustrated by such organizations as the Council of Europe with its major product, the European Convention of Human Rights and the machinery for its implementation, and by the European Community which is the focus of the present Project – and *regionalism*, evidenced by well-known developments in the post-World War II constitutional structure of such countries as the Federal Republic of Germany, Italy, Belgium and even France and Great Britain.[12]

Whereas integration, both as a process and a result, provides the context – the coordinating overarching element which distinguishes pluralism from divisive separation and which makes of pluralism a force, not a weakness – participatory federalism is the safeguarding element, the guarantee against oppressive unchecked centralization which was, unfortunately, the recurring danger in the history of the European nation-states. Thus the "twin concepts," integration and participatory federalism, provide the realistic working philosophy for what has become *a study in democracy* – for this is, in the final analysis, what the Florence Integration Project has, not surprisingly, turned out to be.[13]

undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.... Amongst democratic nations,... all the citizens are independent and feeble; they can do hardly anything by themselves, and none of them can oblige his fellow-men to lend him their assistance. They all, therefore, become powerless, if they do not learn voluntarily to help each other. If men living in democratic countries had no right and no inclination to associate ..., their independence would be in great jeopardy ... [and] civilization itself would be endangered." *Id.*, ch. 30, at 181, 182. Tocqueville's prophecy was borne out by Europe's sad experiences through more than one hundred years after he wrote his celebrated book; his lesson has been clearly one of, in our terminology, pluralistic participatory federalism.

[12] *See, e.g.*, CENTRE-PERIPHERY RELATIONS IN WESTERN EUROPE (Y. Mény & V. Wright eds., London, Allen & Unwin, 1984); DIX ANS DE RÉGIONALISATION EN EUROPE (Y. Mény ed., Paris, Cujas, 1982); MOBILIZATION CENTER-PERIPHERY STRUCTURES AND NATION-BUILDING – A VOLUME IN COMMEMORATION OF STEIN ROKKAN (P. Torsvik ed., Bergen, Universitetsforlaget, 1981); BUILDING STATES AND NATIONS (S.N. Eisenstadt & S. Rokkan eds., Beverly Hills, Sage, 1973); Flora, *Il macro-modello dello sviluppo politico europeo di S. Rokkan*, 10 RIV. ITAL. SCI. POLITICA 369 (1980).

[13] I happened to make an analogous statement about the previous Florentine project on Acess-to-Justice, on which *see infra* note 29 and accompanying text. *See Foreword*

A few words will now be dedicated to the scope of the comparative analysis which pervades the Project. This, too, is a theme extensively discussed in the *Introduction*, but some considerations of a more general character might be in order here concerning the relevance of the American federal experience to us in Europe. For, over the last few years my associates and I were repeatedly confronted with the following questions: How can a two century-old history in American federalism provide any useful lesson to Europeans? How can we pretend to compare that hybrid, relatively recent combination of much "intergovernmentalism" and little "transnationalism" – the European Community – with a strong and well-established federal system, almost unlimited in its reach and substantive jurisdiction – the "enumerated powers" principle of the American Constitution having long lost much of its original significance as a tool for the delimitation of federal power? Are there any meaningful problems which can be shared in common by two so radically different systems? Indeed, how can a federal system, whose budget in 1982 was about 720 billion dollars, be compared with the Community system, whose budget in the same year was about the equivalent of 23 billion dollars?[14] And, what about the fundamental diversities in Europe, linguistic, cultural, legal and, not least, economic? What about our most varied and often so proud national traditions and nationalistic feelings? Are not the terms of reference totally incomparable?

In attempting to give a preliminary answer to these questions, let me quote from the diary of a celebrated man, who thus expressed his momentary despair in a grand effort to inspire an integration movement. He said, "Tedious, indeed, is our Business. Slow, as Snails. Fifty Gentlemen meeting together, all Strangers, are not acquainted with Each other's Language, Ideas, Views, Designs. They are... jealous of each other – fearful, timid, skittish."[15] I happened to invite my students, both in Florence and at Stanford, to guess the identity of the author of these short phrases. Most of the answers indicated one or another of the "Fathers" of the European Communities, perhaps Jean Monnet or Robert Schuman. The author, however, was not a European; he was an American, one of the "Fathers" of the American union. It was John Adams who bared his soul writing those phrases in his diary on 25 September 1777 – and the "Fifty Gentlemen meeting together" like "Strangers" in "Language, Ideas, Views, and Designs," were the Delegates to Congress who were assembled to try to form a new Nation, a Union of States.

If Europe is, admittedly, much unlike the U.S.A., it is however a matter of fact that diversity was extremely profound even in America in the formative

to the Access-to-Justice Project Series, in 1 ACCESS TO JUSTICE, *infra* note 29, at vii. This recurrence should surprise no-one; for, as I will elaborate in a moment, both Projects reflect connected aspects of a major trend in law and justice in the modern democratic societies.

[14] Both figures are taken from THE EUROPA YEARBOOK 1983, vol. 1 at 202 (EC); vol. 2 at 1677 (US).

[15] LETTERS OF DELEGATES TO CONGRESS 1774–1789 (Washington, U.S. Gov't Printing Off., 1978), *reprinted in* International Herald Tribune, 24 May 1978.

era of that Union – and not only in the formative era. Far from having been an uninterrupted, continuous process of integration, the two century-old history of the U.S.A., which of course includes a War of Secession, has been a continuous shifting from centralization to decentralization and vice versa – with a renewed emphasis in most recent years on a return to decentralization. Indeed, the cardinal feature of American federalism, as it emerges from the Project studies, is the fact that integration has never come to be identified with plain uniformity and centralization: it has always meant a *sharing of powers* among central and local governments as a fundamental element of a participatory, democratic system of checks and balances, both vertically and horizontally.

This is not to say that the American experience, indeed the American federalistic principles and structures, are necessarily the example to follow. A few years ago the political scientist George Codding wrote that "the early post-Second World War federalists [in Europe] were under the impression that all that was required was simply a structural change... following the pattern set by the thirteen American colonies."[16] I submit that no-one is so unsophisticated today. And yet, the relevance of the American experience cannot be denied. Apart from the obvious fact that comparative analysis is not limited to similarities and convergences but can very usefully extend to differences and divergences, and their *raisons d'être*; and apart also from the fact that comparison is not meant exclusively as a search for models to follow, but also for pitfalls and shortcomings to avoid; I do think that there is a clear "comparability" – even in the narrow sense of "similarity" – between America and Western Europe. This comparability has numerous bases and justifications, many of which are being analyzed in this and the following Project volumes. I would like to touch here briefly upon only one of these bases, which is rooted in the historical heritage of Europe – a domain which, most unfortunately, could not be dealt with in the Project.[17]

The political and legal history of Europe, not unlike that of the U.S.A., has itself been a continuing history of processes of integration and disintegration, of unification and division. Processes of legal integration were very much at work, in particular, during the XI–XVI centuries A.D., the era of the great revival and growth of a *jus commune*, a *gemeines Recht* or common law of Europe, consisting principally of the "revived" Roman law of the *Corpus Juris*

[16] Codding, *Federalism: The Conceptual Setting*, in INTERNATIONAL ORGANIZATION. A CONCEPTUAL APPROACH 326, 340 (P. Taylor & A.J.R. Groom eds., London/New York, Nichols, 1978).

[17] This is, admittedly, a major (for me, *the* major) lacuna of the present research project, which lacks an historical dimension other than a merely implied one. I should say, for the record, that the attempt to add the contribution of two European historians was made but failed. There are, however, two studies on the historical foundations of a "new European common law" by Helmut Coing and Gino Gorla in the volume NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE, whose place in the Florence Integration Project is described *infra* text accompanying note 31.

Justinianeum as glossed and commented upon by the authoritative scholars and the courts in those centuries of flourishing economic, cultural and legal renaissance.[18] Both aspects of legal integration were present, namely that of "normative" and that of "institutional" integration. The first aspect – normative integration – was represented by rules and principles very much similar to those of both the American federalism and Community transnationalism: that is, the principles of direct applicability and supremacy of the norms of *jus commune*, which were affirmed – in certain epochs at least – as having direct universal validity and as being superior to the local laws or *statuta*.[19] Even the prin-

[18] In addition to the *jus civile* of the Empire – mostly based on the *codification* of Emperor Justinian as glossed, molded and adapted by the Bolognese glossators and their successors in the Medieval universities, and rather casually supplemented and modified by new Imperial enactments – the other main component of *jus commune* was the *jus canonicum* of the Church. As is well-known, the *jus commune* was "received" – hence the remarkable phenomenon called "*receptio*" – in much of continental Europe during the centuries up to the Reformation. Even in the sixteenth to eighteenth centuries, a common law of Europe was much more than a mere abstraction. Years of research by Professors Gino Gorla, Helmut Coing and others, for instance, have documented the permanent circulation of ideas and the reciprocal influence of higher court decisions in Western Europe on both sides of the Channel, as well as the permanent existence of a "community of legal rules" and a "*communis opinio totius orbis*" which played a significant role in the case law of those courts until, at least, the great national codifications of the nineteenth century. It has been demonstrated, in particular, that there was a tradition of the courts to search for, and feel bound by, a "common" or "uniform opinion" of other courts, often unlimited by state borders. Moreover, a common academic training based on "European" ideas had a major role in the formation and preservation of a common legal heritage in the Middle Ages as well as in the Age of Enlightenment. In addition to the contributions by Gino Gorla and Helmut Coing in NEW PERSPECTIVES, *infra* note 31, *see, e.g.*, G. GORLA, DIRITTO COMPARATO E DIRITTO COMUNE EUROPEO, *esp.* at 511–907 (Milan, Giuffrè, 1981); *id.*, IL DIRITTO COMPARATO IN ITALIA E NEL "MONDO OCCIDENTALE" E UNA INTRODUZIONE AL DIALOGO "CIVIL LAW-COMMON LAW" (Milan, Giuffrè, 1983); H. COING, DIE URSPRÜNGLICHE EINHEIT DER EUROPÄISCHEN RECHTSWISSENSCHAFT (Wiesbaden, Steiner Verlag, 1968).

[19] As in England, where, until the Glorious Revolution in 1688 proclaimed the supremacy of the enactments of Parliament, in theory at least "common law and reason" prevailed over "repugnant" statutory law (*see especially* the celebrated Dr. Bonham's Case of 1610, 8 Coke's Reports 118a, 77 E.R. 652), so on the Continent *lex* (*civilis et canonica*), being the law of the highest universal authorities – the Empire and the Church – claimed pre-eminence vis-à-vis conflicting *statuta*. *Cf., e.g.*, Di Renzo Villata, *Diritto comune e diritto locale nella cultura giuridica lombarda dell'età moderna*, in DIRITTO COMUNE E DIRITTI LOCALI NELLA STORIA DELL'EUROPA. ATTI DEL CONVEGNO DI VARENNA (12–15 GIUGNO 1979) 329 ff, *esp.* at 331–32 (citing to F. Calasso) (Milan, Giuffrè, 1980). To be sure, such pre-eminence became more and more difficult to enforce, and the opposite rule – *"lex municipii vincit legem generalem in loco"* – eventually prevailed. *See, e.g.*, 1 F. CALASSO, *supra* note 7, at 453 ff. However, even when "force" failed to implement that supremacy (*see infra* note 22) efforts were made to, at least, limit the damage. Thus the glossators denied any possibility to ex-

ciple of pre-emption was not absent.[20] As for the other aspect of integration – the institutional – it was represented by at least two political institutions[21] which affirmed themselves as frontierless, indeed as *par excellence* universal: the Catholic Church, claiming jurisdiction over "*res spirituales*," and the Holy Roman Empire, claiming jurisdiction over "temporal matters."[22]

True, this may sound like ancient history, remote past. The principles of di-

pand the application of local laws by means of analogical interpretation ("*statuta stricte sunt interpretanda*," *see, e.g.*, F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 138 (2nd ed., Göttingen, Vandenhoeck & Ruprecht, 1967)) to the point that local law was defined as "*jus irregulare et anomalum*" and even "*tamquam mulum*," that is, incapable of generating further norms. *See, e.g.*, Paradisi, *Notes critiques sur le problème du droit commun*, 58 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 423, 437–38 (1980). Also, to save at least the appearances, the theory was developed that local laws were themselves made by the Emperor, who had delegated legislative power to the cities: "*videtur ipsum statutum ab imperatore factum, cum civitatibus faciendi potestatem concesserit.*" *Id.* at 438.

[20] The principal sources of "central" law, the Empire and the Church (*see infra* text accompanying note 21) were constantly in conflict, both between themselves and with local governments, to preserve for themselves exclusive jurisdiction, legislative and judicial, in certain areas. Suffice it to remember the role which the papal claim to have jurisdiction in matrimonial (and other) affairs played in the breach between the Church of England and Rome under Henry VIII.

[21] Institutional integration was also represented by the university, which in its Bolognese model had a transnational character not only in the subject taught (Justinian's *Corpus Juris Civilis*) and language (Latin) but also in composition. For instance, in 1250 students at Bologna came from seventeen nations: three *Citramontanes*, or "this side of the Alps," and fourteen *Ultramontanes*, or "the other side of the Alps." H. RASHDALL, THE UNIVERSITIES OF EUROPE 182–83 (Oxford, Clarendon Press, 1936).

[22] Needless to say, historical developments were often very ambiguous and zig-zagging. The Church, for instance, tried constantly to act more as a unitary than a federal legal order, pretended at times to be superior, not equal, to the Empire, and made continuous efforts to expand the scope of its jurisdiction and that of canon law to more and more areas, including family law, the law of successions, criminal law, even contracts, etc. Indeed, the famous forgery of the Donation of Constantine was used to affirm the Church's power even *in temporalibus*. Ultimately, of course, what really counted was *political force* – not sheer military power but a mix of many elements, including economic wealth, cultural prestige, and popular faith or superstition. Hence, at times the Church (and *jus canonicum*) was in fact superior while at other times it was subordinated to the Empire (and *jus civile*); and, at other times, neither of the two had force sufficient to impose its will and law over local, centrifugal elements. The local laws or *statuta* of the city-states flourishing in the twelfth century, for instance, had to be accepted, willy-nilly, by the Emperor after, roughly, the Treaty of Constance – "the *magna charta* of the communal liberties," as defined by 1 F. CALASSO, *supra* note 7, at 423 – which followed the debacle of Frederick I "Barbarossa" in the battle against the league of the free city-states in Legnano in 1176. Students of checks and balances and federalism might find of extraordinary interest such documents of that epoch as those defining the respective jurisdiction of the Church and the Empire, often indicating an ante-litteram system of separation of powers between, on the one hand, the two "equal" institutions (as the great Accursius said,

rect applicability and pre-eminence of *jus commune* soon became theory more than reality; and the authority of the frontierless institutions gradually faded out, to give place, eventually, to the "absolute sovereignties" of the newly emerged nation-states. Yet, it was not until the great national codifications of the 19th century, from the *Code Napoléon* in the early years of the century to the German *BGB* at the end of it, that the idea of a *jus commune* died out even in its more limited meaning as a complementary law and a *ratio scripta*, to be applied only when the local laws were either lacking, incomplete, or unclear.[23] What is most important, however, is the fact that the history of Europe has been formed and molded over many centuries by strong transnationalistic forces – norms and institutions – no less strong, perhaps, than the divisive nationalistic elements; and that such transnationalistic factors have left profound and lasting marks upon which the new integrational trends of our present epoch can still draw.[24] Indeed, the era of the nation-state has been a relatively short phase in a bi-millennial European history of encounters and fusions, no less than of clashes and separations. One needs a visionary, perhaps – but has there ever been any real historian who has not been a visionary as well? – to see the history of American federalism, both normative and institutional, as nothing less than a first chapter in the larger book of transnationalism in the West. In this vision, the formation of a new, continental, multi-state nation at the end of the 18th century can be appraised as both a relatively late chapter in the world-wide birth and growth of the modern nation-states, the chapter of a book in which France, England, Spain and other countries have a much earlier place, and also as a very early chapter in another book *still being written*, in which other multi-state, continental entities such as the European Community will also have, one can expect, a relevant place.

My conclusion is that far from being an unjustifiable attempt to compare incomparables, the quest for data and inspiration from the American experience is but a most reasonable effort to learn from a political history which is in many ways connected to our own. Incidentally, let me add that this should certainly not be a one-way exercise: in understanding American federalism, a scrutiny of European experiences, past and present, can be of great value as well. Paradoxical as it might seem, Europe's experiences with integration and federalism are much more ancient, and certainly more varied, than the American one.[25]

"nec papa in temporalibus nec imperator in spiritualibus se debeant immiscere"), and, on the other hand, between these two institutions and the "inferior" ones, *i.e.*, the local governments.

[23] *See, e.g.*, René David, *The International Unification of Private Law*, 2 INT'L ENC. COMP. L. ch. 5, at §§ 36–37 *et passim*.

[24] Two exceptional books shall suffice to illustrate this point: the masterpiece by PAUL KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT (4th ed., Munich, Beck, 1966), and the posthumous, unfinished work by H.F. JOLOWICZ, ROMAN FOUNDATIONS OF THE MODERN LAW (Oxford, Clarendon P., 1957).

[25] In a sense, feudalism itself was a brand of federalism, with its central sovereign having overarching, yet limited powers vis-à-vis a descending hierarchy of local and, in their turn, limited sovereigns.

My colleagues in this Project and the readers of these pages will now permit me, I hope, some reflection of a more personal nature.

By way, perhaps, of an apology at the end of what I consider – with mixed feelings of relief and regret – my last effort in organized international research projects, I want to elaborate a little on what I have seen as the intellectual *raison d'être*, and indeed the moral and political justification, for embarking on such a large, years-long effort.

I shall go back to the early years of my research activities as a student in comparative law, in the wake of World War II. Not surprisingly for that time of re-birth and reconstruction, the vision which from the very beginning stimulated those activities – and which, as simple and perhaps naive as it might be, has inspired my scholarly endeavors ever since – was one of a world in which individuals, groups and peoples shall strive to understand and respect each other, to communicate and "dialogue" with each other. I saw this striving at various levels:

– the *constitutional-human rights* level, whereby serious efforts are made to assure individuals, groups and peoples a fair protection of, at least, certain fundamental rights and freedoms;

– the *social* level, evidenced by the gigantic phenomenon of the gradual emergence of more and more persons, categories and classes of people from a situation of social marginalization to one of effective "access" to the political, economic and legal systems;

– and, finally, the *transnational* level, based on the recognition that most of the emerging features of our epoch – such as the industrial, technological and mass media revolutions; the large migrations of people from the countryside, the farms and the south into the towns, the factories and the north; more recently, the further massive shift from manufacturing into services, including the servicing of automatic, computer and electronic machinery – have assumed an increasingly multinational, transnational character. Hence, the need is growing for transnational forms of government of such phenomena, lest they lead us to anarchy and conflicts.[26] Moreover, this third – transnational – level encompasses the other two, for the constitutional and the social developments just mentioned have largely transcended the borders of nation-states, thus becoming themselves essential elements of the transnational development.

Indeed, all these developments represent what I would consider the most important trend in the political and legal evolution of our epoch, at least in the West – the three major "dimensions" of law and justice in our century.[27]

[26] Here, too, I want to cite only one author who best lends authority to my words: ARNOLD TOYNBEE, CITIES ON THE MOVE, *esp.* ch. X, *The Coming World-City*, at 195–247 (London, O.U.P., 1970).

[27] For some elaboration, still very preliminary, of this three-dimension trend *see* my studies *Appunti per una fenomenologia della giustizia nel XX° secolo*, in 1 STUDI IN ONORE DI ENRICO TULLIO LIEBMAN 153–210 (Milan, Giuffrè, 1979); *Nieuwe Rechtsdimensies*, 25 TIJDSCHRIFT VOOR SOCIALE WETENSCHAPPEN 111–21 (1980).

Significantly, all three bring about a tremendous expansion of pluralism of the sources of law, with the addition of a higher law to ordinary law in the constitutional dimension, the addition of social rights to the traditional civil rights in the social dimension, and finally, the addition of a law which transcends that of the state in the transnational dimension. All three have become features which characterize larger and larger parts of our modern world – as aspirations and demands, charters and declarations, if not yet as actual achievements and irrevocable conquests of those involved. And, of course, there is an integrational force inherent in each of them, for constitutional law dictates, as a minimum, some common and relatively permanent standards binding for and superior to all the laws of the particular country involved, and transnational law exercises a similar binding role vis-à-vis the laws of several countries. In its turn, the integrational force inherent in social rights operates on a different but no less important level, for, as mentioned, it involves integration in the sense of participation of all in the legal, political and economic systems. Integration within pluralism, then, emerges once again as the inspiring philosophy of the major trend in contemporary societal evolution, a philosophy which thus finds its epitome in the "twin concepts" of this "study in democracy."[28]

In this vision, previous research projects, as well as the present one, shall, I hope, find both their justification and their context. The "Access-to-Justice" Project, commenced in the early 1970's at the Florence Institute of Comparative Law and concluded in 1981 at the European University Institute,[29] was an attempt to catalyze the scholarly interest of a large international group of lawyers, sociologists, political scientists and students of other sciences to achieve a better understanding of the "social" dimension of our epoch, whereas another multinational project, prior and, in part, simultaneous to that on ac-

[28] *See supra* text accompanying note 13.

[29] *See* ACCESS TO JUSTICE (M. Cappelletti gen. ed., Milan/Alphen aan den Rijn, Giuffrè/Sijthoff & Noordhoff, 1978–79): Vol. I, A WORLD SURVEY (M. Cappelletti & B. Garth eds., 1978); Vol. II, PROMISING INSTITUTIONS (M. Cappelletti & J. Weisner eds., 1978–79); Vol. III, EMERGING ISSUES AND PERSPECTIVES (M. Cappelletti & B. Garth eds., 1979); Vol. IV, THE ANTHROPOLOGICAL PERSPECTIVE (K.F. Koch ed., 1979). Of this Series, partial translations have been published in volume form in Spanish (M. CAPPELLETTI & B. GARTH, EL ACCESO A LA JUSTICIA (La Plata, Colegio de Abogados, 1983) and in Japanese (two volumes have already been published, one by Yuhikaku Publ., 1981, and one by Chuo University Press, 1982, and two more are presently being translated). The Series was followed by ACCESS TO JUSTICE AND THE WELFARE STATE (M. Cappelletti ed., Vol. 7 Publications of the EUI, Alphen aan den Rijn, Sijthoff, 1981) which is also published in a French version prepared by RENÉ DAVID (Paris, Economica, 1984). Within the Access-to-Justice Project a number of other studies in several languages were also published, including M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (2nd ed., Milan/ Dobbs Ferry, N.Y., Giuffrè/Oceana, 1981).

cess and to the present one, led to a number of studies concerning various aspects of what I see as our world's constitutional and human rights dimension.[30]

Finally, the present Project, a pilot study of which constituted the first publication of the European University Institute and included the contributions by some of the most eminent legal minds of Europe,[31] focusses on a remarkable aspect of the trend toward a transnational ordering of human life. If the social and the constitutional trends represent the answer that our time tries to give to the problems and needs of equality, liberty, and dignity of human beings, this transnational trend can be seen, I suggest, as the dramatic attempt to solve the problem of peace, a problem of unprecedented dimension in an age in which "the potential is in place to kill every man, woman, and child on the globe several times over, and the holocaust could be triggered relatively easily."[32] In a time of re-emerging skepticism, of crisis and disconcertment, it is perhaps worthwhile to remind certain present-day politicians, whose calculations often appear to be those of petty accountants rather than persons of vision and leadership, that from the outset the rationale for the construction of, first, the Council of Europe and then the European Community was to prevent a new outbreak of war in Europe – in particular, by making Franco-German conflicts no longer possible, those very conflicts which had triggered the two tragic World Wars which have plagued our century.[33] As proclaimed by the Schuman Declaration of 9 May 1950,[34]

[30] The principal publications within the "constitutional guarantees" project have been: M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (Indianapolis, Bobbs-Merrill, 1971) (also published in Italian: 8th ed. Milan, Giuffrè, 1979; in Spanish: 2nd ed. México, Universidad Nacional Autónoma de México, forthcoming; in Japanese: Tokyo, Yuhikaku Pub., 1974; in Portuguese: Puerto Alegre, Fabris, 1984; and in German, in 20 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART (1971)); FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION/LES GARANTIES FONDAMENTALES DES PARTIES DANS LE PROCÈS CIVIL (M. Cappelletti & D. Tallon eds., Milan/Dobbs-Ferry, N.Y., Giuffrè/Oceana, 1973) (partially published also in Japanese: Chuo University Press, 1982); M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW (Indianapolis, Bobbs-Merrill, 1979).

[31] NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE/NOUVELLES PERSPECTIVES D'UN DROIT COMMUN DE L'EUROPE (M. Cappelletti ed., Vol. 1 Publications of the EUI, Leyden/ Brussels, Sijthoff/Bruylant, 1978).

[32] Inkeles, *supra* note 3, at 57.

[33] The whole political and intellectual movement which – from David Mitrany to Gunnar Myrdal to Ernst Haas, etc. – goes under the label of (neo)functionalism in international organizations had, of course, at its core the notion of integrating the national systems into a *communitas gentium* to achieve permanent peace. Yet, these are but theories; our statement in the text is based on hard and well-known facts. In the words of an economist, "Those who sought, and still seek, a united Europe, have always had at the forefront of their minds the desire to prevent any further outbreak of war in Europe." D. SWANN, THE ECONOMICS OF THE COMMON MARKET 14 (4th ed., Harmondsworth, Penguin Modern Economic Texts, 1978).

[34] The full text of the statement made by Robert Schuman can be found in BULL. EC 5–1980, at pp. 14–15.

> World peace cannot be safeguarded without the making of constructive efforts proportionate to the dangers which threaten it.
>
> The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations....
>
> Europe will not be made all at once.... It will be built through concrete achievements, which first create a *de facto* solidarity. The gathering of the nations of Europe requires the elimination of the age-old opposition of France and Germany....
>
> The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible....
>
> ... [T]his proposal will build the first concrete foundation of the European Federation which is indispensable to the preservation of peace....

In all of these Projects I have been very fortunate to find inspiration, in addition to help and collaboration, from many persons and several institutions. Of the first, I shall only mention three: Bryant Garth and Joseph Weiler, the two first non-Community citizens to earn the Doctorate from the European University Institute, and Monica Seccombe. Bryant, now a professor at Indiana Law School, has been more than a co-editor and co-author of the access project; whereas Joseph, now a professor at the European University Institute and Michigan Law School, and Monica, whose qualities no academic title would be adequate to express, have been more than co-editors and co-authors of the present Project. While I provided, perhaps, the original impulse and motivation, these three extraordinary colleagues and friends have become the real motors of the respective Projects – with myself playing a collaborative, not the leading, role. Of the institutions, I shall single out here only two: the European University Institute at Florence, and Stanford University, which share my loyalty and gratitude. They provided the ideal framework within which my co-editors, co-authors and collaborators and I were able to perform our challenging task – a task in which the objectivity of the scholar was never disjoined, I am proud to say, from the awareness that the subject matters of our research were, and are, some of the most serious problems, needs, and aspirations of individuals and societies in our time.

Florence, May 1984

Mauro Cappelletti

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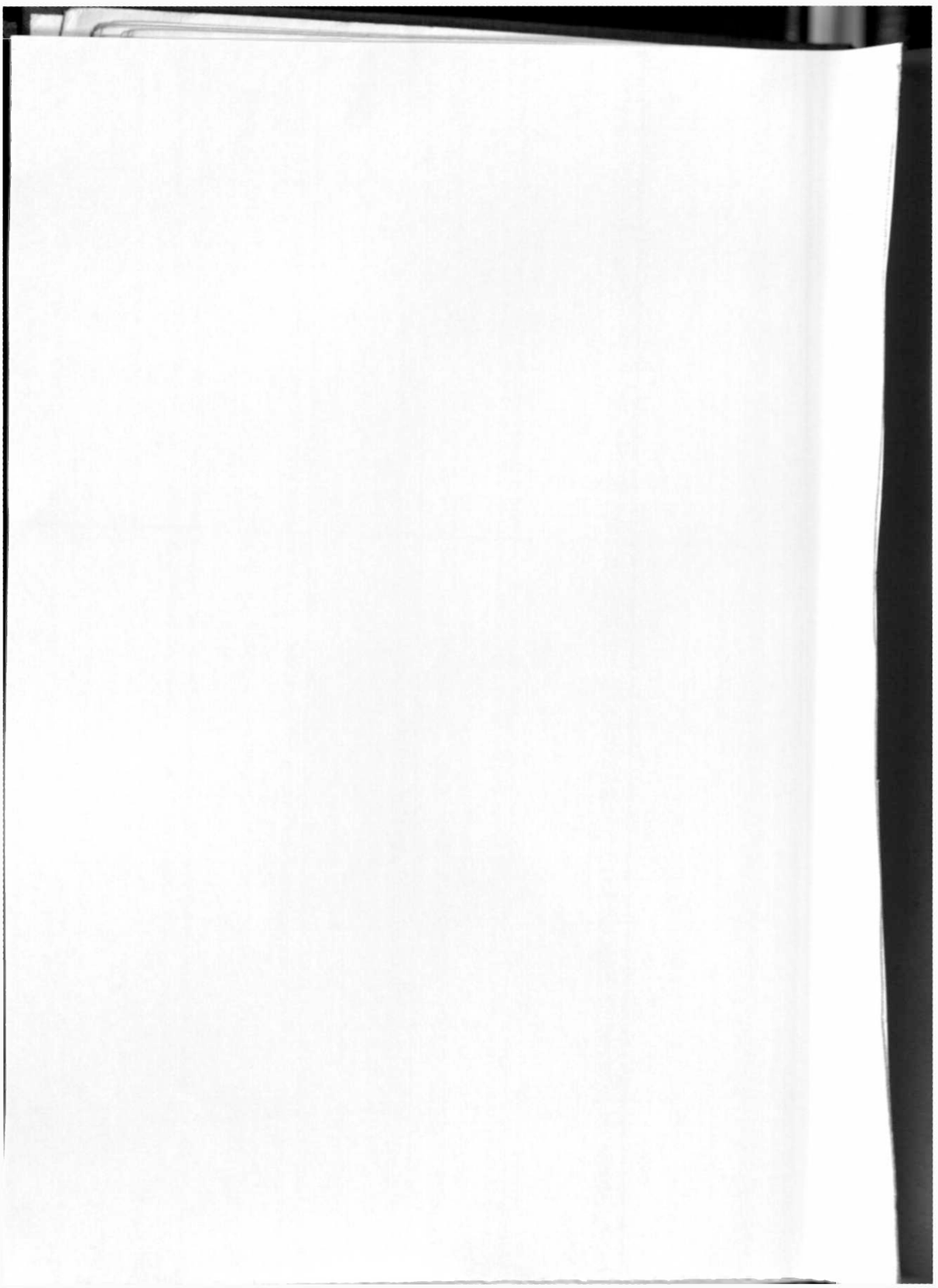

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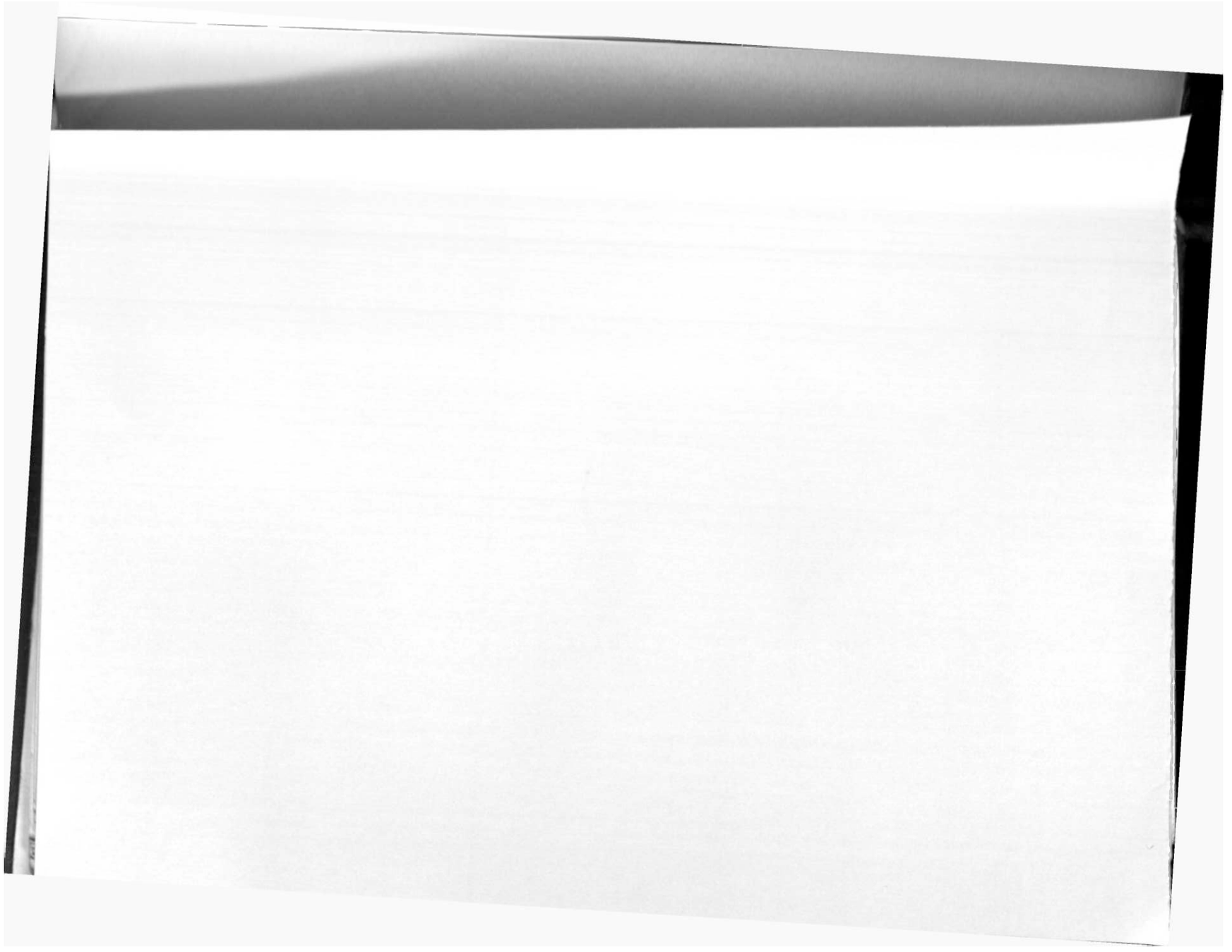


List of Abbreviations

A.A.L.S.	Association of American Law Schools
A.B.A.(J.)	American Bar Association (Journal)
A.B.F. (Research J.)	American Bar Foundation (Research Journal)
A.C.	Appeal Cases (Law Reports, U.K.)
ACLU	American Civil Liberties Union
Admin.	Administrat(ive, -ion)
Adm'r	Administrator
A.F.D.I.	Annuaire Français de Droit International
A.G.	Advocate General; Attorney General
Agric.	Agriculture
AJIL	American Journal of International Law
Ala.	Alabama
A.L.I.	American Law Institute
A.L.J.(R.)	Australian Law Journal (Reports)
All ER	All England Law Reports
A.L.R.	Australian Law Reports; American Law Reports
A.L.R.2d	American Law Reports Ann. (Second Series)
Am.	America(n)
Am. Econ. Rev. Proc.	American Economic Review Proceedings
Amend(s).	Amendment(s)
Am. Hist. Rev.	American Historical Review
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. of Legal Hist.	American Journal of Legal History
Am. U.L. Rev.	American University Law Review
Ann.	Annotated
Annals Am. Acad. Sci. Pol. & Soc. Sci.	Annals of the American Academy of Political & Social Sciences
Ann. Fac. Dr. Econ. et Sc. Soc. Liège	Annales de la Faculté de Droit, d'Economie et de Sciences Sociales de Liège
AöR	Archiv des öffentlichen Rechts
App.	Appendix
Ariz.	Arizona
ARSP	Archiv für Rechts- und Sozialphilosophie
Art(s).	Article(s)
Ass. Nat.	Assemblée Nationale
Assoc.	Association
Austl.	Australia(n)
Austl. J. Pol. & Hist	Australian Journal of Politics and History
AWD	*see* RIW/AWD
B	Belgium
BaöRV	Beiträge zum Ausländischen öffentlichen Recht und Völkerrecht

BB	Der Betriebs-Berater
Bd.	Board
Beitr. z. ausländ. u. intern. Privatrecht	Beiträge zum ausländischen und internationalen Privatrecht
BFH	Bundesfinanzhof
BGB	Bürgerliches Gesetzbuch
BGBl.	Bundesgesetzblatt
BGE	Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung
Brit. YB. Int'l L.	British Yearbook of International Law
Bull.(EC)	Bulletin (of the European Communities)
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des BVerfGE
C.A.	Court of Appeal(s)
Cal.	California
Calif. L. Rev.	California Law Review
Cal. W. Int'l L.J.	California Western International Law Journal
Cass.	Cour de Cassation
Cass. ch. mixte	Cour de Cassation, Chambre Mixte
Cass. civ.	Cour de Cassation, civile
C.C.	Conseil Constitutionnel; Corte Costituzionale
C.D.E.	Cahiers de droit européen
C.E.	Conseil d'Etat
Ch.	Chancery Division (Law Reports, U.K.)
Civ. Proc.	Civil Procedure
C.J.	Chief Justice
C.J.Q.	Civil Justice Quarterly
Cl(s).	Clause(s)
C.L.P.	Current Legal Problems
C.L.R.	Commonwealth Law Reports
CM	Common Market
Cmd.	Command (paper)
C.M.L.R.	Common Market Law Reports
C.M.L. Rev.	Common Market Law Review
Colo.	Colorado (Reports)
Colum. J. Transnat'l Law	Columbia Journal of Transnational Law
Colum. J. World Bus.	Columbia Journal of World Business
Colum. L. Rev.	Columbia Law Review
Comm'n	Commission
Comm. Print	Committee Print
Comm'r	Commissioner
Comp. Pol.	Comparative Politics
Conf.	Conference
Cong. Rec.	Congressional Record
Conn. (Gen. Stat. Rev.)	Connecticut (General Statutes Revised)
Const.	Constitution
Const'l	Constitutional
COREPER	Committee of Permanent Representatives

Cornell L. Rev.	Cornell Law Review
Corte cass.	Corte di cassazione
Cost.	Costituzione
C. Proc. Civ.	Code de procédure civile
Crim. L. Rep.	Criminal Law Reporter
CU	Customs Union
C.U.P.	Cambridge University Press
Cwlth.	Commonwealth
D	Germany (Federal Republic of) — Deutschland
DB	Der Betrieb
D.C.	District of Columbia
D. Chron.	Dalloz, Chronique
Deb. Parl., Ass. Nat.	Debats Parlementaires, Assemblée Nationale
Del.	Delaware
Dep't	Department
DG	Directorate General
Dir. com.	Diritto comunitario e degli scambi internazionali
D. Jur.	Dalloz, Jurisprudence
DK	Denmark
Doc. COM	Commission Documents
DöV	Die öffentliche Verwaltung
Dr. soc. (spéc)	Droit social (special issue)
D.S. Jur.	Dalloz-Sirey, Jurisprudence
DVBl.	Deutsches Verwaltungsblatt
Duq. L. Rev.	Duquesne Law Review
EAEC	European Atomic Energy Community; Euratom
EC	European Community (European Communities)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court (of Justice), Reports of the
ECSC	European Coal and Steel Community
ECSC Stat.	Protocol of the Statute of the Court of Justice of the ECSC
Ed.	Editor; edition
Educ.	Education
EEC	European Economic Community
EEC Stat.	Protocol of the Statute of the Court of Justice of the EEC
EEOC	Equal Employment Opportunity Commission
EFG	Entscheidungen der Finanzgerichte
EGBGB	Einführungsgesetz Bürgerliches Gesetzbuch
E.H.R.R.	European Human Rights Reports
E.M.F.	European Monetary Fund
E.M.S.	European Monetary System

Env't (Rep.)	Environment (Report)
Envtl. (Pol'y & L.)	Environmental (Policy and Law)
EPA	Environmental Protection Agency
EPC	European Political Cooperation
E.R.	English Reports
Esp.	Especially
EuGRZ	Europäische Grundrechte Zeitschrift
EUI	European University Institute
EuR	Europarecht
Euratom	European Atomic Energy Community; EAEC
Euratom Stat.	Protocol of the Statute of the Court of Justice of the EAEC
Eur. Comm'n H.R. (Coll. Decs.)	European Commission of Human Rights (Collection of Decisions) [Council of Europe, Strasbourg]
Eur. Comm'n H.R. Decs. & Reps.	European Commission of Human Right, Decisions and Reports [Council of Europe, Eur. Comm'n, Strasbourg]
Eur. Ct. H.R.	European Court of Human Rights
Eur. Econ.	European Economy [published by DG for Economic & Financial Affairs of the Commission of the EC, Office for Official Publications of the EC]
Eur. L. Rev.	European Law Review
Europ. T.S.	European Treaty Series [Council of Europe, Strasbourg]
Eur. Parl. Deb., Sess.	European Parliament Debate, Sessions
F	France
Fed. L. Rev.	Federal Law Review (Australia)
Fed. R. Civ. P.	Federal Rules of Civil Procedure
Fed. Reg.	Federal Register
FERC	Federal Energy Regulatory Commission
F.I.D.E.	Fédération Internationale pour le droit européen
Fla.	Florida
Foro It.	Foro Italiano
F.R.D.	Federal Rules [of Civil Procedure] Decisions
FTA	Free Trade Area
Ga. (J. Int'l & Comp. L.)	Georgia (Journal of International and Comparative Law)
GATT	General Agreement on Tariffs and Trade
GB T.S.	Great Britain Treaty Series
Gen. Ed.	General Editor
Geo. L.J.	Georgetown Law Journal
German Y.B. Int'l L.	German Yearbook of International Law
GG	Grundgesetz
Giur. Cost.	Giurisprudenza Costituzionale
Gov't	Government
GR	Greece

Harv. C. R. — C.L.L. Rev.	Harvard Civil Rights — Civil Liberties Law Review
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
H.M.S.O.	Her Majesty's Stationery Office (London)
Hosp.	Hospital
Hous.	Housing
H.R.L.J.	Human Rights Law Journal
I	Italy
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.D.	International Labor Defense
Ill.	Illinois (Reports)
ILO	International Labour Organization
Ind. (L.J.)	Indiana (Law Journal)
Indus. Arb. Serv. — Current Rev.	Industrial Arbitration Service — Current Review
Indus. & Lab. Rel. Rev.	Industrial and Labor Relations Review
Inst.	Institute, Institution
Int'l Aff.	International Affairs
Int'l Enc. Comp. L.	International Encyclopedia Comparative Law
Int'l Enc. Soc. Sci.	International Encyclopedia of the Social Sciences
Int'l Org.	International Organization
Int'l Trade Comm'n Pubs.	International Trade Commission Publications
Iowa L. Rev.	Iowa Law Review
IPRG	Bundesgesetz über das internationale Privatrecht
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts
IPSA	International Political Science Association
IRL	Ireland (Republic of), Eire
I.Y.B. Int'l L.	Italian Yearbook of International Law
J. Austl. Stud.	Journal of Australian Studies
J.C.M. Stud.	Journal of Common Market Studies
J. dr. int. (Clunet)	Journal du droit international (Clunet)
Jerusalem J. Int'l Rel.	Jerusalem Journal of International Relations
J. Int'l Aff.	Journal of International Affairs
J. Leg. Ed.	Journal of Legal Education
JO	Journal Officiel (of EC unless otherwise stated)
JORF	Journal Officiel de la République Française
J. Plan. & Envtl. L.	Journal of Planning and Environmental Law
J. Pol. Econ.	Journal of Political Economy
J.T.	Journal des Tribunaux (Belgium)
Jud. Proc.	Judicial Procedure
J. World Trade L.	Journal of World Trade Law
JZ	Juristenzeitung

Kan.	Kansas (Reports)
Ky.	Kentucky
L	Luxembourg
La.	Louisiana
Lab.	Labor
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Soc'y Rev.	Law and Society Review
Law Found.	Law Foundation
LDC	Less developed countries
LIEI	Legal Issues of European Integration
Lloyd's Rep.	Lloyd's List Reports
Local Gov't Rep.	Local Government Reports
L.Q.R.	Law Quarterly Review
L. Sch. Rec.: — U. Chi.	Law School Record of the University of Chicago
Mass.	Massachusetts (Reports)
MCA	Monetary compensatory amount
Md.	Maryland
Me.	Maine (Reports)
Melb. U.L. Rev.	Melbourne University Law Review
Mich.	Michigan (Reports)
Mich. L. Rev.	Michigan Law Review
Minn. (L. Rev.)	Minnesota (Law Review)
Mo.	Missouri
Mod. L. Rev.	Modern Law Review
Monash U.L. Rev.	Monash University Law Review
Mont.	Montana
MS	Member State(s)
N.C. (L. Rev.)	North Carolina (Law Review)
N.D.	North Dakota
Nat'l	National
Nat. Resources J.	Natural Resources Journal
Neb.	Nebraska
Nev.	Nevada
New L.J.	New Law Journal
N.H.	New Hampshire
N.J.	New Jersey; Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
NL	The Netherlands
NL Int'l L.J.	Netherlands International Law Journal
NL Y.B. Inter'l L.	Netherlands Yearbook of International Law
N.M.	New Mexico
Nordd. Bund	Norddeutscher Bund
Notre Dame Law.	Notre Dame Lawyer
NS	New Series
N.S.W.	New South Wales
N. Terr.	Northern Territory
Nw. U.L. Rev.	Northwestern University Law Review

N.Y.	New York (Reports)
N.Y. Civ. Prac. R.	New York Civil Practice Rules
N.Y.S.	New York Supplement
N.Y. St. B.J.	New York State Bar Journal
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Policy
N.Y.U. L. Rev.	New York University Law Review
OECD	Organization for Economic Cooperation and Development
Ohio C.C.	Ohio Circuit Court Reports
OJ	Official Journal (of EC unless otherwise stated)
Okla. (L. Rev.)	Oklahoma (Law Review)
Or.	Oregon
Ord.	Order
OSHC	Occupational Safety & Health Cases
Österr. Z. öffentl. Recht u. Völkerrecht	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (Austrian J. of Public & Int'l Law)
O.U.P.	Oxford University Press
P.	Probate Division (Law Reports, U.K.); Press
P., pp.	Page(s)
Pa.	Pennsylvania
para(s).	paragraph(s)
Pas.	Pasicrisie Belge
P.C.	Privy Council
P.G.	Procureur Général
Pol. Sci. Q.	Political Science Quarterly
Proc. Am. Soc'y Int'l L.	Proceedings of the American Society of International Law
Pt(s).	Part(s)
Pty.	Property
Pub.	Publish(er, ing), public
Pub. L.	Public Law
Publius	Publius Journal of Federalism
Pubs. of Eur. Ct. H.R.	Publications of the European Court of Human Rights
Queens.	Queensland
R.	Rule
R & D	Research & Development
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rac. uff. corte cost.	Raccolta ufficiale delle sentenze e ordinanze della Corte Costituzionale
Rass. arb.	Rassegna dell'arbitrato
R.C.D.I.P.	Revue Critique de Droit International Privé

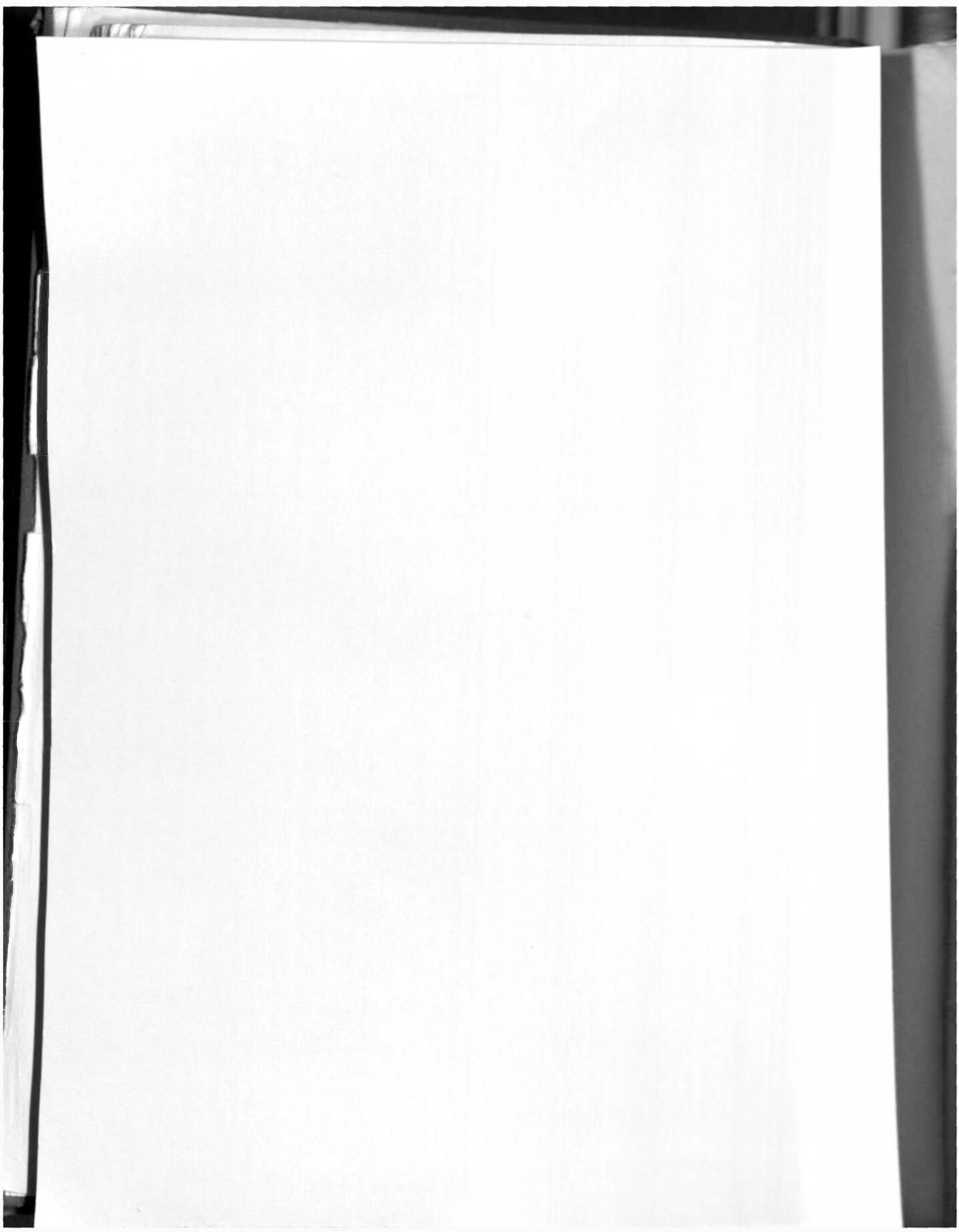
Rec. des Cours Acad. dr. int.	Recueil des Cours de l'Academie de droit international
Rec. Leb.	Recueil des décisions du Conseil d'Etat (Lebon)
Rev. Belge dr. int.	Revue Belge de droit international
Rev. fr. sci. pol.	Revue française de science politique
Rev. Gén. Dr. Int. Pub.	Revue Générale de Droit International Public
Rev. int. dr. comp.	Revue internationale de droit comparé
Rev. int. eur.	Revue d'intégration européenne
Rev. Marketing & Agric. Econ.	Review of Marketing and Agricultural Economics
R.I.	Rhode Island
Riv. dir. eur.	Rivista di diritto europeo
Riv. dir. int.	Rivista di diritto internazionale
Riv. dir. proc.	Rivista di diritto processuale
Riv. t. dir. pubb.	Rivista trimestrale di diritto pubblico
RIW/AWD	Recht der Internationalen Wirtschaft/ Außenwirtschaftsdienst des Betriebs-Beraters
R.J.E.	Revue juridique de l'environnement
R.M.C.	Revue du Marché Commun
R.M. Themis	Rechtsgeleerd Magazijn Themis
Royal Inst. of Int'l Aff.	Royal Institute of International Affairs
R.S.C.	Rules of the Supreme Court
R.T.D.E.	Revue trimestrielle de droit européen
S.A.	South Australia
S.C.	South Carolina
S. Cal. L. Rev.	Southern California Law Review
Sch.	School
S.C.L. Rev.	South Carolina Law Review
S. Ct.	Supreme Court Reporter
S.D.	South Dakota
SDR	Special drawing right
Sec.	Secretary, section
Serv.	Service
SEW	Sociaal-Economische Wetgeving — Tijdschrift voor Europees en economisch recht
S. Jur.	Sirey, Jurisprudence
SMU	Southern Methodist University
Soziale Welt	Soziale Welt: Zeitschrift für sozialwissenschaftliche Forschung und Praxis
Stan. (L. Rev.)	Stanford (Law Review)
Stat.	Statute
State Hist. Soc.	State Historical Society
StPO	Strafprozeßordnung
Sup. Ct. Rev.	Supreme Court Review
Tas.	Tasmania
Tenn.	Tennessee
Tex. (Int'l L.J.)	Texas (International Law Journal)

Tex. L. Rev.	Texas Law Review
T.I.A.S.	Treaties and Other International Acts Series
Transp.	Transport(ation)
T.S.	Treaty Series
U.	University
U.C.C.	Uniform Commercial Code
U. Chi. P.	University of Chicago Press
U. Cin. L. Rev.	University of Cincinnati Law Review
U.C.L.A. L. Rev.	University of California, Los Angeles Law Review
UfR	Ugeskrift for Retsvoesen
U.K.	United Kingdom (of Great Britain)
U. Ill. L.F.	University of Illinois Law Forum
U. Ill. P.	University of Illinois Press
U.L.A.	Uniform Laws Annotated
U. Mich. P.	University of Michigan Press
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.N.S.W.L.J.	University of New South Wales Law Journal
U.N.T.S.	United Nations Treaty Series
U.P.	University Press
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U. Queens. P.	University of Queensland Press
U.S.	United States of America (Reporter)
U.S.C.(A.)	United States Code (Annotated)
U.S.L.W.	United States Law Week
U.S.T.	United States Treaties
Utils.	Utilities
U.W.A.L. Rev.	University of Western Australia Law Review
Va. (J. Int'l L.)	Virginia (Journal of International Law)
Va. L. Rev.	Virginia Law Review
Vand.	Vanderbilt
V.A.T.	Value added tax
VerfGH	Verfassungsgerichtshof
VerfGHE	Erklärungen des VerfGH
VerwG	Verwaltungsgericht
V.I.	Virgin Islands
Vict.	Victoria
Vol(s).	Volume(s)
Vt.	Vermont
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
W.A.	Western Australia
Wake Forest L. Rev.	Wake Forest Law Review

Wash. (& Lee L. Rev.)	Washington (and Lee Law Review)
Western Pol. Q.	Western Political Quarterly
W. Ger.	West Germany
Wis.	Wisconsin
W. Va.	West Virginia
Wyo.	Wyoming
Yale L.J.	Yale Law Journal
Y.B. Eur. Conv. H.R.	Yearbook of the European Convention on Human Rights
Y.B. Eur. L.	Yearbook of European Law
Y.B. Int'l L. Comm'n	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZBJV	Zeitschrift des Bernischen Juristenvereins
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZögU	Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen
ZPO	Zivilprozeßordnung
ZRP	Zeitschrift für Rechtspolitik
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZVR	Zeitschrift für Verkehrsrecht
ZWassR	Zeitschrift für Wasserrecht

Part I

Introduction



Integration Through Law: Europe and the American Federal Experience A General Introduction

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and
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This Project sets out to examine the role of law in the process of European integration as seen against the American federal experience. The Project is divided into two parts: in Part One, in a series of introductory studies written by teams of European and American scholars, the political, legal and economic context in which the integration process has taken, and is taking, place is analyzed. These contextual studies are followed by analyses of the Australian, Canadian, Swiss and German federations, thereby widening the comparative context of the Project. Then the actual process of governance in the European Communities and the United States is examined: a study on political institutions and decision-making precedes an examination of tools and instruments for integration and an analysis of the judicial process. Part One concludes by looking at five core areas of integration which in our view represent the basic elements for the eventual emergence of a European identity. Part Two of the Project, which is open-ended, deals in a comparative manner with areas of substantive law and policy in the Community and the United States. The first five monographs cover environmental protection policy, consumer protection policy, energy policy, corporate law and capital market harmonization and regional policy. Other studies may follow in the future.

What is the rationale of this Project, its philosophy and methodology? And what are the reasons for the various choices of topics for analysis? In the remainder of this introduction we shall address these issues, while also attempting a survey of some of the Project's principal findings.

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I. The Methodology, Philosophy and Scheme of the Project

The process of European integration faces the existential dilemma which is inherent in most forms of social organization – be it a family, a tribe, a nation or even the world order of states. It is the dilemma of reaching an equilibrium between, on the one hand, a respect for the autonomy of the individual unit, freedom of choice, pluralism and diversity of action, and, on the other hand, the societal need for cooperation, integration, harmony and, at times, unity. The desire for this equilibrium is the product not only of a quest for a functional optimalization of economic and social welfare, but also of the more profound and never-ending search for a peaceful order which is at the same time consonant with the ideals of liberty and justice. The tensions which exist between the two poles – the One and the Many – and the specific solutions for their reconciliation at the transnational (principally European) and the federal state (principally American) level constitute the underlying theme of the various studies in this Project.

That law and the legal system have been among the primary instruments for controlling social relationships so as to achieve the desired balance requires little elaboration here. Within any given system the relationships among individuals, the definition of their status and rights, the consequences and implications of their actions, the mechanisms for reaching collective decisions and for the execution thereof, are often influenced, and at times governed, by the law, frequently implemented by the legal system and usually enforced by its institutions.

Another statement which needs no elaboration here is that the legal and politico-economic systems are interdependent, with the law being a product of the polity and the polity to some extent the creature of the law. This interdependence is true also of the integration process. Integration is fundamentally a political process: whether to engage in it, its pace, shape, success and failure are largely determined by political actors and political will. But the law has a vital role to play in the process. It defines many of the political actors and the framework within which they operate, controlling and limiting their actions and relations, and determining, at least partially, the effects and effectiveness of their acts. At the same time it performs a role in ordering social life, translating the highly visible political acts into more mundane daily applications and, through this implementation, it determines the implications of the political decisions. It is the role of the law in implementing the political decisions to ingrate (and in some instances conditioning these decisions) that is the focus of this work.

This research endeavor involves contributions by many teams of scholars working on both sides of the Atlantic. The difficulties of constructing within this Project the One from the Many have been reminiscent of the transnational processes described in the studies themselves. In this introduction we shall first explain the methodology and philosophy of the Project. We shall then explain

the scheme of studies and finally review some of the principal themes raised in the various contributions – our main object being to highlight their interconnectedness, as well as their place within the Project's scheme.

A. The Methodology and Philosophy of the Project

In the prosecution of this general enquiry, in an enterprise which includes no less than twenty-one studies, we have sought to establish two principal guidelines: a) a full utilization of the comparative method; and b) a concentration on the manifestation of the federal tension in the various systems examined.

1. The Comparative Method

In political, legal and economic analysis one does not have the benefit of the laboratory conditions available to the natural and some of the human sciences. The comparative and historical methods thus become the only available "laboratories" for dealing with the issues, general and specific, which such analysis involves. The purpose of such "laboratories" is two-fold. On the one hand, they provide an empirical basis of concrete data upon which to found realistic, not merely abstract, speculation. On the other hand, especially in legal research, historical and comparative analysis is a fundamental instrument for overcoming the dangers of sheer empiricism and value-free positivism. History and comparison serve to reveal actual societal problems and needs, developments and trends, shared by certain societies – highlighting, say, the problem, of pollution or the need for consumer protection in economically advanced societies.

Thus, data can be seen in the light of their contribution to the solution of a given problem and to the satisfaction of a given need, and can therefore be *evaluated* – ultimately, as "progressive" or "backward," "just" or "unjust" – within the context of a given development and trend. Suppose the problem illustrated by historico-comparative analysis consists in the economic inconveniences deriving from certain barriers to movement of persons or goods and the need to overcome such barriers. Comparative legal analysis will then be brought to "evaluate" laws, institutions and techniques in relation to that particular problem and need. This approach represents, in a real way, a "Third School" of legal thinking, different both from mere positivism, for which law is a pure *datum* not subject to evaluation, and from evaluation of such *datum* based on abstract, airy, inevitably subjective criteria such as "natural law" principles.[1] Historico-comparative analysis, on the contrary, provides a yardstick for objective evaluation, even though not an "absolute" one, abstract

[1] The origins and meaning of comparative law as a Third School are discussed in M. CAPPELLETTI, PROCESSO E IDEOLOGIE 280–82 (Bologna, Il Mulino, 1969); M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD vii-x (Indianapolis, Bobbs-Merrill, 1971). *Cf.* Stein, *Uses, Misuses - and Nonuses of Comparative Law*, 72 NW. U.L. REV. 198 (1977).

from the "contingencies" of space and time, but one which is relative to the particular problem and need, to the concrete development and trend which have emerged from that analysis.

The need for comparative analysis as a Third School in the context of European integration is particularly acute. The subject is burdened with understandably emotive and ideological prejudices. It is also rooted in a profound political-philosophical dilemma concerning the relationship between integration, federalism and democracy. Our claim is that the comparative method, this Third School, may help in tackling these problems.

Let us first outline the problems. The emotive issue is easily stated. For a start, the trauma of World War II – which was the immediate and powerful mobilizing vehicle for the integration movement – created, especially in the generation of the "Founding Fathers," a strong commitment to European integration as a meta-value in itself above any mundane cost-benefit analysis. This clashes not only with the current revival of the most potent of political forces and actors claiming social allegiance – nationalism and the state – but also with a more down to earth and pragmatic mood accentuated by the end of the period of post-War growth. Moreover, historically, European integration was elitist and, at least in popular perception, business oriented. New emerging social forces regard the venture with a mixture of excitement, linked to its radical goals, and suspicion addressed at its conservative operators. Finally, the common market orientation with its philosophy of open borders (at least on the intra-Community level) conflicts, especially in times of economic stagnation and crisis, with protectionist forces at work both in labor and business circles. Detached discussion of integration is thus as difficult as it is necessary.

The problems of federalism, integration and democracy – at least in the formal sense – are more subtle.[2] Let us first take the easy case. A political unit decides to devolve power, to subdivide functionally, into more "manageable" units of governance – to adopt some form of federal arrangement of government. Once a polity reaches a certain size, this seems an almost inevitable course to take. Dahl suggests that above a certain, limited size, "[t]o manage public affairs [the polity] will *need* other units, including local governments."[3] This need is confirmed empirically by the occurrence of what can only be called the "Federal Revolution." Since the War "[n]early 40 percent of the world's population now lives within polities that are formally federal, while another third live in polities that utilize federal arrangements in some way."[4] In this case of *devolution of power*, it would seem that the democratic process

[2] For a recent concise but profound discussion on which we have relied and to which we are indebted, *see* Dahl, *Federalism and the Democratic Process*, in LIBERAL DEMOCRACY 95 (R. Pennock & J.H. Chapman eds., Nomos XXV, New York, N.Y.U.P., 1983). *See also* Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, *esp. at* 635 ff (1984).

[3] Dahl, *supra* note 2, at 95 (emphasis added).

[4] Elazar, *Introduction*, in FEDERALISM AND POLITICAL INTEGRATION 3 (D. Elazar ed., Ramat Gan, Turtledove, 1979).

is enhanced by the federal arrangement: the citizens of the system at large retain the same measure of control and influence over and participation in the matters which remain within the jurisdiction of the central government while increasing their influence and control over matters which are now within the purview of local government. Each voice counts for more; participation is enhanced. There is a deconcentration of power.

Certainly, there is a formal loss of democratic control in that the majority of the system as a whole will not be able to impose their will over a minority, if that minority is a majority in a devolved unit. This, however, is not a crippling disadvantage: in the first place one could simply say that the loss is outweighed by the gains of decentralization; secondly, we could point out that democracy does not mean total submission to majoritarian rule. In the same way that most constitutions protect certain minority individual rights against majoritarian tyranny, so the principle of unit autonomy could be characterized as a minority collective right. Finally, if the behavior of the devolved unit within its jurisdiction becomes intolerable to a significant majority of the entire polity, there could always be a constitutional amendment reallocating powers between center and periphery. Few federal arrangements prevent such a reallocation *in extremis*.

The matter is far more complicated in the case of integration rather than devolution. In this case the constituent units join together and transfer competences, hitherto in their exclusive control, to a larger and, by definition, more remote structure. *Prima facie* there is a net loss of democratic control, influence and participation by the individual citizen. Whereas under the devolution model the citizen lost nothing and gained a closer control over the subject matter devolved – and was able to control everything either at the central level (as before) or at the local level – in the integration model certain powers are removed, or at least distanced. Does this mean that democracy is definitionally at odds with integration?

In a certain sense the reply must be affirmative, though subject to major qualifications. But it is precisely because of this tension between integration and democracy that we, as editors, have decided to explore fully the process of integration in the light of the *federal experience*. Federal arrangements, not necessarily the federal *state*, are a means of mediating between the advantages of integration and its costs, one of them being this loss in democratic control.

What are the advantages of integration of smaller units into a larger one? Obviously one key element is size. Certain functions of governance can, it is claimed, be better achieved by the larger integrated unit than by the sum total of its constituent units individually. In some cases it will be sheer size that is important, as in certain aspects of defense. In other areas it will be the transnational nature of the phenomenon: the supervision of multinational corporations, the regulation of environmental hazards which do not respect national boundaries. In other cases still it might be the alleged opportunities opened up by larger markets. We already have here part of the answer to the democratic dilemma, for although in the integration process the constituent units give up their autonomous power or jurisdiction, this power is illusory if in practice it

does not yield the results for which it is exercised. If an individual state is simply unable to control the multinational phenomenon, what loss of *real* power is there in joining with others, and losing formal autonomous exclusive jurisdiction in the process, if that is the only way of achieving an acknowledged societal goal?

Still, in theory, once the advantages of size are spelt out, integration might be directed toward a centralist model – a superstate in the case of transnational integration. The federal principle is posited as a means of preventing such wholesale centralization. For federalism insists on a division of competences and on some sort of rational basis for such a division so that advantages and disadvantages of transfers of power will be matched in some way. In theory, federalism suggests the allocation of powers to the level "best" suited to exercise them. This, however, does not advance us much. First, there is the problem of deciding what is the ideal goal. Even assuming that this question can be resolved, since the permutations of federal arrangements – deciding to which political unit should be given competences in any given field – are so vast, there would simply be a new conundrum: Which level is indeed best at achieving certain goals? Herein lies the crux of the matter. As Dahl convincingly argues, "it does not seem possible to arrive at a defensible conclusion about the proper unit of democracy by strictly theoretical reasoning: we are in the domain not of theoretical reason but of practical judgement."[5]

Comparative analysis, in a world rich in federal arrangements, would seem to be an obvious method of arriving at informed practical judgment; of reviewing options on the basis of the experience of others facing similar problems. And yet, in Europe, both policy formation and research, with some noticeable exceptions,[6] have made little use of the wealth of experience in non-unitary arrangements that may be found outside the Community.

So, for us, the Third School, looking out to the "laboratories" of comparative analysis, becomes a virtual need. By eschewing the temptation both of a strict natural-law-type a priori affirmation of a particular model of integration (characteristic of the early days of the European Community) and of the inward-looking positivistic visionless step-by-step approach (characteristic of the Community of today), one may actually remain with a vision – of federal integration – while examining critically, and objectively, the permutations of different federal arrangements.

Before discussing some of the methodological difficulties of the comparative method, we would add one final thought on the issue of federalism and democracy. As noted above, part of the democratic structure is not only majoritarian rule but also the protection of minority rights. This is now done typically through the explosion of constitutionalism and judicial review in the contemporary world. The "federal revolution" alluded to above has been accom-

[5] Dahl, *supra* note 2, at 106.

[6] For a recent comparative treatment, *see* COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE (T. Sandalow & E. Stein eds., Oxford/New York, Clarendon P., 1982) [hereinafter cited as COURTS AND FREE MARKETS].

panied by a "constitutional revolution." An examination of judicial review and the protection of fundamental rights allows the empirical affirmation that often the most dramatic effects have been achieved in two-tier (federal) systems of judicial review, where the "higher law" asserted against the legislature was not only higher normatively but also connected with an "upper" level of a two-tier system. A judiciary which is detached federally from the tier of the legislative and administrative organs whose actions come up for review, may be more able to take a broader, long-term and more "principled" approach to the issues. This then, in its own way, is a potential contribution to the democratic structure even in the context of upward integration. At the same time there can be dangers of an upper-tier judicial organ applying almost by necessity a uniform standard across the non-unitary entity without specific consideration of the various cultural, social and political differences among the constituent units. The precise balance of costs and benefits of upper-tier judicial review becomes again a matter of practical judgment best served by comparative analysis.

To be sure, the selection of the actual models – or "terms of comparison" – to be used in comparative analysis is itself not without problems since the peculiarities of each model are conditioned by variables which the examiner has no means of controlling, and often has some difficulty in identifying. In addition when one is concerned with an evolutionary process, which is true of integration, it is difficult to isolate for comparison models in the same or sufficiently similar developmental stages: comparative analysis then consists, in part, of identifying the variables which condition the development of the systems under consideration and of drawing certain conclusions and prognoses from the developmental similarities or differences perceived in the systems under comparison.

Thus comparative analysis contains by its very nature an inevitable dialectical tension. On the one hand the subjects of comparison must have a point of identity or similarity so as to render analysis meaningful. This point may be the function of a political institution or legal mechanism, or the structure or even the material-substantive content of a rule or a policy; or above all, the problem or the politico-economic conditions which suggest the need for a legal "answer" or "solution." But an identity or similarity of one factor will frequently be accompanied by differences in relation to others. Comparative analysis becomes meaningless in conditions of identity. Total identity or total dissimilarity are, thus, equally unprofitable in this kind of enterprise. Instead it is the task of the comparativist to spell out the interplay between similarity and diversity, divergence and convergence.

The specific purposes of this particular method are manifold. There may be a policy objective – to learn about and perhaps eventually transplant or modify existing legal institutions, policies or rules by reference to the experience of others. Another objective may be the attempt to better understand a given legal institution, policy or rule – transcending its specific manifestation in a particular legal-political order. Here one will typically try to identify the causes of any converging (or diverging) trends which spring from the array of problems

and needs with which political and legal systems grapple. Last, but not least, the comparison of convergence and divergence gives us a unique perspective in which to analyze, understand and, as we said, to *evaluate* one's own legal institutions and even to foresee the probable future evolution within the trend of which they are a reflection. And, of course, seeing alternative approaches often stimulates us to ask questions about ourselves, questions which otherwise might not have been perceived.

Unless one seeks to be encyclopedically comprehensive, inevitably one must make a somewhat arbitrary choice of the models to be compared. And, since our interest in legal integration arose out of our preoccupation with the present crises in the European Community, the choice of the EC as one of the primary models was inevitable: our main objective at the outset was to attempt to understand more clearly the problems facing the institutions and legal system of the Community, to attempt to find possible solutions to current difficulties and needs, and to predict the problem areas of the future; in other words, to take stock and reassess the current achievements with a view to future progress.

Let us make it clear at this point that to suggest that the process of European integration in general and the functioning of the European Community in particular are in crisis – indeed, to take the problems involved in such crisis as the basic starting point of our comparative analysis – does not necessarily amount to an expression of pessimism or even skepticism. This is so not only because the European venture has been characterized by recurring crises almost since its inception so that crisis has become the norm, thus losing its essential meaning, but also, as has been suggested not infrequently, because the ability of a system to generate crisis may be regarded as a sign of vitality and the absence thereof as an indicator of a worse fate – irrelevance. Indeed, a far more telling, perhaps even puzzling, fact has been the resilience of the Community in the face of crisis and constant challenges from without and within.

The above notwithstanding it does seem as if recent events and challenges facing the Community in the 1980's, and perhaps beyond, are of a different and larger order of magnitude which call for fresh assessments. Three examples drawn from the political, the economic and the legal spheres should suffice to illustrate this point.

Ever since the mid-1960's the EC has been operating in a political process of decision-making which many suggest seriously called into question not only the preconceived balance between Community and Member State interests but also the very ability of the system to execute the various programs enshrined in the Treaties and to cope with new problems. The prospect of an enlarged Community of twelve – double the original number – coupled with new substantive North-South cleavages might, it must be feared, stretch present processes beyond breaking point. The quantitative change may yield an unprecedented qualitative decisional disruption.

In the economic sphere our attention is turning increasingly to problems in relation to which the specific programs and powers in the Treaties do not seem to give sufficient replies. The wasteful Common Agricultural Policy, the

budgetary crisis, the failure to realize a transport policy, etc., are all serious issues, solutions to which must be found. But it is unemployment, inflation and a deep-seated industrial malaise which form the real challenge, the gravity of which is matched only by the absence of adequate Community tools and policy responses.

On the legal level it would seem as if the major constitutional principles of the system – direct effect, supremacy and the rest – have reached a certain maturity. What is now being called into question, however, is the day-to-day implementation of Community law, the incorporation of directives, the compliance with Community law, the obedience to the judicial system.

The various studies in this Project do not attempt to give *specific* answers to these or related problems. Rather, and primarily, they try to examine critically the root causes of current shortcomings in the structure and processes of the Community and to evaluate the extent to which the Community is equipped to deal with present and future challenges.

The principal model chosen for the comparison with the European Community is the United States of America, since it is popularly treated as the epitome of the "federal state," although brief surveys of some other federal systems, namely Australia, Canada, Germany and Switzerland, are also included for additional perspective. We need not outline here the numerous and profound differences which exist between the European Community, on the one hand, and – on the other hand – a federal state, especially the USA. Systemic differences are elaborated fully in the three introductory studies under general political, legal and economic profiles. Specific constitutional and substantive differences are highlighted in all the remaining studies. The basic difficulty, however, derives surely from the comparison of the European Community – which remains, perhaps permanently, composed of more or less sovereign nations and the object of which is to try to bring about a closer union among its peoples – with a federation, which derives its statal sovereignty and legitimacy directly from its own people and not from its constituent states; in other words, a comparison between a community of states and a single – albeit federal – state.

While this critical difference, and the other more specific ones which undoubtedly derive from it, demand particular prudence in analysis, the notion that the utility of comparison is thereby negated would be founded on a misconception both of the purposes and methods of comparative analysis and of the concept of federalism. Taking the systems as a whole, and apart from stating blandly that the US (and other federal states) and the EC are both non-unitary orders, one needs to establish a link or basis for comparison which will transcend the wide divide which was identified above as existing between a "federal state" and a "community of states," between the American reference to the union of one *people*, and the European reference to the ever closer union among the *peoples* of Europe.

One approach to answering this question is to point out the numerous areas where solutions adopted in the Community, despite its non-statal structure, do in fact closely resemble those found in the federal state experience. Exam-

ples in the constitutional field abound and one need merely refer here to the legal doctrines developed to regulate the relationship between Community law and Member State law which have come so closely to emulate full-fledged federal systems that it is now common to refer to the Community legal order as being "quasi-federal." Further examples of similarities of this kind have frequently emerged throughout this Project. But one can find a bridge which goes even beyond these points of convergence, important as they may be, and which is concerned with the objectives, the very *raison d'être*, of the unions in question. This link between the federation and the community of states is to be found in a wider conception which allows one to analyze both phenomena as expressions of the same underlying philosophy: federalism.

2. The Philosophy of the Project: Integration and the Federal Principle

"Integration" is a deliberately loose term which can be used to encompass a whole spectrum of activity ranging from mere cooperation to ultimately complete unification. The element of completeness and unity which integration includes does not negate, however, but rather implies the possibility of compositeness: the term is primarily concerned with how various independent elements come together and interrelate so as to form an identifiable whole. "Integration" connotes the process of integrating; but it is also concerned with the end results, the integrated systems and the degree of integration which they have achieved, for the process may successfully stop well before unification. Both these elements – process and result – are essential to an analysis of integration, for the success of a process can only be assessed in terms of its results, however intermediate; whereas a result which is only one step in an ongoing process may lose much of its significance if assessed out of its developmental context.

But whether we are considering the process or its product, it is necessary to establish certain external criteria against which to evaluate performance. While "integration" might be used to provide a standard against which to measure the success of a given development, mechanism or institution, it is our submission that it does not in itself constitute a value which can be used to assess worth. Given a particular technique, process or institution it should generally be possible to say whether it is successful in "integrational" terms, that is whether it allows or encourages the development of a cooperative or integrated relationship. But if we conceive of "integration" as free of any ideological connotations, the ultimate "test" of success applying this standard would be uniformization and unification. In some circumstances legal standardization may be of value per se. Thus whether one drives on the left or the right hand side of the road has no policy implications; what is important is that all drive on the same side of the road. "Simplification," too, with its resultant savings in time and trouble and promotion of legal certainty is undeniably of value. But this is only one of many policy considerations which a legal system must take into account and in the integration context, where an attempt is being

made to forge originally independent systems into some form of union, the cost of simplicity in terms of other interests may be too high.

It is true, of course, that the integration standard does not necessarily deny the value of legal pluralism and is merely concerned with achieving the compromises necessary to secure the desired balance: as we have noted, integration does not require complete uniformization or unification. Where the pure integration standard falls short, however, is in its inability to suggest the criterion for evaluating the mechanism developed for reconciling the various conflicting interests in the process of integrating the legal systems. Thus in "pure" integrational terms dictatorship might be accounted a highly successful means of eliminating (if not exactly reconciling) local differences. Clearly some ideological content needs to be added to the concept of integration, in order to evaluate whether the integrational advances are achieved at too high a price in terms of sacrifice of other societal interests, such as democracy or liberty. This content depends both on the ideologies of the polities which the integration process seeks to unite and on the ideological objective of the union.

The integrational ideology which emerges from the studies included in these volumes – concerning the European Community, the United States, Australia, Canada, the Federal Republic of Germany and Switzerland – may be shortly defined as "federalism," a term which, as we shall see, is used to incorporate not only the idea of partnership or community in democratic government – a "participatory" form of polity – but also notions of western civil libertarianism. Thus the enquiry is twofold: it is an investigation of integration, but of integration in a federal mode.

The common point of departure which renders a comparison between the USA and the EC particularly fruitful is to be found in the concept of federalism itself. A cursory examination of the literature on federalism reveals the futility of attempting a watertight definition of the concept. Many past failures in conceptual definition, however, are rooted in a fundamental confusion between the federal principle and the federal state which is but one manifestation of that principle. As Elazar points out:

> The concept originates first in the Hebrew term brit [covenant] then the Latin foedus (literally "covenant") from which the modern federal is derived....
>
> Elaborated by the Calvinists in their federal theology, the concept formed the basis for far more than a form of political organization.... [T]he original use of the term deals with contractual linkages that involve power sharing – among individuals, among groups, among states. This usage is more appropriate than the definition of modern federations, which represents only one aspect of the federal idea and one application of the federal principle.[7]

Judge Pescatore of the European Court of Justice echoes this rationale while actually comparing the American and European experiences:

> The methods of federalism are not only a means of organizing states. It would rather seem that federalism is a political and legal philosophy which adapts itself

[7] Elazar, *Preface*, in SELF RULE/SHARED RULE iii (D. Elazar ed., Ramat Gan, Turtledove, 1979).

> to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interest of the particular entities.[8]

It is true that at first sight there might, especially to the lawyer, appear to be little in common between integration and federalism. In the classical understanding and evaluation of European legal and political integration those committed to the "European ideal" have always tended to hail those juridical developments which have emphasized uniformity and the concept of "one law"; supremacy and the concept of a "higher legal order"; pre-emption and the concept of "exclusive Community competences." These concepts and developments, which have been considered the hallmarks of integration, have constituted an essential and laudable foundation in the quest for unity within the federal equation; but they could also seem to suggest that if integration, as manifest in these concepts, were taken to its logical conclusion, it would not be consonant with the federal principle. Political scientists as well have frequently adopted a similar perspective. Each time the Member States asserted their dominance within the Community system, this has been taken to be a retrograde step in the process of integration. Any development in the Community which has tended to detract from the centrality of Community institutions in favor of the Member States has been characterized as disintegration. We propose a view which seeks to render compatible this apparent tension between federalism and integration.

The roots of the confusion may be found, perhaps, in the implicit acceptance of a center-periphery model as an instrument for political and legal analysis. While analyzing non-unitary systems in center-periphery terms is frequently useful, it leads almost inevitably to an identification of integration with a strengthening of the center at the expense of the periphery, or, at least, with an ever-tightening hold of the center over the periphery.

If, however, following Elazar, we accept that at least one construction of federalism offers a counter concept to the center-periphery model, it may be possible to give a new interpretation to integration as well. According to this understanding, federalism concerns *the entire frame* and not merely a center around which the periphery coalesces.

> Integration on [this] model is potentially quite different from integration around a common center.... [The] measure of ... integration is not the strength of the center as opposed to the peripheries; rather the strength of the framework. Thus both the whole and the parts can gain in strength simultaneously and, indeed, must do so on an interdependent basis.[9]

Here then is an additional tool not only for reconciling the federal principle with a traditional notion of integration but also for analyzing and evaluating anew the existing patterns of federal states and the European Community.

[8] Pescatore, *Foreword*, in 1 COURTS AND FREE MARKETS, *supra* note 6, at x.
[9] Elazar, *supra* note 4, at 1.

It is in this spirit that we earlier rejected the concept both of unity as an absolute value and of integration for integration's sake. This understanding of federalism allows us to regard integration and federalism as "twin concepts," both expressing the societal philosophy and organizational principle which require a particular balancing of individual and communal interest – a balance between particular and general, peripheral and central, and between autonomy and heteronomy.

On this reading, the US as a federal state and the EC as a community of states, profoundly different though they may be, are but points on a continuum, different mixtures of the federal potion. What ideal mixture is suitable to any specific societal form which opts for the federal principle, and the implications of different choices, become the central comparative theme of this Project. The Project is thus as much a study on European integration in the light of the American federal experience as it is a study on the federal principle in the light of the European and American experiences.

B. The Scheme of the Project

1. Some Underlying Themes

Our interest in "integration through law" has a dual aspect: on the one hand, law is examined as an *instrument*, the focus being on the function and potential which legal institutions and mechanisms have had and may yet have in the process of integration – economic, political, cultural, etc. On the other hand, law is examined as an *object* of integration in itself, the focus being on the problems created by the interaction of several initially distinct legal systems under the umbrella of a central authority. Thus, our intent has not been to produce yet another multi-volume treatise on Community law, even less one on American federal law, but rather to focus on those legal doctrines, institutions, mechanisms and procedures, which could shed light on this dual aspect of the law.

This, however, does not mean that our approach is purely abstract, nor that all consideration of substantive goals and achievements can be excluded. Far from being abstract, the studies contained in the various volumes are based on analysis of existing systems, examining the workings of actual institutions, doctrines and procedures. Nor is the analysis of the integration process undertaken in an ideological vacuum or without regard to substantive achievement. As we shall see, the progressive achievement of certain substantive goals is an inevitable part of the methodology of the integration process, and as such much attention needs to be given to how the law may serve to promote such substantive goals. Thus, for instance, given the fact that economic integration forms one of the cornerstones of the American and European "unions," an investigation of integration through law must examine how law can be used, if at all, to promote such economic integration. It is the substantive achievements which, in the ultimate analysis, justify the means; the integrating system must, at the end of the day, either in its globality or in its specific fields perform "better" than the constituent units. And for this reason it is necessary to

determine and examine some of the substantive issues which are quintessential to the type of "federal" society which has been chosen as model for the purposes of these studies. These goals have already been alluded to in the *Foreword* and we shall return to them below in discussing Book Three of the first volume of the Project and all subsequent volumes.

2. The General Framework – The Scope of the Project

To devise an analytical framework for a topic as broad as "integration through law" is no easy matter, even if (as here) one narrows the field by adopting a restricted comparative framework, choosing only two primary models. The difficulty arises not only from the breadth and complexity of the topic, but also from the fact that integration and law are each difficult to isolate, both depending on reaction and interaction with other disciplines and phenomena for their full implications to be realized, so that any division for analytical purposes is clearly artificial. It was this complexity which led to the decision to divide the Project into two distinct parts, the first of which is now contained in the three books of Volume One and the second in all subsequent volumes.

The first volume is a "methodological" one. We use the word "methodology" in two senses. First, we have tried to build up a methodology of analyzing Integration through Law. Thus in this first volume of the series we start by attempting to establish the general context – political, economic and legal – in which the process of integration takes place (Book One); we then move to the institutional dimensions (Book Two) and conclude with analysis of the forces the realization of which would constitute the attainment of a basic European identity (Book Three). The second sense in which the first volume is methodological derives from its historical and comparative context. We simply highlight the methods – especially legal – of working toward transnational integration. The remaining volumes are in a real sense an "application" of the ideas and methods developed in the first volume – case studies in integration through law.

a) Part I – Volume I: Methods, Tools and Institutions

The function of Volume One is to establish a framework for analysis of integration through law: its three books, containing a total of sixteen essays, provide not only the context for, but also suggest a scheme of, analysis:

i) *Book One* (A Political, Legal and Economic Overview) provides the essential background for meaningful comparative and interdisciplinary analysis. Three introductory essays[10] present comparative overviews of the political, le-

[10] Elazar & Greilsammer, *Federal Democracy: The U.S.A. and Europe Compared – A Political Science Perspective, infra* p. 71; Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective, infra* p. 169; Heller & Pelkmans, *The Federal Economy: Law and Economic Integration and the Positive State – The U.S.A. and Europe Compared in an Economic Perspective, infra* p. 245.

gal and economic contexts of Europe and America, while the three following essays (on the federal experiences in Australia,[11] Canada,[12] Germany and Switzerland[13]) offer a wider comparative context, allowing a more realistic appraisal of the European and American developments. All of these general introductory studies focus on the interrelationship between integration and law, be it in a comparative or interdisciplinary context. We have also included in Book One a general comparative study which ties the federal experience of Europe and America – the main focus of the Project – with that of the other four federations.[14]

ii) *Book Two* (Political Organs, Integration Techniques and Judicial Process) provides a more specific analysis of the problems of legal integration. It concentrates on the methods and means of integrating distinct systems and of establishing central institutions in order to create a new order, focussing on law and decision-making organs – both political and legal – and on legal doctrines and institutions. It considers the instruments available to the law-makers and the methods of proceeding toward creating a unified (if not uniform) legal community – the relative merits of central law-making (integration by command) and of parallel coordinated legislation (spontaneous integration). Finally, all studies pay attention to the vexed question of implementation and enforcement. In a sense the volume follows the chronology of law and policy-making, commencing with the political process, considering the tools and techniques available to the law- and policy-makers and concluding with the actual operation of the law and the methods for its implementation and judicial enforcement. The emphasis is on method and mechanism. The studies in this book build on the previous ones in that they all try to illustrate the interaction of law with politics and/or economics.

iii) *Book Three* (Forces and Potential for a European Identity), building on the previous two Books, concentrates less on the problems of integrating legal systems, and more on the problems of how law can be used to promote certain basic goals of integration. This involved a consciously subjective choice of social and economic goals of integration. We tried to define what in our view would constitute the core areas of a "European Identity." We have chosen five areas which in our opinion touch on central and most representative themes in the quest for a supranational identity. Thus we commence with the capacity of the transnational entity to "speak with one voice" to other actors – a test of the emergence of an international identity,[15] (although later we

[11] Rowe, *Aspects of Australian Federalism and the European Communities Compared, infra* p. 415.

[12] Soberman, *The Canadian Federal Experience - Selected Issues, infra* p. 513.

[13] Frowein, *Integration and the Federal Experience in Germany and Switzerland, infra* p. 573.

[14] Kommers, *Federalism and European Integration: A Commentary, infra* p. 603.

[15] Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution, infra* this vol., Bk.3, p.3.

shall argue, in line with the federal principle, that the test of speaking with one voice might need reformulation). We continue with two studies dealing with the movement rights of persons[16] and goods[17] – the test for an emerging internal political identity and an internal common marketplace as a sign of an economic identity. The protection of fundamental human rights at the transnational level[18] and the challenge of harmony in the educational field[19] (in this case legal education) conclude the volume, testing respectively the emergence of a moral and cultural identity. In our view each of these areas not only represents an indispensable goal, the attainment of which is a *sine qua non* for any meaningful discussion of a European identity, but also they all represent areas where there is an objective advantage in, and hence force for, integration – the level of which, of course, remains a matter for debate. We shall return to this choice below.

The studies in Book Three are not intended as expositions of the current state of substantive law. They are illustrations of the role law can play in the central enterprise of socio-political integration. Thus, for example, the study on the international personality and the foreign relations of the Community does not analyze, except by way of illustration, the actual content of the multitude of relations which the EC has with other countries and international organizations. Instead, it gives an in depth comparative view and critique of the various mechanisms and institutions which exist or which could exist for the vindication of a unified foreign policy. The essence remains instrumental and methodological. Moreover, as the reader will see, each of the five areas displays a different use and different potential for use of legal mechanisms. Thus, for example, whereas the creation of a common marketplace for goods necessitates binding legal instruments of both primary and secondary nature, the field of education can only follow developments in other areas and must rely essentially on parallel spontaneous harmonization. These five studies display the entire range of legal techniques between these two extremes.

b) Part II - Volumes II-VI: Integration Policies in Selected Areas

Whereas Volume I is concerned, even in Book Three, with methods, techniques and institutions, the studies in the subsequent volumes of the Project are concerned with substantive policies. Here indeed, the object is to examine concrete achievements and failures, the interplay in several areas of centrifugal and centripetal forces. This second part of the Project is open-ended. At pres-

[16] Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State, infra* this vol., Bk.3, p. 85.

[17] Kommers & Waelbroeck, *Legal Integration and Free Movement of Goods: The American and European Experience, infra* this vol., Bk.3, p. 165.

[18] Frowein, Schulhofer & Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration, infra* this vol., Bk.3, p. 231.

[19] Friedman & Teubner, *Legal Education and Legal Integration: European Hopes and American Experience, infra* this vol., Bk.3, p. 345.

ent, five monographs, each co-authored by a team of European and American experts, have been planned but others might follow in the future. The areas covered are: environmental policy,[20] consumer protection policy,[21] harmonization of company law and capital markets,[22] energy policy[23] and regional policy.[24] Each of the studies is concerned, of course, with the central dilemma of transnational integration in a substantive policy area.

II. The Comparative and Interdisciplinary Setting

Comparative analysis, as we noted earlier, is one of the methods which the social sciences have developed to overcome the fact that they are unable to run controlled experiments to check the deductions made upon the basis of observations. Thus one of the principal functions of comparative analysis is to seek to identify the factors which are responsible for, or contribute to, certain perceived developments or trends. But the variables which combine to condition developments in a living polity do not lend themselves to easy identification and isolation. Law, politics and economics conspire to shape the evolutionary path to their own ends. Thus even where one's interest lies in analyzing a particular aspect of a general phenomenon – for instance, the legal aspect of integration – or in analyzing only a specific institution or process – for instance, the judicial process – one must conduct such comparative analysis within a wider interdisciplinary framework.

Thus the first seven studies in Volume I are designed to give an overview of the systems intended for comparison and to analyze the interdisciplinary context against which all subsequent contributions are to be set. To be sure, an important task here is one of *information*. These studies set out the salient features – political, institutional, legal and economic – of the European Community and the United States and, more selectively of Australia, Canada, Germany and Switzerland. However, these contributions also go beyond this descriptive-informative task. They already contain, to a larger or smaller extent, an overall comparative assessment of the different non-unitary systems under

[20] E. Rehbinder & R. Stewart, Environmental Protection Policy (2 Integration Through Law Series, 1985).

[21] T. Bourgoignie & D. Trubek, Consumer Law, Common Markets and Federalism in Europe and the United States (3 Integration Through Law Series, forthcoming).

[22] R. Buxbaum & K. Hopt, Legal Harmonization and the Business Enterprise: Corporate Law and Capital Market Harmonization: Policy in Europe and the U.S.A. (4 Integration Through Law Series, forthcoming).

[23] T. Daintith & S. Williams, The Legal Integration of Energy Markets (5 Integration Through Law Series, forthcoming).

[24] Y. Mény, B. de Witte & J. Webman, Regionalism and Federalism: The Challenge of Regions in National and Transnational Polities (6 Integration Through Law Series, forthcoming).

consideration. This overall evaluation is specifically contained in the concluding study of Book One.

Not surprisingly, despite a wealth of common elements, similar institutions and mechanisms, and at times overlapping purposes of the transnational and statal organs, the overall picture displays a large measure of divergence among the different systems. Interestingly, though again not unexpectedly, these differences feature not only in the comparison between the European Community – a young community of states and peoples – and the United States – a mature federation with over two centuries of experience – but also in the comparison among the different experiences of the various federal states themselves.

Historical experience, "federal size" (the number of constituent units), diversity of culture and language, as well as political, legal and economic structures and conditions, are the principal factors which determine this diversity. And yet, throughout all introductory studies one notes the common nature of the basic problems inherent in the federal condition; and one is struck by the fact that despite the absence in the European Community of some of the most critical statal hallmarks – such as a common army, a unified foreign policy apparatus and posture, a common currency, a monetary policy and crucial macro-economic competences – the overall framework and the institutional legal and economic structures it has evolved are sufficiently well-developed to enable meaningful comparative analysis.

One need not agree completely with the assessment of Judge Pescatore who recently commented, somewhat whimsically, that Europeans faced with a systematic exposé of the American federal practice would experience

> a delight not unlike that of Monsieur Jourdain, Molière's famous character, when he discovered that he had been speaking prose for years without even being aware of it... [for they would discover] that they have been practicing federalism on lines not unlike those of the United States.[25]

Likewise one need not accept the overall comparative conclusions of the introductory studies of this Project, which in any event offer different interpretations dependent not only upon the different prisms through which the experiences have been viewed but also upon the personal perspective of the authors. It is the strength and weakness of comparative analysis that, to some extent at least, convergence and divergence, like beauty, are all too often in the eye of the beholder. To us, however, as editors, came at times a surprise even greater than that of Monsieur Jourdain: not only was the Community, especially in its judicial aspects, in some respects practising federalism on lines not unlike that of a full-fledged federal state, but at times it seemed to have an even greater respect for the federal principle than even the United States, especially in its efforts to maintain the balance of power between the central authority and the constituent states, and in its greater creativity – to which we shall return later in this Introduction – in evolving truly federal solutions in areas such as foreign policy, where the American experience and that of other federal states would seem to suggest that non-unitarianism cannot work.

[25] Pescatore, *supra* note 8, at ix.

But perhaps the greatest importance of the introductory studies lies not in their descriptive-informative function, nor even in their overall comparative evaluation and conclusions, but rather in the way in which they analyze the respective systems from the different disciplinary perspectives and establish the interconnection among the political, legal and economic factors. The following few examples will suffice to illustrate this point.

Let us isolate as an example a key element in the American analysis of market integration in America, the "Regulatory Gap Theory."[26] At its simplest the theory suggests that – contrary to the traditional view as perceived by lawyers who usually deal only with "pathological" cases reaching the courts – the *de facto* transstate mobility of factors of production in the USA often restricted the ability of the member states to adopt legislation designed to protect, say, workers, consumers and the environment. If limited in application to the member state, such restrictive state legislation would, it is argued, discourage corporate investment and production mobility within the USA, with negative consequences for the state seeking to introduce such social regulation. Thus, judicial prohibition of discriminatory state restriction was merely a reinforcement of a limitation which existed *in rerum natura*. This in turn created state pressure – from-below-to-above – for central (federal) regulation in such fields so as to enable the attainment of socio-economic regulation without any individual state (or at least, economically vulnerable states) bearing alone the consequences of such legislation.

It is clear that this sequence of events is largely inapplicable in Europe. To begin with, the Regulatory Gap Theory itself is not without its difficulties. Sometimes the cost of complying with a state regulation is not so great as to have much of an influence on corporate behavior; in addition it is always possible that some states would be quite happy with low regulatory thresholds. Secondly, even if we could imagine a Europe free from formal legal barriers to factor movement, the diversity of economic, cultural and social conditions creates formidable *de facto* barriers. With the exception of multinational enterprises, the temptation for national business interests and Member States to erect comforting protectionist barriers remains strong, even seductive. Perennial wine, apple, pig or mutton inter-Member State "wars" are evidence of this, as is the increasing prominence of article 30–36 cases coming before the European Court of Justice. And yet the Regulatory Gap Theory gives us a powerful tool of analysis to understand the geometry of open borders, Member States regulation (or protectionism) and Community harmonization. Article 30 cases can be seen as a device for creating by judicial fiat a Regulatory Gap, giving rise to a situation of open borders and/or "below-to-above" Member State pressure for Community harmonization. The utility of this tool can be appreciated from the extensive use made of it in the analysis of the Community fortunes and misfortunes in the field of consumer protection in the Second Part of this Project (Volume III).

[26] The Regulatory Gap Theory is discussed in Heller & Pelkmans, *supra* note 10, especially at §II.D & E (by Heller).

Another example can be drawn from the European economic analysis[27] in which the entire classical (Balassaïn) theory of market integration is reassessed, not only exposing the fallacy of a progression by crude steps from free trade to custom union to Common Market and, finally, to full economic integration, but also indicating the impossibility of achieving even lower levels of integration without macro-economic tools. This, in turn, creates a discouraging cleavage between legal (possibly optimistic) and economic (decidedly pessimistic) perceptions of where the Community stands today and what it can achieve in the foreseeable future. It becomes evident that there is little, if anything, that the Court of Justice – traditionally the lawyer's last resort – can do to cope with such fundamental economic problems, even though they threaten the very fabric of the Community. Clearly a more radical solution is required and this is a task for the political, not the judicial, institutions. But the political institutions in turn are beset by internal structural difficulties which hamper attempts by them to deal effectively with such problems. One perceives clearly how essential is the interdisciplinary approach. For, as pointed out in the economic analysis, the failure of the market integration theory as well as practice cannot be attributed solely to a lack of lucidity in legal categories (such as "free trade area" or "customs union,") or in the perception of the tools needed for their attainment. Success or failure of the integration process is essentially dependent on political factors, such as electoral constraints on politicians, and the impact of economic centralization or decentralization on such factors. At a stroke we find all three of the first introductory studies – on law, politics and economics – coming into play in explaining one of the central purposes of the European and federal state experience: market integration.

Similar issues are raised by a key historical economic difference. The American common market was developed in an era in which the positive interventionist state was still unknown or frowned upon. In Europe, on the contrary, the mixed economy which is typical of our epoch is based on such state intervention. The linkages between federal forms of government and the emergence of the positive state in different historical settings is another feature which transcends the disciplinary divides and becomes an issue in most of the substantive studies in Part Two. Finally, it is not altogether surprising that the American economic analysis, springing from a system in which the major macro-economic activity is directed as if in a unitary state, powerfully reexamines the virtues of economic decentralization, whereas the European analysis, sharing perhaps the same criteria of the "efficient" location of power at the appropriate level of government, almost pines for greater macro-economic competence for the central power.

A comparable interplay exists between the legal and political introductory studies. The juridical outlook tends to concentrate on normative conflict and its resolution: federalism and integration are seen as a balance sheet of divided competences, hierarchies of norms and methods of adjudication. By contrast

[27] Heller & Pelkmans, *supra* note 10, at §III (by Pelkmans).

the political outlook is interested in the effect of norms on the body politic, in the organization of decision-making, and, above all, in a federal ethos of participation in such decision-making. Moreover, and here political theory goes back to the origins of the American experience, federalism is not seen merely as a mechanistic concept designed to yield an efficient mode of government whereby regulating powers are assigned to that level of government which would exercise them most effectively. Rather, federalism is regarded as an encapsulation of the democratic principle which shies away from the concentration of too much power in the hands of any single given actor and regards allocational distribution as a per se value. "Checks and balances" at the federal level, as well as a demarcation of competences between the central power and the constituent members (or actors within the constituent members), are the manifestation of this principle. Thus the juxtaposition of the study prepared from a legal viewpoint with that of political scientists might suggest that the traditional center-periphery model is rooted in our *legal* tradition, whereas the framwork-linkage model is a product of modern *political* theory's greater preoccupation with processes.

Taking these seemingly two distinct models as yardsticks may lead us to correspondingly distinct evaluative conclusions as regards the two systems. From the legal point of view, by contrast with the United States, the Community seems fragile in its inability to create a strong center with a decisive power over the periphery. This fragility is rooted in the organizational structure of its law-making institutions and their internal decision-making processes, and even in the apparatus of judicial review and enforcement: all elements depend to a very large extent on Member State organs. At the same time, and somewhat paradoxically, a direct application of the political democratic perspective results in another disconcerting conclusion: despite the stronger decentralized element in Europe, the institutional evolution of Community law-making organs has seen an accretion in the powers of the Member States' executives and of the Member States' administrations, which have found in the Community setting a forum in which law-making activity can take place even further removed from at least the semblance of democratic control.

If, however, we combine the political and the legal outlook the way opens for a reassessment of these conclusions. Thus, for example, from the legal perspective the absence in the Community of a full-fledged system of federal courts, as can be found in the United States, is interpreted as an indication of fragility. From the political perspective of balanced participation, however, one may at least wonder if the tandem of European Court-Member State courts – so central in the architecture of Community judicial review – is not a model more faithful to the federal ethos. The success of this model – cases of judicial rebellion by Member States are still the exception that proves the general rule of growing cooperation – suggests that this is not merely a theoretical consideration but one of great practical significance.

Likewise, the dominance of Member State governmental organs in Community decision-making clearly embodies one of the central structural differences between a community of states and a federal state. In center-periphery

terms it is an obstacle to progressive integration. In framework-linkage terms, however, it suggests the possibility of, paradoxically, a more harmonious evolution, since the classic conflict between federal government and constituent units, so evident and perennial in, say, the Canadian experience, becomes diffused in the Community.

In short, once we abandon the federal-state, center-periphery model as the ideal prototype for European integration, we find that in trying to assess the measure to which the two systems are respectful of the federal idea – "the search for unity, combined with genuine respect for the autonomy and legitimate interests of the participant entities" – no easy answers are available. The introductory studies give us data, varying disciplinary perspectives, the personal evaluations of the writers, and above all criteria and tools for evaluation. But ultimately any assessment can only depend on the subjective mix of unity and autonomy which the observer may adopt as representing the optimal balance.

III. Integration and Law

It is not easy to determine when political "integration" ceases to be mere intergovernmental cooperation and becomes instead an exercise in federal government. The dividing line is not obvious, but comprises a complex combination and interaction of institutions, structures, processes and effects. It is clear that even the establishment of a central authority and the partial transfer of sovereign powers thereto by participating polities are not in themselves sufficient indicia, as for instance the various international commodity agreements or international organizations such as the Council of Europe indicate. Non-lawyers occasionally think that the essence of federalism lies in a division of competences which puts certain matters "constitutionally *beyond* the scope of the authority of the [different levels of government]."[28] The history of enumerated powers in federal systems defies such a definition. The difference may be partly quantitative – at a certain point in the integration process competence in so many important or essential sectors may have been transferred to the central authority as to result in a real division in substantive governmental powers; but it is also qualitative – the reach of the central authority, its law-making, decision-making, implementation and enforcement powers and possibilities being such as to allow it a direct impact in the government of the whole territory comprised in the union.

These dynamics of integration have been extensively analyzed by political scientists, and it is not our objective to examine the political theory further here. Rather, the objective of the studies contained in these volumes is, as the title of the Series suggests, to examine the interaction of law with the process of integration, an examination which covers both the passive or negative aspect

[28] Dahl, *supra* note 2, at 95.

of legal integration, namely the problem of integrating several initially distinct legal systems – both inter se and within the central legal order – and the more active or positive aspect, namely the role which the legal order may play in the formation of the federal union.

A. Legal Integration: Organs, Techniques and Processes
(in particular, Volume I, Book Two)

The integration of legal systems within a federal framework involves two main problems. The first, and for our purposes most interesting, is the problem of creating the "central" authority, of arranging for the division of competences and powers, and of establishing the relationship between the central system and the systems of the constituent units. The second problem is that of integrating inter se the various laws and systems of the constituent units in order to allow the "union" to function smoothly. Both elements are essential to the viable operation of the enterprise and are discussed in some detail, especially in Book Two of Volume I.

1. Creating a Federal Legal Order: Democracy, Legality and Efficiency

Integration with a view to establishing a new "federal" system requires the creation of a "new legal order." Two studies in Book Two – "The Political Organs and the Decision-Making Process in the United States and the European Community"[29] and "The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration"[30] – analyze these topics extensively, and we will here only mention some of the issues raised by the studies.

On a concrete level, these two studies focus on the functional aspects of the new system, on such issues as who makes law and how; what is the effect of such law; and how is it implemented and controlled. But on a more abstract level they are also concerned with the "legality" of the system – a concept which is used here in a broad significance, including not only formal legitimacy and the "rule of law," but also the "morality" of law and the system's federal viability or validity, as well as its "efficiency" and its democratic basis.

In very simplistic terms, one measure of the success of a legal system is its acceptance by those who are subject to it. And in turn, acceptance of the law could be an indication of the acceptance of the integration process. Instruments for enforcing compliance are of course essential; but unless compliance is largely "voluntary" and the use of force only exceptional, the system is likely to crack under the strain. Again very simplistically, compliance is obtained by securing the subjects' confidence in the system, principally – or so at least we believe in Western democracies – by allowing the subjects to participate both in the selection of the form of government and in the law-making process and by assuring through procedural means that substantially the laws reflect

[29] By Krislov, Ehlermann & Weiler, *infra* this vol., Bk.2, p. 3.
[30] By Cappelletti & Golay, *infra* this vol., Bk.2, p. 261.

or satisfy the common values of the society. As for the concept of "efficiency," in addition to normal connotations applicable to any system of governance, in a non-unitary system we may specifically ask whether the functions of government are indeed allocated as between the central authority and the constituent units in the most efficient way. The test of efficiency is of course much more difficult to construct and is almost always value laden. For some it will be an economic notion of maximizing the utility of resources, for others a notion of decisional responsiveness and streamlined policy-making, for yet others it could represent a system which most successfully responded to the wishes of its constituents. The authors in this Project have adopted different definitions of these concepts; but the tension between the three categories is a constant in all studies.

One of the principal difficulties for a federal legal system is that it has in effect two sets of subjects at different levels of remoteness: the constituent states and the people; and that the individual – who, at least, in the political framework we are considering, is the system's primary subject – is likely to suffer from split loyalties between the constituent state and the federation. (These problems seem to have been more notional than real in the US, but even in Canada and Australia they presented some difficulties, whereas in the EC, where the objective is the integration of highly independant and mature nation-states, they present real obstacles.) The integrational challenge is for the federal order to seduce the individuals' loyalty – at least in part – away from the state, while at the same time maintaining the idea of the states as intermediate subjects of the federal order, in effect by attracting them as cooperating participants. Thus the federal order must gain acceptance or support from two parties: the states, because their non-cooperation could effectively undermine the system; and the populace, because it is "the people" who are the direct object of the system.

Whereas the principle of federalism is, as we have already explained, the *idée de base* which guides analysis throughout the whole series, democracy and legality are isolated as the two other single most important principles; firstly, because of the ideological commitment of all the states and systems included in the survey to these principles; and secondly simply because it is a legal order that we are expounding. The focus on the democratic principle is also, perhaps, influenced by the fact that in Europe the overwhelming emphasis on the problems of integration in terms of governmental power-sharing has tended somewhat to obscure the issue of constructing an acceptable form of democratic government, leading eventually to what is now perceived of as a "democracy deficit."

Within a federal context, democracy – the other side of the rule of law – can be considered to have a dual aspect, for one of the problems of integration in the formation of a federal "union" is created by the fact, as we have mentioned, that at the outset the "federal order" is confronted with two potential classes of subjects: the states and the people(s). The distinction between an international and a federal system lies in the fact that in the federal system, the "central" authority partially replaces the state government in a direct gov-

ernmental relationship with the people, and that within the areas of federal competence the states are no longer considered as sovereign subjects, but rather are subordinated to the federal authority. The federal system of government is, however, designed to serve both the interests of the member states and the popular interest. In government representational terms, this implies that some provision needs to be made for the representation of the member state interests, what we might call "federal democracy," and of the people's interest, what we might call "popular democracy." In the more integrated or centralized federal-state system it is likely that the emphasis on participation in government will be less on the federal aspect and more on the popular, since the federal order is identified as being in a direct relationship with and having a direct impact on the people. But in a less integrated system it is likely that the federal aspect will predominate, since the popular interest is still closely identified with the state interest, the state is still perceived as the primary actor, and popular confidence resides with the state government. If the balance alters and the federal authority is perceived as having a greater direct impact, there is likely to be a call for an increase in direct popular participation in policy-making at the federal level. Thus although the democratic requirement is one which touches primarily upon the institutions and structure of political organs, it responds to legal stimuli: the greater the direct reach and impact of federal law upon the citizen, the greater the requirement for popular participation in the law-making process, and the less satisfactory indirect participation through the states. The matter becomes even more complex if we remember the artificiality of discussing the "popular" interest in general terms. Parties, interest groups and all other actors partaking in decision-making in neo-corporatist structures (which so typify the modern state), will relate differently to the process of transnational integration and the policies of "federal" organs. Consideration of these variables renders even more difficult system building and system analysis.

Turning now to consider briefly the question of legality, we may note again how, in all systems considered, the federal order has in effect adopted the traditional constitutional theory espoused by each of its member states of distributing governmental powers as a means of guarding against abuses of power. In principle there is a two-fold distribution: a vertical distribution, between the federal and state levels; and a horizontal distribution, amongst the branches or institutions of government at each level. But the symmetry of this division could be misleading. Neither in practice nor in theory are these separations hermetical. Just as the strict separation of powers theory has in effect gradually given way, to be substituted by a system of reciprocal interferences and controls often called "checks and balances," so on the vertical plane the division of competences between federation and state does not exclude, for instance, the institutionalization of state participation in federal policy-making.

It would be tempting to say that the principal lesson in democracy to be learnt from the American experience is the deconcentration of power in both the vertical and horizontal senses. In their long history, Europe and European states have often suffered from concentration of power, either in one of the

branches of government, or – where non-unitary systems developed – within the central authority. Examination of present conditions may call, however, into question such a sweeping generalization. In the USA of today, with some noticeable exceptions that prove the general rule, the vertical division of power – in the legal sense – is more a myth than a reality. A determined Federal Government will find no serious *legal* obstacles in its way.[31] Likewise, the current historical condition of the EC would suggest a non-unitary system in which the center is almost deliberately weak; power is decidedly diffused within the constituent units. However, as is well-known, the political structure of the Community, dominated by the governments and the bureaucracies of the Member States, serves to strengthen executive and administrative power within the Member States.

The truth is that legal forms of government are only partial guarantors and indicia of federal democracy. The essence of federal government is in effect a certain ethos of participation reflected in an interplay which exists between the various branches and levels of government, which yields a combination of self-rule and shared-rule. For this reason the studies of the institutions and processes contained in Book Two of Volume I deal extensively with the *actual* operation of federal or transnational systems and less with formal structures or procedures. Given this approach and our more general preoccupation with methods and tools, rather than substantive achievements, it follows that the Project's primary interest has focussed, firstly, on the processes and institutions involved in policy-making at a federal level; secondly, on the instruments and techniques available for the implementation of centrally determined policy decisions; and finally, on the issue of the effectiveness and impact of such implementation, especially as seen through the courts, the legal guardians of the rule of law and of the federal ethos in a non-unitary system.

The appeal of this sequence is of course attenuated by the inevitable artificiality inherent in any attempt at structuring these key elements in the functioning of non-unitary systems: they may follow each other temporally but they are also mutually conditioned and influenced. Thus the judicial function goes well beyond dispute resolution and adjudication and touches on central issues regarding both decision-making and instruments. Also, the character of different legislative instruments will have a direct bearing on their implementation, effectiveness and, ultimately, impact. And the process of political deci-

[31] Support for this view may be found in, *e.g.*, Jacobs & Karst, *supra* note 10, at nn. 108–16 and accompanying text; Elazar & Greilsammer, *supra* note 10, in Appendix D *passim*. The point is also convincingly argued in Stein & Sandalow, *On the Two Systems: An Overview*, in 1 COURTS AND FREE MARKETS, *supra* note 6, at 3, 20–22 ("Congress for all practical purposes now exercises plenary legislative powers. . . ."); and, in greater detail, in Sandalow, *The Expansion of Federal Legislative Authority*, in 1 COURTS AND FREE MARKETS, *supra* note 6, at 50 ff ("Congress has ceased to be merely the legislative authority of a federal government; it has for all practical purposes acquired the legislative authority of a unitary nation. Especially in the economic sphere, it is only a small exaggeration to say that Congress now possesses plenary authority.").

sion-making will be influenced, even conditioned, by the character of available tools and often may be a reaction to the activities of the judicial branch.

In Book Two these issues are treated separately, concentrating on the specific questions raised by each one individually. We propose here neither to repeat nor even to synthesize the respective analyses or conclusions. Instead we shall attempt to highlight some elements of the *interplay* between political decision-making (and organs), tools for integration, and judicial processes in the hope of demonstrating how these separate elements combine to constitute a central component in the functioning of the transnational non-unitary system. Our main emphasis, as is that of the studies themselves, will be on the European dimension, with the American experience a constant background for reflection.

If we would wish to summarize the "conclusions" of the above mentioned studies in one proposition we could say that the political decision-making system of the EC has evolved so as to "accommodate" the participating Member States, and that the judicial system has evolved – almost as a counter force – to "accommodate" the exigencies of the individual. This might suggest perhaps an ideal equilibrium or, at least, a neat organizing principle. However, as may be expected, things are not usually what they seem. Accommodating the Member States has not only called into question the efficacy of political decision-making, but has also raised grave problems of democratic accountability with inevitable consequences for the status of the individual. Likewise, the dramatic judicial enfranchisement – and there is no better term to describe the process – of the individual within the transnational order by the Court of Justice has had, as we shall argue, important ramifications on the political process.

2. The Interaction of Political and Legal Processes[32]

The studies on political-institutional decision-making on the one hand and the evolution of judicial doctrines on the other hand reveal an interesting comparative contrast: in its process of decision-making, a process increasingly accentuated by a growth in the intergovernmental-diplomatic element, the European Community not only started a long way away from the American and other federal-state structures, but seems, over time, to have increased this distance. Divergence almost to an unbridgeable point seems to prevail: "decisionally," the Community is closer to the United Nations than it is to the United States. In contrary fashion, in the evolution of judicial review and above all in its constitutional jurisprudence, the European Court of Justice seems to have been fashioning no less than a "federal" constitution for the European Community. This constitutional jurisprudence, despite a series of differences, seems to chart a strong converging trend with the American federal experience and indeed with the experience of other federal states.

[32] We are here relying extensively on Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. Eur. L. 267 (1981) and J. Weiler, The European Community: Legal Structure and Political Process (forthcoming).

The comparative setting brings thus into bold relief not only a divergence between the European transnational and the American federal experiences but also a divergence in the integrational evolution within Europe itself on the legal and political planes. The federal-state experience might have led us to expect that the process of integration would take place simultaneously on the two planes, with constitutional consolidation – expressed in the doctrines of direct effect, supremacy, pre-emption and exclusivity – being accompanied by a parallel strengthening of central decision-making institutions at the expense of the Member States. And yet, as we have noted, not only has this parallelism not materialized but the tendency has been the reverse, toward internal divergence.

Any explanation of this divergence must be speculative and multifaceted. The process of constitutionalization in the jurisprudence of the Court of Justice can be explained entirely in terms of the apparently quite orthodox legal philosophy adopted by the Court. The principle of effectiveness – enshrined in the basic maxim of *pacta sunt servanda* – which is at the root of the doctrine of direct effect, coupled with the principle of uniformity derived from procedural elements (*e.g.*, article 177) and substantive elements (*e.g.*, article 5) in the Treaty, lead by an inevitable logic to supremacy and pre-emption. The logic is simple: if Member States are to treat their obligations as binding and legally meaningful they must be given direct effect. And if the subjects of the law throughout the Community are to be subjected to uniform obligations, Member States must not be allowed to override Community law by national legislation. Likewise, as regards the political process, it was perhaps only to be expected that with the passage of time the Treaty would lose its legitimacy as a mere blueprint for discretionary programmatic activity and that as the Community began increasingly to impinge on classical state activities the Member States would seek to assert their willpower and interests with greater insistence. And yet one can perhaps go beyond these self-referring legal and political explanations and seek another explanation in the interaction of politics and law.

On the one hand, it would seem clear that the Court of Justice, aware of the erosion in the "legendary" political will of the Member States, considered it to be part of its institutional function to act as the guarantor of the integration process, and thus sought to circumscribe by legal rules the opportunities for unilateral Member State activity and to counteract, at least juridically, the intergovernmental trend. The complexity and dialectical character of political and legal interaction is enhanced if we take this hypothesis even further. Could it be that judicial constitutionalization, encapsulated in such doctrines as direct effect, supremacy and pre-emption, in fact had a "negative" effect on the process of integrating decision-making – that "normative" integration exerted a negative impact upon "decisional" integration? The development of those far-reaching judicial doctrines meant that the impact of Community law and policies was perceived as growing not only in scope – to cover more substantive fields – but also in depth, so as to have a more immediate and binding legal effect from which Member States could not escape. Thus, supremacy of

Community law was perceived as the single most important factor in the alleged "loss of sovereignty" by the Member States. It was only natural then that this would be counteracted by the Member States insisting on their right to participate in, and control, the making of this "supreme" law, ultimately claiming the right to block its making. The tremor which, say, the 1982 majority vote over agricultural prices sent through the United Kingdom was precisely because of a disruption in this delicate *balance* between political process and legal structure.

Thus the divergence between political process and legal structure, between decisional and normative integration, represents on this reading an outcome of a process of action and reaction whereby the permeation and expansion of *Community* influence in the constitutional sense, largely a creation of the Court of Justice, was balanced by the ever-growing *Member State* influence in the decisional process. These diverging political and legal developments may be regarded as antidotes to each other, producing, in a two-way process, a certain equilibrium by a cyclical interaction of the judical-normative process with the political-decisional one. Here then is one dimension of the Community formula for attaining a balance between whole and part, centripetal and centrifugal, Community and Member States. It is an equilibrium which explains a seemingly irreconcilable equation: a large, indeed surprisingly large, and effective measure of transnational integration, coupled at the same time with the preservation of strong, unthreatened, national Member States. It is an inherently "federal" solution which also seems to fit the *framework* model discussed above whereby general power and constituent units are strengthened together. It is this equilibrium which may perhaps explain the overall stability of the system and its resilience in the face of recurring crises generated within and outside. It explains how the Member States were able to "digest" a constitutionalization of the Treaty without abandoning the concept of a community of states.

It would be easy to turn round today and condemn the Court's activism for the negative, counterproductive impact which it may have had on the development of the decisional structure. But such a criticism would hardly be fair. Not only do the decisional "defects" precede the Court's activism, but as we noted, they have independent causes, and it is not sure that solutions to such weaknesses – whether less or more intergovernmental in character – would have been sought even if normative integration had occurred at a slower pace. Had there been any evidence that the Court's activism stifled the desired development in the decisional structure, this criticism might carry weight. But while it may be true that legal doctrines developed by the Court may inhibit the decisional process today, there is no evidence that had the Court accepted a wholly passive role, the decisional bodies would have been forced into a more dynamic role. On the contrary, whether one considers the Court a spur or a thorn in the flesh one cannot deny its motive force, and it is likely that without its jurisprudence we would hardly be able to speak of a *Community* as we know it today; substantive achievements would be perhaps no more than, say, those of the GATT. Professor Hamson's critique that in *Van Gend en Loos*

and its progeny the Court was severing "the legal world – the world in which it operates – from the world of what we call real or actual events"[33] may be turned on its head: the Court's jurisprudence was inspired perhaps by its all too familiar knowledge of that very world in which international agreements lacking a normative framework – lacking direct effect and supremacy – have such limited impact.

Consideration of the interaction of legal and political processes not only gives us an insight into the macro-structure of the Community, in which the "federal" and the "con-federal" are intertwined in the aforementioned way, but also at a micro-level it enables us to analyze with greater precision various aspects of the integrational process. One example will suffice to illustrate this point, and we will take as an illustration an area which, despite a few pioneering treatments, is still one of the most obscure areas of Community law, namely pre-emption.

The doctrine of pre-emption (including implied limitations on the Member States) is, like supremacy and direct effect, of the very essence to the federal legal structure since it plays a crucial role in the allocation of competences and the exercise of powers. It is the essential complement of the supremacy doctrine as it determines, even before an express central measure in point exists, whether a whole policy area has been actually or potentially occupied by the central authority in such a way as to influence the intervention of the states in that area. The difficulty of the doctrine arises from its very potentiality, which makes it hard to define in advance which areas are pre-empted and under what conditions, and also whether powers in such areas are concurrent or exclusive. We do not propose to discuss the doctrine in detail here, because it is adequately treated elsewhere in the Series' volumes[34] but we would like to touch upon some of the wider implications of the doctrine in this context.

Several problems arise from the fact that a legal vacuum is otiose, and that therefore all areas tend in some way to be "covered" by some law-maker. At the same time because integration is an on-going process, it may be that although programmatically an area should eventually come within the competence of the central authority, for one reason or another – for instance practical difficulties in achieving consensus, or lack of maturity – the central authority has not yet acted, or perhaps cannot yet act, in that area. A strict legalistic approach defining rigid criteria as to the conditions of pre-emption may argua-

[33] Hamson, *Methods of Interpretation – A Critical Assessment of the Results*, in COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, JUDICIAL AND ACADEMIC CONFERENCE, 27–28 SEPTEMBER 1976, at p. II.9 (Luxembourg, Office for Official Pubs. of EC, 1976).

[34] *See, e.g.*, Jacobs & Karst, *supra* note 10, at §III.B.1.c & B.2.c; Krislov, Ehlermann & Weiler, *supra* note 29, at §VII.C; Gaja, Hay & Rotunda, *Instruments for Legal Integration in the European Community – A Review, infra* this vol., Bk.2, at §II.B; Cappelletti & Golay, *supra* note 30, at §V.B.2. *See also* the seminal article by Waelbroeck, *The Emergent Doctrine of Community Pre-Emption – Consent and Re-Delegation*, in 2 COURTS AND FREE MARKETS, *supra* note 6, at 548.

bly prove counterproductive since it could result in a form of law-making paralysis, if, for example, the area is deemed to be pre-empted by the Community law-maker but it proves impossible to achieve consensus in the Community decision-making process. On the other hand, the reasons which make legal certainty desirable also apply with equal force in the area of pre-emption, and we have strong doubts that the determination of important federal power-sharing issues can be allowed to depend on political contingencies or, even more dubiously, on a judicial appreciation of political contingencies. Thus the need for clear criteria which nevertheless allow a degree of flexibility exists, and indeed is increasing.

Perhaps even more significant, however, is the fact that the application of a legal pre-emption doctrine can itself have an important influence in the decision-making process, and that a strict doctrine need not be viewed as the potential source of legal paralysis, but rather as a device for promoting consensus in decision-making. This is so because in policy terms pre-emption operates on two levels. On the political level, we find what has elsewhere been termed "factual" pre-emption, that is where there is no real viable Member State policy option in the absence of agreement at the Community level because of the factual situation.[35] On another level, and irrespective of the factual situation, we find "legal" pre-emption, *i.e.* where as a matter of law an area is deemed pre-empted. Such pre-emption occurs irrespective of whether the central authority is actually in a position to regulate it. The tendency even for lawyers to adopt a pragmatic approach to produce a functional system is great. But here again one must be careful to analyze in depth the interaction of the legal situation and the decision-making process, for if the legal system over-compensates for defects in the policy-making system the result may be atrophy in the latter. The existence of legal pre-emption can act as a strong element in forcing the decision-making process, even within a consensus framework. Thus if we consider a case in which no factual pre-emption exists, one can see that pressure to arrive at a Community consensus decision is low, while potential for delays and pushing of Member State interests is high; decision-making in such a case even in the Community forum will resemble an international treaty-making conference. But the situation will undergo a subtle but far-reaching change if we introduce an element of legal pre-emption, for the reason that if they fail to reach consensus the Member States are not *legally* permitted to adopt unilateral measures in the absence of a Community decision. Of course, a Member State could, and indeed might well, break the pre-emption obligation. But the political damage that the deliberate and persistent breaching of this legal obligation would cause to the entire structure is so extensive that, unless a Member State has determined on a general disintegrative and obstructive policy, in principle non-compliance will not be treated as a serious element in a bargaining position save in exceptional circumstan-

[35] For examples and further elaboration, *see* Krislov, Ehlermann & Weiler, *supra* note 29, at §VII.C.

ces. Rarely should a particular interest involved in an individual decision be worth the sacrifice of the entire system, and there is thus a general pressure to respect the law, in theory if not necessarily in practice. Thus the fact that an area is legally pre-empted can act as an important pressure toward creating political consensus, given the condition that an overall political commitment to the maintenance of the system as a whole exists. The lawyer in analyzing the legal doctrine of pre-emption must, therefore, be aware not only of the dangers of legal paralysis, but also of its "value."

The divergence between the institutional and constitutional levels of European integration can explain another interesting comparative phenomenon. In the history of American federalism, and to an even greater extent in the Canadian history and even current experience, the major "federal" battle concerned the material division of competences between the central government and the constituent units. Up until the 1930's it was considered that the law-making competence of Congress was limited in major ways legally as well as politically. The substantial elimination of the supposed constitutional barriers was a painful and not uncontroversial experience in the USA. In Canada it remains a divisive issue to this date. The European Community, surprisingly, has escaped this particular federal battle. The competences of the Community have been extending in a material sense, through the use of the judicial doctrine of implied powers[36] and the legislative reliance on the "elastic" clauses in the Treaty – articles 100 and 235 EEC.[37]

The Court has adopted an attitude of "active passivism": it has never struck down a Community measure on the grounds of constitutional ultra vires. More surprisingly, the Member States, champions of state rights, have not gone to the political and legal barricades. Or is it really surprising? Surely not, for it is the Member States themselves who have engaged in this process of material expansion. Earlier we explained that the political process in the Community has developed to accommodate the exigencies of the Member States. The very fact that each Government has a real possibility of checking any unwanted material expansion means that what in other federal systems, where the central government is distinct from state governments, is a major source of political conflict, is diffused in the Community. It becomes extremely difficult for a Government to claim that in adopting a certain measure the Community legislator, principally the Council, has encroached on Member State jurisdiction,

[36] The leading case on the implied powers doctrine is Case 22/70, Commission v. Council, [1971] ECR 263 (*ERTA*). For further discussion and a review of the case law *see, e.g.*, Gaja, Hay & Rotunda, *supra* note 34, at §II.A.; Stein, *supra* note 15, at nn. 67–78 & 181–211 and accompanying text.

[37] For further discussion *see, e.g.*, Gaja, Hay & Rotunda, *supra* note 34, at §II.A; Cappelletti & Golay, *supra* note 30, at §V.B; Jacobs & Karst, *supra* note 10, at §III.B.2.b. *See also, e.g.*, Tizzano, *Lo sviluppo delle competenze materiali delle Comunità europee*, 21 RIV. DIR. EUR. 139 (1981).

when that very Government *ex hypothesi* was party to the legislative process with a real veto power.[38]

3. Integration Outside the Central Legal Order

So far we have concentrated primarily on the central legal order and on the problems of integrating the central and state systems. The fact remains, however, that only limited competences are vested, whether permanently or only temporarily, in the central order and that much remains to be regulated by the Member States. The closeness of the relationship which is instituted amongst the Member States clearly requires that some adjustments be made to their individual legal systems to allow the cooperative venture to succeed. But the issues involved in such "voluntary" approximation are somewhat different, because either *ex hypothesi* such integration is not "necessary" to the federal objective, for if it were it would fall within the federal jurisdiction, or, although it should so fall, the Member States prevent it from becoming centralized.

Of course, we have already seen in the discussion on pre-emption that the matter is not so simple, and indeed it may often be the case that the Member States will even allow certain matters which strictly fall outside central competence to be regulated by Community law, either because this is more convenient or because there is no viable state regulatory option. From the legal point of view this practice is open to criticism, principally on the grounds of legal certainty, but since consensus, in the EC, is in any event required and the same end could be achieved through international agreement, very little real objection can be made to the use of the central mechanisms for this purpose. These gray areas apart, however, it is clear that there are vast areas which fall outside central competence but which are affected by substantive integration in such a way as to require adjustment of laws and the legal system. Thus for instance, market integration may require approximation not only of commercial and competition law, but also of the law of contract or of civil liability; free movement of persons may lead to family law problems; and transfrontier mobility of all kinds raises problems of enforcement of judgments and of jurisdiction.

There are, of course, various competing interests at work in this field. Complexity may be undesirable because of the costs in delays, expense and anxiety and because of the room it leaves not only for error, but also, through use of discretionary interpretation, for divergence. But "pluralism" also has its virtues and becomes even more attractive when the alternative is radical and often traumatic change. Thus the adjustments to be made to the member state systems to permit integration and a painless working relationship must be ap-

[38] *See, e.g.*, Case 91/79, Commission v. Italian Republic, [1980] ECR 1099, where the Italian Government, prosecuted for failure to implement a directive, explicitly refrained from challenging the legality of the Community environmental directive. It should be noted that the veto power over material expansion under EEC Treaty arts. 100 & 235 is based on the Treaty itself.

proached subtly, harnessing a wide variety of instruments – some imposition, some inter se agreement, some parallel coordinated development, whether guided or spontaneous, some direct intervention and some more indirect adaptation, for instance through conflict-of-law rules. Thus the choice of tools is as important in this field as it is in the federal order and is examined in detail in the middle two studies in Book Two ("Instruments for Legal Integration in the European Community – A Review"[39] and "Conflict of Laws as a Technique for Legal Integration"[40]).

4. Tools for Legal Integration

There is no single "correct" method of classifying different legal instruments or techniques for integration. One basic distinction, which to a certain extent is followed by the studies in the body of the Project, is that between, on the one hand, those instruments available to the central law- and policy-making organs and, on the other hand, those instruments which the constituent units can negotiate among themselves without the need for the mediatory function of the institutionalized center. Thus, in the European context, the first group would refer typically to classical Community instruments such as regulations, directives and decisions, whereas the second group would refer typically to, say, international treaties concluded within or without the Community framework, and to the evolving coordinated principles of private international law. This basic classification, however, is only a starting point for a variety of other instrumental distinctions which result in different groupings.

If we are interested in the *binding* as opposed to the *persuasive* character of the instrument the institutional dividing line will disappear. Thus we would have to group Community legislative tools together with ratified and operational international conventions which have the status of binding law within signatory countries, whereas Community recommendations might be grouped together with, say, OECD codes of conduct and Council of Europe non-binding resolutions, which typify the notion of parallel-coordination designed to bring about a spontaneous and non-centrally enforced level of harmonization.

An alternative organizing principle may be found in the context of judicial remedy. Here we might distinguish between those instruments in which provision is made for transnational/central adjudication, and those which, despite the normatively binding character of the tool, leave adjudication at best entirely in the hands of state courts, at worst in the hands of Member State Governments. Under this organizational principle we would find, for example, central Community legislation classified together with the European Jurisdiction Convention which has "appropriated" the European Court of Justice as a central adjudicatory forum, and with the European Convention on Human Rights with its autonomous quasi-judicial and judicial organs. Other interna-

[39] By Gaja, Hay & Rotunda, *infra* this vol., Bk. 2, p. 113.
[40] By Hay, Lando & Rotunda, *infra* this vol., Bk.2, p. 161.

tional treaties or even Community measures which do not qualify as "acts" for the purpose of ECJ review would fall in another group.

Yet another organizing principle might follow a distinction borrowed from the classical long-term process of international legal unification and embodied in the concept of *penetration*. Thus the weakest measure of penetration will be represented by uniform rules on jurisdiction of courts and on enforcement of foreign judgments, preserving diversity, however, both at the level of substantive law and conflict-of-law rules. This classification is illuminating since the 1968 European Jurisdiction Convention regarded as a "hard" instrument in terms of its binding effect and adjudicatory machinery, is under the profile of penetration a "weak" instrument. A higher level of penetration would be represented by instruments which harmonized choice-of-law rules. The example which comes to mind here is the European Convention on the law applicable to contracts and obligations, since it offers a higher level of penetration but arguably its institutional machinery is weaker than its sister Jurisdiction Convention.[41] The highest level of penetration is achieved at the level of uniformizing substantive law, which would also obviate the need for choice of jurisdiction or law instruments. But this of course brings us back to our initial differentiation between uniformization through central or decentralized institutions, and/or uniformization by binding instrument or through spontaneous adaptation promoted by persuasive parallel coordinated instruments, such as model codes and restatements, since in order to uniformize substantive law one is thrown back to that very starting point: Who will do the uniformization, with what instruments and with what legal effect?

To examine all these permutations would necessitate an entire project in itself. The contributions highlight a great many problems indirectly but are able to examine only some directly. Essentially the studies have tried to emphasize the basic distinction inherent in centralized tools with different measures of binding force, so that for example the Community *directive* is treated at some length because of its hybrid nature. The American experience both in the field of parallel-coordination, where it has a relatively long history (of success and failure), and in the highly developed conflict-of-law field is brought out here to the full, especially in the middle two studies of Book Two.

It is not our intention to summarize the analysis or conclusions of these studies. But, in line with the central theme of these introductory remarks, we would like to examine only some of the issues which the choice of tools raises, once again within the framework of the interconnection of the three elements in Book Two of political process, legal tools and judicial review. Our point can be made by reference to two issues: firstly, the approach of the Court in this area, and secondly, the problem of increasing central law-making power.

[41] The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention) (OJ No. L 304, 30 Oct. 1978, pp.36 & 77) and the Convention on the Law Applicable to Contractual Obligations (the Rome Convention) (OJ No. L 266, 9 Oct. 1980, p.1) are discussed in detail in Hay, Lando & Rotunda, *supra* note 40, at §§IV.B.2. & V.B.

Almost needless to say, the European Court has not remained aloof on the issue of tools. Although we do not propose to examine here the Court's role in this respect, which is more than adequately dealt with in the chapter on tools and incidentally in other studies, we would like to touch upon what is perhaps the most radical and controversial judicial departure in this context, namely the attribution of direct effect to directives in certain circumstances; this in our view provides a good example of the difficulties involved in reconciling all the conflicting interests in legal integration. The attribution of direct effect to directives – albeit only within certain circumscribed circumstances – can be criticized, and indeed often is, for reducing the options open to the Community authorities in the choice of tools. If the directive is treated as a pure Community-Member State mandate, with no further implications, and action for non-compliance relies entirely on a Community institution or Member State initiative, then both the Member States and the Community are given considerable leeway for political maneuvering as far as non-compliance and the condoning of non-compliance are concerned. This makes the directive an extremely flexible tool and ideal for use in controversial areas, in terms of the decision-making process: the Member States may agree to accept the directive, knowing that they are prepared to pay the price for possible non-compliance. The introduction of the concept of direct effect, however, by-passes this political option and means that the Member State is effectively given no choice in whether to comply. It can, therefore, generally be considered as strengthening the reach of central law and central power, attempting to pressurize the states, and thus upsetting the "federal" balance. But it must be remembered that the direct effect doctrine is equally a constraint upon the Community authorities: the Community institutions are no more capable of denying direct effect if the prescribed circumstances exist than are the Member States.

We would not seek to deny that given the current state of development in the Community, the Court's jurisprudence has in practice increased the direct impact of Community law and indeed that it may have been provoked, subconsciously perhaps, by the Court's (political) sensitivity to the ever-increasing problem of non-compliance to directives. Nobody, we believe, could deny that the Court's decision on this point may have far-reaching effects – maybe even negative ones – on the policy- and law-making plane. Indeed given the fact that this jurisprudence has even provoked national judicial resistance – notably in France and Germany – putting at risk the central judicial working relationship on which the Community legal order depends, one may agree that "politically" the development could appear more negative than positive in Community terms. Even in terms of the coherence of the *legal system*, there is much to be said for the undesirability of attributing different effects to a single instrument dependent upon certain contingencies of drafting or implementation by the various Member States.

But notwithstanding the validity of these criticisms, we would suggest that it is mistaken to believe that the Court has been or will be ruled by *political* rather than by *legal* considerations. The Court's preoccupation with the federal legal order is two-fold: it is concerned with promoting the "federal" co-

herence *and* with assuring respect for the rule of law. The decision to attribute direct effect to directives in certain circumstances is, in our submission, as much concerned with the rule of law as with the federal relationship, for, in effect, its concern is to ensure that neither level of government can rely upon its malfeasance – the Member State's failure to comply, the Community authority's failure or even inability to enforce compliance – to defeat the legitimate expectation of the individual or indeed the Community as a whole (since non-compliance is typically an act of one Member State rather than of all of them jointly). If a *court* is forced to condone wholesale violation of a norm, that norm can no longer be termed law. And who would deny that directives are intended to have the force of law under the Treaties? The fact that the application of the doctrine of the direct effect of directives is clearly circumscribed mitigates some of the legal shortcomings of the approach, which in any case appears to be the only means available to the Court to counteract the procedural shortcomings inherent in the more "orthodox" procedures – such as the procedure under article 169 – for ensuring compliance with directives. In the legal context – and ignoring the politics – the Court is almost obliged in equity to prefer the individual who comes with clean hands to rely on what should have been performed, to the defaulting national (and conceivably Community) authority. Thus, in terms of the legal coherence of the federal order the Court's decision, albeit not perfect, is to be welcomed, despite what may be considered negative political feedback, not only because it increases the direct reach of Community law, but also because it maintains the integrity of the legal system.

Arguably, given the present state of European legal integration, what is needed is a strengthening in the usage of centralized binding instruments. Even the directive, which leaves the Member States a limited space for maneuver and which could not in truth be characterized as a parallel instrument, has become a major source of Community difficulties. The dramatic increase in the number of directives in force – from a few dozen in the 1960's to over seven hundred at present – has been matched by a growing problem of non-implementation. It looks as if even the limited margin allowed the Member States by a directive is "exploited" as a means for shirking Community obligations. This malaise is analyzed in the study on decision-making and some remedies are suggested in the study on tools.[42] And yet, an insistence on an increased use of centralized binding tools, despite the primary positive effect of enabling freer Community action, could have dangerous consequences given the present machinery for decision-making. We shall mention some of these possible consequences.

a) In the face of the immediate obligatory character of the central-binding tool, the reluctance of the Member States to adopt the instrument might grow. This reluctance might be even greater if, as is the case with certain Community

[42] *See* Krislov, Ehlermann & Weiler, *supra* note 29, esp. at §VI; and Gaja, Hay & Rotunda, *supra* note 34, at §III.B.

harmonization measures, Community adoption also results in an irreversible transfer of competence from Member States to the EC.

b) Even if this reluctance could be overcome, and the growth in Community legislative output suggests that this may be the case, the trauma caused by the changed legal situation, augmented by a wholesale use of centralized Community legislation, might create a resistance at the implementation level which could culminate in non-implementation or wrongful application. By contrast with federal systems in which it is in many cases a federal agency which is entrusted with the implementation of central law, in the European Community, with few exceptions, policy is entirely in the hands of Member State administrations when it comes to implementation. The dangers of non-implementation go beyond the substantive area in question and reveal the defects of the weakest link in the Community system of remedies – the article 169 procedure. An increase in article 169 prosecutions is no solution since this might simply devalue the deterrent effect of that remedy. The growing number of cases where European Court decisions have been flouted is both embarrassing and detrimental to the authority of the Court.

c) Finally, the combination of binding instruments and irreversible Community competence coupled with the increasingly tortuous Community decision-making process gives rise to an acute danger of legal obsolescence. The problem is as simple as its solution is difficult. If it is correct that the Community procedure with its inherent *lourdeur* and inflexibility reduces the capacity for efficient decision-making (although this in some ways is challenged in the study on decision-making[43]), the danger is that once a Community measure is adopted it may become inordinately difficult to amend when changing circumstances render it outdated or even obsolete. This problem might be particularly serious in social fields. It might be possible to convince reluctant Member States to compromise their position (both upward and downward) and adopt a measure in, say, the field of consumer protection or even a simple measure of harmonization of product standards. By virtue of that Community decision the area may become Community pre-empted, thus tying some, or even a majority of, Member States to an "aging" standard simply because it may suit the industrial or other interests of one partner whose consent would be necessary to effect any change in the old measure. The problem could be mitigated by, for instance, an increased use of "minimum standard" directives and other such devices. But there are limits to such techniques if other interests – for instance, in our example, the free circulation of goods – are not to be put in danger.

This problem is not unique to the transnational setting. The position of full-fledged federations is interesting, for the legislative process in federations is no less complex, the timetable exigencies no less pressing and the problem of obsolescence, for different reasons, often no less acute. And yet a clear majority, once it is found, cannot be obstructed by one recalcitrant constituent member. Paradoxically, however, this area also highlights one Community ad-

[43] *See* Krislov, Ehlermann & Weiler, *supra* note 29, esp. at §V.B.2.

vantage in relation to the federal state. The absence of a Community parliamentary procedure, lamentable as it may be in terms of democratic control and legitimacy, can result in the speeding up of legislative updating. The management of policies, once the "grand design" is approved, is frequently left in the hands of the combined Community-Member State bureaucracy. (This of course, is the situation in some states wherein much secondary legislation will be enacted de facto by the administration.) Where technical emendation is concerned this can prove a much more efficient vehicle for legislative change, since it operates through autonomous clusters of Commission services, COREPER working groups and Management Committees, which do not create a demand on an overburdened parliamentary timetable, nor rely on the "idiosyncrasies" of elected politicians and changing political majorities. Indeed, as is shown in the study on Community decision-making, middle-range policy management is not nearly as inefficient in temporal terms as one might have expected from an abstract consideration of the decisional structure of the Community.[44]

At the end of the day, the interaction of political reality with legal norms in the context of the choice of tools leaves the transnational policy-maker with several serious dilemmas. The most "efficient" legal instrument in terms of binding effect might create a series of decisional problems. On the other hand, parallel-persuasive tools, which are more sensitive to the clash of integrating interests, suffer from their own innate defect: they are, after all, only persuasive. There can be no easy "rule of thumb" for this particular manifestation of the federal dialectic in the Community context.

Finally one should consider a crucial difference between the US and the EC systems which presents a tantalizing option for future Community evolution. One "tool" which seems almost an ideal compromise between the central-binding ethos and the parallel-persuasive one has been the ability of federal governments to "buy" the loyalty and compliance of states toward central policy, for instance by means of financial federal aid conditioned upon such loyalty and compliance. These instruments of "new federalism" – now quite old – are used in virtually all federal states. Not only have they enabled the general power to exert an influence in areas which are beyond the legislative competence of the central authority, but they have also constituted "result-oriented" instruments which are probably far more effective than say the Community directive, allowing a greater respect for state diversity than a directive could while providing an incentive for compliance the force of which goes beyond many a judicial remedy.

The best illustration in the Project of this point may be found in the study on Canadian federalism. Canada's system of division of competences is far stricter than of most other federal systems. This derives in part from the formal character of the original Canadian Constitution, a British Act of Parliament; in part from the non-integrationist ethos of the once supreme "Canadian"

[44] *Id.*

tribunal – the British Judicial Committee of the Privy Council; and in part from the socio-political reality of the Canadian polities and in particular the uneasy position of Quebec. For these and other reasons successive Canadian Federal Governments found it much more difficult than their counterparts in other federations to tackle on a central level problems which called for federal solutions but which were apparently forbidden by the allocational principles in the British North America Act. As Professor Soberman describes:

> In the post-War era, federal government intervention took the form of energetic use of its taxing powers ... and of making revenues available to the Provinces in the form of conditional grants. By insisting that Provinces, in order to receive grants, contribute a specified percentage from their own revenues, say one-half or one-third, and that they maintain minimum standards of availability and quality of service to the public, the Federal Government used its "spending power" in effect to legislate in areas of provincial jurisdiction: Provinces were forced to pass appropriate statutes and establish the necessary administrative machinery in order to qualify for grants.[45]

It is frustrating that the availability of this instrument in the Community is so remote, for in many ways it seems tailored for the needs of the Community, in which uniform legislation creates so many problems. But the absence of its precondition – an autonomous and self-managed Community revenue based on direct and/or indirect taxation – represents at present an insurmountable obstacle. Furthermore, it is highly likely that the inter-governmental decision-making apparatus would ensure, as in the case of the Regional Fund, that the financial incentives would be used more for national redistribution – as a clearing-house operation to balance the financial inputs of Member States. But as a political option in any reconstruction of the present Community this tool will retain its great attractiveness.

B. Integration Through Law: Toward a European Indentity
(in particular Volume I, Book Three)

In the preceding section we discussed some of the issues involved in integrating legal systems. But, as we said earlier, integration is not undertaken for integration's sake, however much we may admire the mechanics for achieving interlocking legal systems. Rather, the law is but one of many social instruments harnessed to achieve a wider societal objective. Thus the true measure of the success of legal integration is not whether the integrated legal system is technically sound and functional, but whether the system actually promotes the achievement of the integrational objectives. We have deliberately chosen not to focus in this Volume on the substantive law of any of the systems examined, concentrating rather on legal techniques. But at a certain level substantive achievement itself becomes incorporated into technique. This is so because of the very nature not only of the integration process, but also of the law itself. In-

[45] Soberman, *supra* note 11, text accompanying n.20.

tegration is not a simple exercise in power sharing, but goes deeper and aims at a fundamental restructuring of society and of societal attitudes, and these changes are reflected in and promoted by the law.

We have already discussed the fact that one of the major problems facing integration as a governmental enterprise is the difficulty of arranging a transfer of popular loyalty from the state to the federal government. In order for such a transfer to take place, it is essential that the citizen be able to see in the federal order something with which he/she can so to speak "identify" positively. Such positive identification springs in our view from two sources: from an "internal" perception, when the citizen judges that the new order promotes certain interests, objectives and values; and from an "external" perception, when the citizen perceives that whatever the internal difficulties, the new order is "distinct" from "the rest of the world," and recognizes the identity of interests this creates, the value of speaking with one voice. Of course, this is a simplistic approach to a far from simple matter, but even such over-simplification does, in our view, retain some value. We have chosen, therefore, to act on this assumption and to focus on certain substantive areas to see how legal integration in these fields has acted in promoting the federal identity or, where it has not, to see the obstacles to such an effect.

To be sure, it was no easy task to choose the appropriate "areas" for this methodological part of the Project. We are confident, however, that in choosing foreign policy and external relations (the overtly political sphere), the movement of persons and goods (the socio-economic sphere), human rights (the moral sphere) and education (the cultural sphere), we have a tenable selection. In the first place, each of these representative spheres encapsulates a powerful moving force for integration. There is in fact in our increasingly interdependent world an objective need – which is especially strong in certain regions of the world and particularly in Western Europe – for an economy not paralyzed by national boundaries, for politics not debilitated by obsolete divisions, as well as for an overall arch of legality and morality and for a common cultural understanding. In a sense, the combination of these elements is the *conditio sine qua non* for successful community enterprise. Moreover, success and development in each of these spheres is partially dependent on progress in the others. Ultimately, these four "needs" are, potentially at least, the most basic tools and forces for integration.

In the second place, however, we shall bear in mind that these same elements also represent, with perhaps equal strength, the basic possible *obstacles* to integration. Economic protectionism is still well ingrained in our national systems; it appeals to powerful interests and finds defenders among the most distinguished economists. As for foreign policy, one can hardly imagine any other area where national jealousy is so strong. Human rights, too, is an area which reminds us of vexed issues of local standards, proud national autonomy and the varying socio-economic bases of both the substantive contents and the procedural implementation mechanisms of human rights. Finally, education, with all the complex historical, linguistic, curricular and other diversities, raises equally difficult barriers.

These barriers are not necessarily chauvinistic, obstructionist and negative, however. They might often stem from economic, social, cultural and other diversities which demand respect and deserve to be preserved. Integration, as we said, is not standardized unification, and diversity is an element of, not a contradiction to, the "federal idea." Let us emphasize once again that the entire story of integration rests in the interplay between genuine concern to preserve that which is different while eliminating that which divides.

1. Creating a European Identity

With these considerations in mind, we shall now revisit the five areas of integration which are analyzed in the third and last Book of the first Part of the Project and which, in our view, are central to the creation of a "European identity."

The external posture of the polity toward the outside world, the subject of the first study in this book,[46] touches on a theme fundamental to classical nation building. In classical international law doctrine this probably constitutes the veritable hallmark of the transformation from confederation to federation.

Second only in importance to the international identity, and in part deriving from it, is the question of citizenship and nationality within the polity. *The movement of persons* to and within the polity, the subject of the second study in this book,[47] touches on this theme. The rights, duties and privileges of citizenship and nationality as seen through the prism of immigration and intra-Community movement law and practice are examined here. These two notions – citizenship and nationality – highlight yet another crucial difference between the federal state and the community of states. And yet as the study in the book will illustrate, once one descends from the airy level of symbolism and high principle, the operational problems and policy conflicts facing both systems come surprisingly close.

The internal movement of goods, the third study,[48] underlines that the notion of a "common marketplace" is more than a simple device to attain an alleged measure of economic efficiency in the distribution of production factors. The common marketplace has a symbolic value which transcends its operational justification. This symbolism might explain a difference in judicial attitude between the US Supreme Court and the European Court of Justice which emerges in the study, whereby the latter seems less compromising toward *any* obstruction to movement whereas the former is concerned usually to eradicate only *discriminatory* obstructions. It might be that for European judges, operating in a far from perfect union, a maintenance of this symbolism, occasionally even at the price of undermining bona fide Member State regulatory measures, is considered of high value in community building. For them One

[46] Stein, *supra* note 15.
[47] Garth, *supra* note 16.
[48] Kommers & Waelbroeck, *supra* note 17.

Market is a crucial element in the movement toward the Preamble's "ever closer union."

The transnational protection of human rights constitutes in our view another indispensable element in the creation of a European identity. Since the modern dream of Europe was built on the ashes of the calamitous World War II, it is understandable that the first significant "supranational" advance was made in this field. Admittedly, frequently the challenge and indeed the successful operation of the European Convention on Human Rights underscore the social and political differences which legitimately remain between the European nations and their peoples. But the "European Bill of Rights" remains as a constant reminder that there is a basic moral heritage – a standard beneath which Europeans, even at the cost of national embarrassment, or, almost worse, governmental inconvenience, are committed not to sink. Like the Bill of Rights in America, in Europe this is part of "being European." The fourth study deals with the dilemmas and difficulties in creating, maintaining and enhancing this vision.[49]

Finally, in the fifth study we focus on the realm of *education and culture.* Given the overall focus of the Project we have selected legal education.[50] Certainly the problems and challenges here are specific and conditioned by the existence, or otherwise, of, for example, professional mobility, a transnational right to practice, the measure of unification of substantive law and above all the call and need for a "European trained" lawyer. But this study, despite its specificity, underscores the importance of education in general and of reciprocal exchanges of knowledge and understanding, from which tolerance is bred, in creating a meaningful sense of European identity.

We would not maintain that a *unified* or *single* or *common* citizenship, foreign policy, marketplace, set of human rights standards and education are the necessary or sufficient conditions for a European identity. Rather we would merely suggest that these are among the areas – falling in the social, political, economic, moral and cultural domains – which are most critical to this issue and in relation to which the balancing of the common and the diverse, the centralized and the decentralized, the one and the many will be most crucial.

Not surprisingly, over the years attitudes toward these issues have undergone considerable change in Europe. Nor have the developments in each of the five areas mentioned been in the same direction; and the movement toward federal integration, as well as the lessons to be adduced from comparison, have varied, often greatly, in each of the fields. Thus the movement of persons and goods, representing the most classical area of socio-economic integrational activity, is, not surprisingly, most closely associated with concrete progress in the past. But even foreign policy – an area of high political charge (and resistance) which deliberately received scant attention at the inception of the Community (a European foreign policy was all but excluded and even in the eco-

[49] Frowein, Schulhofer & Shapiro, *supra* note 18.
[50] Friedman & Teubner, *supra* note 19.

nomic sphere severely curtailed, no doubt because of its importance in the balance between the Community and the Member States) – has come to occupy a central place in Community activity. And although one can still today hardly talk of a "common foreign policy" and only just of a Common Commercial (trade) Policy, the challenge and need for creative solutions within the context of a community of states is greater than ever. Likewise in the area of human rights: at inception this area received – within the European Community – even less attention than external relations, but with the evolution of the Community's constitutional order and the branching of the Community into new social fields, human rights and their protection within the EC have attained an undeniable importance. In contrast, legal education, once a source and a product of a European *jus commune*, is now probably little more than a hope or prospect for the future.

It is not only in perception and historical evolution that these five areas differ: within each we also find both a variation in the "federal balance" and a different usage of integrative techniques and tools. The inclusion of the five within Part One of the project thus provides an instant illustration of the themes discussed in the previous studies in Books One and Two. For example, whereas the free movement of persons and goods illustrates the classical centrally binding regulatory measures largely of a "negative" prohibitory kind (Member States are prohibited from obstructing the movement of goods), legal education is probably a field where, as the American experience confirms, only spontaneous harmonization in the wake of substantive legal integration is feasible. The area of human rights illustrates the effective potential which a non-Community framework, and a traditional tool – the international convention – may still yield. Significantly, it is the existence of a relatively advanced investigatory and judicial apparatus as part of the European Convention machinery, a feature similar in some ways to the Community, which is instrumental in bringing about this effectiveness. Finally, in the area of foreign affairs we have probably the most striking example of the fullest possible range of instruments available to the Community: between the exclusive Common Commercial Policy and the loose, non-binding, extra-Treaty Framework for Political Cooperation we find almost every possible combination of interaction between Community and Member States and the fullest range of legal and other instruments used for execution of the Community's external posture.

These studies, in a sense also sound a note of caution about the limits of law as an instrument of social change. While it is certain that a negative attitude of the legal system to the type of federal enterprise we have been discussing could prove fatal unless there were an extremely strong political impetus to counteract it, it is doubtful that the positive attitude of the legal system and its actors alone could do more than merely encourage tendencies which are already inherent. Thus one of the themes underlying the studies in Book Three is that of the positive or promotional role played by legal developments in the integrational process, as opposed to the purely negative or non-obstructionist role. The perspective, however, is not institutional, but substantive, in the sense that the analysis is concerned with the way in which what we might call "fed-

eral constitutional" legal doctrines can be used to promote substantive ends which in an extra-legal perspective are pivotal to the process of integration. Thus the focus in the human rights studies is not so much on the fundamental rights as such, but on how their protection through central devices can not only help, in many cases, guarantee a better standard of protection but also can lead to an increased cohesion of the "union." It is this approach also which lies at the heart of the last study in the Volume concerning the area of legal education. A central question in the study of integration through law is, in effect, whether law can have any influence on the integration process; the legal education study takes the argument one step further by asking how far lawyers can control that influence. The study examines not only the socio-psychological problems which are created within a self-contained legal community by the intrusion of a new and, in some respects, superior order, but also how that community can be taught to overcome the socio-psychological blocks, as well as to use the process of adaptation in order to develop a new awareness of and sensitivity to the role of law in society.

Finally, these five studies afford us an excellent example of the insight that may be gained from the comparative method. In some cases this insight leads to a better understanding of the respective systems or to an identification of specific problems with which the law – regardless of its systemic setting – grapples. In other cases, more dramatically, it can bring about a reevaluation of the entire field. We shall illustrate the first of these dimensions by drawing virtually random examples from studies in Book Three. Then, more ambitiously, we shall use the comparative analysis of foreign relations as a background for a far-reaching and extensive reevaluation of the international posture of non-unitary actors. We have chosen foreign policy for this more extensive treatment not simply because of the importance which external relations and foreign policy have come to occupy on the Community agenda, but also because this issue provides an excellent instrument for deepening our understanding regarding the fundamentals of federal entities. After all, it is in relation to this issue that most observers draw the sharpest line between federal states and the Community, making the claim, even in this Project,[51] that the single actor unified posture is one of the critical hallmarks of federal integration. We shall try to examine this position afresh. Naturally, we do not propose to summarize the five studies nor even to recapitulate systematically their comparative conclusions. The readers, or even the authors themselves, might disagree with our analysis. Here then is our random selection of some comparative lessons derived from Book Three.

The mobility of workers and rights of citizenship is one of those topics in relation to which the first expectation must be of an overwhelming divergence in the current experience of the United States and the European Community. The most distinctive difference must lie in the constitutional position of the

[51] *See, e.g.*, Elazar & Greilsammer, *supra* note 10, at nn.80–83 and accompanying text.

subject: in America citizens are first and foremost nationals of the United States from which status an entire array of citizenship rights are deduced. The position of the individual within a state and *qua* "worker" is largely consequential of the overall constitutional position. The relationship between constitutional status and functional rights is thus deductive; and the autonomy of the states is limited by the overriding principle of national (federal) citizenship. In Europe the individual derives his or her transnational rights from the constitutional position of being a national of a *Member State* and from the functional status of being a "worker." The divergence is at least double: conferring citizenship is not a right of "Europe" but of the Member States. And the content of the rights still derives from the original Common Market notion of free movement of factors of production amongst which is labor. In principle the individual derives rights as a "factor of production" the mobility of which across frontiers the Member States are forbidden to impede. This relatively narrow base is underscored by the so-called "reverse discrimination" cases where a foreign national may be better protected (as a cross-frontier factor of production) than the citizens of the Member State itself.[52]

If we were to try to speak of an emergent European citizenship it would depend, at this point, on an inductive exercise of adding the functional rights one by one to something which could begin to resemble a nascent – no more – constitutional position of European citizenship.

And yet a closer examination reveals that the apparent chasm is not always as deep as it at first appears. First, on a rather obvious and expected level, history provides one bridge. The American experience illustrates that the *formal* legal barriers placed in the past in the path of the migrant derive from similar concerns to those now prevelant in Europe whether real or apparent: the unwillingness of the host state to be burdened with the social or economic cost of the migrant whose utility has diminished – through personal circumstances or the general economic environment. Solutions to these problems such as the protection of the rights of families, the granting of educational benefits, the acquisition of social security and even residence privileges are remarkably similar in both systems despite the constitutional divergence. The overarching principle which courts, and to an extent the legislator, have learnt or have been forced to learn, was that human beings are not at the end of the day simply "factors of production" and that this fact defeats the rationale of a common market in Europe and the early non-intervention ethos in the United States. The treatment of persons *qua* persons has reduced even if not eliminated the supposed differences that the formal statuses of citizen and worker could a priori suggest.

The migrant worker study illustrates an even more striking convergence – one which is not rooted in history but in the political and economic reality of today and which provokes a sober reflection in both systems. As indicated above, the constitutional and legal norms developed in this area were unable

[52] *See, e.g.*, Case 175/78, R. v. Saunders, [1979] ECR 1129.

to rely hermetically on a common market rationale and had eventually to guarantee fundamental rights for the migrant as a person. To a certain extent there was a naive belief that these human rights would also work to ease labor mobility as part of the common market rationale. Discrimination against the worker was conceived as a disincentive to the ability and will of the migrant to seek work throughout the Community. The labor market, however, is not composed only of workers but also of employers. In both systems, employers, with or without the connivance of governments, have turned to the employment of guestworkers from outside the system – often as a means of avoiding the very social and economic rights introduced to protect and facilitate internal mobility. Remove the identifications and the reader of the study on migrants in Book Three cannot tell whether the descriptions allude to North Africans in France or Latin Americans in Texas. Both systems have little to be proud of in this sector. But if policy lessons are to be learnt they may in this instance move from Europe to America: not only in the recent experience gained in regulating these matters by treaty between host and home countries but also in the experience gained *within Europe* in rejecting the melting pot notion and respecting the "right to diversity" of large migrant groups.

By contrast with migration, in the study in Book Three on legal education the reader is confronted with a veritable divergence. The emergence of a "national" legal education in the United States is a feature which thirty years of European integration has not even begun to emulate. The reasons are not difficult to discern. In the USA a national legal education was a response to a certain demand; and the demand could be satisfied because conditions, cultural (such as a common language) and normative (a legal system deriving largely from a common tradition), allowed such a development. To be sure, once such a movement begun it must have had some reflexive effects on further integration of the American legal system; but this cannot change the basic relationship of cause and effect: the fact that despite the variations in the content of legal systems a student could graduate in a "national" law school, and then in a matter of months readapt to pass state Bar exams was a condition which today exists *within* some of the Member States (England, Scotland; the German *Länder*) but is a far cry from the situation in the Community as a whole. There already has been allusion to an earlier epoch in Europe in which a *jus commune* of one sort or another prevailed. But that was possible precisely because the conditions in Europe, at least among the classes which practised the law, permitted such a measure of uniformity.

Two questions face the architects of European integration today. The first is whether, empirically, the substantive divergences among the different legal systems are such as to realistically defeat any notion of a "European" legal education, a common Community-wide university syllabus from which the student would pass on to a mere technical brush-up in his or her Member State system. Our own reply must, sadly, be pessimistic. There would have to be still a great deal more of substantive legal integration before such conditions could prevail. The second question, indeed a challenge, is whether the relationship of cause and effect may be reversed. Whether, say, in this field the development

of a common syllabus for European law studies, in the admittedly unripe conditions, could be viable and instrumental in furthering a larger measure of necessary and functional legal integration. We would not wish to reply categorically to this question – even if the odds are against such an enterprise succeeding. Firstly, because the entire edifice of European integration has been built on the foundations of realism and vision intertwined. If Jean Monnet and his associates had followed the dictates of "realism," the European venture would never have been launched (at least not in the way it was). Secondly, because total solutions are not the only ones; there might well be an array of intermediate solutions, some of which are explored in the study itself. Finally, and this in our view is the major contribution of the legal education study, if the comparison between Europe and America underlines the necessity of a large measure of commonality in the legal system itself in order to explain and justify a transnational legal education, the question is posed whether there are no other elements which are common despite the substantive differences. The answer is that such elements do exist in the relationship between law and society, in the understanding of the instrumental character of law in ordering and reacting to societal exigencies – exigencies many of which are common to all post-industrial Western democracies and inherent in the very inner doctrinal structures and processes of legal systems as such. The need for further advances in the methods of legal sociology and the sociology of law, as well as legal theory and comparative law itself as two of the methods of understanding the relationship of law and society, is but one facet of this commonality. Until the conditions exist, if at all, whereby the extent of substantive legal integration is such as to make the training of a lawyer outside the immediate statal environment feasible, even attractive, it is this interdisciplinary and comparative approach as a component of legal education which offers most promise in reducing, if not eliminating, the educational barriers which the substantive law seems to demand.

The last brief comparative example we wish to give derives from the study on free movement of goods as a means of creating a European economic identity. We confine ourselves to one dimension which illustrates an irony of the relationship between law and practice.

Legally, this is an area where there is the largest measure of convergence between the non-unitary systems. Indeed, the legislative provisions of the Treaty of Rome are explicit on many issues where, say, the American system relies on the vague Commerce Clause which is dependent on the integrationist ethos of the courts. But, as the study in Book Three illustrates, the formal differences in legislative bases have not prevented very similar substantive results. Protectionist measures are frowned upon in both systems (except if "federally" sanctioned). The European Court has gone even further than its American counterpart in restricting Member State non-tariff barriers to intra-Community trade even if based on health, public safety and other such good causes. With some exceptions,[53] the attitude of the European Court seems to be strict

[53] *See, e.g.*, Case 46/80, SpA Vinal v. SpA Orbat, [1981] ECR 77.

and objective, whereas the American Supreme Court places reliance on the subjective bona fide character of a measure.

The European law is severe, its ambit comprehensive and the remedies, especially through the 177 procedure, effective. Looking at the legal system in isolation, outside its social and economic context, would lead us to conclude that this is a small success story of European integration. The market reality is, however, an altogether different story. Legal success is matched by economic failure. Protectionism remains rife despite the exigencies of norms. It is estimated that existing non-tariff barriers are equivalent to a 10–12 percent tariff on intra-Community trade. More meaningfully, the European enterprise cannot think of its market as Europe, the way the American, Canadian and Australian counterparts may think of the US, Canada and Australia respectively. This in turn inhibits investment and research and development programs, and creates, in chicken-and-egg fashion, greater pressure on governments to reinforce protectionist walls.

The temptation would be great to seek remedies in a more efficient monitoring and enforcement system. The Commission clearly cannot cope with the mountain of presumed violations of the free movement provisions. In our view, however, this type of legal remedy is illusory. There is a point where even the effective legal remedy on a case by case basis cannot substitute for a specific absence of a habit of obedience in this sphere on the part of the Member States. It is our view that the only remedy here will come from a harsh economic reality: the option for European industrial survival, especially in the new technology sector, will depend on the realization by the Member States that it is only the creation of a real *European market*, through faithful implementation of the free movement rules, which could induce the kind of capital investment and promote the kind of development on which the American, and Japanese, successes in this field are based. This realization will also give impetus to the European program for transnational health, safety and other measures which at present are one of the principal causes or pretexts for obstructing intra-Community trade.

We shall now conclude this part of the introduction by a more extensive discussion based on the study of the foreign policy posture of the two systems, a study which in our opinion – not necessarily shared by the author – may lead to a veritable reevaluation of the notion of federal foreign policy.

2. Foreign Affairs and the Federal Principle[54]

The troublesome evolution of mechanisms and institutions for the formation and execution of a common European foreign posture represents a microcosm of the wider story of European integration within the EC framework, for within this evolutionary tale are encapsulated all the principal ambiguities,

[54] We are relying here on Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle*, in MIXED AGREEMENTS 35 (D. O'Keeffe & H.G. Schermers eds., Deventer, Kluwer, 1983).

conflicting forces and contradictions which have characterized the European Community from its inception.

The experience of federal states gives a convenient vantage point for this analysis. Typically, in the history of most federal states, the international environment provided one of the cardinal incentives for initial unification or for the movement from confederal arrangements to some form of federation.[55] And although constitutions of federal states, normally based on a doctrine of enumeration of powers divided between central government and the constituent units, describe in greater or lesser detail the respective competences allocated to each level of government, "it is usually assumed that the foreign relations of a federation will be controlled predominantly, if not exclusively, by the general government of the whole territory."[56]

A useful prism through which to illustrate this point is provided by the approach to treaty-making. An examination of the collective experience of federal states in fact demonstrates strong converging trends. If we turn first to consider the question of international personality and capacity of member units of a federation we find that in many federations this is denied constitutionally. Historically, even in federations such as West Germany, Switzerland and to a certain measure the USA where there is some constitutional provision for member state international capacity, the actual exercise of such capacity has been in decline. In recent times member states have rarely concluded independent treaties and have preferred to rely on the federal government with, as in the Federal Republic of Germany (FRG), certain constitutional guarantees.

For its part, the world order (as encapsulated in public international law) takes little cognizance of the internal structure of federations: "federal clauses" have always been an inconvenient disturbance, at best tolerated and for the most part resisted, and both international capacity and international responsibility (the hallmarks of statehood and sovereignty) have only grudgingly and to a limited and declining extent been accorded to constituent units of federations. From the legal point of view the world order is composed of unitary actors.

Not surprisingly, the federal (central) treaty-making power has been construed in most federal states in very wide terms. With a few theoretical exceptions the general trend is to recognize plenary treaty-making power limited by substantive constitutional provision but not by allocational ones. In all federal states, treaty-making power has not been limited to those areas over which the central government enjoys internal competences. And to cap it all, with the well-known exception of Canada, and to a smaller extent the FRG, federal (central) governments have been allowed by constitutional courts to implement treaties even if the implementing legislation crosses the internal demarcation of competences. Court after court has ruled that the exigencies of the external environment may override the internal federal demarcation.

[55] *See id.* at 41–59.

[56] K.C. Wheare, Federal Government 169 (London/New York/Toronto, O.U.P., 1963).

Even if federations have a unitary external posture, it is arguable that the federal principle may be vindicated in the *internal process of foreign policy-making*. Thus, in schematic terms, although it will be the US *qua* single state that concludes a treaty, Senate approval could mean that constituent state interests would have been represented before ratification. To be sure, the role of parliamentary organs at the central level in the foreign policy process, especially in the US (but not in the EC), has increased dramatically in recent years, with the imposition of a measure of democratic control in the foreign policy field, historically regarded as a *domaine reservé* of the executive. But it could be argued that federal legislative organs even if designed to represent state interests have lost some of their mediatory function and have come to be regarded as part of the central authority – displaying less sensitivity, or ability, in this sphere to vindicate their original constituencies. Indeed, the process of foreign policy-making is for the most part not conceived as being a legitimate interest of the constituent units *qua* units of the federation.

We should note, however, that this unitarist image must be qualified, at least partially, by political fact. Across the board we find that even where federal governments are given the possibility to encroach on member state competences through the exercise of treaty-making power, they have been very reluctant to conclude treaties which would have that effect. Moreover, there is a growing trend of evolving structures of cooperative federalism to overcome some of the problems to which the unitary solution gives rise. It remains true, however, that in the strict constitutional/international legal sense, federal states face the world as unitary actors and their internal policy process is essentially centralized.

How can we explain, then, that in the federal state, based on a notion of division of competences, such exclusive power was bestowed on, or allowed to move to, the hands of central government? Historically the rationale behind this exclusive concentration of the foreign affairs powers rested on two premises:

The first premise was that in matters of external relations a united posture would maximize the power of the individual units. This was particularly felt in the areas of defense and security. One can go even further. A unified foreign posture and international personality emerged probably as the two most important factors in giving federations, in their formative years, the quality of statehood as compared with all other types of federal arrangements. This was certainly true in the formal relations among actors in the world order and was recognized in public international law. But a unified foreign and defense posture did not have only an external and formal significance. The federation's flag, the "federal" army, the "national" anthem and other such paraphernalia – all being, at least in part, expressions of the unified posture vis-à-vis "outsiders" – imbued the formal distinction with social meaning. Thus even at the social and human level, whereas citizens of a federation could in internal matters regard themselves as being Texans or Tasmanians, vis-à-vis the outside world they would normally regard themselves as respectively Americans or Australians. To be a federal state was to have a unified foreign posture.

But this premise alone would not explain the willingness of the member states of federations – especially in formative periods when traditionally there was a much stronger insistence than today on preserving the rights and autonomy of the constituent units – to vest responsibility for virtually all foreign power in the hands of the central government. It is here that the second premise comes into play. For there was a widespread belief that matters of foreign policy and contacts with foreign states would, ipso facto, interest the general government and would, by contrast, be of lesser relevance to the constituent states and the domestic powers usually vested in them. It seemed, therefore, that one could gain the benefits that a unified foreign posture was to yield without encroaching on the internal division of powers between the two levels of government as regards domestic policy. It is this premise which accounts for the fact that until the advent of the European Community there was with rare exceptions no such thing as a genuine "federal foreign policy." Federal states distinguished themselves by their unified, non-federal, external relations posture. Finally, there was perhaps the belief, characteristic of early federal theory, that the representation of state interests within federal government, would give sufficient protection to state interests – if indeed these would exist.

The first premise whereby a united posture is more effective than individual foreign policies, arguably retains much of its force to this day and constitutes the principal mobilizing drive for those pushing for further integration in the foreign relations of the EC. By contrast, it is doubtful if the second premise was ever wholly correct. And in today's interdependent world it is clear that there are few areas of so called domestic jurisdiction which do not have some international dimension and equally few areas of international activity which do not have internal ramifications.

We are now in a position to understand the evolutionary dialectics and conceptual framework of the foreign relations apparatus of the EC. The emergence of European institutions and mechanisms for the formulation and conduct of a common external posture was not a result of a preconceived and rational design, but was instead the outcome of a process conditioned by conflicting interests and forces.

On the one hand, the belief in the alleged benefits of "speaking with one voice," at least in some contexts, provided the Member States with an integrative impetus. Moreover, the fact that internal matters tend to have an international dimension meant that even in areas where the Community was not vested with explicit external competences, there was pressure to create such competence so as to enable the EC to pursue in an adequate manner its internal policies.

On the other hand, it is easy to understand the source of Member State ambivalence and resistance to a unified foreign policy. The awareness of the fact that historically a unitary external posture and single international personality emerged as the hallmarks of the federal state – distinguishing it from other non-unitary entities – was and remains a potent potion, maybe even poison, for the Member States. Even the most integration minded of these did not bar-

gain for the creation of a European "super-state" under whatever federal nomenclature. The area of foreign relations acquired thus a sensitivity unparalleled in any other field.

Furthermore, the patent falsity of the abovementioned second premise, that one can delimit the interaction of internal and external powers, means that were the Member States to vest the exclusive conduct of foreign policy in Community institutions they would not only lose their much cherished international personality, but would also be impeded from autonomously conducting national policy in areas which at first sight might appear to be wholly within domestic jurisdiction. The history of all federal states has demonstrated clearly that implementation by federal government of federal foreign policy involves inevitable incursions into and encroachments on the areas reserved to the states.

Given these conflicting interests we should not be surprised to find that all activities of the Community in the international environment are characterized by a strong ambivalence on the part of the Member States. The alleged external utility of the joint posture is always weighed against the alleged individual statal loss of power.

We shall now examine in more concrete fashion the actual evolution of the Community foreign affairs apparatus in its dual aspect – external relations and Political Cooperation – with the view not of repeating the contents of the first study in Book Three, but rather, as indicated above, of seeing the extent to which this evolution may represent a contribution of the Community to a rethinking of federal theory in the least likely of fields: foreign affairs.

a) The Starting Point

As known, the EEC was created in 1957 against the failure of the more ambitious proposals in the mid-1950's for European political and defense communities. European integration was to evolve on the economic plane. The reluctance of the Member States to extend their joint venture to defense (outside the NATO framework) and to foreign policy was reflected in the Treaty of Rome in two ways.

First, an "iron curtain" was drawn between what later became known as "high" and "low" politics. The Community was to have international competence only in respect of *external (economic) relations* (low politics). The Member States would retain in their individual capacity exclusive competence over *foreign affairs* (high politics). There could thus be a series of European commercial and trade agreements with many countries. There could not be – until the creation of the Framework for Political Cooperation in the late 1960's – even the semblance of a joint European policy toward the political issues on the international arena. Here one was to have a French policy, a Dutch policy and so forth.

Anticipating a theme to which we will return below, this very example serves to illustrate the untenability of a conceptual and operational distinction between high and low politics – between external relations and political cooperation. For, one has to be singularly shortsighted and dogmatic to believe that ex-

ternal economic relations operate in a political vacuum and that one can pursue a vigorous foreign policy without recourse to economic instruments. The Member States were to learn that lesson slowly and reluctantly. The theoretical division, so neatly drawn in the Treaties setting up the Community, was gradually to become an unworkable solution, despite its ideological attraction.

Second, even within external relations, the international capacity of the Community expressed in particular through its treaty-making power was explicitly granted only in relation to the international trade policy of the Community. Thus, although the Treaty provided for conclusion by the Community of Association Agreements, when these covered matters which could not be regarded as coming under the general subject matter of international trade, the Member States prevented the Community from concluding such agreements alone and insisted on joint participation of the Member States leading to the so-called Mixed Agreements. Here as well the untenability of the initial document is evident. Could the Community which had explicit competences, at times even exclusive, over matters such as fisheries and transport, operate as if the Europe of the Six (and later Nine and Ten) was a planet with no connections with third states and other international actors? Could there be a Community fisheries policy without Community agreements with other fishing nations sharing the same high seas?

b) Mutation of the Starting Point

For these and other reasons it was not long before the initial Treaty formulae were subjected to powerful mutations. The pattern of external relations today is a far cry from the initial blueprint. We may mention in particular the following developments in the context of external economic relations:

(i) In quantity, external contacts of the Community formalized through international agreements have grown and now run into hundreds. The Community also has a network of international contacts, through legations, which is equally impressive. Any expectation that the external relations of the Community could or would be contained has inevitably proved erroneous.

(ii) This growth was and is connected to constitutional changes effected by decisions of the European Community Court of Justice. An important landmark was the *ERTA* decision of 1971, in which the Court held that the treaty-making power of the Community would extend to all areas in relation to which the Community had internal power. The confinement of Community agreements to international commerce and trade was thus removed. The importance of this decision was not so much in its practical consequences, as in its internal and external constitutional symbolism.

(iii) In a further development the Court gave an extremely wide interpretation to the reach of the Community Common Commercial Policy. This was significant since in relation to this policy the Community was not only entitled to conclude agreements but had exclusive competence vis-à-vis the Member States.

These developments could at first sight suggest a process not unlike that which has occurred in most federal states: a monopolization of external contacts and treaty-making power in the hands of the central government. This conclusion could not be further from the truth for reasons inherent in the institutional structure of the Community amplified by its political process. In particular we can mention the following two factors:

First, we must remember that the above process of expansion was confined to areas of external economic relations, however widely defined. Explicit problems of, say, defense and other issues of foreign affairs in the classical sense remained entirely in the hands of the Member States.

Second, the Member States reacted to the increased margin of competence of the Community to engage in external relations by tightening their grip on the actual procedure of negotiation, treaty-making and implementing process. The process which we described in relation to Book Two applied here in great vigor: the Council and its sub-organs together with the Member States were able over the years to reduce the autonomous role of the Commission in the external relations process in all its phases.

Thus, although the external and internal environment forced the Community to an expanded external economic posture, the process of its realization moved away from a "supranational" centralized model, to a more classical inter-governmental one. As Community external relations grew so did the role of the Member States within this process.

c) The Emergence of European Political Cooperation

Whereas Community activity in the field of external economic relations found its basis in the Treaties themselves, foreign policy proper (high politics) was, as we have seen, excluded from the Community process. The creation of the Framework for Political Cooperation as a mechanism for joint European activity in this area might, therefore, seem as a process distinct and even detached from the internal Community processes described above. Although this is the classical view taken in the literature, a closer look will reveal that the same forces which shaped the evolution of external relations mechanisms conditioned the development of Political Cooperation.

There was a multiple rationale for the creation of the Framework. The "objective" reason was of course rooted in the claim that given the actual state of internal European integration, the failure to operate in the field of foreign policy was a waste of a significant potential. In other words that a common European foreign policy would be able to project onto the world environment the joint power of the partners, a power that was greater than the sum of the individual units. A Europe which would *act* and *react* as a single actor to world events would by this vision be more effective than hitherto.

There was also an internal, "subjective," reason. In 1969, when the idea of the Framework was effectively launched, the Community was emerging from a period of sustained political stagnation associated with de Gaulle's long term in office and recovering from the most immediate aftereffects of the Luxembourg crisis. The Community was to be "relaunched" and alongside the deci-

sion to accept the three new Member States, the principal concrete political initiative was the plan to set up the Framework for Political Cooperation.

Whereas both the objective and subjective reasons pointed toward a rosy future in terms of the Framework for Political Cooperation, in reality already at its inception we find powerful countervailing forces. Recalling our brief account of the evolution of external relations, it should come as no surprise that the first important steps in the evolution of Political Cooperation coincided with the institutionalized strengthening of the inter-governmental component in the European Community, namely the creation of the European Council of Heads of State and Government. This appears to be an almost constant factor in the mature phases of European integration. Substantive progress is bought at the price of decline in the unique decisional characteristics of the Community. In this case, the equation was at its extreme: the Framework for Political Cooperation was to be completely outside the Treaties. It was not sufficient that in the Community of the 1970's, in which the Luxembourg Accords were an accepted way of life, the decisional process was dominated totally by the inter-governmental Council of Ministers, often at the constitutional expense of the Commission. For Political Cooperation, at least as initially conceived, any EC contact was considered anathema. The European Political Cooperation institutions and procedures were thus to be insulated from any "contaminating" European Community contact. In a famous incident recalled by Professor Stein in his study in Book Three, the Foreign Ministers of the Community were forced to end a meeting in Copenhagen wearing one hat, and travel to Brussels to meet wearing their other hat.[57] The Commission was excluded from the Political Cooperation procedures or, at best, barely tolerated. It is telling that the only Community organ which had an official role in Political Cooperation was the European Parliament. But, this was not only an organ which had virtually no impact on the Community game, especially in the pre-direct elections days, but also its role in Political Cooperation was extremely limited. This separation, symptomatic of the inherent contradiction of the process of European integration, was reflected in the very definition of the objectives of the Framework.

Even in 1983, in the second decade of the EPC Framework, in the Solemn Declaration on European Union signed in Stuttgart in June of that year, the Member States acknowledge that "increasing problems of international politics [render] necessary [the] reinforcement of European Political Cooperation."[58] And yet despite this acknowledgement the new formulation of the objectives of the Framework underscores the inherent ambivalence and contradiction in the notion of a European foreign policy. The language remains one of consultation, joint – rather than common – action, etc.

It is clear that one has not arrived at a single policy, with a single policy-making apparatus and a single policy-execution apparatus. The objectives of the Framework are in fact inherent in the name: Political Cooperation. The

[57] Stein, *supra* note 15, at p. 63.

[58] BULL. EC 6–1983, p.24, point 1.6.1., at p.28, para.3.2.

major actors remain the Member States. Where the interest exists, joint action would be encouraged with the Framework mechanisms facilitating this joint action. Even the formulation of a common position, the hallmark of the Framework, is to serve as a basis and reference point for national, not a transnational, foreign policy.

In many ways then, Political Cooperation as initially conceived was the story of the mountain which turned out to be a molehill. However, as in the case of external relations, the dynamics of the international environment as well as internal political pressures forced certain mutations on the original framework. The result is still a far cry from a veritable Europe speaking, let alone acting, with one voice. And even today, five years after it was written, there is much truth in the sober conclusion of von der Gablentz that although the Framework for Political Cooperation constitutes "the world's most advanced model of collective diplomacy," "neither the Community nor the Nine seem to have managed to perform the essential task of any foreign policy, namely to convert internal strength and resources into external influence on world affairs."[59]

d) Toward a Revised Concept of a European Foreign Policy

How then are we to assess these mechanisms developed for a European foreign policy? The tendency in the literature has often been to dismiss European foreign policy, and especially the Framework for Political Cooperation as a failure – procedural substitutes for substantive accord; and, as regards external economic relations, although they have been recognized as a "growth area" of Community activity, the predominance of Mixed Agreements has been seen as a sign of decline in the "integrational" and "federal" elements of the Community process.

This type of negative criticism is, however, typically rooted in a view which has been conditioned by the foreign policy concept developed in other non-unitary entities and especially the federal state. The criticism is usually based on a criterion, against which to judge the Community foreign policy apparatus, which adopts an ideal type model "in which common institutions are in a position to make and carry through all necessary foreign policy decisions for the Community and thereby replace the national foreign policy of the Member States."[60]

For obvious reasons this ideal type is referred to as the federal model – a nomenclature which is patently wrong given the non-federal character of the foreign policy of federal states. But the problem is not simply one of nomenclature; such an ideal type is not only alien to the original Political Cooperation concept which sought to separate the Framework from Community struc-

[59] Von der Gablentz, *Luxembourg Revisited or the Importance of European Political Cooperation*, 16 C.M.L. Rev. 685, 688 (1979).

[60] Wessels, *European Political Cooperation: A New Approach to European Foreign Policy*, in European Political Cooperation 3 (D. Allen, R. Rummel & W. Wessels eds., London, Butterworths, 1982). Wessels rejects, as we do, this ideal type.

tures, but is also alien to the entire modern trend of European integration in the field of foreign policy which tends to suggest, both in external relations and in Political Cooperation, a new experiment of a non-unitary foreign policy process and foreign posture which may veritably be called the federal option of foreign affairs.

Naturally, in order to justify what might appear to be a colossal terminological *faux pas*, we must insist on the formulation of the federal idea adopted by us which rejects the center-periphery model in favor of the participatory model. As we noted above, the paradox is that federal states typically have a unitary, non-federal foreign policy. By contrast it would seem that the Community and its Member States, clearly not a federation, are experimenting with a genuine federal foreign policy. In the legal world of external relations the key indicator of this development is found in fact in the growing use of the much maligned Mixed Agreements which involve participation in one and the same international treaty of the Community, its Member States and the third state. Mixed Agreements, in the profound integrational sense, have an effect which is very much like the so-called "pure" Community agreement. They force all the Member States into a common external position which is legally binding on them. The argument that the presence of Member States in mandating and negotiating the agreement – as distinct from the "pure" agreements in which the Commission has an exclusive role – is negative from the integration point of view holds today little conviction: even in "pure" agreements the Member States have managed to assert a controlling influence on the process. The role of the Commission will be defined by its functional utility, independent of the formal categorization of an agreement. The Commission may play a fundamental role in a Mixity situation and a marginal role in a "pure" situation. But the presence of the Member States, alongside the Community, in Mixed Agreements advertises to the external world, not without raising extremely difficult and not yet resolved issues of international responsibility, a reality which has for long been recognized internally: unlike the federal state in which foreign policy is a matter for central organs (and particularly the executive), in the Community this area as well is subject to the full dialectics of the Community/Member States. The Mixed Agreement, in this sense, is the symbol of an instrument which strengthens the general power and the constituent units simultaneously.

In the non-legal world, the expression of this federal rationale in Europe is the Framework for Political Cooperation which rejects a unitarist centralist model in favor of the far more complex cooperative model. In effect what we are arguing here is that the rallying cry of European Political Cooperation – Europe Speaking with One Voice – is misconceived. We do not propose to elaborate this point much further. If we were to translate it into a slogan we should say that the descriptive and prescriptive trend of European foreign policy is toward a "Europe singing like a choir" – remembering of course that the choir concept is not meant to replace totally the one voice: sometimes the choir sings in unison, at other times in several voices (in more or less harmony) and occasionally there is even scope for soloists.

IV. Case Studies in Integration Through Law

Whereas the first, "methodological," volume of the Project attempts a certain exhaustiveness, subsequent volumes deal with specific substantive areas of federal/transnational policy; this part of the Project is thus open-ended. As mentioned, to date five monographs have been planned in the following areas: the protection of the environment,[61] consumer protection,[62] harmonization of corporation law and capital markets,[63] energy policy,[64] and regional policy.[65] It is hoped that further studies will be undertaken in the future.

We decidedly do not wish to review the contents or even the conclusions of these studies, each of which is a book in its own right. Instead we propose to explain briefly the approach adopted in all of these studies and their connection with the philosophy of the Project.

Each of the five topics has already elicited a substantial amount of scholarly attention in the legal literature. Why then this new examination? First and foremost is the value of a fresh analysis by the distinguished authors of the volumes. But it is our belief that in adopting, to a greater or lesser extent, the methodological approach used in the first part of the Project, new insights may be gained. Most obvious is the comparative context: each volume presents a tight comparative analysis of the European and American experiences. The parameters for comparison are of course quite different from study to study: in some cases, such as environmental protection or corporation law, there is a real basis of common problems and at times common techniques for drawing general conclusions – not only on the process of integration but on the substantive area itself. In other cases, such as regional policy, the operational basis for comparison is wafer thin, even though the philosophy of European regional policy may find, as we shall explore below, a rich background in the American experience. We do not wish to repeat our convictions about the value of comparative analysis, save to say that in all studies the comparative context has enabled the authors to explore many uncharted aspects of these areas.

The Project offers, however, more than the comparative contribution. It is in this context that the link of Volume I to the Volumes in Part Two, the substantive part of the Project, can be raised again. We have already mentioned the contextual setting, *i.e.*, the examination of legal problems in their political economic and social setting – an approach followed by all contributors, especially in Part Two. There is, however, a further dimension to this law in context approach.

The European Integration Project follows on from an earlier wide-ranging research project which was carried out at the European University Institute – the Project on Access to Justice, whose principal results were published in

[61] E. Rehbinder & R. Stewart, *supra* note 20.
[62] T. Bourgoignie & D. Trubek, *supra* note 21.
[63] R. Buxbaum & K. Hopt, *supra* note 22.
[64] T. Daintith & S. Williams, *supra* note 23.
[65] Y. Mény, B. de Witte & J. Webman, *supra* note 24.

1978–79 in the four volume *Access to Justice* series.[66] Access to Justice was not only concerned with an examination and indeed extension of the procedural and institutional mechanisms for the vindication of rights in contemporary society. It was an approach which sought to emphasize that in legal study, an analysis of the normative content of legal rules and policies – while still central – can only give a partial picture of the function and shortcomings of the law in its societal context. Normative analysis is but one layer of analysis: the effective (or otherwise) reach of the law, its implementation and enforcement, its accessibility to subjects to whom it is addressed as a source of rights and duties is a second, no less important, layer. This approach has been a constant guideline to all contributions to the European Integration Project. Its fruits are most visible in the studies in Part One of the Project which discuss implementation, enforcement and remedies – judicial and otherwise – in more general terms, as well as in the substantive studies in Part Two in which access issues – encapsulating a preoccupation with the post-normative phase, with effectiveness, implementation and vindication (not necessarily through individual claimants) – are analyzed in specific substantive contexts.

If the Access-to-Justice philosophy postulated the addition of this post-normative layer in the analysis of law, the institutional and processual character of the Integration Project postulated the addition of yet another layer – a pre-normative layer. Both in the first general methodological part of the Project and in its second substantive part we have given considerable attention to the decision-making process by and through which norms emerge. The necessity of this addition is so clear as to obviate any lengthy explanation. Not only is decision-making an essential component in the analysis of the system as a whole, but it also gives, particularly in the context of the European transnational concordance of interests, an insight into the normative outcome and, as explained throughout the Project, into the very problems of implementation, application and enforcement.

All five studies in Part Two have thus adopted what one may call a "total" approach to legal analysis. Certainly the normative, "black letter" dimension of the law is explored. But the normative analysis is, as explained, sandwiched between the pre- and post-normative phase.

A few words should be dedicated to the choice of subjects. As noted, this part of the Project is open-ended and almost all areas of transnational law and policy could be the subjects of analysis. The choice of the first five areas is, however, not altogether haphazard. In the first place we tried to concentrate

[66] Access to Justice (M. Cappelletti gen. ed., Milan/Alphen a/d Rijn, Giuffrè/Sijthoff & Noordhoff, 1978–79): Vol. I, A World Survey (M. Cappelletti & B. Garth eds., 1978); Vol. II, Promising Institutions (M. Cappelletti & J. Weisner eds., 1978–79); Vol. III, Emerging Issues and Perspectives (M. Cappelletti & B. Garth eds., 1979); Vol. IV, The Anthropological Perspective (K.F. Koch ed., 1979). *See also* Access to Justice and the Welfare State (M. Cappelletti ed., Pubs. of the EUI, Alphen a/d Rijn/Brussels/Stuttgart/Florence, Sijthoff & Noordhoff/Bruylant/Klett-Cotta/Le Monnier, 1981).

on areas which may be regarded as second or even third generation Community policies. Environmental policy, consumer protection policy, energy policy, regional policy and, to a lesser extent, corporate law and capital market harmonization, are not explicitly envisaged in the Treaties. They are policies which have emerged on the foundations of the classical common market and are, indeed, a result of, and a condition for, its successful operation and evolution.

Our interest in this "novel" dimension is two-fold. Firstly, these policies represent the operation of the "positive state" in the mixed economy. They are far more representative of current exigencies than the first generation policies – of the "negative" kind which simply demanded of the states to eliminate certain practices. Secondly, these policies are the best illustration of the decisional difficulties and the policy-making challenges of the Community. Beauty is of course in the eye of the beholder, but it takes a great measure of faith to regard these five areas as success stories of the Community. Of the five, environmental protection comes closest to what we may call a genuine Community policy. The other areas represent a continuum of different degrees of integration, cooperation, common action or simply high hopes with meager results. But in that sense they are a reflection of the reality of European integration after thirty years. And through these "total" analyses we may gain insight, in each case, as to the moving forces of the process often of a surprising nature. Thus, we learn that the abstract analysis which suggested that in a decisional process dominated by a veto power policies would always be reduced to the lowest common denominator, is simply not correct. Several of the environmental measures were dictated by bona fide professional reasons and not by political bargaining. Likewise, from the harmonization study we learn of some of the dangers of advanced legal integration in the absence of a commensurate political and economic development. Community pre-emption which would preclude Member State autonomous action once a Community policy comes into effect, has the danger of prohibiting innovation and adaptation by "progressive" Member States in, say, the field of corporate organization and accountability.

Our choice of studies was also determined by the actual relevance of the policy areas. Environmental and consumer protection represent for us the need for the Community to branch into new areas of social relevance. In some ways these areas could be seen as policies enhancing the Common Market: equalizing competition, harmonizing regulations so as to remove barriers to trade and so forth. But they also represent a social challenge in their own right. It is fashionable today to dismiss the protection of the consumer or the environment as a luxury, or indeed a fad, of the 1960's characterized by economic growth and ample resources (though the steady destruction of European age-old forests by "transnational" acid rain has provided a new urgency to the environmental issue). For us, this, or similar social activity by the Community, is essential if Europe is really to progress into a *social* rather than legal and economic reality.

Energy policy and corporation law and capital market harmonization re-

flect another vision. They represent examples of what the late Sir Andrew Shonfield called "Alliance Politics,"[67] in other words those areas in which, due to the character of the actors – *e.g.*, multinational corporations – or political-economic factors – such as the international crude oil market – there could evolve phenomena which would simply not be susceptible to single Member State governmental control. Arguably, the only way to assert public control in these areas would be on a multinational, indeed a transnational, level. Put in these simple terms, one could expect that the mere phenomenon would create the conditions for a successful policy. Instead, as the studies amply demonstrate, the complexities of transnational controls are such as to defeat cooperation even where failure means no control at all, at times even to the point of calling into question the superiority of the transnational over the national.

Finally, under the profile of policy content, we find regional policy. It is a well-known fact that the Community Regional Policy is a mere shadow of the high hopes expressed at the time of its launching. The importance of this study is not, however, limited to an analysis of that dubious enterprise. It is the phenomenon of regionalism, as a potent and, in the European national context, vigorous expression of the principle of federalism which is of interest to us. Regionalism, whether cultural and/or political, gives expression to the principle of deconcentration of power. It touches as such on one of the classical rationales of federalism. In Europe, it finds itself on the other side of the Community coin. Both the movement for European integration and the movement for regionalism, on the face of it at odds with each other, share instead a deep-rooted common historical basis: the resistance to over-concentration of power in the hands of the classical nation-states. The emasculation of the Community Regional Policy by the Member States is testimony perhaps to the inherent vitality of the phenomenon and the profound threat which it represents to the nation-state. We do not propose here to explore the internal dialectics of regionalism and its interplay with European integration save to state two general propositions. Like the danger of over concentration of power in the central government, there can be a danger of militant and divisive regionalism. Here as well the challenge is to find the illusive federal balance; and indeed, a Community-wide regional structure could perhaps diffuse some of the tensions which are now located in specific regions. These issues are explored in the fifth study.

[67] A. Shonfield, European Integration in the Second Phase: The Scope and Limitations of Alliance Politics (Univ. of Exeter, 10th Noel Buxton Lecture given 26 Nov. 1974; Colchester, U. Exeter P., 1977).

V. Concluding Remarks

We may now review briefly the objects of the Project. The first was to use the comparative method as an instrument by which to address some of the key structural, institutional and substantive issues to which the process of European integration gives rise. Although the legal profile of this process is central to the Project, a deliberate effort has been made to examine juridical development in their contextual economic and political settings.

At a deeper level it is hoped that the various comparative studies in this Project, examining extensively the American and European systems and including specific complementary case studies on the German, Swiss, Canadian and Australian experiences, will amount to an up-to-date statement of the application of the federal principle in its modern context in different societal settings. The Project is as much about the general problems of federal arrangements as it is about the specifics of European integration. Although the organization of studies within the Project follows, as we have seen, a predetermined plan and methodological approach, in the actual analyses the various authors – perhaps as an internal application of a "federal philosophy" – were encouraged to pursue and express their own notions and widely diverging values as regards the various issues posed; there has been no imposition of, or an expectation for, uniformity in analysis or evaluation. Thus the reader will find a range of approaches to the definition of problems, to the methods of analysis and to the evaluation of concrete achievements or failures in the systems examined, as wide and numerous as the number of contributions. The unitary themes – the comparative context and the dialectics of federalism – are starting points. But for some the comparative context is an instrument to emphasize divergences, for others convergences, and for many a mixture of both. Likewise, several authors reach pessimistic conclusions as regards present achievements or future prospects for the enterprise of European integration, particularly when viewed against the federal state experience, whereas others reach opposite conclusions. All this goes perhaps to show that an ideal balance between unity and diversity is not only linked to the specific exigencies of the setting in which the federal principle is being applied, but also to the subjective inclinations of observers and ultimately the values of political and social actors.

As its third purpose, this Project represents a specific approach to the study of law and legal institutions which is concerned not only with the content of law, but also with the process of law-making and the impact of law, as much as it is with the normative content.

It will be seen then that ours was more a project designed at understanding fundamental structures and processes of transnational organization than a project designed to give immediate answers to specific short and medium term problems facing Europe or, for that matter, the other federations discussed. We may, however, make in these conclusions a brief allusion to the ongoing debate – which is almost as old as the Community itself and has become part of its ethos – on institutional reform.

On the European agenda we find now two concrete strategies for further progress of European integration. We have no particular interest in this study in the details of either; their significance lies in the different philosophies for change which they represent. The first is encapsulated in the Solemn Declaration adopted by the Heads of State and Government at the European Council meeting at Stuttgart in 1983.[68] It is more commonly known as the Genscher-Colombo initiative. The second is encapsulated in the Draft Treaty establishing the European Union adopted by the European Parliament in February 1984.[69] It is more commonly known as the Spinelli initiative.

Both initiatives have in common a similar type of diagnosis of the Community malaise: a Europe unable to cope with the major social and economic problems owing to a deep seated decisional malaise, a certain measure of obsolescence in the substantive provisions of the Treaty of Rome, and a general decline in the momentum of European integration. Both initiatives also acknowledge, to a differing degree, the democracy deficit linked to the weak role of the European Parliament.

If there is this commonality in diagnosis, the remedies suggested represent opposite poles. Genscher-Colombo believe that the very causes which underlie the Community malaise would also militate against any radical, not to say revolutionary, attempt at amending the Treaties. Consequently the Treaties must stay intact and progress must be made on – not surprisingly given the originators of the plan – the inter-governmental level. The Framework for Political Cooperation, now designed to deal only with the joint foreign policy problems of the Ten, would in this view extend to new fields: culture, law, maybe even defense. Inside the Community some effort would be made to reduce the debilitating effect of the veto; and the consultation powers of the Parliament would be strengthened.

By contrast, the Draft Treaty establishing the European Union invites a radical restructuring of Europe: the Treaty of Rome as such would effectively be replaced by a new Treaty which would bring the Member States to a much closer Union. A complete rehaul of the institutional setup is suggested, bringing, *inter alia*, the European Parliament to a position much closer to that of classical Parliaments. The Commission remains, with a somewhat attenuated role, as does a Member State inter-governmental Council though more limited in its power of blockage. The other major innovation of the Draft Treaty would be a dramatic widening of the competences of the Union – actual or potential.[70]

[68] Bull. EC 6–1983, p.24, point 1.6.1.

[69] For the text of the Draft Treaty and the Resolution of the European Parliament adopting it *see* OJ No. C 77, 19 Mar. 1984, p.33; Bull. EC 2–1984, p.7; Bull. EC 9–1983, p.7; European Parliament, Draft Treaty Establishing the European Union (Luxembourg, Eur. Parl., D.G. Info. & PR, 1984).

[70] For a recent discussion of the Draft Treaty Establishing the European Union, *see* Il Trattato dell'Unione Europea per superare la crisi della comunità (Atti del Convegno, Roma, 7 febbraio 1984; Rome, Movimento Europeo, 1984).

As noted, the Genscher-Colombo initiative was adopted by the European Council. It was the victim of the very malaise it sought to remedy: by the time it reemerged from the special committee which examined it it had become an even paler version of the original. It will display no bias to say that even if the Genscher-Colombo initiative had been implemented in full, and not truncated by the very organs of the decision-making process which it was seeking to correct, it would still have had only a minimal effect on the Community and its problems.[71]

The Draft Treaty is a far from perfect proposal. But it has a measure of radical flare. It represents a structural innovation, for it decidedly envisages a much more comprehensive Union in the range of actual and potential competences available to the central instutions and a far more effective and democratic Union in the institutional provisions. At the same time it would *not* eliminate the essential character of the EC as a Community of States. The Draft Treaty establishing the European Union is decidedly not a blueprint for a United States of Europe. This is well reflected in the name of the instrument: Draft Treaty [alluding to States *qua* High Contracting Parties] establishing the European Union [alluding to the constitutional cohesion of the venture].

The very radicalness of the proposal might nevertheless constitute its major weakness. Europe might be in the tragic situation whereby the malaise is sufficiently strong to emasculate the moderate proposals (of the Genscher-Colombo type) and not sufficiently strong to drive the Community inexorably toward the radical remedies (of the Draft Treaty establishing the European Union type). We are not interested in political speculation on the possible outcome of these specific proposals. Documents of this type have a notoriously short life in the Community. We would suggest, however, that they represent two distinct philosophies of change which we confidently expect to find in the ongoing debate on institutional reform in the Community for years to come.

We might, however, contribute one tentative thought inspired by several years of immersion in comparative federalism. This idea can be expressed in the phrase of "Pluralistic Federal Structures." Europe does not perhaps need, or could not at least digest, one comprehensive federal system, with a unique set of institutions, courts, administrative agencies and norms to deal with the challenges facing her. Pluralistic Federalism would mean the setting up of interlocking circles of institutional arrangements and normative provisions accepted by different groupings of states. To an extent this is already a reflection of the present situation: the Council of Europe and especially its Human Rights machinery for the Twenty-One; the EC for the Ten and eventually Twelve; the EMS for the Nine. And, why not the *approfondissement* suggested by the Draft Treaty establishing the European Union for, say, Seven? Not as a second best, but as a strategy which acknowledges different measures of social, political and economic receptiveness to integration and rejects an all-or-

[71] *See* Weiler, *The Genscher-Colombo Draft European Act: The Politics of Indecision*, 6 J. EUR. INTEGRATION 129 (1983).

nothing approach to system building. This is the direction, we believe, for further policy-oriented research in this field.

Finally, we come to the last purpose of the Project, which transcends all previous more concrete issues, and which represents, it must be said, the deep belief of the Editors; ours is an attempt to present the European integration experience, set against the other federative statal experiences, as a new emerging dimension of law and justice – the transnational dimension. And, in this context, the "failure" of Europe to develop into a super-state, federal or otherwise, is conceived by us as a virtue. As mentioned in the *Foreword*, this dimension is based on a simple and obvious fact: most of the powerfully emerging phenomena of our time, from the technological revolutions to the explosion of the mass media, the massive migrations of people, consumerism and pollution and all the rest, have assumed a multinational, indeed a transnational, character. If such phenomena are not to lead to anarchy and tragic conflicts, the need arises for transnational forms of law and government.

Although our current thoughts, by necessity, concentrate on the day-to-day substantive institutional and processual problems facing Europe, the historical roots of the Community as an essential brick in transnational reconstruction after the sad lessons of two enormously costly European "civil wars," and the revolutionary character of the wider European construct, especially as encapsulated in the European Convention on Human Rights as a bulwark against the return of tyranny and totalitarianism, should not be forgotten.

The present European construct, as amply demonstrated in this Project, is riddled with conflict, disagreements and strife. But these all take place within a framework which, despite all weaknesses, provides institutionalized mechanisms for mediating the conflict, diffusing the disagreements and containing the strife. In many ways the bureaucratic character of the Community, the democracy deficit of its decision-making processes and the remoteness of the institutional structure pose a challenge to some of our cherished values of Western democratic civilization. But these factors, which undoubtedly call for urgent remedies, are in our view overshadowed – if our collective memories are to extend to events which must remain for ever imprinted on our social, cultural and moral consciousness – by a completely new dimension of the rule of law in international life and the projection of the individual in unprecedented terms, even if in the most mundane economic activities, not merely as an object of the law but as an active subject which can play a cardinal role in this transnational venture.

Part II

A Comparative Political, Legal and Economic Overview

Federal Democracy: The U.S.A. and Europe Compared A Political Science Perspective

DANIEL J. ELAZAR* and ILAN GREILSAMMER**

I. Introduction: Is the American Federal Experience Relevant to the Problems of European Legal Integration?

After the end of World War II, at the time when various European states began the process of European community building, there was a tendency among public figures and in the mass media to describe that process as an effort to build a "United States of Europe" analogous to the United States of America. Responding to that tendency, several scholars speculated about the pertinence of the American federal model to the European situation.[1] Most of these scholars – political scientists, historians, specialists in public law – rejected the analogy as misleading, concluding that the kind of federalism developed in the United States would not be helpful in the case of European integration. Indeed, some went so far as to assert that Europe had nothing whatsoever to draw from the U.S. pattern.[2]

The attitude that the systems are so totally different as to make a comparison between them an exercise in futility has persisted into more recent times. Without in any way wishing to minimize the differences, this paper attempts to refute the allegation that the two systems are not, or at best only marginal-

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[1] *See, e.g.*, L. LINDBERG & S. SCHEINGOLD, EUROPE'S WOULD-BE POLITY: PATTERNS OF CHANGE IN THE EUROPEAN COMMUNITY (Englewood Cliffs, N.J., Prentice-Hall, 1970); M. BELOFF, THE UNITED STATES AND THE UNITY OF EUROPE (Washington, D.C., Brookings Inst., 1963).

[2] *See, e.g.*, Beloff, *False Analogies from Federal Example of United States*, The Times (London), 4 May 1950, at 5, cols. 6–7 ("what one is struck with is not the parallel ... but the immensity of the difference.... [T]hose who believe in furthering European unity must seek elsewhere than in American federalism.").

ly, comparable. Comparison is not merely a quest for similarity; contrast may be as revealing as analogy. In our view, in terms of political structures, institutions and processes, there are sufficient points of contact between the two systems as they exist today to make comparison a meaningful exercise. The objective, admittedly limited, of this essay is to provide a framework for useful analysis, to pin-point the issues and areas which might reward further comparative research; in short, to provide a context for the more detailed studies which will be following later in this and subsequent volumes of the Florence Integration Project series.

Our principal focus is on the U.S. federal and Community systems as they exist today. But since it is impossible to appreciate either system out of its socio-political context, the first part of the paper is dedicated to establishing the historical, cultural, socio-political and ideological backgrounds of each system.[3] No attempt is made to disguise the very real gulf which divides mid-twentieth century Europe from mid-eighteenth century America, each with its own distinctive history, culture, geographic and demographic distributions, economy, political-philosophical ideologies, and problems; rather the authors emphasize the differences between the two contexts which led to the original skepticism, but reject the conclusion that they are so fundamental as to make comparison useless: the challenge for the comparativist is to determine how far and in what ways these divergent factors have influenced the development of the institutions, structures and relationships which currently exist, and to what extent they condition future developments.

The second part of the paper proposes a framework for comparing the American federal model with the European Community pattern.[4] The principle underlying the two-fold analytical structure advanced is that any association of political entities – at whatever level and whatever form it takes – involves not solely a question of structure or constitution, but is also concerned with the interaction, with the relationships which exist, amongst the political entities. Thus it is suggested that both aspects of the two systems under consideration must be compared, firstly the constitution and secondly the relationship. Within this overall framework, selected institutions and processes which are identified as central to the functioning of an association of polities are briefly compared, illustrating how in each model structure and process combine to produce different working models, and some tentative conclusions as to how the perceived differences affect the development and functioning of the political process in the two systems are advanced. This leads to the discussion in the final two sections, in which the possibilities for a European evolution toward the American federal pattern are investigated,[5] and in which the wider governmental implications of the differing political tensions of the two systems are elucidated.[6]

[3] *See infra* § II.
[4] *See infra* § III.
[5] *See infra* § IV.
[6] *See infra* § V.

II. U.S. Federalism and the European Experience: A Comparison of the Processes, Methods and Ideologies of Integration Within an Historical Perspective

Several arguments were advanced by early commentators on the European post-World II development to support their negative assessment of the relevance of the U.S. experience thereto. For example, according to Max Beloff[7] the crucial differences between Europe and the U.S. would be the following:

- First, the American colonies shared a common culture, a common ethnic background, a common language, and a common religion. Europe, on the other hand, displays great diversity in every one of these respects, as well as in philosophies of life, and ideologies.
- Second, a confederation preceded the American federation. The thirteen colonies had always had a common center of gravity, a common political center, something lacking in Europe.
- Third, the American union was established mainly for defensive-strategic reasons; in 1950 Beloff argued that if a European federation were to emerge, it would be essentially for economic reasons.

In a book published in 1963, Dusan Sidjanski restated what were essentially the same objections from a Euro-centered perspective:[8]

- First, a European federation would have to be established between very ancient nations and peoples, countries which have very rigid structures and are not inclined to radical transformation.
- Second, Hamiltonian federalism has a political essence: everything begins on the political level. European unification, on the other hand, began on the economic level and may be called an economic process.
- Finally, the American federation was established at a time when the economies of the individual member states were less developed than the economic potential and structures of the present European states.

These arguments were reiterated in a recent article by Roderick MacFarquhar.[9] The European Community, he suggests, is the antithesis of the United States in that it includes ten different states, embracing old, established peoples, speaking eight languages, and which agreed to collaborate after centuries of strictly individual development, often in conflict with one another. Contrary to the United States which "jumped" directly to confederal and then federal integration, the European Community has made little progress in thirty-five years. On the institutional level, Europe has only succeeded in establish-

[7] *Supra* note 2.

[8] D. SIDJANSKI, DIMENSIONS EUROPÉENNES DE LA SCIENCE POLITIQUE 122 ff (Paris, Librairie générale de droit et de jurisprudence, 1963).

[9] MacFarquhar, *The Community, the Nation-State and the Regions*, in FEDERAL SOLUTIONS TO EUROPEAN ISSUES 17–24 (B. Burrows, G. Denton & G. Edwards eds., London, MacMillan, 1978).

ing a technocratic bureaucracy, and a very weak parliament elected by direct universal vote. Finally, he points out that when the United States was constituted, it had only three million inhabitants, virtually all sharing the same origin and culture, who had the same institutional past and who had just conducted a common war of liberation against a foreign power.

The assessment of these scholars is basically accurate. A comparative analysis of the process and method of unification in the two systems serves only to highlight the contrasts. At the same time, however, the influence of the American experience and model on European theories and developments should not be overlooked, since the American experience has influenced and even stimulated European unification efforts to no small degree.

A. The Contrast Between the American and European Experiences

1. Historical Origins and the Process of Unification

The American federal system came into existence when the United States declared its independence in 1776.[10] Indeed, the very process of declaring independence involved a series of reciprocal initiatives and actions on the part of the colonies-cum-states (the Continental Congress declared independence for all thirteen colonies in one act), and was federal to the extent that the declaration itself came as a culmination of this interplay and was undertaken by delegates from the states, each state speaking with one voice.

The foundation of the United States was a federal act par excellence, involving a consistent and protracted interplay between the colonies-cum-states and the Continental-cum-United States Congress which they created as a single national body to speak in their collective name. In the year that the representatives of the people of the colonies collectively declared the independence of the United States, other representatives of the same people were reconstituting the colonies themselves as states. Four colonies – New Hampshire, South Carolina, Virginia and New Jersey – adopted state constitutions in 1776, prior to the adoption of the Declaration of Independence, and before the year was out four more – Pennsylvania, Maryland, Delaware and North Carolina – did likewise. Within sixteen months, all the former colonies except Massachusetts had adopted constitutions (Massachusetts wrote one but it took several years before it was formally ratified by the voters).

At one time the fact that many state constitutions predated the Declaration of Independence was used to argue that the creation of the states preceded that of the Union. Today it is generally agreed that both came into existence simul-

[10] There is a vast literature on the history of the birth of the American federation. *See generally, e.g.*, A.C. McLaughlin, The Foundations of American Constitutionalism (New York, N.Y. U.P., 1932; *reprinted* Gloucester, Mass., P. Smith, 1972); A.C. McLaughlin, *infra* note 85.

taneously – in the original federal act of the United States as such.[11] In sum, all of the ambiguities of diversity in unity endemic to federalism are – fittingly – "present at the creation." Even local governments (in this case the towns and counties) got into the act as participants in the constitutional drafting and ratifying processes, then as now, not because they were asked but because they felt that they had as much right as any government to do so.

As the Americans moved westward, they created new states, "from scratch," in virtually every case establishing local and territorial institutions under the general aegis of the Federal Government, but generally as a result of local initiatives. Ultimately, these new polities, with their new populations, would be admitted to the federation as states, fully equal to their sisters under the Constitution. Thus the American federation expanded from the Atlantic to the Pacific by settling what were, to the Americans, empty lands and organizing them politically.

The last of the forty-eight constituent states of the continental United States were admitted in 1912, and Alaska and Hawaii, two non-contiguous states, were added in 1959 and 1960 respectively after relatively long periods of territorial status. The latter accession represented the first American attempt to add a previously well-populated, politically sovereign polity to the federation. A marginal addition to what was, by then, a continental power of 150 million people, the Hawaiian struggle for statehood was initiated in an attempt to retrieve powers of self-government after American annexation. In the same decade, the United States embarked upon a new experiment in federalism by creating a category of "free associated state," one not fully within the federal union as a polity, but whose people as American citizens voted to associate their state with the United States under a special charter. This new arrangement was devised for Puerto Rico, which became the first "free associated state" in 1952. In 1976 a similar arrangement was made with the Northern Mariana Islands, formerly part of the U.S. Trust Territory in the Pacific Ocean. In both cases, small, populated territories sought that status to increase their autonomy, not to diminish it.[12]

Historically, then, the United States model is that of a political entity which was federal from its founding. The European case is completely different. There, the decision to form some kind of union, or even to expand the union, has been the result of the deliberate policy of well-established and highly-developed independent sovereign states. As a result, on the one hand, the

[11] For further consideration of the position and role of the states, *see generally* 6 PUBLIUS *passim* (1976), *esp.* issue 6(1) (special issue entitled *A Bicentennial Look at American Federalism*) with lead article: Elazar, *Introduction – The States as Keystones: A Reassessment in the Mid-1970's*, at 3–19; and issue 6(4) (special issue entitled *Dialogues in Decentralization* (J.L. Mayer ed.)) with lead article: Elazar, *Federalism vs. Decentralization: The Drift from Authenticity*, at 9–20.

[12] On the category of free associated states, *see generally* Stevens, *Asymmetrical Federalism: The Federal Principle and the Survival of the Small Republic*, 7(4) PUBLIUS 177 (1977).

method of European integration had no federalist content;[13] and, on the other hand, the issues over which the European process of unification has polarized are very different from those which confronted the United States.

2. The Method of Unification: Distinctive Geographic, Demographic and Cultural Determinant Factors

On the level of the method of integration, the process of European unification has been greatly divergent from that of the United States. One basic problem is that of the geographic limits of the union, that is, of determining which countries and peoples could be included in the process: a question more simply of "which Europe?" This question did not have to be asked a priori by the United States but could be dealt with in a pragmatic way as matters developed. We have seen how the thirteen American colonies became independent states and joined one another within a federal framework, and how other states were added as they were founded by America's moving westward. Therefore, the basis of the association has never been a real problem, or at least has not been as controversial as in Europe. In the European case, several bases can be suggested for union. A "United Europe" could be based on a common cultural framework and common values; it could be established on a political basis, including only democratic regimes; it could be organized in a pragmatic way (the countries which would agree to union). A United Europe could also be based on the requirement of an equal or consistent economic development of the states which would constitute the union.

The American states did not have to find a common cultural denominator since they had one from the first. All of their regimes were of the same character, with only peripheral differences. Indeed, most had been founded as compounds of localities, as well-unified polities, hence they had experience with federal mechanisms and arrangements of one kind or another. Their level of economic development was roughly equal as well.[14] It is important to note that no plan for inter-colonial union was ever put forth that was not federal in character, in contrast to the European experience. The American colonial period, indeed, had been a period of incubation for a uniquely American approach to governance which properly can be termed *federal democracy.*[15]

Most thinkers disagree on the central question of whether European countries have a similar culture, or at least some similar elements which can serve as the basis for a common culture. Almost all the scholars who have tried to study the problem point out the cultural divisions which split the Old Continent: the diversity of languages, of values, of religions, and so on.[16]

[13] *See infra* §§ II.A.2 and II.A.3.b.

[14] For a detailed consideration of the comparative economic contents, *see* R. Gordon & J. Pelkmans, Challenges to Interdependent Economies – The Industrial West in the Coming Decade (New York, McGraw-Hill, 1979).

[15] Discussed *infra* at § II.A.3.a.

[16] *See, e.g., supra* notes 7–9 and accompanying text.

On the other hand, the French political scientist André Siegfried has tried to define, explain and interpret the "European culture," asserting that such a cultural common denominator *does* exist.[17] According to him, the European cultural identity is at the confluence of three distinctive streams: Greek philosophy, Roman institutions and conception of the law, and the Jewish and Christian religious traditions. Those three main contributions have created what Siegfried calls the "European spirit":

- a specific conception of knowledge, based on rational and logical thought;
- a specific conception of man, a notion of humanity, directly based on Greek philosophy and Christianity, and also on eighteenth century Enlightenment philosophy;
- finally, a specific approach to law and order, mainly the product of Roman antiquity.

Notwithstanding such a "European spirit," these various cultural contributions did not constitute a consistent homogeneous foundation for a European polity and were unable to prompt the establishment of a large federation. It was something much more fluid and impalpable than the American "federal democracy." The shared cultural characteristics of Europeans could only assure a strong economic capability on one hand, and a high level of public administration and political efficiency on the other.

Europe and the United States not only have distinctive cultural and religious traditions, but they were also confronted with different challenges. The fundamental challenge which has confronted the United States has been to master and control a huge continent, a continent which is united by its prominent geographic features and which is not penetrated by the sea. The Americans had to overcome the immensity of their country. They had to take root in the West, they had to find a solution to bridge the gap between geographic reality and the demographic factor (a very limited population on a huge territory), a problem which is completely foreign to Europe where the relation between space and population is radically different.

3. The Ideology of Unification

a) The American Theory of Federal Democracy

As was noted earlier, the peculiar circumstances of the historical developments of the U.S. colonial period combined to produce a theory of federal democratic governance which is highly distinctive. Federal democracy is the authentic American contribution to democratic thought and republican government.[18] Its conception represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitu-

[17] A. SIEGFRIED, L'ÂME DES PEUPLES (Paris, Hachette, 1950).

[18] For a more detailed discussion, *see* D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3rd ed., New York, Crowell, 1984).

tional ideas of the English "natural rights" school of the seventeenth and early eighteenth centuries. The covenant idea, which the Puritans took from the Bible, demands a different kind of political relationship (and perhaps, in the long run, a different kind of human relationship) from that emphasized by theories of mass democracy, that have attracted many adherents since the French Revolution. It emphasizes a partnership of individuals, groups, and governments in the pursuit of justice, cooperative relationships that make the partnership real, and negotiation among the partners as the basis for sharing power. The Lockean understanding of the social compact as the basis for civil society represents a secularized version of the covenant principle. It is the synthesis of the two forms that undergirds the original American political vision. Contractual noncentralization – the structured dispersion of power among many centers whose legitimate authority is constitutionally guaranteed – is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of and argument for federal democracy.

Federal democracy is a composite notion, which includes a strong religious component, which grew out of the federal theology which dominated the churches in colonial America and which manifested itself in the congregational polities and local governments of many of the colonies. The religious expression of federalism was brought to the United States through the theology of the Puritans which viewed the world as organized through the convenants which God had made with mankind, binding God and man into a lasting union and partnership to work for the redemption of the world, but in such a way that both sides were free as partners must be to preserve their respective integrities. This daring notion lies at the basis of all later perceptions of human freedom since only free men can enter into covenants. Thus, implicit in the Puritan view is the understanding that God relinquished some of His own omnipotence to enable men to be free to compact with Him.[19]

According to the federal theology, all social and political relationships are derived from that original covenant. This theological perspective found its counterpart in congregationalism as the basis of church polity and the town meeting as the basis of the civil polity. Thus, communities of believers were required to organize themselves by covenant into congregations just as communities of citizens were required to organize themselves by covenant into towns. The entire structure of religious and political organization in New England was a reflection of this application of a theological principle to social and political life and its echoes can be found in the economic life of the New England colonies as well.[20]

[19] For a more detailed account of the influence of the Puritan theology, *see, e.g.*, E. Emory, Power and the Pulpit in Puritan New England (Princeton, Princeton U.P., 1975); The Puritan Tradition in America, 1620–1730 (A. Vaughan ed., New York, Harper & Row, 1972).

[20] *See generally* R. Eisenmenger, The Dynamics of Growth in New England's Economy, 1870–1964 (Middletown, Conn., Wesleyan U.P., 1967); A. McLaughlin, *supra* note 10.

Outside of New England perhaps half of the churches were organized on the basis of congregational covenants and a fair share of the local governments as well. It has been demonstrated that early Virginia was also influenced by Puritan ideas to a great extent.[21] The Presbyterian Church, so strong in the middle colonies and the upper South, was even more closely attuned to a federal structure of governance, so much so that it has been said that the federal Constitution of 1787 is merely that of the Presbyterian Church transposed to a civil setting.[22]

Even after the eighteenth century secularization of the covenant idea the behavioral pattern persisted, to resurface on every frontier, whether in the miners' camps of southwestern Missouri, central Colorado and the mother lode country of California, or in the agricultural settlements of the upper Midwest, or in the wagon trains that crossed the plains whose members compacted together to provide for their internal governance during the long trek to the Pacific.

It should not be surprising that Americans early became socialized into a kind of federalistic individualism, that is to say, not the anarchic individualism of Latin countries, but an individualism that recognized the subtle bonds of partnership linking individuals even as they preserve their individual integrities. William James was later to write about the federal character of these subtle bonds in his prescription for a pluralistic universe as a "republic of republics."[23]

While most if not all of the elements of the American cultural background were deeply rooted in Europe, and were brought to the new continent by Europeans, they could not serve – in the twentieth century – as the basis for European unification. Even had they been sufficiently widespread throughout Europe, which they were not, the secular society of contemporary Europe led Europeans to approach the search for union on the basis of continental European thories of the state which are, in most respects, the antithesis of federal democracy, emphasizing state rather than popular sovereignty as the basis of governmental powers and intergovernmental activities.

b) Theoretical Approaches to European Integration in the Period After World War II[24]

American federalism was principally concerned with providing a republican form of democratic government. We have seen how the enterprise was from

[21] P. Miller, Errand Into the Wilderness (New York, Harper & Row, 1964).

[22] E. Gausted, A Religious History of America (New York, Harper & Row, 1966).

[23] W. James, A Pluralistic Universe (London, Longmans, Green & Co., 1909); W. James, Collected Essays and Reviews (R. B. Perry ed., New York, Russell & Russell, 1969).

[24] This section draws heavily on earlier articles by one of the authors, *i.e.*, Greilsammer, *Theorizing European Integration in its Four Periods*, 2 Jerusalem J. Int'l Rel. 129 (1976) [hereinafter cited as *Theorizing European Integration*]; and Greil-

the start a political undertaking and how the dual founding of the states and federation meant that the issue of state sovereignty never presented a real problem for or barrier to the union, the process of the formation of the union being treated more as question of history than as a fundamental issue of the federalist theory. Thus the theoretical analysis of U.S. federalism has not been in terms of *state* (still less of *national*) sovereignty, which were issues that were early settled in favor of the federation, but in terms of *popular* sovereignty.

When we turn to Europe, and we are concerned here mainly with the European Communities although some of the theories developed around the EC are also of more general application, we are faced with a very different picture. Here the issue appears to be not that of assuring a democratic government, but rather one of international cooperation between independent sovereign nation-states. Thus in Europe issues of popular sovereignty and democracy have been confronted and resolved within the national context of each Member State, and in approaching the problem of "uniting Europe" the emphasis has been on theories of state sovereignty, focussing on the dynamics of effecting a transfer of sovereign powers from a national government to an extraneous (*i.e.*, non-national) "central authority," and on the process whereby a new form of popular government can be created around this new "sovereign" power. Indeed, because the Community is still very much in its formative stage, in Europe it is the *process* of integration or unification which is the focal point of attention, rather than the outcome of the process.[25] Thus European theories can be seen as theories in the process or *dynamics* of the *regional integration of nation-states* rather than as theories in federal democracy.

Whatever the idealism surrounding the foundation of the European Communities,[26] the Founders were pragmatists, and rather than risk the almost certain failure which an immediate attempt at political integration for governmental purposes would have provoked, they set out to achieve a degree of integration in only limited areas, starting with coal and steel, later adding atomic energy and branching out into fields of wider economic integration with the establishment of the Common Market. Idealists committed to a "United States of Europe" in the immediate post-War period, even before the setting-up of the ECSC, had attempted, with very little success, to construct federalist theories for European unity,[27] but the avowedly limited economic aims of

sammer, *Some Observations on European Federalism*, in FEDERALISM AND POLITICAL INTEGRATION 107 (D. Elazar ed., Ramat Gan, Turtledove Pub., 1979) [hereinafter cited as *Some Observations on European Federalism*]. *See also* De Bussy, Delorme & de la Serre, *Approches théoriques de l'intégration européenne*, 21 REV. FR. SCI. POL. 615 (1971).

[25] For a discussion of the difference between integration as a dynamic concept and as a static concept or condition, *see* D. SIDJANSKI, *supra* note 8, at 16–19.

[26] *See* Willis, *Schuman Breaks the Deadlock*, in EUROPEAN INTEGRATION 19–37 (F.R. Willis ed., New York, New Viewpoints, 1975).

[27] *See generally Some Observations on European Federalism, supra* note 24, at 108–12; *Theorizing European Integration, supra* note 24, at 134–35.

the Communities made it very difficult to construct successful federalist theories around the Communities, although the commitment, perhaps the overcommitment, of many intellectuals to the European ideal has led to some such attempts which have mostly failed because of their highly utopian character.[28] Toward the later 1950's, however, a more realistic approach to analyzing the process which was starting in Europe began to emerge, treating the problem as one of political integration at an international level and examining how a process which started as a purely economic undertaking could turn into a political enterprise.

Immediately after the war, and inspired chiefly by the idea of "world peace," several theorists began to analyze the problem of international political integration, concentrating on the dynamics of the transfer of state sovereignty, with the ultimate object of transferring popular sovereignty. This led to the development of what has come to be known as the "functionalist school."[29] Although functionalism presented itself as a strategy for universal world integration, and did not deal with the integrational problems of regional areas (*e.g.*, differences of cultural and political affinities within different subsystems), problems crucial for Europe, it was nevertheless to have a far-reaching influence on later European theorizing. The basic postulate of functionalist analysis, first formulated by Mitrany in 1946,[30] was that a distinction can and should be made between the political and the socio-economic functions of state, the latter comprising what Mitrany called the "non-controversial" or "technical" sectors. The strategy advocated was the creation of myriads of international agencies and institutions based on specific tasks or functions in the non-controversial sectors, with extensive powers in their own limited spheres. To these international organizations the specific state functions would be transferred, until gradually the state's entire field of technical activity would be covered. At a certain point, the people would transfer their confidence and loyalty to these organizations, thus leading their governments to cooperate on the political level and an effective international *political* organization would be born.

Quite apart from the fact that functionalist theories left certain questions unanswered (*e.g.*, the relationship between "non-controversial" and "controversial" sectors; how the transfer of popular loyalty was to take place; the role of the government's "political will"), experience tended to demonstrate not only that international organizations had little popular appeal, but also that economics and politics substantially overlap. Clearly, therefore, in practice the theory would be doomed to failure.

Functionalism, despite this failure, was nevertheless to form the basis for a later and extremely influential school of thought which developed in the late

[28] *See Theorizing European Integration, supra* note 24, at 137 n.19 and accompanying text.

[29] For a more detailed account, *see id.* at 133–34.

[30] In D. MITRANY, A WORKING PEACE SYSTEM (London, Royal Inst. of Int'l Affs., 1946).

1950's and came to be known as Neofunctionalism.[31] Building on the functionalist theories, neofunctionalist analysis defined the process of international integration as a process of gradual "politicization" by which the political actors are persuaded to transfer their loyalties to central independent organizations, a process which begins with the integration of limited but fundamental economic sectors and automatically results in a "political community." But there were at least two crucial differences between the two schools.[32] In the first place, from the start, Haas, "the Father of Neofunctionalists," insisted that it would be necessary, if a transfer of popular loyalty were to take place, for the central organizations to be *supranational*, as opposed to *international*, in character, the crucial difference being that the supranational organ would be autonomous, having independent rather than intergovernmental powers within its own domain and would have the capacity and desire to expand its activity into adjacent sectors. Popular commitment to an autonomous, supranational organization was not only more likely than to an international organization but would gradually become stronger. This leads us to the second important departure of the neofunctionalist theories, which was the rejection of the rigid distinction between economics and politics. Rather, the neofunctionalist thesis (again in Haas' analysis) was that these two spheres of a state's activities are linked by a continuum and that the progression from the economic to the political sphere occurs *automatically*. This "spill-over" effect or "expansion of tasks" from the economic to the political spheres is extremely gradual, but is seen as an inevitable logical progression, with the final, inescapable result of the process being the constitution of a real "*political community*" (which Haas defined vaguely but which is more or less equivalent to a federal state). This highly controversial "spill-over" theory was later refined to introduce a measure of relativity and even to admit the possibility of regression ("spill-back"). At the same time, in order to counterbalance the argument that too much emphasis was placed on the internal logic and dynamics of integration,[33] the theo-

[31] For a more detailed account *see Theorizing European Integration, supra* note 24, at 138–39 and references cited therein. The pioneer of neofunctionalist analysis was Ernst Haas, who first set forth his theory in E. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950–1957 (London, Stevens & Sons, 1958). His original theory was later developed and refined by himself (*see* Haas, *The Uniting of Europe and the Uniting of Latin America*, 5 J.C.M. STUD. 315 (1967)); by Schmitter (*see* Schmitter, *A Revised Theory of Regional Integration*, 24 INT'L ORG. 836 (1970)); and by Lindberg and Scheingold (*see* Lindberg, *The European Community as a Political System: Notes Toward the Construction of a Model*, 5 J.C.M. STUD. 344 (1967); Lindberg, *Political Integration as a Multidimensional Phenomenon Requiring Multivariate Measurement*, 24 INT'L ORG. 649 (1970); L. LINDBERG & S. SCHEINGOLD, *supra* note 1).

[32] *See generally* G. MALLY, THE EUROPEAN COMMUNITY IN PERSPECTIVE 27–34 (Lexington, Mass., Lexington Books, 1973).

[33] For a general overview of the criticisms of neofunctionalist theories, *see Theorizing European Integration, supra* note 24, at 142–44. *See also, e.g.*, Hoffman, *Discord in Community: The North Atlantic Area as a Partial International System*, 17 INT'L ORG. 521 (1963).

retical basis was expanded by Haas and others to include an analysis of the external variables which influenced the process.[34] However, despite its increasing sophistication, neofunctionalism remains a theory concerned with the dynamics of regional integration, not with the political community which is its outcome.

Neofunctionalist analysis was concerned with the manipulation of the focus of popular sovereignty in order to secure a shift from a national to a supranational government, a process which once started is more or less automatic, but which must be instigated by the national governments which are the original focus of the popular "loyalty" which is to be shifted. By contrast, the other major school of thought which was developing at more or less the same time, namely that centered around the social communications theory, was more concerned with the behavior of social groups, and adopted a more transnational than international approach.[35] This concentration on social groups rather than on political actors as instigators represents an important shift in the theoretical approach to integration in Europe (although the theory was constructed to be of general application).

Applying the causal logic of cybernetics to social processes, Karl Deutsch and his associates in the Social Communications School,[36] perceived integration at the international level as a process of strengthening the cohesion of transnational groups. The theory operates on the principle that increased cooperation among transnational social groups leads to intensification in the communications among the groups. This intensification in the flow of transactions among the groups in turn creates an increasing mutual dependence among political actors thus promoting a process of integration amongst them. Ultimately this process may result in what Deutsch called a "community of security," which may be one of two kinds – "pluralistic" or "amalgamated." In

[34] Especially by Schmitter; *see* Schmitter, *supra* note 31.

[35] A good account of the theory of social communications can be found in R. Cobb & C. Elder, International Community: A Regional and Global Study (New York, Holt, Rinehart & Winston, 1970).

[36] The theory of social communications was developed by Karl Deutsch in K. Deutsch: Nationalism and Social Communications: An Inquiry into the Foundation of Nationality (New York, John Wiley, 1953); Political Community at the International Level: Problems of Definition and Measurement (New York, Doubleday & Co., 1954); Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience (Princeton, Princeton U.P., 1957); France, Germany and the Western Alliance (New York, C. Scribner's Sons, 1967). His basic theory was refined upon by several writers associated with the school including: Russett (*see* B. Russett, International Regions and the International System: A Study in Political Ecology (Chicago, Rand McNally, 1967)); Puchala (*see* Puchala, *Integration and Disintegration in Franco-German Relations, 1954–65*, 24 Int'l Org. 183 (1970)); Jacob (*see* Jacob, *The Influence of Values in Political Integration*, in The Integration of Political Communities 209–46 (P.E. Jacob & J. Toscano eds., Philadelphia, Lippincott, 1964)); and Teune (*see* Teune, *The Learning of Integrative Habits*, in *id.* at 247–82).

"pluralistic communities" states retain their sovereignty but manifest their desire to resolve conflicts peacefully and have a sense of community, *i.e.*, a belief that common social problems must and can be resolved through peaceful change, normally by institutionalized procedures, without resorting to large-scale physical violence. "Amalgamated communities" include confederate, federal and unitary states. Clearly a central issue is the conditions which allow a pluralistic community to become amalgamated. Applying his theory to Europe, Deutsch in fact reached the extremely pessimistic view that the trend in Europe has been away from amalgamation, with an increase in the independence of the nation-states.[37]

The criticisms levelled at the early formulation of the communications theory (*e.g.*, the failure to analyze the role of ideologies, the functions of central regionalism, the process of decision-making, the psychology of political actors, or the interplay of economic mechanisms),[38] have been tackled in later studies which are loosely associated with the school.[39] Meanwhile, theoretical research was progressing outside the two main streams, with, for instance, to name but two examples, Etzioni focussing on the interaction between the European subsystems and the global international system,[40] or Kaiser setting up an intensive classification system for regional subsystems and examining their relationships to the superpowers.[41] The very prolificacy of these theories, which are still concerned principally with theorizing the process of integration, is a cogent comment on the lack of ideological unity in Europe, but perhaps hardly surprising given the fact that they have been formulated extemporaneously with, often even a priori to, the development of the novel phenomena with which they were concerned.

More recently attention has been turned onto the outcome of the process, chiefly because of the growing awareness of the "democracy deficit" which exists in relation to the central authority, namely the Community institutions.[42] Thus, the direct elections to the European Parliament has focussed attention on the problem of the democratic basis for the Communities. Of course, the integrationalist theories were concerned with this issue, but since the outcome was – and indeed is still – uncertain, and since the process was proving problematic, attention naturally focussed on the dynamics rather than on the problem of consolidating the outcome. Indeed, in many respects the process of integration has been the very reverse of the process in America: in Europe integration has tended to have been seen as a value in itself, confusing the

[37] In K. Deutsch, France, Germany and the Western Alliance, *supra* note 36.

[38] *See generally Theorizing European Integration, supra* note 24, at 144–45.

[39] *E.g.*, by Puchala, Russett and Jacob, *supra* note 36.

[40] *See* A. Etzioni, Political Unification: A Comparative Study of Leaders and Forces (New York, Holt, Rinehart & Winston, 1965).

[41] *See* Kaiser, *The Interaction of Regional Subsystems: Some Preliminary Notes on Recurrent Patterns and the Role of Superpowers*, 21 World Pol. 84 (1968).

[42] *See, e.g.*, D. Marquand, Parliament for Europe (London, Jonathan Cape, 1979).

means with the ends, and it is only once the process has started to produce some results that the question of the type of government, indeed the nature of the political enterprise, is being questioned. In America, on the other hand, as we have seen, the federal form of government was conceived to embody the fundamental republican democratic principles which inhered in the society.

B. The Influence of American Federalism on European Developments

Given these widely divergent historical, cultural and ideological factors and developments, one is led to acknowledge the tremendous gap which exists between the American and European experiences. Nevertheless the American experience has not been without influence on European developments. The idea of European integration, we all know, is a very old one. Examining the various proposals for European unification since the Middle Ages, we discover that the establishment of the United States represents a watershed, after which the American federal model influenced all such plans, either as a model or in apposition to it.[43]

1. Early Influences

Before the American Revolution, European thinkers who recommended unification on the Continent had no concrete model of successful federation to apply. The numerous proposals for the promotion of European unity[44] – or more exactly of a "union between European princes and monarchs" – did not include any of the basic instruments or structures which have come to be characteristic of federal systems. In general, such proposals were founded on narrow national motivations. Two classical examples are the proposals of Pierre Dubois in the fourteenth century[45] and of Antoine Marin in the fifteenth. The former aimed for the establishment of a "Deeply Christian Republic," which was to be based on a strict equality between European monarchs, and would have involved the settlement of conflicts by procedures of arbitration (a kind of "lay council" with a right of appeal to the Pope). The aim, in fact, was to defend the King of France against the German Emperor's voracity. The latter, proposed by Marin to the King of Bohemia as the constitution of an "Assembly of Monarchs," was motivated by narrow "strategic aims" which were void of any federalist content.

[43] *See generally* D. DE ROUGEMONT, VINGT-HUIT SIÈCLES D'EUROPE (Paris, Payot, 1961).

[44] *See generally Some Observations on European Federalism, supra* note 24, at 107.

[45] *See* E. ZECK, DER PUBLIZIST PIERRE DUBOIS, SEINE BEDEUTUNG IM RAHMEN DER POLITIK PHILIPPS IV. DES SCHÖNEN UND SEINE LITERARISCHE DENK- UND ARBEITSWEISE IM TRAKTAT "DE RECUPERATIONE TERRE SANCTE" (Berlin/Fürstenwalde, G. Schade, 1911).

More federalist in character although still in an embryonic way, was William Penn's 1693 proposal of an "Organized European Peace."[46] Penn's plan gave the first sign of the spirit of partnership which would later typify the United States of America. Penn, who was founder of the Commonwealth of Pennsylvania and the author of its Constitution, the first to make pluralism the basis of a state, also proceeded along the same lines as his predecessors. Like them, he contemplated a kind of "European Parliament" consisting of the delegates of the monarchs. Penn, however, offered new notions such as the idea of a "perpetual compact" between the princes, the introduction of the principle of majority voting which would bind the minority, and the idea of apportioning the weighted voting by population.

After the establishment of the American Confederation, and, subsequently, of the American Federation, the European thinkers could base themselves on a concrete, functioning, and successful model. Nevertheless, even when they describe the characteristics of American democracy with admiration,[47] they are rather skeptical about the possibility of transplanting American federalism to Europe.

The best known figure among those who admired American federalism and who believed in the possibility of a transplantation was Immanuel Kant. He was the first European who dared to suggest a European federation along the American guidelines. In 1795 he wrote that a parliament composed of delegates of the monarchs would be of no use, because such a "congress" could, at any moment, vote its own dissolution. He contended that as soon as a basic disagreement would develop between the sovereign princes, they would withdraw from that assembly, which would then be dissolved. His conclusion was that a federation, following the U.S. model and founded upon the various European peoples and nations, would be the only way to advance irrevocably along the path toward European unity.[48]

The various proposals which followed Kant's during the nineteenth century, such as the treaty on "the Reorganization of the European Society" by Augustin Thierry and Saint-Simon, the call for a united Europe by Lamartine, or the project for a United States of Europe by Victor Hugo, did not follow along the lines of his work.[49] The greatest federalist thinker of the nineteenth cen-

[46] Penn, *An Essay Towards the Present and Future Peace of Europe, 1644–1718*, 394 INT'L CONCILIATION 569–83 (1943). *See also* R. UMBDENSTOCK, WILLIAM PENN, THÉORICIEN DU "PACIFISME": SES DEVANCIERS – SES IMITATEURS (Saint-Dizier, Brulliard, 1931).

[47] *See, e.g.*, A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (H. Reeve trans., revised by F. Bowen; P. Bradley ed., New York, Knopf, 1963) (first published 1835).

[48] *See* Vlachos, "*Fédération des peuples*" *et coexistence pacifique chez Kant*, in MÉLANGES SÉFÉRIADES (Athens, Ecole de Sciences Politiques Panteios, 1961); S. ROZEMOND, KANT EN DE VOLKENBOND (Amsterdam, H.J. Paris, 1930).

[49] *See* H. BRUGMANS, PROPHÈTES ET FONDATEURS DE L'EUROPE 185–99 (Bruges, College of Europe, 1974); C. MORANDI, L'IDEA DELL'UNITÀ POLITICA D'EUROPA NEL XIX° E XX° SECOLO (Milan, Marzorati, 1948).

tury, Proudhon, did not believe that a European federal state could be established. He took for granted that, within such a state, the big powers would struggle and crush the small nations. He thought that a United Europe could only be achieved after having divided the largest states. Proudhon insisted on internal – or integral – federalism, a far more radical solution.[50]

In this century, Aristide Briand, the French foreign minister, was the first major public figure to speak of the necessity of a "federal bond" between European countries and peoples and to make a formal proposal to that end.[51] He insisted on the idea of a true *partnership* (an idea which is at the core of federalism), speaking of "*la possibilité, à tout moment, d'entrer en contact, de discuter leurs intérêts, de prendre des résolutions communes, d'établir entre eux un lien de solidarité.*"[52] However, at the same time, he declared that such a federal bond would in no way harm the absolute sovereignty of the member states. Thus he tried to link such antithetic notions as "federation," "respect of the absolute sovereignty," and "association of states." We do not know whether he foresaw the establishment of a true federation, of an "association," which is by definition very limited in scope, or merely the development of procedures of intergovernmental cooperation. In any case, the negative reaction of most European governments destroyed any further consideration of Briand's proposal.

2. Post-World War II Developments

Has the American federal model had any influence on the plans suggested or implemented in Europe since 1945? At first glance, the answer appears to be negative. On the one hand, the European organizations which were established between the end of the War and 1949 were international institutions in the classic mold (*e.g.*, the European Organization for Economic Cooperation, the Atlantic Pact, the Council of Europe). On the other hand, the European Community – which begins with the establishment of the European Coal and Steel Community – is defined as a functional rather than a federal organization. The neofunctionalist process which led to its establishment, as well as its specialized character, differentiates the Community from classic federalist organizations.

Nevertheless, if we try to match the American experience and the process of European integration after 1945, we have to underline three points.

a) U.S. Support of European Integration Movement

The United States of America was a crucial factor in the development of that

[50] *See* M. Amoudruz, Proudhon et l'Europe: les idées de Proudhon en politique étrangère (Paris, Montchrestien, 1954).

[51] Briand, *Memorandum on the Organization of a Regime of European Federal Union, Addressed to 26 Governments of Europe*, in Int'l Conciliation, June 1930 (Special Bull.). For a general account, *see* P. Gerbet, La politique d'unification européenne (Paris, Institut d'Etudes Politiques, 1975).

[52] Speech to the autumn meeting of the League of Nations, Geneva, 5 Sept. 1929 (reported in P. Gerbet, *supra* note 51, at 54).

process, because of the sympathy of the Americans for what they saw as an experience parallel to their own. Most Americans who considered the matter believed that their federal system could or would be transplanted to the Old Continent. The idea of the "United States of Europe" (later, the name of the federalist pressure group led by Jean Monnet), which would be a faithful partner of the United States of America, could be seen behind the Marshall Plan, the American decision to take part in the defense of Europe (the Vandenbergh Resolution), and U.S. support for the process of neofunctional integration after 1950.

b) Support for the Idea of Federalist Process in Europe

Several statesmen and higher civil servants who were among the promoters of the Schuman Plan and the Common Market believed in the necessity of a federalist process – if not a full federation.[53] Indications of this can be found in the basic legal documents of the Community – the Treaty of Paris and the Treaties of Rome. Etienne Hirsch for example, who was to become the President of the European Union of Federalists and who was one of the people who drafted the Schuman Plan, certainly had in mind the American experience. As a result, several clauses of the basic treaties had either a federal character or federalist potentialities. For example, one of the most interesting features of the ECSC is the quasi-federal tax imposed directly by the High Authority on coal and steel enterprises.[54]

c) Use of the U.S. Federal Model by European Integration Pressure Groups

Even if the American federal model was not adopted by the states of Europe after 1945, and even if the only organizations established have been intergovernmental or "supranational," the federal model has guided the activities of the numerous federalist pressure groups.[55] The possibility of a direct transplant of the U.S. model to Europe was one of the main topics of the European Union of Federalists (E.U.F.) founded in 1946. Federalism was the common denominator of this organization, which was agitated by passionate controversies between integral federalists[56] (who took their inspiration from Proudhon's writings) and political federalists (who found their inspiration in *The Federalist* and the American pattern).[57] A basic cleavage also divided the E.U.F. between "maximalist" and "possibilist" movements. The "Maximal-

[53] *See infra* notes 65–68 and accompanying text.

[54] ECSC Treaty arts. 49–50. Consider also, for example, the "federal potential" of EEC Treaty arts. 164–188 (the Court of Justice), discussed in Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *infra* this vol., Bk.2.

[55] *See generally* A.(I). GREILSAMMER, LES MOUVEMENTS FÉDÉRALISTES EN FRANCE DE 1945 À 1947 (Paris, Presses d'Europe, 1975).

[56] For example, Marc, who was one of the main leaders of the group. *See generally* A. MARC, A HAUTEUR D'HOMME: LA RÉVOLUTION FÉDÉRALISTE (Paris, Eds. "Je sers," 1948).

[57] *See* A.(I.) GREILSAMMER, *supra* note 53.

ists," under Altiero Spinelli, emphasized the necessity of a European constituent assembly,[58] while the "Possibilists," mainly Dutch and French federalists, insisted on the possibility of an intergovernmental federal pact.[59]

Notwithstanding their divergence, these small groups and movements included an elite – men who, in each European country, were able to promote the federal model. They all had studied American institutions, and most of them believed in the applicability of the American federal model in Europe. They represented a core where federalism and federalist structures were studied, explained, and promoted. Some of their leaders, such as Spinelli, Marc, Hirsch, and Brugmans, were the initiators of several attempts to revolutionize and transform European institutions in the federal way. For example, in the "Action for a Federal Pact," which took place in October 1949, the federalist leaders asked the Consultative Assembly of the Council of Europe to vote immediately on the necessity for a federal pact. In spite of the campaign which was conducted around that demand, especially in France, where 10,000 mayors signed a petition, the attempt to influence the Consultative Assembly did not succeed. However, at the November 1950 session of the Consultative Assembly, the Status Commission did give its formal approval to the report of the British federalist Mackay. This report contemplated the establishment of a true European Parliament, composed of two Houses, and having legislative and control powers. But after the vote of the Commission, the project was quickly forgotten. In general, there have been many such attemps to make of the Council of Europe a true "Congress," similar to that of the United States. The failure of all these efforts is a reflection of the general impotence of the Strasbourg institution.[60]

III. Comparing the American Federal Model and the Pattern of the European Community

A. Introduction

The differences in history, ideology and background which surrounded the founding and evolution of the two systems are crucial, and their importance to an understanding of the models should not be minimized. The fact remains, however, that whatever their origins there exist today two systems which are roughly intended to serve the same purpose – the joining together of identifiable polities in a common enterprise, with an overarching centralized authority. The nature of the "union" may, as we shall see, be different in each case – federal, confederal, intergovernmental, etc. – but there is at least a common

[58] *See, e.g.*, A. SPINELLI, MANIFESTE DES FÉDÉRALISTES EUROPÉENS (Paris, Société Européenne d'études et d'informations, 1957).

[59] *See* A.(I.) GREILSAMMER, *supra* note 53.

[60] *See generally* J. GOUZY, LES PIONNIERS DE L'EUROPE COMMUNAUTAIRE (Lausanne, Centre de recherches européennes, 1968).

point of departure for a comparison. In this section, the authors do not pretend to engage in exhaustive comparative analysis of the two models, to determine how far they resemble or differ from each other. The approach adopted is, rather, to focus selectively on certain issues, structures, processes and, last but not least, relationships, which are of intrinsic importance to the operation and success of a federal (in the widest sense of the term) association, and to investigate the provision made by, or the experience of, each system in respect thereof. Through comparative analysis of the results of this enquiry, we hope simply to illustrate how certain factors in the experience of each model have conditioned their approaches to each of these key issues and to investigate the implications which the variations in these approaches might have for the overall political enterprise.

The analytical framework is two-fold: the first part, after establishing the definitional framework for classifying the types of federal union, will examine the structural and institutional aspects, whereas the second part will focus on the relationship which the formal structures embody, examining the system as an exercise in *sharing* or *partnership*, reflecting the desire to live together and to take part in a common political enterprise. This framework is dictated to a large extent by the very nature of the entities under consideration. In strictly governmental terms, federalism is a form of political organization which unites separate polities within an overarching political system, enabling all to maintain their fundamental political integrity, and distributing power among general and constituent governments so that they all share in the system's decision-making and executing processes. In a larger sense, federalism represents the linking of free people and their communities through lasting but limited political arrangements to protect certain rights or liberties and achieve specific common ends while preserving their respective integrities. To reverse the order, federalism has to do first and foremost with a *relationship* among entities – and then with the structure which embodies that relationship and provides the means for sustaining it. Originally federalism was most widely recognized as a relationship, with structural questions incidental, but since the creation of the American federal system, in which a new structure was invented to accommodate that relationship, federalism has become increasingly identified in structural terms. This, in turn, has contributed to a certain emphasis on the legal and administrative relations between the units, as if that were the be-all and end-all of the matter, and a neglect of the larger question of the relationships federalism is designed to foster throughout the polity.[61] Both aspects, however, are important for a complete understanding of the system.

[61] For a more detailed discussion *see* Elazar, *Federalism*, in INT'L ENC. SOC. SCI. (New York, MacMillan, 1967); and D. ELAZAR, THE AMERICAN PARTNERSHIP (Chicago, U. Chi. P., 1962). *See also* K. WHEARE, FEDERAL GOVERNMENT (4th ed., New York, O.U.P., 1963); W. ANDERSON, THE NATION AND THE STATES: RIVALS OR PARTNERS? (Minneapolis, U. Minn. P., 1955); R. LEACH, AMERICAN FEDERALISM (New York, Norton, 1970); REPORT OF THE COMMISSION ON INTERGOVERNMENTAL RELATIONS (16 vols., Washington, D.C., U.S. Gov't Print. Off., 1955).

B. The Constitutional or Structural Perspective

1. Theoretical Definitional Framework

Do the basic treaties, structures, legal and functional features of the European Community have a federal, confederal, or associational character? Since the establishment of the Coal and Steel Community in 1951, the problem has been studied by dozens of law specialists and political scientists.[62] No clear-cut conclusion can be drawn from those studies. Our aim is not to reopen the controversy but to study in what way the European Community institutions may or may not be compared with the basic federal model of the United States.

a) The U.S. Model[63]

The U.S. may be used as a model of a non-centralized federal system: there is no central government with absolute authority over the states in the unitary sense, but there is a strong national or general government coupled with strong state and local governments that share authority and power, constitutionally and practically. Thus, it differs from a confederation which is a union of essentially separate political systems where the overarching authority is deliberately weak.[64]

b) The Legal Character of the European Community[65]

Several theories have been formulated regarding the legal character of the Community.

i) Federal

As soon as the ECSC was founded, a great number of legal scholars – especially in Germany – insisted that the new institution had a typical federal char-

[62] *See infra* notes 65–75 and accompanying text.

[63] It is not proposed to undertake a detailed examination of this question here. There is a vast literature on U.S. federalism. *See, e.g.*, D. ELAZAR, *supra* notes 18 & 61 and references cited therein; P.M. BATOR, P.J. MISHKIN, D.L. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2nd. ed., Mineola, Foundation P., 1973). *See also* P. HAY & R. ROTUNDA, THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE (22 Studies in Comparative Law, Milan, Giuffrè, 1982).

[64] On the classification of federal systems, *see generally* Elazar, *The Role of Federalism in Political Integration*, in FEDERALISM AND POLITICAL INTEGRATION, *supra* note 24, at 13, 17 ff. On the U.S. system, *see* 6(4) PUBLIUS, *supra* note 11.

[65] *See generally* Sidjanski, *L'originalité des Communautés européennes et la répartition de leurs pouvoirs*, 65 REV. GÉN. DR. INT. PUB. 40 (1961); P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS ch. 2 (Urbana/London, U. Ill. P., 1966); A. GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE 15 ff & 545 ff (Leyden, Sijthoff, 1969); Dagtoglou, *The Legal Nature of the European Community*, in THIRTY YEARS OF COMMUNITY LAW 35 (European Perspectives Series, EC Commision, Luxembourg, Office for Official Pubs. of the EC, 1983); J.V. LOUIS, THE COMMUNITY LEGAL ORDER (European Perspective Series, EC Commission, Luxembourg, Office for Official Pubs. of the EC, 1980).

acter. They referred to the newborn Community as "a prefederal structure," "a largely federal organization," "an incomplete federal state."[66] For example, according to the leading jurist Georges Scelle, "The Schuman plan establishes very clearly a specialized federal enterprise – this is the significance of the High Authority."[67] Similar attitudes in respect of the later Communities are not hard to find.[68]

ii) Confederal

On the other hand, several authors and statesmen have insisted upon the confederal characteristics of the Community.[69] Under the Fifth Republic, French presidents, especially Georges Pompidou and Valéry Giscard d'Estaing, have consistently asserted that this was their own conception of the organization.[70] Numerous political scientists have pointed out the similarity between the European Community and the Confederation of the thirteen states in the decade before 1789.[71]

iii) Intergovernmental

According to certain jurists, the Community remains a limited association of sovereign states, a "traditional international organization," "a classical inter-governmental institution."[72]

iv) Supranational or sui generis

Robert Schuman himself adopted the term "supranational" which was sug-

[66] *See* P. Hay, *supra* note 65, at 60 ff & 77–78 and works cited therein; A. Green, *supra* note 65, at 15 ff and works cited therein.

[67] Scelle, *Fédéralisme et travaillisme*, Le Monde, 29 June 1950, at 2, col. 2–3 ("Or le plan Schuman constitue un type très net d'*enterprise fédéraliste spécialisée* en ce qu'il exige pour diriger le pool industriel qu'il prévoit une 'Autorité'.").

[68] *See, e.g.*, D. Lasok & J. Bridge, An Introduction to the Law and Institutions of the European Communities 27 (3rd ed., London, Butterworths, 1976) ("On balance the emerging European Community fits, in the light of the EEC Treaty, better into a federal than confederal form.") *But see also id.* at 26 ("Occasionally the EEC is described as a federation but ... neither the federal nor the confederal label fits the organisation").

[69] *See, e.g.*, Taylor, *The Politics of the European Communities: The Confederal Phase*, 27 World Pols. 336 (1975); Pentland, *Political Theories of European Integration: Between Science and Ideology*, in Les Communautés Européennes en fonctionnement/The European Communities in Action 545, 558 ff (D. Lasok & P. Soldatos eds., Brussels, Bruylant, 1981); Wallace, *Less than a Federation, More than a Regime: The Community as a Political System*, in Policymaking in the European Community 403 (H. Wallace, W. Wallace & C. Webb eds., Chichester, Wiley & Son, 1983).

[70] *See, e.g.*, *President Pompidou's Vision of a Bigger and Better Europe*, The Times (London), 12 May 1972, at 14, col. 6.

[71] *See, e.g.*, Hunnings, *The Future of Community Law*, in Federal Solutions to European Issues, *supra* note 9, at 51–61; Beloff, *supra* note 2.

[72] *See* P. Hay, *supra* note 65, at 45–59 & 72 (Appendix II) and references cited therein.

gested when his plan was issued.[73] Paul Reuter, who was asked to give his opinion on the nature of the organization he helped to create, said that he considered it a *sui generis* institution.[74]

v) Integrative

Finally, in a recent article which reviews the legal characteristics of the Community, Leontin-Jean Constantinesco asserts that all the former analyses of the European Community are rather out of date, and that this organization must be considered as an "integrative institution" (*institution intégrante*), which means that it is *not yet* federal but already *on the path of federal integration.*[75]

2. Comparison Between the Institutions of a Federation and of the EC

Constantinesco suggests a basis for comparison between the institutions of a federation and the Community.[76]

a) Constitution v. Convention

The first important feature of a federation, following the U.S. pattern, is the fundamental role and importance of the federal Constitution as an organic law. The European Community was not established through a federal constitution, but through three international conventions: the Treaty of Paris and the Treaties of Rome. The jurist George Jellinek insists on this basic distinction: federalism requires a constitutional compound and not simply a classical convention.[77] However, we have to go beyond the formal character of the status of the union and to analyze the *deep quality* of such a document.[78] Of course, the constituent treaties of the European Community do not constitute a federal charter like the U.S. Constitution, but they certainly have an organic character. On the level of *content*, they are very close to a constitution. That, indeed, is the interpretation given to those Treaties by the Court of Justice of the European Community: it refuses to consider the three basic Treaties as

[73] *See id.* at 30. *See also* R. Hostiou, Robert Schuman et l'Europe (Unpublished thesis, Univ. of Rennes, Nov. 1964).

[74] On the "*sui generis*" classification, *see* P. Hay, *supra* note 65, at 43–44 and references cited therein. On the "*supranational*" classification, *see id.* at 29–42 & 76 (Appendix I).

[75] Constantinesco, *La nature juridique des Communautés Européennes*, 24 Ann. Fac. Dr. Econ. et Sc. Soc. Liège 151 (1979).

[76] In 1 L.-J. Constantinesco, Das Recht der Europäischen Gemeinschaften §§ 237–46, at pp. 316–32 (Baden-Baden, Nomos, 1977).

[77] G. Jellinek, Allgemeine Staatslehre (3rd ed., 1921; *reprint* Darmstadt, Wissenschaft, 1959).

[78] Constantinesco, *supra* note 75, at 157–59. This was also Kelsen's argument. *See* H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts (Tübingen, Mohr (Siebek), 1928).

strictly limited international conventions, and interprets them in broadly constitutional terms.[79]

b) Sovereignty and International Relations

Much more essential is the distinction between a federation and the EEC on the level of foreign affairs.[80] One of the foremost features of the United States is the international personality of the Federation, which appears as a sovereign entity in international relations. For Europeans, this poses a basic question as to who has sovereignty: the Community or the Member States?

The American approach to sovereignty avoids this question by rejecting the idea that states or governments are sovereign, as such, holding that the People are the ultimate repositories of sovereignty and that governments only have "powers," delegated to them by the People. That approach precludes any notion of inherent powers not derived from delegated ones. Under the Constitution, all powers possessed by the Federal Government are delegated to it by the People through their states. The Federal Government has no inherent powers although as a result of those delegated, it gains some inherent extensions of its power. So, for example, because the People have delegated to the Federal Government the power to conduct foreign relations, the President is understood to have acquired certain inherent powers to negotiate with foreign governments. This is so because such powers are inherently attached to the power to conduct foreign relations. Once the People delegated the principal power, the inherent power flowed automatically; but the second is dependent upon the first. From time to time, Presidents have claimed that they have inherent powers in the fields of foreign relations and defense that are not subject to constitutional limitations but, rather, flow from the status of the Unites States as a sovereign state in international law. While the U.S. Supreme Court has recognized the existence of inherent powers, it has clearly limited them, most recently in *United States v. Nixon*.[81]

This approach has been possible in the United States because of the dual character of the American founding, because of which Americans did not have to confront the issue of sovereignty head on. Obviously, the situation in Europe, where what is involved is the unification of states built upon a principle of absolute exclusive sovereignty, is radically different.

In opposition to the situation in the United States, the European Community institutions have only limited powers in the field of international relations.

[79] *See generally* Bernhardt, *The Sources of Community Law: The "Constitution" of the Community*, in THIRTY YEARS OF COMMUNITY LAW, *supra* note 65, at 69. *See also* Cappelletti & Golay, *supra* note 54, at § V.A; Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective*, *infra* this book, at § III.B.2; Krislov, Ehlermann & Weiler, *infra* note 115, at § III.B.

[80] *See generally* Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, *infra* this vol., Bk. 3.

[81] 418 U.S. 683 (1974). *See generally* P. KURLAND, WATERGATE AND THE CONSTITUTION (Chicago, U. Chi. P., 1978).

In that field, the sovereignty of the Member States survives almost in its entirety. The Commission, acting alone, may only conclude minor or accessory agreements in the name of the Community, with the power to actually conclude them resting with the Council of Ministers, representing the Member States. The capacity of the European Community to intervene and act is most limited in the most crucial fields of state activity – especially foreign policy. Since the Davignon Report,[82] the coordination of the foreign policies of the Member States has been reinforced – especially in matters concerning the Middle East – but, in spite of the common declarations and the common positions developed at the UN, one cannot speak of a "European foreign policy," and the Community is far from appearing as a state in international relations.[83]

c) Division of Powers and Competences

The division of powers between and the sphere of competence of the union and its member states, are very different in the United States and in the European Community. European jurists and federalist scholars have often repeated that in a federation the federal government has the *competence of competence*, while the components of the union have only subsidiary powers, whereas in other kinds of associations of states (confederations and international organizations) the member states retain the *competence of competence* and the union has only accessory powers.[84] Therefore, when there is a conflict between the union and its components, it is resolved in favor of the center in a federalist union, and in favor of the member states in every other kind of association.

Unfortunately, in matters of political integration, the thrust of European culture is statist and centralist, rather than popular and federalist. For most European countries, modern state-building has involved an effort to republicanize autocracy. Since autocracy is, by its nature, hierarchical, Europeans have been accustomed to thinking of politics in terms of governmental pyramids, with top, middle, and bottom levels (*see* Figure 1). It goes without saying that, under such a conception, the top must be the most important level and the place where decisions are made as to which level does what – hardly inducive to federal organization. Indeed, those thinkers who revolted against this hierarchical model in the name of federalism often came close to endorsing anarchism or syndicalism as the only alternatives to this rigidly hierarchical approach.

Most of those who led the revolt against autocracy embraced another doctrine, Jacobinism, which, while promising democracy, was equally far removed from federalism. Jacobinism sought to democratize traditional regimes

[82] BULL. EC 11-1970, at p. 9.

[83] *See* Stein, *supra* note 80, at § III.B. The role of the Community as such is, of course, greater in the economic sphere than in the political sphere. Indeed in the economic and commercial sphere the Community frequently, and increasingly, appears as a unitary actor. *See id.* text accompanying nn.116–25.

[84] *See, e.g.*, P. HAY, *supra* note 65, at 62, 69–76 and references cited therein. *See also* A. GREEN, *supra* note 65, at 476 ff; Constantinesco, *supra* note 75, at 164–66.

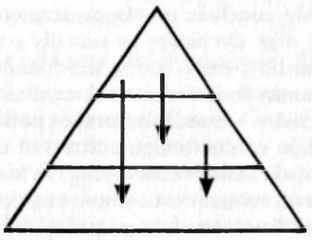


Figure 1
The Hierarchical Pyramid

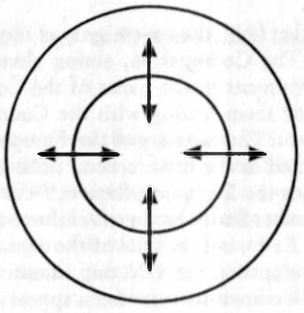


Figure 2
The Center-Periphery Model

by conquering the top of the pyramid and creating in its place a single power center under control of the revolutionary party. Centralization is the organizational expression of Jacobinism, which distrusts dispersed power because of the historical experience out of which it grew, in which localism was synonymous for support of prerevolutionary power holders. Its model is one of center-periphery relations (*see* Figure 2), whereby sovereignty and power are concentrated in a single center which is more or less influenced by its periphery. Federalism, with its emphasis on power-sharing by constitutional right, has no more place within Jacobin theory than within autocracy.

Specialists in American federalism have steadfastly criticized a dichotomic representation of the division of powers in the United States such as that described above. The American federal system is designed to be the very antithesis of a hierarchy. It was intended to provide for the government of a large civil society without reliance upon hierarchical principles.[85] In its original form, the American political system was designed as a matrix of polities (*see* Figure 3), an indefinite number of structured political arenas linked to one another within the framework provided by the national and state constitutions. These arenas were to be distinguished from one another, not on the basis of being "higher" or "lower" in importance, but on the basis of the relative size of the constituencies they served. It was further assumed that the arenas were essentially equal, since size, per se, is no measure of importance. Tasks were designed to be assumed or shared within the matrix on the basis of appropriateness, on the correct assumption that sometimes a small arena is more appropriate than a larger one and sometimes the reverse is true. The federal government was constitutionally mandated to serve the largest arena and to maintain the entire structure by assuring the continuity of the matrix itself. The role of the state governments in serving the basic divisions in the matrix was af-

[85] *See* A.C. McLaughlin, *supra* note 10; A.C. McLaughlin, The Confederation and the Constitution, 1783–1789 (New York, Harper, 1933). *See also* D. Elazar, *supra* note 18, at ch. 1; Elazar, *supra* note 64, at 17–20.

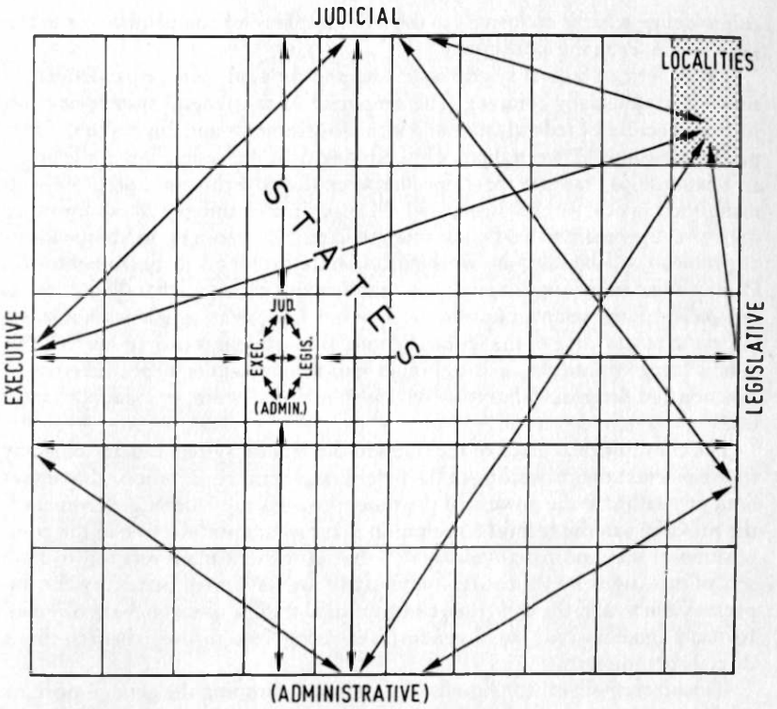


Figure 3
The American Governmental Matrix:
Interacting Power-Centers of General, State and
Local Government

firmed in the constitutional arrangement, and the states established local governments to serve the smallest arenas. Today, the matrix consists of thousands of local arenas within the national framework, divided into fifty plus basic units – the constituent and associated states of the federal union.

The American system has increasingly emphasized *cooperative* rather than *dual* federalism as the basis for its operations. The American pattern of federalism has been cooperative since its beginning, because since its inception most powers and competences have been treated as concurrent, shared by the various planes of government. In Morton Grodzins' terms,[86] it is not a layer cake but a marble cake. Therefore, in the American policy it is especially diffi-

[86] M. Grodzins, The American System: A New View of Government in the United States (D. Elazar ed., Chicago, Rand McNally, 1966).

cult to define what is exclusively in the federal sphere of competence, *or* in the state sphere, *or* in the local sphere.

The American federal system is, at one and the same time, extraordinarily simple and unusually complex. The simplicity of the federal system lies in a formal structure of federal, state and local governments and the outline of formal relationships between them. The complexity of the system lies in the myriad relationships that have developed between the governments and those who make them work – relationships which often make things something other than what they seem to be. People often tend to take it for granted that national problems are handled in Washington; state problems in Sacramento, St. Paul or some other state capital; and that local problems are handled down at city hall or in the county courthouse. This is a nice, neat, simple way of looking at the functioning of the federal system. But, while it is easy to say that this is how things should be, it is well-nigh impossible to take a specific issue or function and determine that it is exclusively national, state, or local in character.[87]

The constitutional place of the states in the federal system is determined by four elements: the provisions in the federal and state constitutions that either limit or guarantee the powers of the states vis-à-vis the federal government;[88] the provisions in the federal constitution that give the states a role in the composition of the national government;[89] the subsequent interpretation of both sets of provisions by the courts (particularly, in the United States, by the Supreme Court); and the unwritten constitutional traditions that have evolved informally and have only later been formally recognized through the first three, directly or indirectly.

The precise federal constitutional provisions outlining the general position of the states must always be taken into consideration even if some of them can be transcended through politics in specific situations. The specific limitations and guarantees of state powers fall into four basic categories: 1) general concern for the integrity of the states as well as their subordination to the Union; 2) some brief provisions ensuring the states a role in the common defense; 3) a delineation of the role of the states in the two central areas of positive governmental activity at home, management of commerce and raising of revenues; and 4) a description of state responsibilities in the administration of justice.

In contrast with the American division of powers, the division of powers in the European Community is extremely precise and detailed. Of course, in the specific fields which are integrated and administered in common, the Member State institutions and their Community counterparts have to cooperate, but the European Community model of dividing powers is more in line with dual than cooperative federalism. In this respect, the Community more closely re-

[87] The complexity of the federal system can be appreciated from Appendices A, B, and C, *infra*, which attempt to give a breakdown of the federal-local relations.

[88] *See infra* Appendix C.I., where the U.S. federal constitutional provisions specifically guaranteeing or limiting state powers are tabulated.

[89] *See infra* Appendix C.II., where these provisions are tabulated for the U.S.

sembles a layer cake than a marble cake. Indeed, the most significant spheres of state activity (*e.g.* foreign policy, economic policy, financial policies) remain mainly with the Member States.

d) Judicial Review[90]

An obvious common denominator between the European Community and the United States is the judicial right to hold the acts of state governments invalid on "constitutional" grounds. In every federation, there is a need for some means to control the legality of federal *and* state actions in light of the basic constitutional rules. The European Community has an internal and permanent Court of Justice, which may control the measures taken at the Community[91] or the state plane.[92] However, there exists a crucial difference between the American and the European Community models: while the Court may cancel the acts of the Community institutions, it is not entitled to cancel the decisions or the acts of the Member States. It may only declare that they do not comply with the Community legislation, but has no power to oblige a Government to adopt another decision.[93]

e) Revision of Constituent Documents

Concerning the procedure by which the basic status of the Union may be revised, one has to remember article V of the U.S. Constitution:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

We could find a similar procedure in most federal constitutions in the world. It underlines one of the paramount characteristics of a federation: the revision of the basic status of the union is *not* totally dependent on the member states. Individual states have no right to veto changes adopted through the accepted

[90] *See generally* Cappelletti & Golay, *supra* note 54; Jacobs & Karst, *supra* note 79. *See also* Federalism and Supreme Courts and the Integration of Legal Systems (E. McWhinney & P. Pescatore eds., Heule/Brussels/Namur, UGA, 1973).

[91] *E.g.*, under EEC Treaty arts. 173 & 175 (direct action) or 177 (indirect action).

[92] *E.g.*, under EEC Treaty arts. 169 & 170 (direct action) or 177 (indirectly).

[93] Note that although the ECJ's power under EEC Treaty art. 171 is purely declaratory, since there is no sanction, the pressure it exerts is considerable. In addition, the EEC Treaty art. 177 procedure ensures that the ECJ can act through national courts in policing national measures. *See* Cappelletti & Golay, *supra* note 54, at notes 278–82 and accompanying text.

procedure; when they oppose an amendment to the Constitution – or demand an amendment – they are not sure to win: the majority overrules the minority.

The procedure of revision of the basic Treaties of the European Community is completely divergent.[94] If we deal only with the so-called "great revision" of the treaties[95] (as opposed to the "simplified procedure of amendment"[96]), we have to distinguish between three steps: the first part of the revision process takes place on the Community plane and it is concluded when the Council of Ministers makes a positive recommendation; the second step has a diplomatic character, consisting as it does of negotiation between the Governments of the Member States, which is concluded when *all* the Governments unanimously agree on the text of the amendment; and finally, the Parliaments of all the Member States have to ratify the amendment. The necessity for a unanimous agreement of all the Member States clearly differentiates the Community and the United States.

Notwithstanding these strict provisions for the formal revision of the EC treaties, it is apparent that provided all Member States (and the Community institutions) are in fact in agreement (even if reluctantly), alterations may be introduced without respecting the formal procedures. Thus in the aftermath of the serious Community crisis of 1965–66, an important "federal" mechanism of the EEC Treaty – the majority voting in the Council of Ministers – was even abolished *de facto*, because of the demands of *one* of the Member States, against the majority.[97]

f) Secession

One of the most important features of U.S. federalism lies in the impossibility for the member states to abandon the federation. There is no right to secede. The American Civil War dramatically affirmed this reality. The U.S. Supreme Court, responding to that war, set down the accepted definition of the American federation in 1869:

> The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States.... 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.... When, therefore, Texas became one of the United States she entered into an indissoluble relation. All the obligations of perpetual Union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final.[98]

[94] *See* Bernhardt, *supra* note 79, at 74–78.
[95] *See* ECSC Treaty art. 96; EEC Treaty art. 236; Euratom Treaty art. 204.
[96] *See, e.g.*, ECSC Treaty art. 95; EEC Treaty arts. 14(7), 33(8), 138, 165(4) & 201; Euratom Treaty art. 76.
[97] *See* The Luxembourg Accords, BULL. EC 3–1966, at p. 8.
[98] Texas v. White, 74 U.S. (7 Wall.) 700 (1869) (per Chase, C.J.)

It is agreed by most federalism scholars that the absence of the right to secede is one of the basic characteristics of a federation.[99] Conversely, in an association of states the right of secession is recognized as one of the most sacred principles of the alliance. In confederations, the matter is not always clear. Therefore, it is not surprising that the problem of the right of secession has been at the core of the debate on the "federal character" of the Community.

A recent study by Paul Taylor reopened the controversy.[100] According to Taylor, the question of secession is of paramount importance. He quotes K.C. Wheare's assertion that this is the basic feature of a federal state.[101] All the "classical" federations (United States of America, Canada,[102] Switzerland, Australia) deny this right to their members. Taylor points out that, already in 1954, the project of a "European Political Community" discussed by the ad hoc Committee of the Council of Europe Consultative Assembly made deliberately no allusion to the right of secession. It was then considered as a victory for the federalist pressure groups.

Concerning the right of secession, it would be logical to make a distinction between the European Coal and Steel Community and the European Economic Community: while article 97 of the ECSC Treaty speaks of a fifty year period, article 240 of the EEC Treaty (and 208 of Euratom) speak of "an unlimited period." It could be argued that "an unlimited period" does not mean a perpetual compact between the Member States. Indeed, it is likely that a thorough analysis of the preparatory works which preceded the conclusion of the Treaty of Rome would show that every participant wanted to keep the right to quit the union, if and when its own interests clashed with those of its partners.[103] Therefore, Dagtoglou reaches the conclusion that the only legal obligation of a Member State, before it quits the European Economic Community, is to try to have the Treaty amended by using all the procedures offered to it.[104] On the other hand, Akehurst, relying on Feinberg[105] – the leading authority on withdrawal – asserts that the practical consequence of the ECSC and EEC Treaties is the same: withdrawal is impossible in both frameworks.[106] This position has been sustained in important decisions of the Euro-

[99] *See, e.g.,* K. WHEARE, FEDERAL GOVERNMENT 91 (2nd ed., London, O.U.P., 1951).

[100] Taylor, *The European Communities and the Obligations of Membership: Claims and Counter Claims*, 57 INT'L AFF. 236 (1981).

[101] *See supra* note 99.

[102] The question of secession in Canada is far from moot, because of recent threats of Quebec secession. *See generally* Soberman, *The Canadian Federal Experience – Selected Issues, infra* this book.

[103] *See* R. PRYCE, THE POLITICS OF THE EUROPEAN COMMUNITY 55 (London, Butterworths, 1973).

[104] Dagtoglou, *How Indissoluble is the Community?*, in BASIC PROBLEMS OF THE EUROPEAN COMMUNITY 258, 265 (P. Dagtoglou ed., Oxford, Blackwell, 1975).

[105] Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT'L L. 189 (1963).

[106] Akehurst, *Withdrawal from International Organisations*, 32 C.L.P. 143, 150 (1979).

pean Court of Justice.[107] Nevertheless, there are real differences between legal and political analysis. On the political level, it is hard to see what the other partners could do if one of the Member States decided to secede. On the other hand, leaving the union may no longer be a practical option, at least for its original six Members, if not for the Nine, because of the level of economic integration already attained which has created great interdependence among the original and subsequent Members. (The tenth Member, Greece, is the exception since it has joined too recently to be much affected by the integrative aspects of the EC.)[108]

g) Federal Norms, Direct Effect and the Issue of Supremacy

Another characteristic of the United States is the existence of *federal* norms, whether legal, administrative or judicial, which bear directly upon the federation citizens, without any need of intervention of the member states. The architects of the American system recognized that a successful federal system that would be more than a loose confederation of states required that both the national and state governments be given substantial autonomy. They also recognized that each had to have some way to influence the other from within as well as through direct negotiation. The Federal Government was given the power to deal directly with the public, that is to say, the citizenry of the states. The states, in turn, were given a major role in determining the composition of the Federal Government and the selection of those who make it work.[109]

Are there such "federal norms," directly bearing on European citizens, in the Community? Constantinesco asserts that the European Community combines two models: the federal, and the confederal. Within the sphere of integration, Community institutions apply uniform and homogeneous norms on the entire territory of the Community. In order to fulfil their task these institutions have necessarily to enter into contact with the public, with the citizens of the Member States. In this specific sphere of Community activity, the EC institutions have no obligation to use the Member States' services; they legislate and communicate directly with the public. In every other field, EC institutions are obliged to work through the Member States which can choose to act or

[107] *See, e.g.*, Case 128/78, Commission v. United Kingdom, [1979] ECR 419, 429; Case 7/71, Commission v. France, [1971] ECR 1003, 1018.

[108] *See* Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267, 296–98 (1981). There have been numerous threats of withdrawal but to date none have actually been carried out. For instance, as soon as General de Gaulle came to power in 1958, European specialists wondered if the new President, who steadily opposed the Community in the past, would decide to quit the EEC. In 1965, at the time of the "empty chair crisis," there was a distinct possibility that France would leave the Union. Such a threat was later uttered by various members, mainly Great Britain, and today Greece, and indeed still forms a part of the British Labour Party's manifesto.

[109] *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in FEDERALISM: MATURE AND EMERGENT 95 (A. MacMahon ed., New York, Doubleday, 1955).

not to act. Under such circumstances, their citizens will only be involved *if* the states adopt as law the recommended European legislation.[110]

A complementary feature to federal norms is the supremacy of federal law: when there is a conflict between federal and state laws, the former prevails. This principle was early established and accepted in America.[111] The relationship between Community law and the law of the Member States has not been without controversy in Europe and has been extensively analyzed,[112] and we do not intend to analyze it further here. It is sufficient for present purposes[113] to report that the principle of the supremacy of Community law, which was mainly developed and championed by the European Court of Justice, has largely, but with some exceptions, been accepted in all the national jurisdictions,[114] both by the courts and, as far as enforcement and compliance are concerned, also by the national administrations.[115] The issues of federal norms (or direct effect) and supremacy are inextricably interwoven, for it is only if a norm is to apply directly that the issue of supremacy will arise, and at the same time the direct application will only be fully effective if the "federal norm" is given supremacy. Thus it is only in the field of Community integration, where the norms have direct incidence, that Community law logically has to be supreme.

Of course that is true in the United States as well. Federal law is supreme only within the limited sphere of its application; otherwise it is interstitial – at most filling in any gaps where state law is absent.[116] Since there are few such gaps, state law may be said to take precedence in most fields where the states administer cooperative programs.

[110] *See* Constantinesco, *supra* note 75, at 171–73. On direct effect *see also* Jacobs & Karst, *supra* note 79, at § III.B.2.a.

[111] *See* U.S. CONST. art. VI, § 2; and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (U.S. Sup. Ct.). *See also* Cappelletti & Golay, *supra* note 54, at nn.57–61 and accompanying text.

[112] The various theories are summarized in Taylor, *supra* note 100. *See also* Mitchell, *The Sovereignty of Parliament and Community Law: The Stumbling Block That Isn't There*, 55 INT'L AFF. 33 (1979); Jacobs & Karst, *supra* note 79, at § III.B.2.a.

[113] *See* Cappelletti & Golay, *supra* note 54, at nn.205–26 and accompanying text, where this topic is analyzed in greater detail.

[114] *Id.* This has not always been the case and there are still reservations, *e.g.* in France, Italy and Germany, most notably the constitutional reservations expressed by the German and Italian Constitutional Courts. *See id.* at § VI.

[115] This does not mean that there is a perfect record of compliance, but cases of deliberate Member State defiance of judgments of the European Court are relatively rare. A recent example of such defiance, however, occurred in the 1980 "Lamb War" between France and England. *See* Jacobs & Karst, *supra* note 79, at nn.220–21 and accompanying text. *See generally* Weiler, *supra* note 108, at 267 n.3; Krislov, Ehlermann & Weiler, *The Political Organs and the Decision-Making Process in the U.S. and the European Communities*, *infra* this vol., Bk. 2, at § VI.C.3. *See also* Editorial Comments, *The Mutton and Lamb Story: Isolated Incident or the Beginning of a New Era?*, 17 C.M.L. REV. 311 (1980).

[116] *See infra* note 122 and accompanying text.

C. The Partnership (Sharing) Perspective

1. U.S. Federalism and the Partnership Principle

a) The "Partnership" Conception of the Federal Relationship

While in a strictly constitutional sense, American federalism is a means by which the Federal Government shares authority and power with the states, the influence of federal principles actually extends far beyond the institutional relationships that link the federal, state and local governments.[117] The idea of the federal commonwealth as a *partnership* is a key principle of federalism and the basis of its integrative powers.[118] Like all partnerships, the Commonwealth is bound by a compact – the Constitution – which sets the basic terms of the partnership to ensure, among other things, the preservation and continued political viability of its basic political units.

The principle of partnership has been extended far beyond its simple sense of a relationship between the federal and state governments. It has come to serve as the guiding principle in most of the political relationships that tie institutions, groups, interests, and individuals together in the American system. The term partnership is used to describe a desired relationship that allows the participants freedom of action while acknowledging the very real ties that require them to function in partnership.[119]

b) The Distribution of Powers Applying the Partnership Principle: The Political Process and Federal Institutions and Purposes

Partnership implies the distribution of real power among several centers that must negotiate cooperative arrangements with one another in order to achieve common goals. Though the basic forms of the partnership are set forth in the United States Constitution,[120] the actual character of the federal system is delineated, maintained, and made functional only partly by constitutional devices. While the role of the Constitution (and its primary interpreters, the courts) should not be minimized, equally important is the way in which the institutions and purposes of federalism are maintained through the political process. The political process, as it affects the federal-state-local relationship most directly, is made manifest through four basic political devices: *territorial democracy*, the *dual system of laws and courts*, the *political party system*, and the *system of public-private "complexes."*

[117] "The United States is a federal country, in spirit, in its way of life, and in its constitution." M. Vile, The Structure of American Federalism (London, O.U.P., 1961). *See also* Daniel Elazar, The Ends of Federalism: Notes Towards a Theory of Federal Political Arrangements (Working Paper No. 12, Philadelphia, Center for the Study of Federalism, Temple U., 1976).

[118] *See supra* note 61.

[119] *See generally* D. Elazar, *supra* note 61; W. Anderson, *supra* note 61.

[120] *See infra* Appendix C, where the constitutional provisions are tabulated.

i) Territorial democracy

Partly because of the character of federalism and partly because of the traditions of an agrarian society, the basic pattern of political organization in the United States is territorial. That is to say, American politics is formally organized around units of territory rather than economic or ethnic groups, social classes, or the like. The nation is divided into states and the states are divided into counties, and the counties into townships or cities or special districts and the whole country is divided into election districts of varying sizes ranging from congressional districts to precincts. This means that people and their interests gain political identity and formal representation in the councils of government through their location in particular places and their ability to capture political control of territorial political units.[121]

ii) The dual legal system

A second basic device is the multiple system of laws and courts tied to the federal division of powers. In the nation as a whole, state law is the basic law. Federal law is essentially designed to fill in the gaps left by the existence of fifty different legal systems. This means that both state and federal courts are bound by state-made law unless it is superceded by the Constitution or federal statutory law. Henry Hart and Herbert Wechsler, two noted legal authorities, have described the situation concisely:

> Federal law is generally *interstitial* in its nature. It rarely occupies a legal field completely . . . despite the volumes of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the same way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.[122]

The complexity of this system is compounded by the nature of the dual court structure, with each state and the federal government having its own complete court system. The federal courts stand in a somewhat superior relationship to the state courts in a widening variety of ways, having asserted extensive superiority in interpreting the manner in which the United States Constitution protects the rights of American citizens (who, of course, are also citizens of their states). Led by the United States Supreme Court, which is constitutionally placed at the apex of both court systems, the federal courts interpret federal law, review the work of the state courts, and enforce the laws of the states in which they are located in cases that come under federal jurisdiction.

[121] *See* Kirk, *The Prospects for Territorial Democracy in America*, in A NATION OF STATES 43 (2nd ed., R. Goldwin ed., Chicago, Rand McNally, 1974).

[122] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Brooklyn, Foundation Press, 1953).

iii) The party system

The third basic political channel is the party system. The Democratic and Republican parties represent two broad confederations of otherwise largely independent state party organizations that unite on the national plane, primarily to gain public office. Despite the greater public attention given to the national parties, the real centers of party organization, finance, and power, to the extent that they exist on other than an ad hoc basis for presidential elections, are on the state and local planes. This noncentralization of the parties contributes to the maintenance of generally noncentralized government in the United States and to the perpetuation of a high degree of local control even in the face of "big government." Thus the party system is of great importance in maintaining the basic structure of American politics and basic American political values, including those of federalism.

iv) Public-private complexes

The fourth political device, the system of public-private "complexes," is partly reflected in the character of interest group activity. The partnership system previously described extends outward to include private elements as well as governments – both public nongovernmental bodies, such as civic, philanthropic, educational, health and welfare associations, and private profit-making bodies. These private associations and bodies often work so closely with their governmental allies that it is difficult to distinguish where the public interest ends and the private interest begins.

2. Europe and the Partnership Principle: The Community Ideal

If it would be wrong to analyze American federalism only in terms of *structures*, of *legal mechanisms* and of *institutions*, the same is true for the Community. Like the United States, the European Community has to do with a specific kind of relationship between its components. As in the case of America, this quality of relationship may be defined as a partnership. Here is an important common denominator between the American and European experiences, and it is as important as the question of structures. It is a factor which is too frequently forgotten or neglected in studies of federalism. The Community is bound by a *compact* in the same way as other federations, a compact which is embodied in the basic Treaties. The compact delineates the form, conditions and aims of the partnership.

a) The Community Philosophy

Of course, in the EC, the partnership has been understood in a different manner than in the U.S. The basic philosophy of the Community – as expressed, for example, by Jean Monnet[123] – is that European countries have in-

[123] *See* J. MONNET, LES ETATS-UNIS D'EUROPE ONT COMMENCÉ, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER. DISCOURS ET ALLOCUTIONS, 1952–1954 (Paris, R. Laffont, 1955).

terests *in common*. Therefore they need to *put in common* a large part of their resources. Such a "Community" philosophy was to penetrate every level of state activity, the institutions, the groups, associations, and individuals.

Like the U.S. "partnership" *idée-force*, the EC *idée-force* ("to put in common") has a double significance: the Member States may retain their autonomy, their freedom of action, *but* at the same time the Union symbolizes the existence of deep, stable, authentic bonds between the Member States, bonds which are indissoluble. This Community or partnership philosophy is embodied in the preambles to the Treaties.

b) The Distribution of Powers on a Community Basis

With regard to the United States, we pointed out how the four basic elements of the political process (territorial democracy, the dual legal system, the party system, and public-private complexes) combine to ensure a working federal relationship. An examination of the EC political processes serves to highlight several important divergences between the U.S. and the EC models.

i) The balance between process and structure

The relation between the compact on one hand, and the political and judical processes is *reversed*. The Community Member States wanted, from the beginning, to keep most of their sovereign powers, and agreed to abandon only a limited part of them, in restricted areas of government. For that reason they imparted a very limited role *to the political and judicial processes*.[124]

While in the American system partnership is embodied and expressed in these processes, the idea of partnership/sharing in the EC is embodied in the basic Treaties. Therefore, the federal development of the Community can only be limited. It is commonly said that the U.S. Constitution has survived until now because it is a fundamental charter and is far from being a narrow legalistic code. The strength of the Constitution – unlike the French Constitutions, for example – has been its ability to adapt itself to changing circumstances. Therefore, the role of the political and judical processes is extremely important, for they are the true substance of the American federal system. Thus the growth of federal government power was based on the Constitution but has gone much beyond the explicit text of this compact.

We can illustrate the comparison with the following example: John C. Calhoun, the theoretician of the sovereign rights of the states in the years which preceded the Civil War, and General de Gaulle in Fifth Republic France, both considered the Federal or Community Government as an agent of the states. Both believed that the basic compact left their entire sovereignty to the member states: the general government must respect these rights, or the member states are entitled to secede. But when a conflict between Union

[124] *See generally* Krislov, Ehlermann & Weiler, *supra* note 115; Cappelletti & Golay, *supra* note 54. While this may have been the original intention particularly regarding the judical process, it has not been wholly successful: *see infra* notes 136–40 and accompanying text.

rights and states' powers did occur, the conclusion of the conflict was very different. In America, the federal political and judicial processes won, albeit through force of arms.[125] At the end of the Community crisis of 1965–66,[126] the French President won, because he could show the fundamental and immutable character of the Treaties, and deny any value to the so-called "political process" which supported the growth of Community powers. This comparison, however, is limited in its applicability because of the difference in time relative to the founding of the respective entities.[127]

ii) The balance of the distribution of powers and functions and the limits of partnership

Another difference is in the way *partnership* or *sharing* is understood in the United States and in Europe. For the Founders of the United States, federalism represented a new political alternative for solving the twin problems of popular government and political integration of a very large territory. The federalism of the Founders was designed to provide substantially new means for the development of: a) a system of government that would be both energetic and responsive to the people; b) a system of politics that would enhance the possibilities for interaction between the governors and the governed; c) a reasonable approach to the twin problems of political liberty and political order; and d) a decent means for securing civil justice and morality.[128] In other words, they saw the federal union under the Constitution as having comprehensive political goals.

On the contrary, when they established the European Community, the Six wanted to keep all these questions of *regime*, *philosophy of the state*, *political culture*, etc., within the national framework, and did not transfer them to the EC. Of course, the Community was founded by countries which uniformly accept the occidental model of parliamentarism and democracy. Such homogeneity on the level of political culture has helped the EC to take positions in several matters (*e.g.*, negative attitude toward Franco's Spain, or toward the Greek Colonels); but it is an accessory consequence of the Union: the Community was *not* created to resolve these problems. Therefore, firstly, the prob-

[125] This is the result of the Civil War, confirmed by the Supreme Court in Texas v. White, 74 U.S. (7 Wall.) 700 (1869).

[126] *See supra* note 97. On the federalist interpretation of the 1965 proposals of the Commission, *see* Cartou, *Le rôle de la Commission*, in LA DÉCISION DANS LES COMMUNAUTÉES EUROPÉENNES (P. Gerbet & D. Pépy eds., Brussels, Presses Univ. Bruxelles, 1969).

[127] At the time of the respective crises the U.S. union was nearly 80 years old the EC about 10 years old – and the quality of those years in integrational terms had also been very different in each case. Indeed, both on the political process level (*see* Krislov, Ehlermann & Weiler, *supra* note 115) and the judicial process level (*see* Cappelletti & Golay, *supra* note 54), there have been significant developments in the years since 1965.

[128] *See especially* Diamond, "*The Federalist's*" *View of Federalism*, in ESSAYS IN FEDERALISM 21 (G. Benson *et al.*, Claremont, Cal., Inst. for Studs. in Federalism, 1961).

lems involved in the administration of a large territory in a democratic way and the problem of local and regional powers are questions which have so far remained peripheral to Community partnership.[129] And, secondly, also outside of the Community's purview is the question of the *kind* of democratic government which Member States are to adopt. Hence, within the "democratic framework" of the EC very different regimes coexist, including the "French Republican Monarchy," the classical parliamentary regime in Britain, the federal parliamentary system of West Germany, and so on.[130] Finally, questions of political freedom and political order, civil justice and public morality are still largely excluded from the Community framework.[131]

In conclusion, one has to recognize that the conception of partnership in the EC is much more limited and narrow than in the United States. The Community embodies a restricted partnership, a voluntary union founded on commonly accepted economic liberalism – with little possibility of political evolution.

iii) The approach to the political process

Three of the four political channels through which the political process may develop in the United States are virtually nonexistent in Europe. The fourth element, the dual legal system, does exist, and although its implications in Europe have been very different to those in America because of important structural and institutional divergences, nevertheless, as we shall see, the judical instrument has become one of the principal, indeed perhaps the only, expression of the partnership ideal in Europe.

(a) Territorial democracy: The federal system is initially important in the United States as the means whereby the population of the country has been transformed into meaningful political components. This is a crucial fact and a crucial act. The federal system, with its basis in "territorial democracy," further acts to define who can legitimately participate in political life; that is to say, who among the nearly 230 million Americans are to be considered full citizens with the right to vote, to seek office, or to act politically in other ways and under what conditions. These are crucial aspects of the transformation of a "population" into a political society.[132]

[129] *See supra* note 42 and accompanying text. On the problem of regional and local powers, *see* Y. MÉNY, B. DE WITTE & J. WEBMAN, REGIONALISM AND FEDERALISM: REGIONS IN NATIONAL AND TRANSNATIONAL POLITIES (6 Integration Through Law Series, forthcoming).

[130] *Cf.* U.S. CONST. art. VI, § 4: "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 . . . against domestic violence."

[131] *See generally* Frowein, Schulhofer & Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration, infra* this vol., Bk. 3.

[132] *See generally* Garth, *Migrant Workers and Rights of Mobility in the European Community: A Study of Law, Community and Citizenship in the Welfare State, infra* this vol., Bk. 3, where the problem is discussed more fully.

While American citizens are bound to the Union through the mediating structures of territorial democracy (the matrix of townships, cities, special districts, counties, states, nation), Europeans are related to political life through strong horizontal *and* vertical cleavages. Their division into social classes, political "camps," nationalities, ethnic groups, etc., is far stronger than in the United States. The process of federal integration, which in the U.S. has been reinforced by territorial democracy, has been hindered in Europe by other primordial cleavages.

(b) The party system: In Europe, no country has a system composed of two parties – or two political streams – which both reinforce and perpetuate basic federalist values. On the contrary, partisan cleavages exist within the nation-state framework. Parties are generally very centralized, and reflect state, not Community values. Even if the various political "camps" are grouped in the European Parliament on the basis of ideological inclination, they remain to a certain extent bound to their respective nation-states.[133]

(c) The public-private complexes: In the United States, the idea of partnership is particularly embodied in the cooperation – in a federal spirit – between private and public institutions. This is one of the central elements of the federalism process. And it is nonexistent in Europe.[134]

(d) The dual legal system and judicial review: Unlike the United States, the Community does not have a dual system of courts, although, as we have seen, there is a duality similar to that found in the United States in the legal system.[135] Rather, the Community system relies on the normal *national (state) systems of courts*, which have jurisdiction to entertain Community issues, combined with a procedure for preliminary references to the European Court of Justice, which also has a limited (but nonetheless important) original jurisdiction. On this level, the divergence with the American judicial system appears to be criti-

[133] For recent studies reviewing European party politics *see* O. Niedermayer, Europäische Parteien? Zur grenzüberschreitenden Interaktion politischer Parteien im Rahmen der Europäischen Gemeinschaft (Frankfurt, Campus, 1983); G. Pridham & P. Pridham, Transnational Party Co-Operation and European Integration (London, Allen & Unwin, 1981).

[134] For a consideration of public-private complexes and the role of private interest groups in the EC, *see, e.g.*, Kirchner, *Interest Group Behavior at the Community Level*, in Contemporary Perspectives on European Integration: Attitudes, Nongovernmental Behavior, and Collective Decision Making 95 (L. Hurwitz ed., London, Aldwych Press, 1980); Sidjanski, *Pressure Groups and the European Communities*, in European Integration 401 (M. Hodges ed., Harmondsworth, Penguin, 1972); Ionescu, *The European Social Partners*, in Federal Solutions to European Issues, *supra* note 9, at 71. *See also* E. Rehbinder & R. Stewart, Environmental Protection Policy ch.8, § B.2.d. (2 Integration Through Law Series, 1985); Rabier & Seiler, *Les autres forces systémiques de la Communauté: opinion publique, partis politiques, groupes de pression*, in Les Communautés Européennes en fonctionnement, *supra* note 69, at 115.

[135] *Supra* notes 110–16 and accompanying text.

cal. On a structural analysis, the absence of a separate system of federal courts apparently means that the "law of the union" is and remains entirely in the hands of the national courts. On the other hand, an examination of the European procedure for ensuring the uniform application of Community law by national courts,[136] demonstrates that in terms of process the judicial review and preliminary reference procedures which have developed depend to a large extent on a real collaboration between the national courts and the central Community court.[137] Indeed, on the whole, the successful working relationship which has developed between the Community Court and the national court systems is perhaps an even stronger embodiment of the partnership principle than that which can be found in the U.S. court system. To some extent what little progress there has been toward more federalism in Europe has been mainly promoted by the European Court's development of federalistic principles (*e.g.*, direct effect and supremacy), in which it has been upheld by the national courts who have, largely, applied the principles developed by the Court.[138] In many ways this has placed the European Court, which is after all only an isolated and limited institution, in an unenviable position, and those who criticize any evolution of the EC toward the U.S. kind of federalism have made the Court a target for their attacks, accusing the Court of being a "megalomaniac institution" and of "behaving like a supreme court."[139] But these accusations are not primarily directed against the Court apropos of its relationship with the Member State court systems. The criticism is, instead, levelled at the Court apropos of its behavior either in confrontations with the other branches of government, or, and in particular, in respect of its encroachment on "national sovereign rights," for instance through its development of the theory of supremacy. In this respect, it is undoubtedly the case that without the support of the national courts, through their acceptance and application of the Court's decisions, the Court would have been unable to support a role which is often in conflict with the wishes of not only the other Community institutions, but also of the Member State governments. As an exercise in judicial partnership the relationship between the Member State and Community courts has proved very promising.

[136] The preliminary reference procedure laid down in, *e.g.*, EEC Treaty art. 177. *See generally* Cappelletti & Golay, *supra* note 54, at nn.255–64 and accompanying text.

[137] They have, in fact, been described as "acting in tandem." *See* Weiler, *supra* note 108, at 301.

[138] *See* Lesguillons, *Le rôle de la Cour de Justice dans la construction européenne*, 143 PROJET 299 (1980). *See also supra* notes 111–15 and accompanying text.

[139] *See, e.g.*, Debré, Oral Question No. 1103, Debats Parlementaires, Assemblée Nationale, 1 June 1979, 1979 JORF, DEB. PARL., ASS. NAT. p. 4607, 4610 ("J'accuse la Cour de Justice de mégalomanie maladive.") *See, also*, Proposition de loi no. 917 portant rétablissement de la souveraineté de la République en matière d'énergie nucléaire (dépôt le 15 Mars 1979) (by Michel Debré & Jean Foyer). (Ass. Nat. 2ème sess. extraordinaire 1978–79, 3ème séance de 15 mars 1979) (Annexe au procès-verbal de la séance du 15 mars 1979).

D. Conclusion

This analysis hoped merely to suggest that by focussing on certain issues, processes, institutions and structures in a comparative context it would be possible to draw certain inferences about the political nature of the entities under consideration. The comparison, albeit superficial, between the U.S. and the EC experiences has demonstrated how a structural analysis is not in itself sufficient, the working relationship which develops between the whole and the parts being as important for the success of the system. The differences which have emerged, both on the constitutional and partnership analysis, are not hard to understand against the background of the founding and evolution of the two systems; indeed, it is perhaps surprising that they are not greater. Many of the devices which have been the pillars of American federalism do exist, albeit in embryonic form, in Europe and do have the potential at least to develop more fully in a federalistic way. Recent proposals concerning a draft treaty for European Union might suggest that such a development is not unlikely.[140] But in our view the political processes needed to foster such development are currently missing in Europe. Of course, it is still early days for Europe, but the trend of European integration so far has been rather confederal than federal in character, and is likely to continue so. But the progress already made toward confederation has been considerable, and might well have surprised the Founding Fathers and early prognosticians. Indeed, the EC is already a confederation, but a new-style one.[141] As such it continues in the vein of the American Confederation of 1781(or 1775)-1789, rather than in the tradition of pre-modern leagues.[142] In the next section we shall consider whether,

[140] *See* Draft Treaty Establishing the European Union (and Resolution of the European Parliament thereon), OJ No. C 77, 19 Mar. 1984, p. 33; BULL. EC 2-1984, at p. 7. *See generally* Catalano, *The European Union Treaty: Legal and Institutional Legitimacy,* 11 CROCODILE 1 (June 1983); Jacque, *The European Union Treaty and Community Treaties, id.* at 6.

[141] *See generally* Wallace, *Europe as a Confederation: The Community and the Nation State,* 21 J.C.M. STUD. 57 (1982–83).

[142] For the Articles of Confederation, *see infra* Annex E. The polity established by the Articles of Confederation was a "Confederation and perpetual Union" (*see* ARTICLES Preamble) while the Constitution of 1787 was designed to "form a more perfect union" (*see* U.S. CONST. Preamble). Therein lies the similarity and the difference. The Confederation established by the Articles was perpetual (Art. XIII) and had virtually unlimited powers within its sphere. It was far more than an alliance since, when a state acceded to it, that state could no more withdraw than can a state from the federal union. Moreover in international law, even under the Articles the U.S. was an independent entity constituted by its states and not simply a committee of them. It was a "confederacy" (*see* ARTICLES Art. I) which came into existence only after ratification by *all* of the member states. Had the Articles constituted a mere treaty of alliance, the Union could have come into existence for those states ratifying immediately upon their ratification. In fact, the Confederation can hardly be said to have "come into existence" because, in reality, the Articles represented a formal constitutionalization of what had already been established in 1775 by "the United

like the American Confederation, the EC can form the basis for a U.S. style federation.

IV. Is There Any Chance for the European Community to Move Toward the American Federal Pattern?

We asserted in the preceding pages that the historical origins, institutional structures, and conceptions of partnership were strongly divergent in America and in Europe. And we suggested that the role left to political and judicial processes in Europe is much more limited than in the United States. Therefore, we would be inclined to answer in a negative manner to the above question. If an evolution is to take place, it will probably be a reinforcement of the nation-state. Most observers of the European Community do not believe in the likelihood of a federal evolution of the organization.[143]

However, bearing in mind the American federal experience, which has been characterized by a steady growth of federal power, we would like to classify the factors which could lead to such a trend in Europe – or, contrariwise, to a reinforcement of the nation-state.

A. Factors Which Could Lead to a Federal Progression of the Community[144]

Two principal elements are currently discernible as potentially fostering a federal progression in Europe. The first is a particular combination of extraneous circumstances which could provide a stimulus for closer cooperation among the Member States; the second is the internal dynamism of the integration process which may generate the momentum for automatic advancement.

1. Specific Circumstances: External Pressures and Crisis Factors

The circumstances which could guide Europe toward federalism are very different from those which led the United States on the path of increased integration.[145]

However, there are developments in the current European situation which, judging from the U.S. experience, might serve to promote federalism. Just as

States, in Congress assembled," an entity which continued to function from 1775 to 1781 even while the Articles were pending ratification.

[143] *See, e.g.*, Everling, *Possibilities and Limits of European Integration*, 18 J.C.M. STUD. 217 (1979–80).

[144] These positive factors have been thoroughly analyzed in several recent books and articles. *See, e.g.*, FEDERAL SOLUTIONS TO EUROPEAN ISSUES, *supra* note 9. *See esp.* Reagan, *The New Federalism*, *id.*, at 1. *See also* Dagtoglou, *supra* note 65, at 39–41.

[145] For an account of the rise and fall of federalist growth in the U.S. *see infra* Appendix D.

in America federal growth was related to the opportunity presented by a severe crisis (*e.g.*, the 1929 crisis led to the New Deal), so in Europe might the present economic crisis lead to a similar process. In America the increase in federal power was linked to the expansion of the federal budget and expenditure; various factors of crisis which face Europe today may lead the Europeans to establish new *funds* or to reinforce those already created, and to develop a true federal budget. By focussing on three areas of current difficulty in the EC we can see how potentially fraught situations may be turned to federalistic advantage.

a) The Economic Crisis

The first factor which could encourage federal trends in Europe is the economic crisis which presently affects every Member State. Recession is particulary serious in certain countries and regions, which are afflicted by massive unemployment and a consequent sharp increase in internal tensions. One of the best-known cases is that of Belgium which is hit by the crisis, but in an unbalanced way: Wallonia is gravely affected, Flanders suffers less. Thus, today federalization is much discussed in that country. Flanders refuses to "pay" in order to allay Wallonia'a crisis; it argues that Wallonia is in fact suffering for its own mistakes in the field of investment, policy, etc. It would not be surprising if, as a result of the crisis, federalism were to become a fashionable idea in this and other EC countries: centralization in the larger arena of all the important decisions in economic policy, coupled with a redistribution of economic powers in the regional and local arenas, may well appear as the only solutions to the crisis.[146]

b) Enlargement of the Community

Independently of the crisis, the Community has been enlarged. Today it includes ten states and may comprise twelve in the near future.[147] The economic, and above all the demographic, weight of the Community is growing. The imbalance between the extraordinary economic and demographic position of the EC and its low political and defense capacities is increasingly paradoxical. The EC is an economic giant, but is unable to play an equivalent role in international relations. If such a disequilibrium continues to grow, it is not impossible that the federal option (including a common foreign policy, economic policy, commercial policy, and so on) will prevail.

c) Regional Imbalances

Finally, the admission to the already industrialized Community of countries which are economically underdeveloped (Ireland and Greece, and perhaps Spain and Portugal in the near future) has reinforced the regional imbalance

[146] *See generally* Y. Mény, B. de Witte & J. Webman, *supra* note 129; and T. Daintith & S. Williams, The Legal Integration of Energy Markets (5 Integration Through Law Series, forthcoming).

[147] *See generally* Commission of the EC, The Second Enlargement (European Documentation 5/79).

within the EC.[148] For an external observer, the regional disequilibrium between very rich and very poor areas appears very dangerous. If no remedy is found to this crucial problem, the Community could be confronted by an explosive situation.

There are three elements in this regional imbalance:

(i) The EC includes some farming areas which are extremely underdeveloped (for example, in southern Italy, western Ireland, and in Greece).

(ii) Several industrial areas are in a steady decline and are doomed to become increasingly impoverished: this is the case of some regions based on the iron and steel industries, or coal-field areas, or regions which had a strong textile industry (the most affected areas are Scotland, Wales, Northern Ireland, South and West Belgium, the Dutch Limburg, certain parts of the Ruhr and the Saar, and northern France).

(iii) One could also point out the extreme congestion and overpopulation of certain urban areas (*e.g.*, the Paris region represents 2% of the French territory, but 19% of French population, 22% of the jobs, and 30% of the national product; such is also the case of the Ruhr-Rhein area in Germany, of greater London, etc.).

It is not impossible – although not certain – that such imbalances provoke, within the EC, a situation of crisis, of rupture and a necessity to find federal solutions. Without going so far as to suggest a "federation of regions," which remains and will remain a utopia, one could seriously imagine the creation of a second assembly on the European level; while the existing EC Assembly would continue to directly represent the population of the Member States, the second assembly would represent the regions.

2. The Role of the Dynamics of Community Integration

Apart from these external and objective circumstances, which could encourage federal trends in the EC, it is necessary to emphasize some positive factors, which could be considered as enhancing the dynamics of Community integration.

The thesis of the "irreversibility" of the integrative process has been advanced frequently. According to this theory, a regression, or even the coming to a standstill, of the integration process would be impossible in practice, because of the progress which has already been made and the "degree of federalism" already achieved. There is already a "threshold of federalism" which would prevent any serious regression. Without taking a stand on this theory, we can express the opinion that if it is true, it finds its strongest support in two areas: a) the substantial progression toward an authentic federal budget; b) the role of judicial review in the EC.

[148] *See* COMMISSION OF THE EC, THE COMMUNITY AND ITS REGIONS (European Documentation 1/80); Y. MÉNY, B. DE WITTE & J. WEBMAN, *supra* note 129.

a) Federalizing the Budget[149]

While the Community is still far from having a federal budget like the United States, it seems to be steadily proceeding in that direction.[150] The Community budget already has a clearly federal orientation, since in order to be efficient it had to adopt certain basic federal rules from the first. The first step was the creation of the ECSC levy on the coal and steel industries, the first "European tax."[151] The second step was the decision, in 1970, to transfer customs duties to the Community.[152] Henceforth, the EC had its own resources *as if* it were a federation. Of course, these "own resources" were rather weak, because they were dependent on the volume of the importations (and of the world price of agricultural products). The third step was the decision by the Member States to relinquish a fraction of the V.A.T. to the Community budget:[153] this new resource has a "dynamic" character and will rapidly increase.

These three successive stages have contributed to give a clear – although limited[154] – federal character to the Community budget. The budget is steadily growing. It now contributes the major part of the EC assistance to regions, and subventions for professional training. There is a high probability that the budget will continue to increase in the future, because of the growing number of "common policies" which are taken in charge in Brussels.

b) Federalizing the Legal System: Judicial Activism

The best chance for the Community to develop along federal lines remains the activity of the Court of Justice. In the preceding pages, we emphasized the fact

[149] *See generally* COMMISSION OF THE EC, THE EUROPEAN COMMUNITY'S BUDGET (European Documentation 5/81); Ehlermann, *The Financing of the Community: The Distinction Between Financial Contributions and Own Resources*, 19 C.M.L. REV. 571 (1982). *See also* Heller & Pelkmans, *The Federal Economy: Law and Economic Integration and the Positive State – The U.S.A. and Europe Compared in an Economic Perspective, infra* this book, at § III; D. STRASSER, THE FINANCES OF EUROPE (European Perspectives Series, Luxembourg, Office for Official Pubs. of the EC, 1981); Usher, *The Financing of the Community*, in THIRTY YEARS OF COMMUNITY LAW, *supra* note 65, at 195.

[150] *See infra* Appendix G.

[151] *See* ECSC Treaty art. 49.

[152] Council Decision (EEC/ECSC/Euratom) No. 70/243 of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities Own Resources, JO No. L 94, 28 Apr. 1970, p. 19 ([1970] III OJ (spec. Eng. ed.) at 224).

[153] Council Regulation (EEC/ECSC/Euratom) No. 2891/77 of 19 Dec. 1977 implementing the Decision of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities Own Resources, OJ No. L 336, 27 Dec. 1977, p. 1; and Council Regulation (EEC/ECSC/Euratom) No. 2892/77 of 19 Dec. 1977 implementing in respect of own resources accruing from value added tax the Decision of 21 April 1970, *id.* at p. 8. It is only since 1 Jan. 1979 that the provisions on V.A.T. resources have been effectively applied. *See* Ehlermann, *supra* note 150, at 573–74.

[154] The limits are discussed *infra* § IV.B.2.

that the Court must be seen as a key element of the partnership/sharing sought by the Member States. But the Founders of the EC probably did not foresee the future "boldness" of the judges. Federalism can progress through the various procedures within the purview of the Court, and the Court has acted in several cases along lines similar to those of the U.S. Supreme Court, developing typical "American" theories.[155]

Indeed, the Court's zeal in promoting the "federal spirit" is considered by some to be excessive, and has led some commentators to make allusion to a "government of the Judges," similar to the "government" of the U.S. Supreme Court during the New Deal.[156] But the audacity of the Court's decisions, its "teleological conception" (inspired by the Community's aims, in order to solve *in a coherent way* the various questions which are brought before the Court), the affirmation of the definitive character of the States' relinquishment of sovereignty, all these decisions are explicitly based on the spirit of the Treaties or on general principles of law.

B. Negative Factors Which Appear to Be Working Against the Evolution of the EC Along Federal Lines

Nowadays, these factors seem much stronger than the positive factors mentioned above. Indeed, in the above analysis the concentration has been on the positive elements inherent in each factor or situation. But while it is true that crises may act as an incentive for solidarity, it is equally true that they may act as a centripetal force if individual self-interest is not identified as being best served by adherence to the collectivity. And even if one accepts the principle of "irreversibility," nevertheless there may be areas of such weaknesses in the Community structures that a complacent preservation of the status quo will not suffice, or where a gradual automatic progression will prove too slow to meet the demands put upon the system. In any event, the irreversibility argument is pragmatic in nature, and it may well be that the direction of the progression can be altered so long as the equilibrium is not disturbed, which is one way of viewing the emergence of the European Council, as we shall see below.

1. The Democracy Deficit

First of all, a federal regime of the American type places great emphasis on the democratic basis of its institutions. Democratic legitimacy finds its main ex-

[155] *See supra* notes 90–93, 110–16 & 135–40 and accompanying text.

[156] This phrase has even been used as the title for a book about the Court: J.-P. COLIN, LE GOUVERNEMENT DES JUGES DANS LES COMMUNAUTÉS EUROPÉENNES (Paris, Librairie général de droit et de jurisprudence, 1966). *See also* R. LECOURT, L'EUROPE DES JUGES (Brussels, Bruylant, 1976). *See generally* A. GREEN, *supra* note 65, for a review of literature on the Court. *See also supra* note 139.

For U.S. comparison, *see, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Cambridge, Harvard U.P., 1977). *See also* Cappelletti & Golay, *supra* note 54.

pression in the *separation of powers* and the existence of a federal Congress comprising one chamber elected on the basis of population and another which represents the constituent states. This explains the importance which the European federalist movements attached to the election of the European Parliament by universal vote. It was supposed to give a new democratic legitimacy to the Community and to be the anchor point of European solidarity.

Even if it is too early to express a definitive judgment, it may be said that the first general election to the European Parliament in 1979 revealed the Community's uneasiness. Electoral participation was meager, and the campaign was marked by a general lack of interest.[157] A similar general lack of enthusiasm was also evident in the second direct elections held in June 1984.[158] Furthermore, the European Parliament elected by popular vote must be balanced against the meetings of the "European Council" composed of heads of state and prime ministers.[159] Some observers have claimed that the election of the Parliament was a "tactical gadget" which the Member States (especially France) agreed to accept in order to smooth the path for the European Council to meet regularly and exercise the real power of decision-making in the Community. Significantly, the European Council was not established by the constituent Treaties but is an extralegal body.

While the powers of the Parliament remain confined to a very limited field, and the Commission sees its powers similarly limited, important decisions are now taken within the framework of the European Council. The summit procedures which characterize these Council meetings succeed in depreciating the formal Community institutions.[160]

The Commission and, to some extent, also the Council of Ministers, the original pair of institutions of Community governance, have been declining in the face of the new power of the European Council. "State administrative powers" are slowly vanishing, to the benefit of "state policy." There is an element in this process of a return to classical diplomatic procedures. In short,

[157] *See* Moreau, *Quel avenir pour l'Assemblée Européenne?*, 143 PROJET 275 (1980).

[158] In the 1984 elections only about 60% of the registered voters went to the polls (as against 62% in 1979). The election campaigns tended to lack a European dimension, focussing mainly on domestic political issues. *See* BULL. EC 6-1984, at p. 13, point 1.2. *See also* 21 EURO-BAROMETRE (May 1984) (special issue surveying opinions immediately prior to the June 1984 European elections).

[159] *See* Dankert, *The European Community - Past, Present and Future*, 21 J.C.M. STUD. 3, 7–8 (1982–83) ("The conflict between the two forces [of intergovernmental co-operation and integration] was most evident at the Paris Summit in 1974 where one and the same final communiqué announced the setting up of the European Council (a real triumph for advocates of intergovernmental co-operation which by its very nature eludes parliamentary supervision) and at the same time offered the prospects of European elections and increased legislative powers for the Parliament – "federalist" countermoves to intergovernmental aberrations: co-operative compensation of federalist incursions: dialectics in optima forma.").

[160] For further discussion *see* Stein, *supra* note 80, at § III.B.; Krislov, Ehlermann & Weiler, *supra* note 115.

the election of the European Parliament by direct universal vote, which was called a "victory for the federalist movement," has only served to hide the marginalization of this institution, and of the Commission.[161]

2. Budgetary Weaknesses

Another negative element is the weakness of the Community budget. While the reinforcement of the EC's "own resources" and the decision to transfer a portion of the V.A.T. to the Community have regenerated the European treasury and even accentuated the federal characteristics of the budget,[162] nevertheless it remains insufficient and incomplete. The European budget is unable to play the role which has been played by the American federal budget in the process of political integration.[163]

We must remember that the major element of this process in the United States has been the ability of the general government to use its financial capacity: the strength of the federal budget and the volume of the federal aid to the states and local governments have played a crucial role.[164] Between 1802 and 1977, federal aid steadily increased ("grant-in-aid") and federal programs of subventions grew and developed. After 1913, the Government in Washington was able to further augment its aid and ultimately interfere more and more in the states' affairs – because of the sixteenth amendment which introduced *income tax* as the major resource of the federation. Since 1913, the American fiscal system has been essentially based on income tax and the tax on company profits (these two taxes are the most productive). For many years thereafter, the fiscal systems of the states were less progressive and less productive of revenues. Only in the past two decades have the states' fiscal systems been transformed in the same way. Therefore, the Federal Government was able to attach serious conditions to its programs of aid to the states.[165] This trend has only recently been reversed, with as yet unknown results.

On that topic, we must recognize that the Community institutions are in a very different situation. They would not be able to use financial aid as an instrument of centralization, because they remain – on the financial level – in an accessory, inferior and subsidiary situation. In 1977–78, funds which had been transferred by the States to the Community did not exceed 1.5% of the gross product of the Member States! Under these circumstances an evolution parallel to that of the United States would be very difficult.

[161] *For* a detailed analysis of the institutional difficulties besetting the EC, *see* REPORT ON EUROPEAN INSTITUTIONS (presented by the Committee of Three to the European Council, Oct. 1979) (Council of the EC, Luxembourg, Office for Official Pubs. of the EC, 1980) (*Report of the Three Wise Men*).

[162] *See supra* notes 149–54 and accompanying text.

[163] *See infra* Appendices B, D & G.

[164] *See* D. ELAZAR, *supra* note 20, at 71.

[165] *See* Kempf & Toinet, *La fin du fédéralisme aux Etats-Unis?*, 30 REV. FR. SCI. POL. 735 (1980); COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 84 (D. Elazar, R.B. Carroll, E.L. Levine & D. St. Angelo eds., Itasca, Ill., Peacock, 1969).

3. Lack of Popular Support or Federalist Feeling

Finally, there is another negative factor: the lack of interest of most Europeans for a United Europe, their lack of "federalist" feelings. One has to remember the crucial role which was played in the American federal process by popular enthusiasm for federalism. Federal principles and techniques have permeated the private sector of American society in numerous ways, ranging from the organization of private groups according to the federal divisions within the political system (particularly in the case of professional and commercial associations and labor unions) to the fostering of internal federal arrangements of their own (particularly in churches and corporations). In the United States, the business world, the professions, labor, and religion partake heavily of the standard mode of organization characteristic of American society, namely federalism, often in more than one way.

Thus, the average American, whether worker, business-person, or professional, is likely to live under federal arrangements in the economic sphere as fully as in the political sphere and, since many Americans tend to be involved with their churches in some way or another, they encounter similar arrangements in the religious sphere as well. All of these mutually reinforce one another to shape a basic federal orientation as part of American culture.[166]

The American Founders believed that their invention was capable of solving the problems implicit in the establishment of government because it was based on valid fundamental principles and was constructed to employ proper, if new, political techniques necessary to effectuate those principles, at least approximately. They were convinced of this – and were soon joined in this conviction by the American people as a whole – not simply because their invention directly solved important substantive questions, but because it provided what was considered to be a proper framework and what were deemed to be correct procedures for dealing with the substantive questions which they anticipated would confront the United States.

What is the level of interest that is displayed by European citizens toward the uniting of Europe? The results of recent opinion polls carried out in the Member States are not encouraging:[167]

According to the polls there is a significant *diminution* in the percentages

[166] *See generally* A Nation of States, *supra* note 121; The Politics of American Federalism (D. Elazar ed., Lexington, D.C. Heath, 1969); Cooperation and Conflict, *supra* note 165; American Federalism in Perspective (A. Wildavsky ed., Boston, Little, Brown, 1967); W. Riker, Federalism (Boston, Little, Brown, 1964); R. Dikshit, The Political Geography of Federalism (New York, Wiley, 1975); I. Duchacek, Comparative Federalism: The Territorial Dimension of Politics (New York, Holt, 1970); Why Federations Fail (T. Franck ed., New York, N.Y. U.P., 1968).

[167] *See* 21 Euro-Barometre (May 1984); 20 Euro-Barometre (Dec. 1983); 15 Euro-Barometre (June 1981). Tables setting out the results of the surveys carried out by *Euro-Barometre* are reproduced *infra* in Appendix F. The surveys were done in the spring of 1984, the autumn of 1983, and the spring of 1981.

of positive reactions to the unification process in Western Europe.[168] The decrease appears very clearly in several of the Member States. Even if such a decline causes no surprise when it takes place in Great Britain (where the starting point was in any case low), it is more disturbing when it takes place in Germany, since in the latter there has traditionally been a strong movement in support of the EC. However, it seems that even in Germany the stock of goodwill and federalist enthusiasm of the population is beginning to decline. Even if the majority of the public (British citizens excepted) continue to assert that belonging to the Community is a "good thing," a decline in positive answers may be observed in most Member States, especially in Germany, Belgium and Ireland.[169]

When asked about the development of understanding among the Member States, the majority of the population continues to give a "neutral" answer (that is, "without change").[170] However, more now respond "declining" than "growing" in almost every country, except for newly admitted Greece. In general, the answer "declining" is on the sharp increase in every country of the Community. Furthermore, in each of the Member States, the "opinion leaders," who represent the most politically and civically involved people, *i.e.*, those who are inclined to participate actively or at least to take an interest in politics, are also most inclined to say that understanding between European countries is declining. This negative trend is particularly clear in Germany.

If an authentic federation like the United States of America has to be based on real bonds of *solidarity* between fellow citizens, then the results of the recent polls are most alarming: when asked if they would agree that their own country should help another Member of the EC, if this other country has very serious economic problems, most Europeans (about three-fourths), of course, answered in a positive manner, although in every country, the positive answers to this question are on the decrease (in Belgium, by 28% in comparison with a 1977 poll). However, when the question is much more "concrete" and asks for a "personal sacrifice," the answers are very different. When asked if they would agree to a personal sacrifice, for example to pay higher taxes, in order to help a needy Member State, *only* in Italy, Luxembourg and Greece did a majority of people answer positively (only 20% answered "yes" in Belgium, 28% in France and in Germany).[171] Finally, in April 1981, 51% of Danish and 61% of English citizens answered that, if there was a referendum in their country, they would vote in favor of leaving the Community.

Polls of this nature, especially when undertaken in a period of general dissatisfaction and economic crisis, are extraordinarily fickle and should not be taken for more than they are. At the same time, they might be taken to confirm what we have suggested throughout this essay, namely that European integration is likely to remain confederal rather than federal in character.

[168] *See infra* Appendix F, Table 1.
[169] *See infra* Appendix F, Table 3.
[170] *See infra* Appendix F, Table 2.
[171] *See infra* Appendix F, Table 4.

V. Conclusion: Toward a Modern Confederation

Our examination of the EC in comparison with the U.S. model, leads us to the conclusion that the integrative trend in Europe is, and is likely to continue to be, confederal rather than federal. The EC is a novel, but nonetheless recognizable and highly-developed, confederation, and as such has perhaps more in common with the American Confederation of the 1780's than with either the modern U.S. federation or the tradition of the pre-modern leagues. There remains to be considered the adequacy and effectiveness of the confederal (when compared to the federal) form of union, in terms of its success both as a form of democratic government (in a civil libertarian tradition) and in furthering the purposes of the union.

A. Federalism and Confederalism as Forms of Democratic Government

1. The Problem of "Good Government"

All forms of federalism begin with the assumption that government in some form is necessary and that the development of appropriately effective government is a major human task. In this respect federalist theories are realistic. The other "given" of federalism is that humans are born free and that good government must be grounded in a framework of maximum human liberty. The task of constitution-makers is to develop a regime for each people which secures liberty even while recognizing and allowing for government in its coercive aspects. Thus, the central interest of both federation and confederation and, indeed, of true federalism in all its species, is the issue of liberty.

To say that liberty stands at the center of federalist striving is to open the door to the question of what constitutes liberty in the federal context and how do federalists deal with the problematics of liberty. On one level, these questions lead us to what may be the decisive difference between confederation and federation. Federations are communities of both polities and individuals and emphasize the liberties of both. The American federation has placed even greater emphasis on the liberty of individuals than on the liberties of its constituent polities, an emphasis which has grown more pronounced over the generations.[172] Confederations, on the other hand, are primarily of polities, which place greater emphasis on the liberties of the constituent polities. It is the task of the constituent polities to protect individual liberty, more or less as each defines it, although the constituent polities of confederations of republics must conform to at least minimum standards of individual liberty in order to preserve the republican character of the whole.[173]

[172] On the federalization of the protection of individual rights, *see* Frowein, Schulhofer & Shapiro, *supra* note 131.

[173] Thus in the U.S. Confederation of 1781, the minimum guarantee of individual liberty was provided by ARTICLES OF CONFEDERATION Art. IV which gave the "free

Thus to understand a confederation it is necessary to understand, first and foremost, what constitutes the liberties of its constituents and how those constituents see the confederation as protecting those liberties. The Articles of Confederation had as the focus of their concern the federal liberty of the constituent states. Hence they had what was at once a more limited and far broader definition of federal liberty with which to work, restricting the freedom of the constituent states in those few fields where it was deemed necessary for a uniform confederal standard, while allowing each in its own way to determine what constituted federal liberty for its own citizens.

2. The Different Approaches of Federalism and Confederalism to the Problem

Returning to the differences between federation and confederation, we may begin with the classic distinction, namely that in federation the federal government can reach out directly to its citizenry as well as through the constituent polities while in a confederation the confederal government must reach individual citizens only through the constituent polities. This definition is accurate as far as it goes, but is not complete. We must add a second characteristic, noted above, namely that a federation is more concerned with the preservation of individual liberty, while a confederation places greater emphasis on the preservation of the local liberties of its constituent polities.

These two factors are in turn responsible for a further characteristic distinguishing federations from confederations, that is that the former will have a *common law* of some scope which is enforceable throughout the federation, while the latter tend to leave matters of law to the constituent polities except as explicitly provided in limited areas determined to be of such general concern that they must be governed by a common law. This is a matter of the greatest importance, some might even say the heart of the matter. Federation is possible only where a sufficiently comprehensive common law binding all citizens of the constituent units is possible. By the same token, confederation is a viable means of establishing federal ties in situations where the parties to the bargain can only tolerate specific and limited common laws.[174]

inhabitants in each of these States ... all privileges and immunities of free citizens in the several States," "free ingress and regress to and from any other State," and "all the privileges of trade and commerce" – in other words, basic civil and commercial rights.

[174] The U.S. Articles of Confederation provided for a common law of war and peace and common foreign relations. Implicit in the Articles is a common republicanism which is so taken for granted that it finds expression only in the prohibition against granting titles of nobility in Art. VI. The Confederation also had full powers over coinage, weights and measures, and postal services. The most ambiguous elements in the Articles are those relating to interstate commerce and the general welfare. It is clear from Art. IV that the U.S. is to be a single entity for commercial purposes but without eliminating the powers of the states to protect their own respective economies, as suggested obliquely in Art. VI. Similarly, there are two references to

B. Integration as a Method of Furthering Governmental Aims

A further dimension must be added having to do with the ends of the polity. Every polity is devoted to the attainment of certain ends, to the achievement of justice as it is conceived by those who constitute it. In this respect, the extent to which the general government possesses power, while crudely related to the defined ends of the polity, is not determinative of those ends.

One of the perceived problems of the American Confederation is that the confederal government was not adequate for the achievement of the ends for which it was instituted. We have already mentioned two elements involved in determining the ends of federal polities, namely liberty, however defined, and good government, however defined. In both cases, federal (*i.e.*, composite) polities, because they are constituted in a formal way by a pact or articles of agreement, are likely to be more explicit about their understanding of these and other ends to which they are devoted. These ends are generally stated in the preambles to their constitutions, but may also be stated or explicated in the body of the constitutional document(s).

As a general rule, confederations will have more limited ends than federations. With respect to the United States, the principal difference between the Constitution of 1787 and the Articles of Confederation was one of means rather than ends. In this respect, the preamble to the 1787 Constitution specified that what is proposed is the establishment of "a more perfect union," not a new one. What was changed were the means for effectuating the union, which required the expansion of the powers granted to the federal government even in order to obtain already agreed upon ends.

The major shift with regard to ends was from an emphasis on the liberties of the individual states, to the establishment of liberty, justice, and domestic tranquility for the people of the United States. Article III of the Articles sets forth the ends of the Confederation:

> The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Contrast it with the preamble to the Constitution of 1787:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

We would not want to minimize this shift. In a certain sense, it is of the essence, but it is not, as some would have it, the exchange of a loose league for a con-

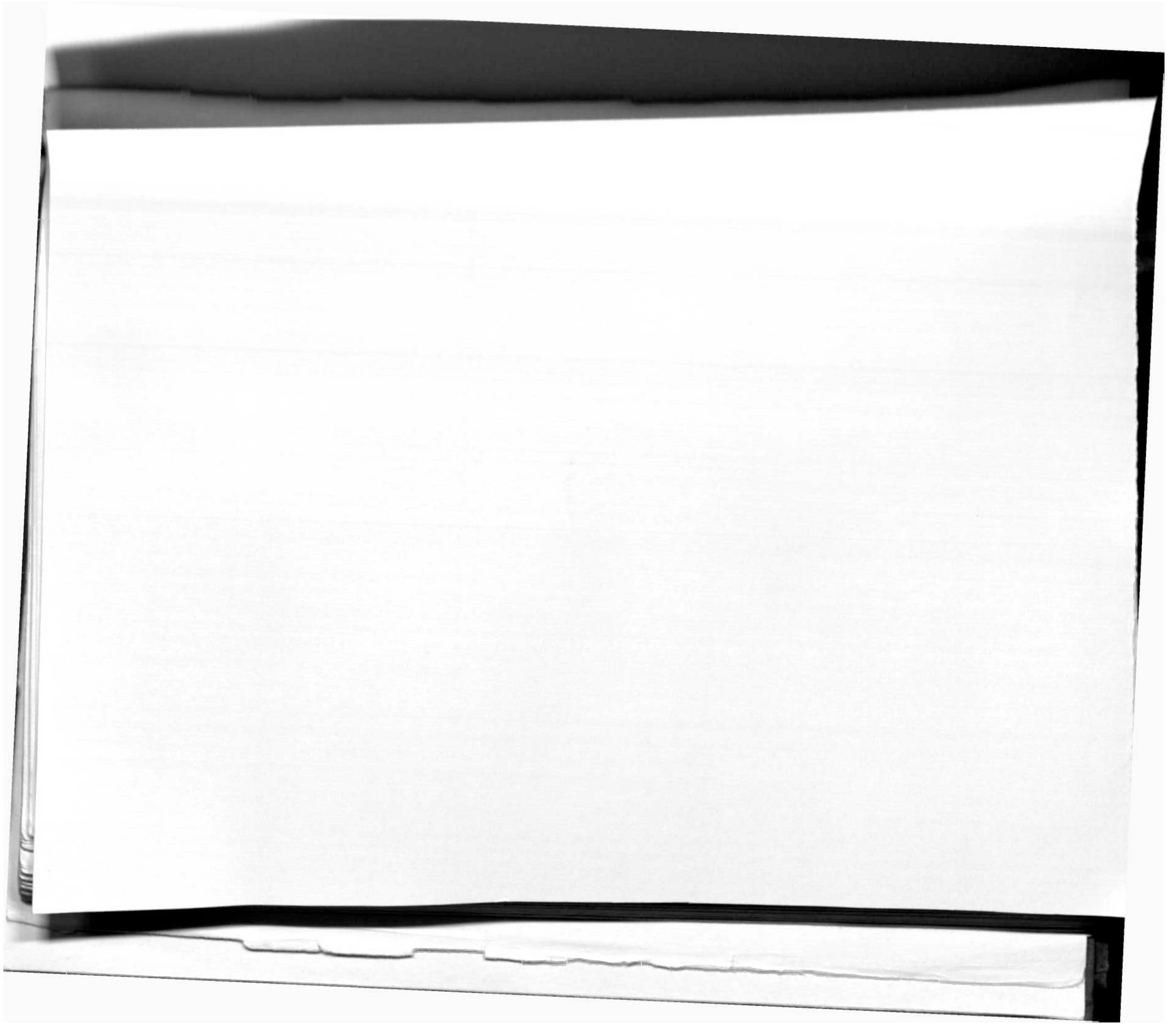
> the general welfare – one in Art. III as one of the ends of the Confederation, and the second in Art. VIII with regard to the revenue-raising powers of the new Congress. Both references are general and open-ended.

solidated union. There is more of a shift in emphasis than in underlying form. We do not wish to enter here into the question of how effective or ineffective the Confederation was; that dispute is well-known to all of us. One thing is clear, however. While we cannot and never will know whether or not the potentialities within the Articles of Confederation could have been developed to deal with the problems of a growing United States, the Confederation Government was not simply a failure. It had a number of accomplishments to its name, not the least of which involved the extension of its powers into new spheres, whether with regard to the organization of western lands (after all, the Confederation Congress established the basis for the admission of new states into the United States), in banking (the Confederation Congress established the first bank in the United States as its instrumentality), or in the initiation of support for educational and eleemosynary development.

C. The Challenge for Europe

The distinction between the U.S. federal and confederal regimes can be summarized as follows: the Constitution of 1787 provided a government that was partly national and partly federal to replace the Articles of Confederation which established a regime that was partially federal and partially a league. The first combination came to be known as federation and the second came to be known as confederation. The tension built into the former is between the national and the federal elements, while the tension built into the latter is between the federal and the league elements. Since federal arrangements always involve one or another set of built-in tensions, the character of the tension of each particular arrangement is the major clue as to the species of federalism involved.

The difficulties – often fatal – of confederation flow from this basic tension. In our consideration of whether confederation can be a viable federal option, we must raise the question as to whether (or under what conditions) the confederal tension can be sustained in a polity on a long-term basis. This is a real issue in the European Community today.



Appendices

Appendix A

The Three Planes of Government and Their Division in the United States

The People
(organized by States)
establish through
The U.S. Constitution – Each State Constitution
The Three Planes of Government and Their Divisions

Plane of Gov't \ Branch of Gov't		Legislative Branch	Executive Branch			Judicial Branch
			Elective	*Appointive*	*Operational*	*Courts*
Local Gov't	City	City Council	Mayor	City dep't heads	City dep'ts & employees Manager	Municipal cts.
	Town or Township	Township Bd. of Supervisors *or* Town Meeting	Town clerk, Treasurer, etc. Supervisors or Selectmen	Township dep't heads	Township dep'ts & employees	Justice of the Peace cts.
	County	County Comm'rs	County clerk, treasurer, sheriff, etc.	County dep't heads	County dep'ts & employees	County cts.
	Special & School Districts	District Bd.	- -	District adm'rs, school superintendent	- -	- -
State Gov't	General	State House of Reps., State Senate	Governor, Sec. of State, Treasurer, etc.	State dep't heads	State agencies & employees	Sup. Ct., Appellate Cts., District Cts.
	Special	Board or Comm'n	- -	District admin. officers	Employees	- -
Fed. Gov't	General	U.S. Senate, U.S. House of Reps.	President, Vice Pres.	Cabinet Secs.	Fed. agencies & employees	Sup. Ct., Appellate Cts., District Cts.
	Special		- -	Chief admin. offices, Comm'rs	Employees	Special Cts.

Appendix B
U.S. Direct Domestic Expenditures of the Three Planes of Government
Selected Functions: 1940, 1950, 1960, 1970 and 1977
(in millions of U.S. dollars)

Year	Function / Plane of Gov't	Educ.	Highways	Pub. Welfare	Hosps.	Health	Police	Agric. & Nat. Resources	Hous. & Urban Renewal	Totals
1940	Federal	189	604	158	87	36	21	2,512	37	3,644
	State-Local	2,638	1,573	1,156	450	159	365	218	230	6,789
	State	375	793	527	236	64	34	144	0	2,173
	Local	2,263	780	629	214	95	331	74	230	4,616
1950	Federal	2,470	69	24	666	297	88	4,335	121	8,070
	State-Local	7,177	3,803	2,940	1,384	364	776	670	452	17,566
	State	1,358	2,058	1,566	788	159	85	468	0	6,482
	Local	5,819	1,745	1,374	596	205	691	202	452	11,084
1960	Federal	685	137	58	978	472	173	5,898	284	8,685
	State-Local	18,719	9,428	4,404	3,235	559	1,857	1,189	858	40,249
	State	3,396	6,070	2,221	1,604	232	245	842	8	14,678
	Local	15,323	3,358	2,183	1,571	327	1,612	347	850	25,571
1970	Federal	3,053	319	2,837	1,830	2,089	409	8,737	1,051	20,325
	State-Local	52,718	16,427	14,680	7,863	1,805	4,494	2,732	2,138	102,857
	State	13,780	11,044	8,203	4,002	786	688	2,158	23	40,684
	Local	38,938	5,383	6,477	3,861	1,019	3,806	574	2,115	62,173
1977	Federal	7,835	265	14,904	3,733	3,775	1,343	20,580	2,212	54,647
	State-Local	102,780	23,058	34,529	17,542	5,497	10,445	7,939	3,377	205,167
	State	27,073	13,853	22,646	8,622	2,587	1,569	3,083	167	79,600
	Local	75,707	9,205	11,883	8,920	2,910	8,876	4,856	3,210	125,567

SOURCE: U.S. Department of Commerce, Bureau of Economic Analysis; U.S. Bureau of the Census; U.S. Office of Management and Budget. All values are current.

Appendix C
Provisions for the Distribution of Powers in the U.S. Constitution

I. Federal Constitutional Provisions Specifically Guaranteeing or Limiting State Powers*

Guarantees	Limits
A. State Integrity and Sovereignty	
No division or consolidation of states without state legislative consent (IV-2)[a]	States cannot enter into treaties, alliances, or confederations (I-10)
Republican form of government (IV-2)	No separate coinage (I-10)
Protection against invasion (IV-2)	No grants of titles of nobility (I-10)
Protection against domestic violence on application of proper state authorities (IV-2)	No interstate or foreign compacts without congressional consent (I-10)
Powers not delegated to the U.S. by Constitution, nor prohibited by it to the states, are reserved to the states (Amend. X)	Constitution, all laws and treaties made under it to be the supreme law of the land, binding on every state (VI)
States cannot be sued by citizens of another state or a foreign nation (Amend. XI)	Slavery forbidden (Amend. XIII)
	All state legislative, executive, and judicial officers and state representatives in Congress to be bound by Constitution (VI)
	No abridgment of privileges and immunities of U.S. citizens (Amend. XIV)
	Reduction of representation in House of Representatives for denial of franchise to citizens (Amend. XIV)
	No payment of debts incurred in aid of insurrection or rebellion against U.S. or for emancipation of slaves (Amend. XIV)
	No abridgment of right to vote on account of race, color, or previous condition of servitude (Amend. XV)
	Popular election of senators (Amend. XVII)
	No abridgment of right to vote on account of sex (Amend. XIX)
	No poll taxes in federal elections (Amend. XXIV)
	Voting age set at 18 years (Amend. XXVI)

* SOURCE: D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 42–43 (3rd ed., New York, Thomas Crowell Co., 1984) (reprinted by permission of Harper & Row, Publishers Inc.).

[a] Numbers in parentheses refer to the article and section of the Constitution containing the provision.

Guarantees (cont.)	Limits (cont.)
B. Military Affairs and Defense	
Power to maintain militia and appoint militia officers (I-8, Amend. II)	No letters of marque and reprisal (I-10) No maintenance of standing military forces in peacetime without congressional consent (I-10) No engagement in war without congressional consent, except for the purpose of repelling invasion (I-10)
C. Commerce and Taxation	
Equal apportionment of direct federal taxes (I-2, 9) No federal export duties (I-9) No preferential treatment for ports of one state (I-9) Reciprocal full faith and credit among states for public acts, records, and judicial proceedings (IV-1) Reciprocal privileges and immunities for citizens of the several states (IV-2) Intoxicating liquor may not be imported into states where its sale or use is prohibited (Amend. XXI-2)	No levying of duties on vessels of sister states (I-9) No legal tender other than gold or silver (I-10) No impairment of obligations of contracts (I-10) No levying of import or export duties without consent of Congress except the levying of reasonable inspection fees (I-10) No tonnage duties without congressional consent (I-10)
D. Administration of Justice	
Federal criminal trials to be held in state where crime was committed (III-2)[b] Extradition for crimes (IV-2) Federal criminal juries to be chosen from state and district in which crime was committed (Amend. VI)[b] Federal judicial power to extend to controversies between two or more states; between a state and citizens of another state when state is plaintiff, and between foreign nation or its citizens, with original jurisdiction vested in the Supreme Court (III-2)	No bills of attainder (I-10) No ex post facto laws (I-10) Supreme Court has original jurisdiction over all cases in which a state shall be a party (III-2) Judges in every state bound by Constitution and all laws and treaties made under it, notwithstanding the constitutions or laws of any state (VI) No denial of life, liberty, or property without due process of law (Amend. XIV) No denial of equal protection of state laws to persons within its limits (Amend. XIV)

[b] This provision insures the integrity of the state's common law in federal cases.

II. Federal Constitutional Provisions Specifically Giving the States a Role in the Composition of the National Government*

Guarantees	Limits
A. National Legislature	
Members of House of Representatives chosen by voters, those qualified to vote for most numerous house of state legislature in the several states (I-2)[a]	Representatives must be 25 years old and citizens of the U.S. for 7 years (I-2)
At time of election, representatives must be inhabitants of states from which they are elected (I-2)	Senators must be 30 years old and citizens of the U.S. for 9 years (I-3)
Representatives to be apportioned among the states according to population every 10 years (I-2)	Congress may make or alter regulations as to the times, places, and manner of holding elections for senators and representatives (I-4)
State executive has authority to fill vacancies (I-2)	Each house shall be the judge of the elections, returns, and qualifications of its own members, shall punish its members for disorderly behavior, and shall expel a member by two-thirds vote (I-5)
Each state shall have at least one representative (I-2)	Basis for apportionment of representation in House of Representatives may be reduced proportionate to state deprivation of the right to vote of otherwise qualified citizens (Amend. XIV-2)
Senate shall be composed of two senators from each state (I-3) who are chosen by the people qualified to vote for the most numerous house of the state legislature (Amend. XVII), with vacancies to be filled as prescribed by state legislation (Amend. XVII)	Without express consent of two-thirds of Congress, states cannot be represented by persons who have taken an oath to support the Constitution and have since engaged in insurrection (Amend. XIV-3)
At time of election, senators must be inhabitants of the states from which they are chosen (I-3)	
Times, places, and manner of holding elections for senators and representatives shall be prescribed for each state by its legislature (I-4)	
No state to be deprived of equal representation in the Senate without its consent (V)	
B. National Executive	
To be selected by the electors of the several states which each state allotted a number of electors equal to the total number of its senators and representatives (II-1)	Congress may determine the time of choosing electors and a uniform day on which they shall cast their votes (II-1)

* SOURCE: D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 44–45 (3rd ed., New York, Thomas Crowell Co., 1984) (reprinted by permission of Harper & Row, Publishers Inc.).

[a] Numbers in parentheses refer to the article and section of the Constitution containing the provision.

Guarantees (cont.)	Limits (cont.)
Each state to have one vote if presidential election is decided in House of Representatives (II-1)	
Approval of presidential appointees by the Senate as Congress shall prescribe (II-2)	
C. Amendment of Constitution	
Amendments must be ratified by three-fourths of the states (V)	
Amendments must be proposed by two-thirds of the states (V)	
D. Voting Rights	
	Cannot be denied or abridged on grounds of race, color, or previous condition of servitude (Amend. XV-1)
	Cannot be denied or abridged on account of sex (Amend. XIX-1)
	No poll tax may be levied as requirement to vote in federal elections (Amend. XXIV)
	Voting age set at 18 years (Amend. XXVI)
E. Foreign Affairs	
Treaties must be ratified by two-thirds of Senate (II-2)	Treaties binding on states as supreme law of the land (VI)
Appointment of foreign service officers subject to Senate confirmation (II-2)	
F. Military Affairs and Defense	
Power to appoint the officers of and train the militia when not in federal service reserved to the states (I-8)	Congress may provide for organizing, arming, and disciplining the militia when it is not in federal service and for governing it when it is in federal service (I-8)

KEY (to the table on p. 135)

\+ signifies that the government indicated is specifically given power to act in the field indicated

– signifies that the government indicated is specifically prohibited from acting in the field indicated

The absence of any symbol means that the government in question is neither specifically empowered to act nor specifically prohibited from acting in that field. In general, the Federal Government may not act in a field in which it is not (expressly or impliedly) empowered to act, whereas state governments may act in non-prohibited fields subject to pre-emption and implied limitations.

III. The Constitutional Distribution of Powers

Powers Granted The government indicated *may*	Federal	State
General		
Provide for the general welfare	+	+
Tax and borrow money	+	+
Protect public health, safety and morals	+	+
Take private property for public use	+	+
Commerce		
Regulate interstate, Indian and foreign commerce	+	
Regulate intrastate commerce		+
Charter banks and other corporations	+	+
Establish uniform laws on bankruptcies	+	
Coin money, regulate its value and punish counterfeiting	+	
Grant patents and copyrights	+	
Establish standards of weights and measures	+	
Establish post offices and post roads	+	
Defense and Foreign Affairs		
Conduct foreign relations	+	
Declare war	+	
Maintain an army and navy	+	
Provide for the militia	+	
Grant letters of marque and reprisal	+	
Define and punish piracies and felonies on the high seas and offenses against international law	+	
Law and Government Affairs		
Establish and maintain courts	+	+
Make and enforce laws	+	+
Establish uniform laws of naturalization	+	
Govern territories	+	
Regulate and dispose of public lands	+	+
Conduct elections		+
Establish and regulate local governments		+
Alter state constitution and government		+
Ratify amendments to the Constitution		+

Powers Prohibited The government indicated *may not*	Federal	State
Commerce		
Tax exports	–	–
Prefer one state over another in regard to commerce	–	
Impose nonuniform duties, imposts and excises	–	
Tax imports		–
Pass laws impairing the obligations of contracts		–
Coin money or emit bills of credit		–
Defense and Foreign Affairs		
Enter into treaties, alliances or confederations		–
Grant letters of marque or reprisal		–
Law and Government Affairs		
Impose direct taxes not proportional to population and states	–	
Deprive states of due representation in Congress	–	
Change state boundaries without consent of states concerned	–	
Violate the federal Constitution or obstruct federal law		–
Enter compacts with other states without consent of Congress		–
Rights		
Violate guarantees of the Bill of Rights	–	
Suspend writ of habeas corpus except when in case of rebellion or invasion, public safety may require it	–	
Deprive any person of life, liberty, or property without due process of law	–	–
Grant titles of nobility	–	–
Pass bills of attainder or ex post facto laws	–	–
Permit slavery	–	–
Deny persons equal protection of the laws	–	–
Prevent people from voting because of race, color or sex		–
Impose poll taxes		–
Abridge the privileges and immunities of citizens of the United States		–

Appendix D

The Development of American Federalism

I. The Stages of American Federalism

American federalism has gone through several stages. The first was classic confederation. For all intents and purposes, the colonies united on a confederative basis even before the Declaration of Independence through the continental congresses of the early 1770's. This confederation remained in operation until the inauguration of the new federal government in 1789. After 1781, it functioned under the Articles of Confederation, the first U.S. Constitution.

From 1789 until the end of the Reconstruction period following the Civil War (1877) and the adoption of the fourteenth and fifteenth amendments, the federal system can be described as one in which the principal role of the Federal Government was to be the servant of the states, particularly in the areas of foreign affairs and defense, the advancement of commerce, and national development, including westward expansion. In some respects, this meant that the Federal Government tended to defer to state action, but at times it was quite activist itself in a manner consonant with the principle that it was serving the states. Thus, in matters of individual rights, the Federal Government deferred to the states, while in matters involving territorial expansion and the promotion of a common market, it took a very activist role on behalf of the states. In some areas, such as infrastructure development, federal-state cooperation was the norm from the first, but again with that servant-of-the-states orientation.

The change wrought by the Civil War, which was crystallized through the adoption of the fourteenth and fifteenth amendments, was to give the Federal Government greater importance in defining common national goals, particularly in the area of individual rights. The change was in many respects a subtle one, at least at first. Thus, while Americans shared a common national identity from the first, the sense of national citizenship developed only as a result of the Civil War and its aftermath, when the Federal Government was actually empowered to protect the rights of U.S. citizenship within the states – the foundation for later federal intervention in the civil rights field.

In the years from the end of Reconstruction to the historical end of the nineteenth century at the time of World War I, little visible change occurred in the character of American federalism, even while the groundwork for decisive changes was being laid. While the role of the Federal Government expanded, it did so less rapidly than did the roles of state and local governments and, indeed, the two spheres were more separated than at any other time in American history. Federal encroachment on the states was of a negative kind, that is to say, the U.S. Supreme Court used the new powers granted to the Federal Government by the Civil War amendments to develop a framework for protecting corporate rights against state regulatory action. While this ap-

proach was to be abandoned in the next generation, it did provide the basis for later federal expansion, both by limiting the states' ability to respond to the problems of industrialization as they wished and by establishing doctrines of federal intervention and even pre-emption which were later transferred to other spheres.

A new phase in the history of American federalism can be said to have begun in 1913 with the election of Woodrow Wilson to the presidency and the introduction of his "New Freedom" program. Wilson effectively inaugurated the era of twentieth century cooperative federalism by synthesizing the two approaches that had been developed in the nineteenth century. The Federal Government undertook new cooperative programs, both in response to state demands (that is to say, as the servant of the states) and in line with congressionally determined national policies that were enunciated as such. The key concept was partnership, linking the states and the Federal Government in joint endeavors to pursue common and shared goals. Cooperative programs were developed in the fields of agriculture, highway construction, education, banking regulation, and regulation of public utilities such as railroads, all fields in which there was wide mutual agreement on both means and ends.

Cooperative federalism was additionally and substantially strengthened as a result of the New Deal. Indeed, while Franklin Delano Roosevelt was urged by certain of his advisors to take advantage of the crisis conditions created by the Great Depression to expand unilateral federal control in many fields, he preferred to build upon the accepted cooperative relationship, only to extend it into new fields of social policy and to expand the initiatory role of the Federal Government. Even there, most of what he initiated followed upon demands expressed countrywide, often by or through the states themselves.

This kind of cooperative federalism reached its apogee in the 1950's when it became widely accepted in theory as well as in practice as the proper form of federal relationship for the United States. But even as it was being accepted in theory, it was beginning to be unintentionally undermined in practice by a series of developments which had unanticipated consequences. The most visible of these were the increased federal role in fields of economic policy and income maintenance, which gave the Federal Government two domestic responsibilities of major proportions for which it became the primary custodian. In both areas, the role of the Federal Government was, if not unilateral, increasingly so pre-eminent as to make state actions clearly secondary and certainly not joint.

While there had always been unilateral federal programs, even in the domestic sphere, such as the postal service, in the case of most of them it was possible to argue that the Federal Government was playing its servant-of-the-states role. This was especially so in the days of political patronage when appointment to locally based federal offices was an accepted prerogative of the local leadership of the political party in control of the White House. The introduction of a strict merit system had, as an unanticipated consequence, a strengthening of the autonomous powers of the Federal Government in such fields.

While the issue was not entirely clearcut in the case of these two new functions, and an argument could be made in the direction of the servant-of-the-states role even for them, the massiveness of their scope and the fact that the states were excluded from representation in the organs of the federal executive branch which actually made economic policy, meant that federal action acquired an independence of its own that went beyond any simple application of that theory.

A further development involved the cold war and the Vietnam intervention which brought the development of what came to be called the "imperial presidency," as a result of which the White House acquired great powers vis-à-vis Congress and the other institutions of American government. While the direct impact of the imperial presidency on federalism was both limited and mixed, indirectly it brought a reconceptualization of the role of executive leadership in the United States which affected governors and mayors as well in a way that did not so much affect the balance of federal-state-local relations but shifted the key decision-making points within the overall governmental system to executives at the expense of legislatures.

Finally, there was a great expansion of the number and variety of federal aid programs in the 1950's on a new basis. Up until that decade, federal aid had been confined to a relatively small number of large grant-in-aid programs which not only had widespread support countrywide but actually reflected public demands expressed through the states themselves. The new programs were much more limited in scope, focusing on very specific functions. Instead of reflecting widespread, deeply rooted common interests, they were the products of the concentrated pressure of small constituencies.

In retrospect, the seemingly modest changes of the 1950's represented the beginning of a change in the scope of federal aid to states and localities and the whole intergovernmental system, in many respects far more so than the New Deal. Whereas the latter had continued the old tradition of a few select programs of clearly nationwide scope and interest, only changing them from infrastructure to social programs, the former introduced the Federal Government into active involvement in a wide variety of areas where the federal presence had not been felt up to that time. Moreover, these new federal aid programs involved far more direct federal-local activity than ever before and introduced shifts in the formulary base that reduced state and local commitments while increasing the federal share.

Most important of all, however, was the introduction of the principle that any field of governmental activity could benefit from a federal aid program provided that there was some interest group strong enough to make its weight felt in Congress, whether or not the states were interested in that particular program. The corollary of this was to prove even more far-reaching. Since the programs often had very narrow constituencies, the federal agency established to administer them was charged with the responsibility of promoting their adoption in the states and localities (which, as before, had to decide, in the case of each new program, whether or not to accept federal funds and participate in the programs) and not simply respond to state and local initiatives as in the

past. No longer were the federal field people "cooperators," as in the agricultural programs. They were salesmen who had to create a demand which they could then fill.

Perhaps the best example of this was to be found in the urban renewal program. Initially adopted as a result of the pressures of a very narrow constituency, it was greeted with great lack of interest and even hostility on the part of local governments around the country. Thus, throughout the 1950's the Urban Renewal Administration field staff was engaged in selling the program, often by compromising the federal standards with regard to housing and building codes that the localities were supposed to meet. In the end, they were successful in getting the program established and in undertaking many of the experimental efforts that reformers at that time viewed as being useful in urban rehabilitation. A decade or so later, the very same program was being attacked by all comers as having contributed greatly to the destruction of the inner city, having favored industrial and commercial developers at the expense of the poor, and as "black removal."

On the other hand, the 1950's saw the establishment of another principle as well, one which strengthened federalism, namely that domestic programs in the United States would under most circumstances be intergovernmental. Thus, even programs started as unilateral federal ones such as the U.S. Corps of Engineers flood control projects and the regulation of atomic energy were transformed during the 1950's into programs involving intergovernmental sharing. This, too, was to be a continuing pattern. Had it not occurred, it is very likely that the great growth in federal intervention of the 1960's and 1970's would have been more unilateral in character and would have virtually eliminated the states as actors in the federal system.

Along with the foregoing developments came the first mechanism for systematizing intergovernmental collaboration. One of President Eisenhower's first acts upon his accession to office in 1953 was to appoint a Commission on Intergovernmental Relations headed by Meyer Kestenbaum whose report laid the foundations for the theory of intergovernmental cooperation that lasted until the middle of the next decade. Toward the end of his administration, the President, unsatisfied with the progress being made in sorting out federal, state, and local functions, which he saw as the only way to strengthen federalism, appointed a Joint Federal-State Action Committee to speed the process. While unable to sort out functions and return some to the states as Eisenhower had hoped, it did stimulate the establishment of a permanent Advisory Commission on Intergovernmental Relations, a federal-state-local body which was to become influential through the 1960's and 1970's in shaping the procedures of intergovernmental relations. To a degree, it too continued to pursue the will-o'-the-wisp of separating functions, but in fact no way was found to do so except through undesired centralization, so intergovernmental sharing continued to increase.

The Kennedy years did not bring any new departures but when Lyndon Baines Johnson launched his Great Society programs, he included a "creative Federalism" dimension as an important part of them. President Johnson's

"Creative Federalism" reflected the new theory of intergovernmental relations which had grown up in response to the conventional theory of the 1940's and 1950's. While the conventional theory saw intergovernmental cooperation as necessary, it still was viewed as a necessary evil with separation of functions still to be preferred. The new theory viewed cooperative federalism as a positive good, a way to better mobilize the country's resources to serve common needs.

As long as the conventional theory prevailed, new federal starts always had to be justified to legitimize federal intervention in state and local affairs. With the acceptance of the new theory, the federal role was considered legitimate in and of itself as long as Congress believed it to be so. Since the U.S. Supreme Court had deferred to legislative prerogatives in such matters since the 1930's, this eliminated the last barriers and restraints on Congressional action in any field it chose. President Johnson strongly endorsed this approach and built his Great Society programs accordingly.

This, in turn, led to yet another change. New federal programs were no longer initiated by overwhelming state and local demand, nor even by narrow interest groups that developed out at the grassroots, but by Washington bureaus responding to what they believed to be real needs but for which they had to stimulate demand. In short, the bureaus had reached the point where they were capable not only of self-perpetuation but self-generated expansion, by dominating Congress as well as the states and localities.

For the first time, the new program represented national efforts to impose national goals nationwide rather than combined efforts to develop nationwide goals and then appropriate programs to meet them. Since Washington-defined national goals did not always square with those of the states and localities, the new federal programs relied heavily upon the established principle that the Federal Government could attach conditions to its grants to influence the adoption of those goals. Indeed, these conditions became more extensive and demanding and their implementation more coercive. In all too many cases, the theory of intergovernmental cooperation became a cover for federal efforts at coercion. Indeed, one could almost develop a proposition defining the situation. The more the program was born in Washington without state and local consent or interest, the stronger the coercive measures that had to be used to gain state and local compliance.

While the Great Society did introduce a whole new dimension to American government, it also led to a backlash whereby the states and localities reasserted themselves and the general public came to the conclusion that they should. In part, this was a result of the disappointments which came as a result of the overpromising built into many Great Society programs. In part, it was the beginning of an understanding that the attempt to centralize decisions in Washington just did not work in a country the size of the United States.

Richard M. Nixon was able to capitalize on this discontent in his presidential race, and shortly after assuming office he proclaimed a "New Federalism" whose avowed goal was to reverse the trend of 190 years of centralization and so turn powers and functions back to the states and localities. The New Feder-

alism rhetoric was to continue to stress this theme throughout the Nixon years, but the reality was somewhat mixed. On one hand, the Nixon administration did try to increase state and local discretionary powers over federal aid funds through general and special revenue sharing and block grants; on the other, it tried to concentrate power in the White House at everyone's expense.

General revenue sharing was designed initially to give the states and localities funds on an entitlement basis which they could spend for almost any purpose they chose, provided they filed appropriate plans. However, Congress, always reluctant to appropriate funds without maintaining some control over their use, added new kinds of general conditions. Because revenue sharing funds were not segregated in particular programs but were mixed with state and local general funds, the Federal Government could apply its conditions throughout. The end result was that general revenue sharing actually opened the door to greater federal control over all aspects of state and local government.

Special revenue sharing was designed to combine major grant categories into wide program areas which, while targeted at specific fields such as law enforcement, health, manpower and/or employment, would grant the states and localities great discretion within those broad fields. Here, too, some greater discretion was gained, but Congress also exacted its price. Block grants represented the combination of very specific categorical programs into what could be called broader categories, not quite as broad as special revenue sharing. In part, these, too, had their desired effect, but Congress has been unable to restrain itself from introducing recategorization both within block grants by the back door or in addition to them.

Beyond that, President Nixon soon made it clear to all who observed him closely that what he was seeking was a form of decentralization, not federalism. That is to say, he wanted to reserve to Washington, and indeed to the White House, the decision as to which governments should be empowered to do what, and the criterion he intended to apply was a simple one; namely, what was politically profitable to the President. Thus, a program that offered potential political profit would be directed from Washington; one which looked like it would bring only disadvantages to the President would be passed over to the states or localities.

The end results of the Nixon years were mixed. On one hand, the states and localities definitely reasserted themselves and capitalized on both the Nixon rhetoric and certain programmatic and administrative changes to do so, not the least of which were their own increased efforts. On the other hand, a constellation of forces combined to bring about the enactment of a whole spate of regulatory legislation, particularly but not exclusively in the environmental field, which had the effect of extending and deepening the federal regulatory role and reducing the states in certain respects to doing the bidding of the Federal Government with a minimum of discretion.

Watergate brought a decisive turn in federal-state-local relations as in so many others. The collapse of the Nixon administration, the decline in prestige of the Presidency and the Federal Government as a whole, and the coming into

office of Gerald Ford, a President who saw his role as binding up the nation's wounds rather than exerting presidential power in new directions, all served to transfer initiative as well as power from Washington to the states and localities, thereby giving them additional self-confidence, a commodity that had been in short supply as the country (including its governors and mayors) accepted the doctrine that "Washington knows best" and must be the source of all initiative. The energy crisis of the winter of 1973–74 typified all of this. With the Nixon administration in disarray, it fell to the states to take the initial steps toward securing fuel supplies for the American people. While the Federal Government later stepped in, once again it reverted to its more traditional role of backstopping and supporting state efforts rather than being the initiator.

Jimmy Carter, the first governor to win a presidential nomination since 1948, campaigned on the principle of strengthening state and local government more or less in the manner of his two predecessors. Upon assuming office, he strengthened the Office of Intergovernmental Relations within the White House, appointing Jack Watson, one of his trusted aides, as Assistant to the President for Intergovernmental Relations, one of the presumably equal Assistants to the President for different fields of activity. Watson defined his task, first and foremost, as one of trouble-shooting in the executive branch of the Federal Government on behalf of state and local goverments. This included trying to simplify the administration of federal aid programs so that federal requirements would be less burdensome on the states and localities and red tape would be reduced to a minimum. The years of the Carter administration saw some modest success in this direction and Watson himself turned out to be one of Carter's most successful appointments, ending as White House chief of staff.

Other efforts on the part of the Office of Intergovernmental Relations to influence the shape of federal domestic policies were less successful. President Carter himself pursued a somewhat unclear course with regard to intergovernmental relations as he did in so many other areas. While at first he indicated an interest in strengthening state roles, he soon returned to the pro-city bias which had dominated Washington for more than a decade, proposing that the states undertake to administer a few locally-oriented programs in return for their acceptance of federal review of their constitutional frameworks, an idea rejected out of hand. One of the last acts of his administration was to fight to secure the elimination of the states from general revenue sharing, a program which had been proposed originally as entirely state-oriented.

The biggest "plus" for the states in the Carter years was the sheer ineptness of his administration, which gave them greater opportunities to assert themselves and made it necessary for them to do so. As a result, a whole generation of governors, raised on the notion that the federal system was a hierarchy in which the states, as middlemen, had to await directions from the "top," began to discover that they did not have to wait for anyone outside of their states' own political systems and could act on their own if they could mobilize popular and legislative support within their states. They proceeded to do so, not on-

ly in matters of traditional state concern, such as trucking, but in new fields, such as resettlement of refugees from southeast Asia and Latin America.

II. New Dimensions of Federal Intervention

While the traditional fields of intergovernmental relations were zigzagging toward a new balance, other major developments influenced the course of American federalism. During the first half of the post-war generation, from 1947 to 1964, the overall growth of the Federal Government was essentially a response to the cold war. Federal growth was primarily in matters affecting national defense, so that domestic activity was left to the states and localities even where new federal programs were initiated.

For the rest of the generation, from 1964 to 1977, federal growth came primarily through its assumption of income-maintenance functions which, while important even in the earlier half, assumed mammoth proportions beginning with the Great Society years. Based on a combination of unanticipated developments in the Social Security system and a new national policy to bring individual income maintenance into federal hands, the Federal Government became a source of support for tens of millions of Americans and income maintenance became the largest single item in the federal budget. The impact of all of this on the federal system is not easy to gauge. On one hand, income maintenance payments in most fields do not bring with them federal control involving, as they do, transfers of funds which are then freely spent by the recipient. On the other hand, the fact that so many Americans have come to expect checks from Washington is an additional force diminishing the importance of state and local government in the eyes of the citizenry.

The increase in federal regulatory activity is another dimension that is having its effects on the federal system, unclear as those effects may still be. In the first half of the post-war generation, federal regulatory activities were primarily directed toward regulation of the economy to promote prosperity and full employment. Beginning with the Great Society, regulation was extended to environmental, consumer, and worker protection, which soon became massive and, in some respects, far outweighed the impact of federal regulation in the economic sphere. In many cases, this regulation was introduced in cooperation with the states and localities because it involved fields in which state powers traditionally had been pre-eminent, but, as indicated above, this collaboration was often more coercive than cooperative in character.

A third area of great significance was the civil rights revolution which brought the Federal Government more fully into the picture in many fields of everyday activity formerly left to the states and localities, in the name of protection of the rights of individual Americans. This intervention, initially concentrated in the southern states and directed against overt efforts at racial discrimination, soon spread to the North as well, where more subtle discriminatory actions also came under federal scrutiny. Federal intervention was most evident in the realm of public accommodations, school integration, and protec-

tion of voting rights. Secondary federal efforts were launched in the housing and job discrimination fields. Moreover, general revenue sharing gave the Federal Government an opportunity to intervene in almost every aspect of state and local government-supported activities. All this created a federal presence where none had existed before.

The situation was particularly extreme with regard to voting rights, where what initially began as an effort to prevent southern states from utilizing state law to keep black citizens from the polls shifted to one in which the Federal Government began a massive redefinition of what constitutes equal access with regard to age, language, literacy and residence, as well as race, for the whole country. The end result has been to impose a wide-ranging set of federal standards on the states in the electoral field. More recently, these standards have been extended to the internal activities of the political parties as well, often in opposition to state law. The greatest problem inherent in all of this is not in the regulations themselves, which probably have the support of the majority of Americans, but in the consequences they may have in bringing about a centralization of the political parties in the United States, whose non-centralized character as coalitions of state parties has been one of the major bulwarks of governmental non-centralization in the United States, a pillar in the maintenance of American federalism.

Federal intervention in the pursuit of school integration was almost as extreme. In city after city, North and South, federal district courts assumed de facto control over local school affairs in an effort to break down neighborhood patterns of de facto segregation arising out of patterns of local residence, often with much disruption and limited success. These efforts were restrained only by the reluctance of the U.S. Supreme Court to allow lower federal courts to decree integration across school district boundaries.

III. The Role of the U.S. Supreme Court

Undergirding all of these federal efforts has been the United States Supreme Court which, from the time that Earl Warren became Chief Justice in 1953 until his retirement in 1969 or shortly thereafter, consistenly supported the expansion of federal powers on behalf of all those causes which the Court's majority considered intrinsically worthwhile with minimum regard for questions of federalism or constitutional balance. The Court itself pioneered in most of these fields, beginning with its series of civil rights decisions, continuing through the reapportionment decisions which gave the federal courts power to override even the voters of a particular state to assure Court-defined equal apportionment, to decisions in the realm of criminal rights and individual liberties which led to the establishment of national standards in the field of criminal rights, and to the dropping of almost all possibility for government-imposed restrictions in fields where personal privacy could be considered a major factor.

While, for the most part, these actions were not designed to be centralizing,

centralizing tendencies were built into them. At the very least, they radically narrowed the discretionary powers of the states in areas which had traditionally been theirs, and frequently mandated new standards to be enforced by the courts or even the Congress or the President of the United States, which all governments within the Union had to accept. Most important of all, because these decisions tended to ignore the question of federalism and treat the constitutional division of powers between the federal government and the states as irrelevant, the Court effectively weakened the constitutional boundaries which are the hallmark of a proper federal system.

In the last years of the Warren Court, the role of principal defender of federalist comity fell to Associate Justice Hugo Black, the noted civil libertarian not usually associated in the public mind with pro-federalist positions but who saw a proper federal-state balance as a constitutional necessity. He enunciated the doctrine of "our federalism" which has served the court as a basis for judgment in this field since the early 1970's.

With the retirement of Earl Warren and the appointment of Warren Burger as Chief Justice, the Court stopped its extreme centralizing tendencies in most respects. The appointment of William Rehnquist to the Court, who rapidly became the first major intellectual force to speak consistently on behalf of federalism since the retirement of Felix Frankfurter, strengthened the hands of those concerned with federalist comity. As a result, the trend toward centralization was actually reversed in a number of significant areas. The Rehnquist-influenced Court actually began to return to federal principles as the basis for decision-making. *National League of Cities v. Usery*[1] was the landmark case in this regard, where not only did the Court strike down Congressional effort to determine wages and hours of state and local employees, but, in doing so, enunciated a clear doctrine of federalism based upon the tenth amendment and the reserved powers of the states. Ironically, *Usery* was overruled in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*[2] on the grounds that the attempt to draw the boundaries of state regulatory immunity in terms of the "traditional governmental functions" test established in *Usery* "is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest."[3] *Garcia* was decided by a 5 : 4 majority, and the dissenters, including Justice Rehnquist, suggested that under a reconstituted Court the principle established in *Usery* might well be restored.

Through all of this, negative public reaction to the interventionist federal government was building up. The polls told the story. According to the Advisory Commission on Intergovernmental Relations annual surveys, public confidence in the Federal Government began to decline in the early 1970's while positive evaluation of local and state governments has grown apace. The over-

[1] 426 U.S. 833 (1976).
[2] No. 82–1913, slip op. (U.S. Sup. Ct., 19 Feb. 1985) (Burger, C.J., O'Connor, Powell, Rehnquist, JJ., dissenting).
[3] *Id.* at 3.

whelming public perception of the Federal Government is that it is too big, too cumbersome, that whatever it touches turns sour, that it is basically incapable of dealing with the country's problems. Local governments, on the other hand, are given high marks, and even the states, traditionally the odd men out in such matters, have grown in stature in the eyes of the public.

Ronald Reagan thus fully reflected the opinion of the majority of Americans when he included in his platform the idea of trimming down the Federal Government and returning functions to the states and localities. Whether his ideas can be translated into practice and whether it is indeed possible to turn back functions to the states and localities remains to be seen. As president he will undoubtedly be tempted by the same factors which have influenced his four predecessors, each of whom in turn proclaimed his devotion to federalism and strong state and local governments, but who, for political reasons if not for others, still tended to act to concentrate power wherever and whenever he felt it necessary to do so. Nor is it at all certain that public responses to the pollsters reflect the opinions of the same people when matters come down to specific programs.

At the same time, President Reagan has already introduced a new outlook in such matters simply by restoring the old vocabulary. Who would have expected the reemergence of phrases like "state sovereignty" a few years ago? Perhaps even more unexpected was the rapidity with which newspapers like the *Washington Post*, no particular friend of federalism in the recent past, quickly moved to respond to Reagan's frequent use of that phrase with an editorial indicating that "states' rights" were okay, but "state sovereignty" was beyond the pale. The rights and wrongs of the discussion are unimportant compared to the fact of the exchange itself. The reviving of this discussion not only demonstrates once again that the presidency is the bulliest pulpit in the United States, but that conceptualization is the first step in winning any battle.

Appendix E

The Articles of Confederation

To All to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.

"Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. 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 III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the Unit-

ed States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance in Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of

forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article – of sending and receiving ambassadors – entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever – of establishing rules for de-

ciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated – of granting letters of marque and reprisal in times of peace – appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such

lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective State – fixing the standard of weights and measures throughout the United States – regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated – establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office – appointing all officers of the land forces, in the service of the United States, excepting regimental officers – appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States – making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction – to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses – to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted, – to build and equip a navy – to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can

be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably ob-

served by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

Appendix F

Attitudes Toward Europe and the European Communities: The Level of Interest Displayed by European Citizens Toward the Uniting of Europe

I. Table 1: Support for Western European Unification 1952–1984

"In general, are you for or against efforts being made to unify Western Europe? If for, are you very much for, or only to some extent? If against, are you only to some extent against, or very much against?"

Table 1a: 1952–1981[1]

Very much for or to some extent for	B	DK	D	F	IRL	I	L	NL	UK	GR	EC[2]
	%	%	%	%	%	%	%	%	%	%	%
1952 September			70	60		57			58		
1962 Jan/Feb	65		81	72		60		87			(72)
1970 Feb/March	66		76	70		78	76	74			(74)
1973 September	60	45	78	68	52	70	80	73	37		63
1975 May	55	41	77	78	57	77	79	66	50		69
Oct/Nov	57	42	74	77	57	77	86	64	51		69
1978 Oct/Nov	69	48	78	80	69	86	74	83	63		75
1979 April	71	49	82	72	64	87	89	84	61		75
October	69	46	81	75	68	85	89	82	61		75
1980 April	67	39	80	75	60	83	86	76	59		73
October	65	48	79	69	59	81	84	79	63	59	72
1981 April	60	46	70	73	59	82	87	80	52	60	69
To some extent against or very much against											
1952 September			10	6		14			15		
1962 Jan/Feb	5		4	8		4		4			(5)
1970 Feb/March	5		5	8		5	4	10			(6)
1973 September	5	32	6	4	12	3	1	15	30		11
1975 May	3	30	3	5	15	3	3	8	22		9
Oct/Nov	4	34	5	4	12	4	1	7	23		9
1978 Oct/Nov	6	32	5	7	10	5	18	10	22		11
1979 April	7	31	7	10	11	4	7	8	20		10
October	8	38	7	10	14	5	8	11	23		12
1980 April	7	40	7	11	12	5	9	14	26		13
October	10	33	9	11	17	7	10	11	12	23	13
1981 April	9	34	13	11	23	11	7	13	29	25	16

Table 1b: 1973–1984

	B	DK	D	F	IRL	I	L	NL	UK[1]	GR	EC[2]
Sept. 1973	%	%	%	%	%	%	%	%	%	%	%
Very much for	22	17	49	23	21	34	47	34	14	:	30
To some extent for	38	28	29	45	31	36	33	39	23	:	33
To some extent against	3	14	4	3	8	2	1	8	15	:	6
Very much against	2	18	2	1	4	1	–	7	15	:	5
Don't know[3]	35	23	16	28	36	27	19	12	33	:	26
Total	100	100	100	100	100	100	100	100	100	:	100
Index[4]	3.24	2.56	3.50	3.25	3.07	3.41	3.57	3.15	2.53	:	3.19
1975–81 (9 surveys)										a	
Very much for	23	15	37	24	22	38	45	33	22	34	29
To some extent for	41	30	40	51	40	44	39	43	36	28	42
To some extent against	5	18	6	6	10	5	7	7	13	10	8
Very much against	2	17	2	2	4	1	2	4	10	10	4
Don't know[3]	29	20	15	17	24	12	7	13	19	18	17
Total	100	100	100	100	100	100	100	100	100	100	100
Index[4]	3.20	2.53	3.31	3.17	3.05	3.34	3.37	3.21	2.85	3.03	3.17
Apr. & Oct. 1982											
Very much for	22	12	32	26	16	32	38	28	20	33	27
To some extent for	42	30	46	52	40	46	40	47	40	29	45
To some extent against	7	19	8	6	11	6	9	10	15	7	9
Very much against	7	18	3	1	4	1	2	5	6	6	3
Don't know	27	21	11	15	29	15	11	10	19	25	16
Total	100	100	100	100	100	100	100	100	100	100	100
Index[4]	3.16	2.45	3.20	3.20	2.95	3.29	3.27	3.09	2.93	3.17	3.14
Apr. 1983											
Very much for	27	13	36	25	16	36	39	29	20	31	29
To some extent for	41	32	49	50	39	44	39	46	40	30	45
To some extent against	6	19	5	5	9	5	8	10	15	6	6
Very much against	1	18	1	1	4	1	3	5	5	6	3
Don't know	25	18	9	19	32	14	11	10	20	27	15
Total	100	100	100	100	100	100	100	100	100	100	100
Index[4]	3.25	2.48	3.30	3.20	2.98	3.34	3.27	3.11	2.93	3.17	3.18
Oct. 1983											
Very much for	23	12	34	29	21	35	47	33	29	40	31
To some extent for	48	27	42	50	41	45	32	39	41	29	44
To some extent against	7	20	6	7	7	5	9	9	9	5	7
Very much against	3	23	2	2	4	2	3	6	5	5	3
Don't know	19	18	16	12	27	13	9	13	16	21	15
Total	100	100	100	100	100	100	100	100	100	100	100
Index[4]	3.13	2.34	3.27	3.21	3.07	3.31	3.35	3.13	3.12	3.33	3.21
Mar.–Apr. 1984											
Very much for	20	11	27	29	17	28	43	30	17	28	25
To some extent for	47	25	45	52	41	49	39	51	45	29	46
To some extent against	9	20	10	6	9	7	6	7	16	11	10
Very much against	3	23	3	2	4	1	2	3	7	9	4
Don't know	21	21	15	11	29	15	10	9	15	23	15
Total	100	100	100	100	100	100	100	100	100	100	100
Index[4]	3.08	2.30	3.15	3.21	3.00	3.23	3.38	3.19	2.85	2.98	3.10

Footnotes to Table 1a

[1] The figures for 1952 come from the archives of the US Information Agency and those for subsequent years from surveys conducted on behalf of the EC Commission. The wording of questions was not always identical. Between 1952 and 1973 (inclusive) the results shown here for the UK related only to GB (N. Ireland excluded). For further details *see* R. INGLEHART, THE SILENT REVOLUTION: CHANGING VALUES AND POLITICAL STYLES AMONG WESTERN PUBLICS 344–46 (Princeton, Princeton U.P., 1977), and 10 EURO-BAROMETRE (Jan. 1979). On the 1962 survey, *see also L'Opinion publique et l'Europe des Six*, 1963 SONDAGES, No. 1 (Paris 1963) and EUROPA IN DER ÖFFENTLICHEN MEINUNG (Zentralarchiv für empirische Sozialforschung, Univ. of Cologne, Cologne, 1979). On the 1970 survey, *see also* LES EUROPÉENS ET L'UNIFICATION DE L'EUROPE (Brussels, EC Commission, 1972) and on the 1973 survey, *see* J. R. RABIER, L'EUROPE VUE PAR LES EUROPÉENS (Brussels, EC Commission, 1974).

[2] Weighted average. The figures in brackets relate to the six countries which were members of the Community before 1973. Greece is included from 1981.

SOURCE: 15 EURO-BAROMETRE 19–20 (Table 9) (June 1981).

Footnotes to Table 1b

[1] Excluding Northern Ireland in 1973.

[2] Weighted average.

[3] In 1973 and 1975 this question included a possible reply of "indifferent"; the percentages for this reply have been added to the "don't knows." The altered wording may partly explain the subsequent drop in "don't knows."

[4] "Very much for" = 4, "very much against" = 1; "don't knows" excluded.

[a] Only three surveys, the first in October 1980.

SOURCE: 21 EURO-BAROMETRE 30–31 (Table 14) (May 1984).

II. Table 2: Understanding Between the Countries of the European Community, 1977–1983

"In your opinion, over the last 12 months, has the understanding between the countries of the European Community (Common Market) in general increased, decreased, or stayed about the same?"

III. Table 3: General Attitude Toward Community Membership

"Generally speaking, do you think that (your country's) membership of the European Community (Common Market) is a good thing, a bad thing, or neither good nor bad?"

Table 2: Understanding Between the Countries of the European Community, 1977–1983

Country	B								DK								D								F							
Year & Month	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X
Increased*	21	27	10	11	8	11	11	18	19	16	11	9	11	12	9	13	26	33	17	28	10	12	12	11	24	23	16	16	11	14	9	9
Decreased	18	8	30	31	38	25	27	23	31	19	35	36	35	24	24	30	24	9	36	21	42	34	27	29	16	11	20	21	31	24	30	22
The same	34	35	32	37	32	38	36	38	40	43	35	40	40	50	49	43	36	37	28	37	36	39	48	44	46	46	47	52	43	50	46	56
No reply	27	30	28	21	22	26	26	21	10	22	19	15	14	14	18	14	14	21	19	14	12	15	13	16	14	20	17	11	15	12	15	13
Total	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
N	1006	1008	949	973	1210	1020	1038	995	992	1002	1006	1009	1211	995	1027	1000	999	1006	1004	962	1328	1012	1049	1058	1149	1194	991	1006	1199	939	1011	1002

Country	IRL								I								LUX								NL							
Year & Month	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X
Increased	42	46	23	26	19	22	17	21	35	33	19	21	10	12	11	10	28	27	19	23	8	12	11	14	14	13	10	10	8	7	9	7
Decreased	9	9	22	14	18	20	19	26	18	10	24	26	26	19	17	22	19	10	26	31	35	29	38	29	24	11	34	32	36	31	28	32
The same	38	31	44	46	44	46	42	41	22	25	41	35	36	44	46	47	41	53	45	42	40	50	43	52	48	54	46	47	41	50	50	49
No reply	11	14	11	14	19	12	22	12	25	32	16	18	28	25	26	21	12	10	10	4	17	9	8	5	14	22	10	11	15	12	13	12
Total	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
N	997	1005	1005	985	1181	1007	987	1002	1155	1030	1183	1070	1301	1025	1031	1033	344	291	300	500	399	300	300	304	943	913	1091	1011	1228	1056	998	1050

Country	UK								GR								EC[a]							
Year & Month	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X	1977 X-XI	1978 X-XI	1981 IV	1981 X	1982 IV	1982 X	1983 IV	1983 X
Increased	32	27	11	15	11	11	11	13	:	:	23	27	17	27	22	21	28	28	15	19	11	13	11	11
Decreased	17	17	51	34	39	35	25	23	:	:	9	11	13	9	7	14	19	12	33	26	34	27	25	25
The same	42	43	30	42	42	46	52	56	:	:	31	32	34	32	31	34	38	38	36	41	39	44	47	49
No reply	9	13	8	9	8	8	12	8	:	:	37	30	36	32	40	31	15	22	16	14	16	16	17	15
Total	100	100	100	100	100	100	100	100	:	:	100	100	100	100	100	100	100	100	100	100	100	100	100	100
N	1351	1403	1369	1395	1419	1335	1348	1277	:	:	1000	1000	1199	1000	1000	1000	8936	8788	9898	9911	11676	9689	9790	9725

Key

a Weighted average

* Expressed in %

SOURCE: 20 EURO-BAROMETRE A58–60 (Table 10) (Dec. 1983).

Table 3: General Attitude Toward Community Membership

	B	DK	D	F	IRL	I	L	NL	UK[1]	GR	EC[2]
Sept. 1973	%	%	%	%	%	%	%	%	%	%	%
Good thing	57	42	63	61	56	69	67	63	31	:	56
Neither good nor bad	19	19	22	22	21	15	22	20	22	:	20
Bad thing	5	30	4	5	15	2	3	4	34	:	11
Don't know	19	9	11	12	8	14	8	13	13	:	13
Total	100	100	100	100	100	100	100	100	100	:	100
Index[3]	2.64	2.13	2.66	2.64	2.45	2.78	2.70	2.68	1.97	:	2.52
1974–81 (16 surveys)										[a]	
Good thing	60	35	59	57	53	73	75	75	34	40	56
Neither good nor bad	21	26	25	28	22	16	15	14	22	26	23
Bad thing	4	29	6	7	19	4	4	4	37	21	13
Don't know	15	10	10	8	6	7	6	7	7	13	8
Total	100	100	100	100	100	100	100	100	100	100	100
Index[3]	2.66	2.06	2.59	2.54	2.36	2.73	2.70	2.76	1.97	2.21	2.47
Apr. & Oct. 1982											
Good thing	52	35	56	55	46	67	72	75	28	43	52
Neither good nor bad	24	29	30	29	28	19	20	15	28	30	26
Bad thing	6	26	7	8	20	5	4	5	38	13	14
Don't know	18	10	7	8	6	9	4	5	6	14	8
Total	100	100	100	100	100	100	100	100	100	100	100
Index[3]	2.55	2.10	2.53	2.50	2.27	2.69	2.70	2.74	1.90	2.36	2.42
Apr. 1983											
Good thing	62	35	61	53	45	70	72	77	28	42	53
Neither good nor bad	19	30	26	30	28	18	18	15	29	29	25
Bad thing	3	24	5	7	20	4	5	4	36	12	13
Don't know	16	11	8	10	7	8	5	4	7	17	9
Total	100	100	100	100	100	100	100	100	100	100	100
Index[3]	2.70	2.12	2.60	2.51	2.27	2.71	2.71	2.75	1.91	2.35	2.45
Oct. 1983											
Good thing	62	35	57	55	42	76	70	80	36	47	55
Neither good nor bad	19	28	24	29	26	17	16	10	30	30	24
Bad thing	5	26	9	9	25	5	6	4	28	12	13
Don't know	14	11	10	7	7	2	8	6	6	11	8
Total	100	100	100	100	100	100	100	100	100	100	100
Index[3]	2.66	2.10	2.53	2.49	2.18	2.70	2.73	2.81	2.09	2.40	2.47
Mar.–Apr. 1984											
Good thing	59	31	53	62	43	70	80	80	34	38	55
Neither good nor bad	25	30	31	27	27	20	14	13	30	35	27
Bad thing	7	29	5	4	23	3	3	3	30	18	11
Don't know	9	10	11	7	7	7	3	4	6	9	7
Total	100	100	100	100	100	100	100	100	100	100	100
Index[3]	2.58	2.02	2.54	2.62	2.22	2.71	2.80	2.79	2.04	2.22	2.48

[1] Excluding Northern Ireland in 1973 and 1974.
[2] Weighted average.
[3] "Good thing" = 3, "neither good nor bad" = 2, "bad thing" = 1; "Don't knows" excluded.
[a] Only three surveys, the first in October 1980.

SOURCE: 21 EURO-BAROMETRE 40–41 (Table 20) (May 1984).

IV. Table 4: Desire for Solidarity Between Member States of the Community and Readiness to Make Certain Personal Sacrifices

"If one of the countries of the EC other than your own finds itself in major economic difficulties, do you feel that the other countries, including your own, should help it or not? Are you, personally, prepared or not to make some personal sacrifice, for example paying a little more taxes, to help another country in the EC experiencing economic difficulties?"

Oct.-Nov. 1978	B	DK	D	F	IRL	I	L	NL	UK	GR	EC[2]
Should help country in difficulty (a)	76%	65%	63%	78%	85%	94%	75%	88%	70%		76%
Prepared to make personal sacrifices (b)	28	42	26	37	39	64	34	60	35		41
Ratio (b)/(a)	37	65	41	48	47	68	45	69	50		53
April 1981											
Should help country in difficulty (a)	54%	66%	62%	75%	79%	90%	82%	82%	67%	90%	74%
Prepared to make personal sacrifices (b)	20	42	28	28	42	69	54	48	36	56	40
Ratio (b)/(a)	37	64	45	37	53	73	60	58	54	62	54

This table, which gives the results for 1978 and 1981, also shows the relationship between the percentage of those who would accept certain sacrifices and those who are in favor of helping a country in difficulty. This relationship is a kind of coefficient of consistency, in each country, between replies given to a "difficult" question (making sacrifices) and an "easy" question (helping others). It will be noted that by and large this coefficient, which still has to be explained in cultural terms, is remarkably stable.[1]

[1] Leaving aside Luxembourg because of the size of the sample, the only countries in which the ratio changed significantly were France and the Netherlands. This reduction shows that the gap between outward altruism and inner conviction increased between the two surveys.

[2] Weighted average.

SOURCE: 15 EURO-BAROMETRE 56 (Table 25) (June 1981).

Appendix G

Annual Government Expenditure of the EC and the Member States: Selected Functions 1979–1982

by
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The following five tables have been included to provide a rough basis for comparing the US and EC "federal budgets." Annex B provides an overview of the US position over the period 1940–1977. Unfortunately, comparison with the EC over this period (even from 1958) would be meaningless, since the EC own resources are a relatively recent development.

Unlike the ECSC, which was financed from inception by a specific Community levy on coal and steel production (*see* ECSC Treaty arts. 49 and 50), the EEC (and Euratom) began in 1958 with financial contributions from the Member States. The Treaties initially set out the scale of contributions (EEC Treaty art. 200; Euratom Treaty art. 172) which, after the Rome Treaties came into force, could be amended by unanimous act of the Council and (in practice) by agreement of the national parliaments (EEC Treaty art. 201; Euratom Treaty art. 173). Article 201 of the EEC Treaty provides that these financial contributions would later be replaced by own resources, a progressive process which began with the Decision of 21 April 1970, with effect from 1 January 1971. (Council Decision (EEC/ECSC/Euratom) No. 70/243 of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities Own Resources, JO No. L 94, 28 Apr. 1970, p. 19 ([1970] OJ (spec. Eng. ed.) at 224).) Own resources were to include: (1) levies on trade with non-member countries established within the framework of the common agricultural policy – immediately; (2) customs duties on trade with non-member countries – progressively from 1971 to 1975; and (3) a value-added tax – from 1975. Due to delays in fixing the uniform assessment basis for the value-added tax, and the extensions required by the Member States for incorporation of the Directive into national law, it was not until 1 January 1979 that the provisions on value-added tax resources could be applied to most of the Member States, and even then this was delayed in Germany, Ireland and Luxembourg for another year. Thus, it is only since 1980 that the budget of the EC has been financed entirely from the Communities' own resources, as laid down by art. 4, para. 1 of the Decision of 21 April 1970 (with the exception of Greece, which will pay contributions based on gross national product until the value-added tax system has been introduced there). (For a detailed discussion, *see* Ehlermann, *The Financing of the Community: The Distinc-*

tion Between Financial Contributions and Own Resources, 19 C.M.L. REV. 571, 573–74 (1982).)

The following tables, therefore, provide expenditure figures from 1979, as the year when the value-added tax provisions were in effect for the majority of the Member States, and the EC was financed almost entirely from its own resources. Comparable figures for the US over the same period are also included.

EXPLANATION OF COMPUTATION AND CONVERSION FIGURES

The figures are all current and have been converted from the national currencies into ECU on the basis of the ECU conversion rate reported in the Official Journal of the EC at the end of each year. The U.S. table is in dollars, giving only the ECU equivalent of the totals. The data was collected from a number of sources, not all of which used the same categories for the break-down of the budget. Similarly not all states apply the same budget headings. We have used general headings and allocated entries accordingly. Where a Member State combines several categories under one expenditure heading, the amount is entered under that heading (*e.g.*, SS & W may include C & SS and H & CA). (Although figures relating to the Greek national budget are included from 1979, it should be remembered that Greek membership of the EC dates only from 1 January 1981.)

ECU Conversion Table (giving the value of one unit)

	1979	*1980*	*1981*	*1982*
Belgian/Luxembourg Franc	40.3432	41.0669	41.3503	45.2093
Danish Kroner	7.7009	7.8494	7.9594	8.1178
French Franc	5.8049	5.9276	6.1987	6.5084
Deutsch Mark	2.4830	2.5546	2.4444	2.2990
Greek Drachma	54.6744	60.0331	62.1764	68.3047
Irish Pound	.6752	.6862	.6826	.6945
Italian Lira	1159.90	1213.94	1305.00	1327.23
Dutch Guilder	2.7460	2.7689	2.6898	2.5456
Pound Sterling	.6474	.5617	.5687	.6022
U.S. Dollar	1.4418	1.3281	1.0785	.9716

SOURCE:
OJ No. C 324, 28 Dec. 1979, p.l
OJ No. C 305, 22 Nov. 1980, p.l
OJ No. C 339, 29 Dec. 1981, p.l
OJ No. C 341, 29 Dec. 1982, p.l

1. Annual Government Expenditure of the European Communities and the Member States (in million ECU's): 1979

Function \ Gov't	EC	MS*	B	DK	F	D	GR	IRL**	I	LUX	NL	UK
Combined Total	666,237.3*											
Total	15,453.3	650,784	40,294	14,975	162,862	161,244	4,271	5,241	108,117	1,417	20,746	131,617
GPS	–	32,806.5	2,332.5	604.9	10,887.3	7,196.9	1,474.7	–	10,178.4	131.8	–	–
Defense	N/A	52,339.5	2,275.5	9.6	11,800.3	15,537.6	1,673.7	–	3,595	31.3	3,517.8	13,898.7
Educ.	799.1[a]	56,125.4	5,988.6	2,144	14,608.3	1,470	605.9	–	8,954.2	121.8	7,316	14,916.6
Health		83,035.5	751	2,451.3	24,410.4	30,616	398	–	10,719	29	–	13,660.8
SS & W		238,519.2	17,269.3	7,032.7	71,887.5	79,951.6	55.8	–	28,793	708	779.3	32,042
H & CA		23,113.8	713.9	698.7	4,720	708.8		–	1,069	36.6		15,166.8
C & SS		12,434.4	297.4	513.4	878.6	100.7		–	750.9	21.8	9,133.3	738.3
Justice/Law Enf.	–	3,972.5	–	64.6	–	–	–	–	–	–	–	3,907.9
Econ. Serv., inc.:	11,680.5	15,489.3	6,880.4	1,186.1	11,473.2	14,079.3	63	–	6,092.7	220.9	–	15,489.3
Gen. Admin.	(538.4)	(4,704.8)	(1,246.8)	–	(3,445.4)	–	. . .	–	–	(12.6)	. . .	–
Agric.	(10,889)	(5,928.4)	(423.8)	–	(1,895)	(882)	. . .	–	(961.3)	(33.3)	. . .	(1,733)
MMC & I	. . .	(9,572)	(639.5)	(35)	(1,481.5)	(1,027)	. . .	–	(871.6)	–	. . .	(5,517.4)
Util./Energy	(253.1)	(752.8)	(2)	(70.5)	(172.3)	(507)	. . .	–	–	(0.99)	. . .	–
T & C	. . .	(30,609.6)	(4,436.9)	(724.6)	(4,410)	(11,248.5)	. . .	–	(4,259.8)	(163.8)	. . .	(5,366)
R & I	. . .	(983.9)	–	–	. . .	–	. . .	–	–	–	. . .	(983.9)
Other Econ. Serv.	–	(2,870.4)	(131.4)	(356)	(69)	(414.8)	. . .	–	–	(10.2)	. . .	(1,889)
Debt Serv.	766.5[b]	20,749.5	–	–	–	–	–	–	6,904.9	–	–	13,844.6
Regional	1,145	–	–	–	–	–	–	–	–	–	–	–
»Dev. Coop.«	691.5											
»Other Insts.«	279.3											
Other	46.4	66,961.7	3,785	269.4	12,196.6	11,582.7	–	–	31.060.4	115.8	–	7,951.8

2. Annual Government Expenditure of the European Communities and the Member States (in million ECU's): 1980

Function \ Gov't	EC	MS*	B	DK	F	D	GR	IRL	I	LUX	NL	UK
Combined Total	796,640.4*											
Total	18,215.4	778,425	42,815.4	16,525.8	184,357.5	175,189.7	4,599.6	5,395	141,034	1,595.1	21,799	185,114
GPS	–	52,471.2	2,853.9	16,525.8	11,640.4	7,390.6	1,644.3	–	12,246	170.2	–	–
Defense	N/A	62,634.8	2,364.4	. . .	13,833.6	16,026	1,665.7	207	4,445	34.6	3,748.8	20,309.7
Educ.	1,085.8[a]	65,518.1	6,343.3	. . .	16,060.4	1,573.6	667.3	672.4	11,065.6	133.2	7,569.8	21,422.5
Health		109,913.3	723.2	. . .	27,717.8	33,422	462.5	899.4	16,565	34.6	. . .	20,471.8
SS & W		271,170.4	18,119.2	. . .	81,921.8	88,256.5	. . .	145.6	35,949	757.3	863.1	44,386.7
H & CA		29,279.2	1,127.4	. . .	5,719	692.8	63.1	708.1	1,326.2	31.3	. . .	20,382.7
C & SS		3,573.9	338.5	. . .	961.6	207.5	. . .	. . .	990.1	22.3	9,617	1,053.9
Justice/Law Enf.	–	6,054.4	–	. . .	–	–	–	204.4	–	–	–	5,850
Econ. Serv., inc.:	13,348.2	47,513.7	7,892	. . .	12,770.6	13,195.7	86.7	736.3	13,199.2	282.8	. . .	21,028.7
Gen. Admin.	(577.8)	(5,654.3)	(1,546.2)	. . .	(4,065.7)	–	. . .	–	–	(42.4)	. . .	–
Agric.	(12,200.3)	(8,065.3)	(414)	. . .	(2,277.5)	(853.4)	. . .	(205.6)	(1,437.5)	(34.3)	. . .	(2,843)
MMC & I	(18.5)	(16,756.6)	(764.6)	. . .	(1,366.5)	(1,174.3)	. . .	(103)	(6,180.7)	–	. . .	(7,167.5)
Util./Energy	(131.9)	(764.4)	(9.7)	. . .	(118)	(634.1)	. . .		–	(2.6)	. . .	–
T & C	(1.2)	(32,705.6)	(4,952.9)	. . .	(4,858.6)	(10,119)	. . .	(427.7)	(5,581)	(191.8)	. . .	(6,574.6)
R & I	(398.9)	(1,415.3)	–	. . .	–	–	. . .	–	–	–	. . .	(1,415.3)
Other Econ. Serv.	(19.6)	(3,743.7)	(204.5)	. . .	(84.3)	(414.9)	. . .	–	–	(11.7)	. . .	(3,028.3)
Debt Serv.	847.8[b]	32,449.6	–	. . .	–	–	. . .	1,154.3	11,087	–	–	20,208.3
Regional	1,621.4	–	–	–	–	–	–	–	–	–	–	–
»Dev. Coop.«	991.4											
»Other Insts.«	320.7											
Other	–	76,168.1	3,053.5	. . .	13,732.3	14,425	. . .	667.3	34,161	129	–	10,000

3. Annual Government Expenditure of the European Communities and the Member States (in million ECU's): 1981

Function \ Gov't	EC	MS*	B***	DK	F***	D	GR	IRL	I	LUX	NL**	UK
Combined Total	787,243.2*											
Total	20,687.5	766,555.7	34,834.8	17,483	102,588.5	197,038	8,884.3	6,994.6	143,524.1	1,758	47,994.3	205,456.2
GPS	–	85,957.4	14,862.1	50.6	–	8,055.1	4,861.3	–	9,993.8	140.2	47,994.3	–
Defense	N/A	71,207.5	2,237.1	1,022	20,720.1	18,082.1	1,459.8	243.6	4,927.2	39.8	–	22,475.8
Educ.	1,212.2[a]	73,593.6	7,326.5	1,274.3	24,982.2	1,603.6	–	888.6	13,271.3	148.3	–	24,098.8
Health		76,787	–	5,146	20,283.9	36,417.9	–	1,061.1	15,764	41.3	–	23,502.7
SS & W		229,976	3,216.9			101,329.5	–	181.2	44,397	875.3	–	53,527.3
H & CA		25,329.4	–	184.6	4,988.6	785.5	–	1,018.9	1,495	29.7	–	17,846
C & SS		2,507	...	–	...	233.2	–	...	1,172.4	23.5	–	1,077.9
Justice/Law Enf.	–	8,017.2	–	335.7	–	–	343.8	288.3	–	–	–	7,049.4
Econ. Serv., inc.:	13,731.6	72,920.9	–	205.8	23,455.2	13,062.5	1,511.8	914	10,743.2	324	–	22,704.4
Gen. Admin.	(691.4)	(11,079.1)	–	–	(11,023.6)	–	–	–	–	(55.5)	–	–
Agric.	(12,440.0)	(8,863.1)	–	(205.8)	(3,145.5)	(679.1)	–	(305.6)	(1,813)	(34.3)	–	(2,679.8)
MMC & I	(15.1)	(14,398.6)	–	–	(4,422.7)	(1,272.3)	–	(128.8)	(2,267.4)	–	–	(6,307.4)
Util./Energy	(137.4)	(406.7)	–	–	–	(405)	–		–	(1.7)	–	–
T & C	(0.9)	(30,501.7)	–	–	(4,863.4)	(10,342)	–	(479.6)	(6,662.8)	(216.5)	–	(7,937.4)
R & I	(427.4)	(3,150.6)	–	–	–	–	(1,511.8)	–	–	–	–	(1,638.8)
Other Econ. Serv.	(19.4)	(4,521.1)	–	–	–	(364.1)	–	–	–	(16)	–	(4,141)
Debt Serv.	969.1[b]	43,887.7	4,758	–	–	–	–	1,542.6	14,573.2	–	–	23,013.9
Regional	3,313.6	179.4	–	179.4	–	–	–	–	–	–	–	–
»Dev. Coop.«	1,107											
»Other Insts.«	969.1											
Other	1.4	76,192.5	2,434.2	9,084.6	8,158.5	17,468.5	707.6	856.3	27,187	135.8	–	10,160

4. Annual Government Expenditure of the European Communities and the Member States (in million ECU's): 1982***

Gov't / Function	EC	MS*	B	DK	F**	D**	GR	IRL	I**	LUX	NL	UK
Combined Total	934,936.1*											
Total	24,170	910,766.1	35,073.5	20,233.1	237,984.7	238,000.4	11,929.4	8,490.3	161,479.2	1,240.1	61,207.8	135,127.6
GPS	–	260,866.1	14,616.5	54.9	237,984.7	–	6,902.4	1,308.1	–	–	–	–
Defense	N/A	33,109.4	1,883.6	1,103.2	...	–	1,832.7	294.6	–	75.9	4,762.7	23,156.7
Educ.	1,683.2[a]	25,846.3	7,455.5	1,423	...	–	–	977.4	–	178.7	11,079.1	4,732.6
Health		18,297.9	–	5,815.4	...	–	–	1,187.2	–	73.2	12,038	17,037.5
SS & W		42,264	3,006.8		...	–	–	1,535.5	–	326.6		19,541.7
H & CA		8,057.2	–		...	–	–	–	–	...	4,208	3,849.2
C & SS		943.2	–		...	–	–	–	–	–	–	943.2
Justice/Law Enf.	–	7,262.8	–	367	...	–	452	323	–	–	2,010.9	4,109.9
Econ. Serv., inc.:	15,738.8	30,416.6	–	241.9	...	–	1,830	1,065.7	–	500.2	6,702.5	20,076.3
Gen. Admin.	(745.6)	(127.8)	–	–	...	–	–	–	–	(101.2)	–	(26.6)
Agric.	(14,129.5)	(4,514.3)	–	(241.9)	...	–	–	(342.3)	–	(93)	(2,734.5)	(1,102.6)
MMC & I	(76.9)	(9,186.4)	–	–	...	–	–	(179.4)	–	–	–	(9,007)
Util./Energy	(138.7)	(298.6)	–	–	...	–	–		–	(298.6)	–	–
T & C	(11.5)	(7,864.7)	–	–	...	–	–	(544)	–		(3,968)	(3,352.7)
R & I	(503.6)	(2,779.8)	–	–	...	–	(1,830)	–	–	–	–	(949.8)
Other Econ. Serv.	(133)	(5,645)	–	–	...	–	–	–	–	(7.4)	–	(5,637.6)
Debt Serv.	2,778[b]	4,576.8	5,793.6	–	...	–	–	1,798.8	–	151.9	4,518	–
Regional	2,158	8,924.2	–	191.2	...	–	–	–	–	–	–	8,733
»Dev. Coop.«	1,153.4											
»Other Insts.«	374.5											
Other	403.7	63,036.5	2,317.5	11,037	...	–	912.3	–	–	– 66.4	15,888.6	32,947.5

5. U.S. Annual Government Expenditure (in billions of dollars): 1979–1982

Year	1979		1980		1981		1982	
Gov't / Function	Federal	State & Local**	Federal	State & Local	Federal	State & Local	Federal	State & Local**
Combined Total	912.99		1,051.68		1,191.13			
Total	506.26	406.73	596.64	455.04	687.61	503.52	764.89	–
GPS	28.95	–	34.71	17.7	31.95	18.94	34.59	–
Defense	108.90	N/A	126.27	N/A	150.14	N/A	176.53	–
Educ.	14.67	–	15.79	183.09	17.11	199.76	15.98	–
Health	53.19	–	62.21	54.26	73.54	62.24	82.66	–
SS & W	170.71	–	203.46	55.01	235.46	63.36	256.52	–
H & CA	13.77	–	16.80	7.68	18.01	8.3	19.90	–
C & SS	2.51	–	2.69	7.88	2.61	8.5	2.46	–
Justice/Law Enf.	–	–	–	24.19	4.7	26.77	4.65	–
Econ. Serv., inc.:	57.70	–	61.98	54.75	67.65	59.00	65.29	–
Gen. Admin.	(18.90)	–	(19.49)	–	(21.15)	–	(13.55)	–
Agric.	(8.39)	–	(7.39)	(5.5)	(8.64)	(6.19)	(17.77)	–
MMC & I	(2.97)	–	(3.11)	–	(3.41)	–	(2.94)	–
Util./Energy	(4.07)	–	(4.25)	(3.67)	(4.67)	(4.22)	(4.77)	–
T & C	(18.53)	–	(22.05)	(39.41)	(23.68)	(41.66)	(20.59)	–
Other econ. serv.	(4.84)	–	(5.69)	(6.17)	(6.10)	(6.93)	(5.67)	–
Other	56.42	–	71.83	50.48	86.45	56.66	108.05	–
Interest Payments	(47.65)	–	(62.00)	–	(79.25)	–	(97.89)	–
Adj. to total exp.	– .56	–	.90	–	– .01	–	– 1.74	–
Totals expressed in million ECU's	351,130.53	282,098.76 633,299.29	449,209.45	342,599 791,808.45	637,561.42	466,870.65 1,104,432	787,247.83	

Key and Abbreviations

Agric.	Agriculture
C&SS	Community & Social Services (cultural, religious, recreational . . .)
Dev. Coop.	Development Cooperation
Educ.	Education
Econ. Serv., inc.:	Economic Services, including:
GPS	General Public Service
Gen. Admin.	General Administration
Gov't	Government
H & CA	Housing & Community Amenities
Insts.	Institutions
Justice/Law Enf.	Justice & Law Enforcement
MMC & I	Mining, Manufacturing, Construction & Industry
MS	Member State(s)
N/A	Not applicable
R & I	Research & Investment
SS & W	Social Security & Welfare
Serv.	Service(s)
T & C	Transport & Communications
Util./Energy	Utilities & Energy
» «	category applicable to EC only
–	no information provided for this category
. . .	category included under another heading
( )	figures in parentheses (usually under the "Econ. Serv." heading) indicate sub-totals of a major category and are not included in calculating the total
*	Aggregate
**	(Detailed) data unavailable at time of compilation
***	Initial estimates
a.	Social
b.	Member State repayment

Sources

The tables were compiled on the basis of data taken from the following sources:

COMMISSION OF THE EC, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES: FOURTEENTH (1980); FIFTEENTH (1981); SIXTEENTH (1982); SEVENTEENTH (1983) (Luxembourg, Office for Official Pubs. of the EC)

EUROPA YEARBOOK 1983 (London, Europa Pubs., 1983)

EUROPA YEARBOOK 1984 (London, Europa Pubs., 1984)

7 GOVERNMENT FINANCE STATISTICS YEARBOOK 1983 (Washington, D.C., IMF, 1983)

37 INTERNATIONAL FINANCIAL STATISTICS 1984, No. 8 (Washington, D.C., IMF, Aug. 1984)

STATESMAN'S YEARBOOK 1983–84 (London, MacMillan, 1983)

STATESMAN'S YEARBOOK 1984–85 (London, MacMillan, 1984)

YEARBOOK OF NATIONAL ACCOUNTS 1981 (New York, U.N., 1983)

The data for each country came from these sources as follows:

EC:	1979–1982 – General Reports on the Activities of the EC
B & DK:	1979 and 1980 – Gov't Finance Stat. YB
	1981 and 1982 – Europa YB 1983
F:	1979, 1980 and 1982 – Gov't Finance Stat. YB
	1981 – Statesman's YB 1983–84
D:	1979–1981 – Gov't Finance Stat. YB
	1982 – Europa YB 1984
GR:	1979 and 1980 – YB Nat'l Accounts
	1981 and 1982 – Europa YB 1983
IRL:	1979 – 37 Int'l Financial Stats.
	1980 and 1981 – Statesman's YB 1983–84
	1982 – Statesman's YB 1984–85
I:	1979–1981 – Gov't Finance Stat. YB
	1982 – 37 Int'l Financial Stats.
LUX:	1979–1981 – Gov't Finance Stat. YB
	1982 – Europa YB 1983
NL:	1979 and 1980 – YB Nat'l Accounts
	1981 – Statesman's YB 1983–84
	1982 – Europa YB 1983
UK:	1979–1982 – Europa YB 1983
US:	1979–1982 – Gov't Finance Stat. YB
	1981–1982 (Fed. Justice/Law Enf. expend.) – Statesman's YB 1983–84

The "Federal" Legal Order: The U.S.A. and Europe Compared A Juridical Perspective

FRANCIS G. JACOBS* and KENNETH L. KARST**

I. Introduction

A. The Analytical Framework

"Legal integration" – whether one considers the case of Europe or America – is not limited to the centralisation of law-making power in a government of continental reach. Rather, the term implies the much more extensive process of adapting laws and legal systems required whenever two or more distinct polities, each with its own legal order, determine to act together with purposes having legal implications. Indeed, the term can encompass a vast spectrum of activities and processes, ranging from the mere coordination of law-making policy to the merging of distinct systems into a single unitary system. The focus of this paper, however, is on legal integration in a narrower sense. It concentrates on the situation in which several initially independent polities agree to associate themselves in a new organisational structure possessing a central authority, and analyses the methods whereby originally distinct legal systems can be modified or reoriented so as to make such an association viable. This analysis requires not only examination of the particular central law-making and implementing institutions established to exercise the central authority, but also inquiry into the dynamics of the resulting working relationship between the whole and the parts.

The issues and problems involved in the process of legal integration are illustrated through a comparison of two actual models which provide examples of the process at different stages and under different conditions of development: the well-developed United States model and the embryonic European Community model. In the United States, as in Europe, governmental power is dispersed in two primary ways: vertically, between the states and the central authority; and horizontally, among the latter's various institutions. This chap-

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ter first analyses the institutions of central law-making in the American and European systems, and then turns to a more detailed discussion of the institutional and doctrinal devices which regulate the relationship on a vertical plane, between the "levels" of government.

B. Some Reflections on Comparing Europe and the U.S.A.

Any comparative discussion of European legal integration and the American federal experience must rest on an appreciation of each system as the product of a peculiar particular history. It is misleading to speak of abstractions such as the separation of powers or the supremacy of Community (or federal) law unless those institutional arrangements are seen in their political, economic, and cultural contexts.[1] As we begin, then, several cautionary remarks seem appropriate.

First, if one is seeking to analyse the European Community[2] in federal or quasi-federal terms, then a contrast must be made between the *evolutionary* character of the Community and the relatively *stable* character of today's American federal system. Politically and economically, the evolutionary character of the Community can be encapsulated in the concept of "integration," a concept that has lost much of its relevance for today's mature federal system in the United States. Historically, a similar evolution can be seen in both systems, as the powers of the Community (or the U.S. Federal Government) develop at the expense of powers of the Member States. The same process can be seen in virtually all federal systems; at some stage, however, most of those systems have ceased to be truly federal and have become, in fact if not in name, unitary.[3] In the United States, a long-term trend towards centralising the most important legislative powers has been alternately promoted, hindered, and again promoted by the federal judiciary. Legally, the evolutionary character of the Community, which finds expression in the programmatic character of the Treaty, is partly reflected by, but perhaps even more determined by, the "progressive" case-law of the European Court of Justice, incontestably over the first two decades of the EC its greatest single force for integration.[4]

[1] *See generally* Elazar & Greilsammer, *The Federal Democracy: The U.S.A. and Europe Compared - A Political Science Perspective, supra* this book; Heller & Pelkmans, *The Federal Economy: Law and Economic Integration and the Positive State - The U.S.A. and Europe Compared in an Economic Perspective, infra* this book.

[2] While the main emphasis in this chapter's discussions of Europe will be on the European Economic Community (EEC), there will be occasional references to the other Communities: the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom).

[3] The Latin American experience with federalism exemplifies this pattern. *See, e.g.*, R. Alexander, Today's Latin America 126–28 (Garden City, Doubleday, 1962); W. Glade & C. Anderson, The Political Economy of Mexico 175 (Madison, U. Wis. P., 1963).

[4] *See infra* § III.A. *See also generally* Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration, infra* this vol., Bk. 3.

Second, if one is seeking to analyse either system in federal terms, one cannot escape a fundamental ambiguity or antinomy in the concept of federalism itself. Federalism, like an even more difficult theological concept, involves something which is at the same time both one and several. Although a federal state may be contrasted with a unitary state, a federal state is in some respects essentially unitary: the federal power must in some ways be exercised directly. Recognition of this necessity came early in the American experience; the Articles of Confederation had been in operation for only six years when Congress called for a convention to write a new Constitution that would give the nation direct governmental powers. Similarly, when we say that the legal character of the Community partly resembles a federal system – for example, that Community legislation, adopted in the form of regulations, is by virtue of its direct applicability "federal" in character – what we really seem to mean is that it is characteristic of a unitary system. Perhaps we should be saying that such Community legislation is unitary in character.

The real point is that in the Community, as in the American federal system, in some respects the central power is exercised directly, while in others powers are retained by the constituent states. It is the preservation of the balance between the central authority and the constituent states that is the essence of federalism. Here again, however, there is a contrast between the two systems. In the American federal structure the central authority is stronger; although one function of the American judiciary has been to maintain the supremacy and uniformity of federal law, another – which came to special prominence in the early twentieth century – has been to protect the constituent states against encroachment by the central authority. In the Community, where the central authority has been weak, the courts (both those of the Member States and that of the Community) have had to play an important role in defending Community power against Member State encroachment.

Thirdly, the European Community, unlike the American union, is a form, even if a peculiar form, of international organisation: peculiar because of its unique institutional structure and its unprecedented law-making powers. In the United States, from the beginning there was one dominant culture; from a very early time there was a genuinely national feeling, no doubt cemented during the Revolution. The Declaration of Independence had spoken of *"one people"* who were dissolving the political bonds connecting them with *another* people. In contrast, the EEC Treaty began by reciting that the signatories were "Determined to lay the foundations of an ever closer union among *the peoples* of Europe." The legal integration of Europe starts, therefore, from a base of legal diversity founded on ancient cultural diversity. The great waves of immigration that continue to diversify American culture did not begin until after a national "legal culture" had been established. Because the Community is a form of international organisation, one may appropriately distinguish between its inter-governmental aspects and its supranational[5] aspects, and there

[5] The notion of "supranational" includes the power of the organisation to make law binding on individuals within the Member States, and the power to take by ma-

is scope for comparison with inter-governmental organisations of a more traditional character such as the Council of Europe.[6]

Fourthly, this distinction – between the United States as a nation and the Community as, in part, an international organisation – has important consequences for the ability of each system's judiciary to serve as an integrative force. In Europe, surely it is fear of Community power that has dissuaded the Member States from granting to Community institutions more far-reaching authority. This reluctance is visible in the Treaty's limited grant of judicial power to the Court of Justice, and the failure to establish a body of lower Community courts. Because the Court of Justice has no direct enforcement powers of its own, and must rely on the courts of the Member States to effectuate its judgments, it remains possible for a Member State to refuse to comply with the Court's decision. As we shall see, this possibility is no longer merely a theoretical one.[7] Not only may a Member State's political authorities defy the Court; even Member State courts may do so. The only enforcement mechanism available in such a case is political action in the Council, where a "convention" presently requires unanimous accord of the representatives of all the Member States in any action that touches a state's important interests.[8]

The experience in the United States may offer some limited encouragement for those who hope that in Europe the judiciary's attempts to play an active integrative role will meet with some success. The United States Supreme Court was still being faced with defiance of its appellate jurisdiction over state court decisions some three decades after Congress gave it that jurisdiction in 1789.[9] Furthermore, although lower federal courts were created by Congress in the same 1789 statute, it was not until 1875 that they were given general jurisdiction over cases arising under federal law. It took a long time for the American federal judiciary to secure a sound jurisdictional base for carrying on its integrative work. Some have suggested that if the European Court of Justice is to perform a similar function, it will need a systematic way of exercising jurisdiction in cases whose decision is crucial to integration, possibly by an enforceable appellate jurisdiction over questions of Community law arising in courts of the Member States.

jority vote decisions binding on Member States. For a distinction between "normative" and "decisional" supranationalism, *see* Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267 (1982); and J. Weiler, Supranational Law and the Supranational System: Legal Structure and Political Process in the European Community (Doctoral Thesis, EUI, Florence, 1982) (to be published).

[6] *See infra* § III.B.3.

[7] *See infra* § III.A.2.b, especially text accompanying note 220.

[8] *See infra* note 58 and accompanying text.

[9] The ECJ, of course, presently has no appellate jurisdiction effectively matching that of the Supreme Court. But similar resistance could be manifested in art. 177 proceedings, with Member State courts being reluctant to refer or to follow ECJ rulings. *See infra* § III.A.2.b. *See also* Cappelletti & Golay, *supra* note 4, at § V.A.2.

Lastly, the Community is more limited in its activities than is the American Federal Government – and perhaps more limited than any federal state. Community powers are limited by the scope and objectives of the Treaties themselves, exemplified by the catalogue of activities and aims of the EEC set out in articles 2 and 3 of the EEC Treaty. However, the limited scale of Community activities is balanced by the evolutionary character of the Community already mentioned. The American federal experience, too, has been evolutionary; federal powers, initially assumed to be limited to those carefully enumerated in the Constitution, have come to be interpreted extremely broadly. The American "necessary and proper" clause finds its European analogue in article 235 of the EEC Treaty,[10] a provision that is potentially almost unlimited in scope. The extent to which that potential is realised is dependent on the political will of the Member States.

In sum, the United States was a nation from a time long antedating Independence; the Community, on the other hand, can usefully be seen as a symbiosis between inter-governmental and supranational elements, uniting some features of an international organisation of the traditional kind and some features of a federal state. Both systems include checks and balances of two kinds: on the one hand, between the central authority and the constituent states; and on the other hand, among the central authority's institutions themselves. Both systems have placed heavy reliance on their judiciaries to lead the integration process. In the United States, judges in modern times have been able to draw on a tradition that views them as the authentic voice of a national community's values. Although it is by no means clear that Europeans will ever come to view their judges in the same way, it is also true that the American judiciary has had nearly two hundred years in which to solidify its institutional position.

II. The Institutional Structure for Central Law-Making

The process of legal unification in the United States began long before Independence, in the colonies' shared inheritance of traditions and institutions from the English Common Law. Yet the confederacy of independent states which followed independence was politically "united" in little more than name: "We have neither troops, nor treasury, nor government," wrote Alexander Hamilton in 1787.[11] The Constitutional Convention of 1787 met in Philadelphia "in order to form a more perfect Union"[12] – specifically to establish a national government with three crucial law-making powers. First, the nation needed power to raise its own taxes directly, without having to persuade the several states to contribute money. Only thus could the war debt be paid and

[10] *See infra* text accompanying note 286 & § III.B.1.b & 2.b.

[11] THE FEDERALIST No. 15, at 106 (A. Hamilton) (C. Rossiter ed., New York, New American Library, 1961).

[12] U.S. CONST. preamble.

the National Government be provided with operating funds. Second, the nation needed power to regulate interstate and foreign commerce, to protect that commerce from strangulation by state regulation and taxation. Third, the nation needed power to raise and support a national army and navy, rather than rely on requisitions of state militia. Urgent political necessity thus dictated the expanded central legislative power that came to supply the institutional base for increased unification of law.

In Europe, by contrast, one starts from a base of legal diversity founded on ancient cultural differences and reinforced by highly developed national state sovereignty doctrines. While the reception of the English Common Law has continued to have a unifying influence on the United States, the reception of Roman law in some of the Member States of the European Community ceased to have a substantial unifying influence when those States adopted their own separate codes. Furthermore, whereas the objectives of the U.S. federal union were broadly governmental in scope, the expressed objectives of the EC, at least in the short term, were politically more limited; two of the elements of fundamental importance to the American system – defence and budgetary powers – are, indeed, either deliberately excluded (defence) or only just beginning to be recognised (budgetary) in the European system, whereas the third element – the "common market" – in effect constitutes the primary focus, with wider political objectives being at best latent and futuristic. If political necessity has dictated the course of U.S. developments, it is functional necessity which has shaped the course of European legal integration.

These fundamental differences[13] have had far-reaching consequences in shaping the form of the central law-making authority. In America, the central authority was conceived and designed to express principles of democratic republican government. In Europe, the central authority was not conceived as an organ of democratic government; although it reshaped the classical model of international organisations, its principal function remained to render the limited objectives of the Treaties operational. One should not lose sight of the trite but important fact that the U.S. Constitution *is* a *constitution*; and that the EC Treaties are *treaties*, albeit with constitutional overtones.

The Framers of the American Constitution primarily sought the expansion of the central government's powers, but they were also sensitive to the possibility of a new tyranny arising out of concentrated powers. In no sense were the several states dissolved into a national union; the states remained the most significant institutions of government and the chief loci of political power. The new central government was, in theory and fact, a government of limited powers. Within its defined spheres, the central government was explicitly declared to be supreme,[14] but residual sovereignty was retained by the states.[15]

[13] Discussed in greater detail in Elazar & Greilsammer, *supra* note 1, at § II.A.

[14] U.S. CONST. art. VI, § 2, makes the Constitution, and laws and treaties made in pursuance thereof, the "supreme law of the land."

[15] *See* U.S. CONST. amend. X.

All the same, two important factors must be kept in mind in this regard when comparing Europe and America. The first is that in the American context arguments based on the assertion of "state sovereignty" or "sovereign rights" do not involve issues of "national" sovereignty – as we have already observed, it is the Federation which is recognised as the "nation" – but rather involve issues of "popular" sovereignty. Second, in America the apportionment of powers occurred when both the states and the nation as independent polities were in their formative stages, thus allowing a certain fluidity in determining the allocation of powers.

In Europe the "state sovereignty" issue takes on an entirely different cast; the constituent states of the EC were at the foundation and remain highly developed, independent sovereign nation-states, each with its own well-established form and tradition of democratic government. Sovereign powers were indeed transferred by these nation-states to the central authority under the Treaties, but this transfer was of both limited scope and purpose. Moreover, the transfer was accomplished by means of a legal framework which only implicitly recognised the supremacy of central legislation enacted in exercise of the powers thus transferred, whereas the Member States continue to guard jealously their substantial residual powers. Thus, it was thought necessary, in addition to the vertical division of powers, to incorporate institutional safeguards of Member State interests in the central institutional structures, which accounts in part for the largely "inter-governmental" nature of the EC Council of Ministers, and for the particular institutional balance established among the EC bodies. One must not lose sight of the international organisational roots of the Community, which help to explain why the institutional balance is as much concerned with inter-governmental as with governmental issues.

The dispersal of governmental powers in the U.S. also had another aim: to defend against majority tyranny. Majority rule, of course, is unstable unless significant minorities are willing to abide by the majority's legislative will – to accept that will as law. The Framers of the U.S. Constitution were acutely conscious of the problem; it is now commonplace to refer to the tension between majority rule and minority rights as a "Madisonian" problem.[16] Madison and his colleagues wrote a series of "checks and balances" into the new Constitution in order to set limits on the power of a majority to destroy a minority. Specifically, they foresaw the need to protect a property-owning minority against populist legislation, and at least some of the Framers expected the federal judiciary to provide the protection.

Fortunately, however, the unbridled conflict the Framers had in mind did not exist. Thomas Jefferson spoke the truth in his first inaugural address, when he said, "We are all Republicans; we are all Federalists."[17] The consent of the governed, in other words, rested on a broad understanding that the political

[16] *See, e.g.*, A. Bickel, The Supreme Court and the Idea of Progress 110 ff (New York, Evanston/London, Harper & Row, 1970).

[17] 8 T. Jefferson, The Writings of Thomas Jefferson 3 (P.L. Ford ed., New York, G.P. Putnam's Sons, 1897).

majority of a particular day would not press the minority too far, and in return the minority would respect the principle of majority rule.[18] This understanding was founded on a widely shared consensus centering around the liberalism of John Locke and an economic order that offered real opportunity, either at home or on the frontier.[19] The one glaring, ugly exception was, of course, slavery. Blacks were not a "minority" in this early period; they were simply left out of consideration as political actors. When Alexis de Tocqueville wrote of equality in America, he also noted the explosive potential of the exclusion of the slave population from the national community.[20] In any case, the dispersal of governmental powers did not stop with the allocation between the central government and the states; it included a further separation of powers in the central government itself, among three branches that would carry out that government's legislative, executive and judicial functions.

In Europe, also, in general the constituent states share common civil libertarian democratic values, which the Community respects. But the limited objectives of the Community as originally conceived, combined with the strong nationalistic views of the Member States, have resulted in quite a different institutional balance: The traditional separation of powers between legislative and executive branches is not even attempted in theory, and it is only the judiciary which is given a traditional role. Indeed, it is doubtful how much the issue of minority rights and the danger of majority tyranny was present in the minds of the designers of the EC system. A charitable view could be that they counted on the strong Member State voice in the policy formation and law-making processes as a means of protecting traditional democratic principles – each Member State being subject to its own national democratic controls. In any case, it could be argued that where the powers of the central authority are limited – as they certainly are as to subject matter and, perhaps even more importantly, as to their effects – the opportunities for majority tyranny are also circumscribed and that the need for strong institutional controls is less keenly felt. Given the initial apparently limited powers of the Community, such an assumption may be one of the reasons why originally so little attention was paid to the "democratisation" of the institutional structures, and why the development and expansion of the Community powers has led to an exposure of the so-called "democracy deficit." Thus while in integrationalist terms the Community structure and institutional balance could be considered potentially successful – because Member State participation in central law-making helps to diffuse State opposition to its reception – in terms of democratic government it may be deficient. Within such a framework, the Court's role as the defender of individual liberties emerges as particularly important for redressing

[18] *See* D. Potter, History and American Society 390–418 (New York, O.U.P., 1973).

[19] *See* L. Hartz, The Liberal Tradition in America (New York/London, Harcourt Brace Jovanovich, 1955).

[20] *See* 1 A. de Tocqueville, Democracy in America 370 ff (P. Bradley ed., New York, Random House, 1945) (originally published 1835).

this institutional imbalance. In comparing the constitutional jurisdiction of the European Court of Justice to that of the U.S. Supreme Court we may be struck by a remarkable fact. While the U.S. Supreme Court has been historically concerned with states' rights (although it has also, of course, expanded the congressional power), the European Court does not seem ever to have ruled a Community measure unlawful, either under article 173 or under article 177, for encroaching on the competence of the Member States. Usually the ground for annulment has been the infringement of a general principle of law, such as the prohibition of discrimination. And even when a Council measure has been annulled for lack of competence, it has not been because the matter in question has been held to be the preserve of the Member States, but on a narrower ground – often reflecting, especially in social security cases, a concern not to prejudice the rights of the individual, or, in agricultural cases, not to permit discrimination between producers. In general terms, the constitutional jurisdiction of the Court of Justice has been exercised for the benefit not of the Member States, but of the Community citizen.

A. The U.S.A.: The Federal Organs and Their Inter-Relationship

1. The Branches of Government: Legislative, Executive, and Judicial

Today as in 1789, the central government's power is dispersed among its three branches. The lines of authority, however, are complex, intertwined, and untidy.

a) Congress

Although the Framers of the Constitution gave the President powers that now seem considerable, surely they thought of the Congress as the branch of the central government that would wield the most power. They sought to limit that power to certain specified areas, such as the regulation of interstate and foreign commerce, the declaration of war, taxation and spending, and the establishment of a uniform currency and a postal system.[21] One of the compromises that persuaded both large and small states to join the new union[22] created two separate Houses of Congress: a Senate, in which each state would have equal representation (two members each),[23] and a House of Representatives, in which representation would be proportionate to the states' populations.[24] The

[21] *See* U.S. CONST. art. I.

[22] The other major compromise was the acceptance by the Northern states of slavery in the South.

[23] Initially U.S. CONST. art. I provided for the selection of Senators by the various state legislatures. In 1913 the seventeenth amendment provided for direct popular election of Senators. A similar shift has occurred in the selection of members of the EC Parliament. *See infra* note 61 and accompanying text.

[24] U.S. CONST. art. I, § 2, cl. 3. A European analogue to this provision is the "qualified majority," with weighted voting, required for certain decisions of the EC Council. *See infra* note 57 and accompanying text.

concurrence of both Houses was required for the enactment of legislation, and the President was given the power to veto a bill, with the proviso that his veto might be overridden if each House repassed the bill by a two-thirds majority.[25] The President's modern role in the legislative process, of course, goes far beyond the veto power, and is discussed below. A crucial feature of the Constitution was that when a congressional bill did become law, it operated of its own force directly on the people; there was no need to call upon the states to enact laws enforcing congressional policy.

b) The Executive Branch: The President

The executive branch was embodied in the President, whose election was deliberately placed out of the hands of the Congress and given instead to a separate body of electors, appointed by the states for this special purpose.[26] The President's term of office was set at four years,[27] and he was made subject to removal from office upon impeachment by the House of Representatives and conviction by the Senate for serious offences.[28] In short, he was to be independent, yet subject to check for serious abuse of his office. His powers were substantial: to serve as commander-in-chief of the armed forces; to execute the laws of the United States; to make treaties, subject to ratification by the Senate; and to nominate judges and other officers of the central government, again with Senate approval.[29] He would depend on the Congress for material support for nearly all his activities, as he would have no power of his own to levy taxes or otherwise to secure funds for the operation of the Government. The Framers sought a strong, energetic executive, but one whose continuance in office would depend on his continued ability to maintain broadly based political support. If members of Congress were expected to represent state and local interests, the President was expected from the outset to be, as the modern election-night cliché has it, "President of all the People."

c) The Supreme Court and the Federal Judiciary

The Constitution's third article established the judiciary as a separate and independent branch of the Federal Government. The judicial power of the United States[30] was vested "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[31] The judges were

[25] U.S. CONST. art. I, § 7, cl. 2.
[26] U.S. CONST. art. II, § 1, cls. 2–3.
[27] U.S. CONST. art. II, § 1, cl. 1.
[28] U.S. CONST. art. II, § 4.
[29] U.S. CONST. art. II, § 2, cl. 2.
[30] This power is strictly limited to the decision of cases. The limitation is expressed in rules governing the standing of parties to litigate, the "ripeness" of the case for decision, mootness of the issues, and the like. In contrast to the EC, where the Treaties specifically provide for the ECJ to give advisory opinions in certain cases (*see, e.g.*, EEC Treaty art. 228), advisory opinions are forbidden to American federal courts, and to most state courts as well.
[31] U.S. CONST. art. III, § 1.

to be appointed for life, during good behaviour, and they were protected against reduction of their salaries.[32] The First Congress did establish a system of lower Federal courts,[33] and, for reasons which will be examined later,[34] the nation has discovered that it cannot do without them. Today these federal courts have jurisdiction where the opposing parties are of different states, where the United States is a party, or in a case arising under the Constitution or other federal law. The Supreme Court of the United States is the highest court in the federal court system, and it also has appellate jurisdiction in cases involving federal law that arise in the *state* courts.[35]

At least some of the Framers of the Constitution expected the federal judiciary to enforce the Constitution by refusing to enforce legislation that violated its terms.[36] Thus, when the Supreme Court announced this principle of judicial review in 1803,[37] it broke no new theoretical ground. As we show more fully later in this chapter,[38] this principle has allowed the Supreme Court to play the leading institutional role in defining the allocations of legislative power between the Federal Government and the states.

2. The Separation of Powers: Theory and Political Reality

The separation of powers among the three branches of the central government may have been inspired by Montesquieu, but an eighteenth century time traveler in search of eighteenth century symmetries would find the modern American version of separation of powers hopelessly blurred. It is a commonplace that the President has become the nation's chief legislator, and not just an administrator of congressional policy. Executive influence on the legislative process is not merely the result of aggressive presidential leadership of one of the national political parties; it has also arisen from such institutional foundations as the President's historic power to set agendas for action through preparation of the budget for operation of the government. Recent congressional efforts to match the President's budgetary apparatus have not yet made much of a change in this field.

In addition, Congress itself deliberately invites Executive policy-making on many broad fronts by casting regulatory legislation in broad terms that can be given specific content only through administrative regulations. Within the Executive branch itself, there are tensions between the Office of the President and the permanent bureaucracy, which often sees its long-term interests as aligned with a stable congressional leadership rather than a transitory presi-

[32] U.S. CONST. art. III, § 1.
[33] *See* the Judiciary Act of 1789, 1 Stat. 73.
[34] *Infra* notes 192–99 and accompanying text.
[35] The Supreme Court's jurisdiction is established in U.S. CONST. art. III, § 2, and in 28 U.S.C. §§ 1251–58.
[36] *See* THE FEDERALIST No. 78 (A. Hamilton).
[37] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See* Van Alstyne, *A Critical Guide Through* Marbury v. Madison, 1969 DUKE L.J. 1.
[38] *See infra* § III.

dential staff. The growth of a bureaucracy within the presidential sphere of the Executive branch represents a continuing effort by a series of Presidents to "get control" of the permanent bureaucracy. Similarly, the "independent regulatory agencies" such as the Interstate Commerce Commission (railroads), the Federal Trade Commission, and the Federal Communications Commission are, by their composition and tenure in office, independent of the President both in form and in fact. In particular, specialised agencies and members of the permanent bureaucracy tend to become closely associated with particular interest groups – the same ones that provide lobbyists who deal with the congressional committees in their subject areas. Thus the Department of Agriculture's permanent bureaucrats become well acquainted with the same farmers' groups who are in regular touch with the agriculture committees in the two Houses of Congress. The result is a considerable blurring of the separation of powers.

So also the judiciary has come to perform roles that would astound the Framers of the Constitution. Not only has judicial review of government action become a routine occurrence; Congress invites broad judicial policy-making in some areas by stating broad legislative goals, and then leaving to judicial interpretation the fleshing out of those standards. The antitrust laws are a well-known example, providing in the most general legislative language (*e.g.*, the prohibition of practices "in restraint of trade") the foundation for a huge body of judge-made antitrust law. Furthermore, in the past two decades courts, in carrying out their responsibilities for protecting constitutional rights, have found themselves deeply involved in the business of running institutions such as school districts, prisons, and state hospitals. In this "institutional litigation"[39] a judge takes on the role of both legislator and administrator. The line between judicial and executive functions is also rendered more indistinct by the opposite type of phenomenon: administrative agencies of the Federal Government regularly play an adjudicator's role as, for instance, they process millions of individual claims yearly under such laws as the Social Security Act.

The exercise of judicial review of the constitutionality of legislation and other action by both the state and the Federal Government places the federal judiciary in politics – not party politics, but nonetheless politics of the sort that frequently engages high feeling. As a consequence, the Supreme Court's most visible (because most controversial) decisions are sometimes greeted with proposals for Congress to limit its jurisdiction, or the jurisdiction of the lower federal courts, or both. The most far-reaching of those proposals have failed to gain the necessary majorities in the two Houses of Congress.[40] If such a proposal should become law, surely it would be attacked on constitutional grounds, as an attempt to undermine the essential role of the Supreme Court

[39] *See* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

[40] At the moment, there are proposals for limiting the jurisdiction of the federal courts in cases involving school prayers and state abortion laws.

or of an independent judiciary. The prospects for decision on this issue are murky; the judicial precedents are sparse and far from definitive, and even the academic commentators are divided.[41]

Judicial review of the constitutionality of congressional legislation is, however, a very real problem in a system of separation of powers. The Supreme Court today is the American nation's most authoritative source of constitutional law-making, and in the strictest sense that legislative function arguably belongs in a legislature and not a judicial body. But the Supreme Court makes constitutional law only in the course of deciding particular cases. When it interprets the Constitution, it does make law – but always because the decision of a particular judicial dispute requires application of a constitutional norm. Similarly, the Court has asserted the power to interpret the scope of the President's constitutional authority, when such an interpretation is necessary for the decision of a case. Despite occasional rumblings about defiance, the pre-eminent political fact is that both Congress and the President have acquiesced in the Court's exercise of these powers. Two incidents in modern American history may illustrate this acquiescence.

In the 1930's, when Franklin D. Roosevelt was President, Congress, under Roosevelt's urging, adopted a series of far-reaching laws aimed at promoting full employment and revitalising the national economy. The Supreme Court struck down several of these laws, as exceeding the Congress's constitutional powers. After his overwhelming re-election in 1936, Roosevelt proposed to Congress that the Supreme Court be enlarged to a maximum of fifteen members, to permit him to appoint a new Justice to match each Justice over age seventy among the nine then on the Court. This measure produced a political outcry, not only in the nation at large but in Congress itself. The Justices might be mistaken, even perverse, but the legitimacy of judicial review was a political fact.

The second illustration is more recent, arising out of the "Watergate" incident that led to the resignation of President Richard M. Nixon. A lower federal court had ordered the President to surrender tape recordings of certain of his White House conversations with his advisors. Although he appealed from the order on the ground that the court had unconstitutionally invaded the province of the Executive branch, in the end the Supreme Court ruled against him on that issue and affirmed the lower court's order.[42] It was reported in the press that the President and some of those close to him had debated for some hours over whether to comply with the Court order, but by the end of the same day of the Court's decision, he had announced that he would turn over the tapes. The reason was not merely Mr. Nixon's vulnerability in the face of ongoing impeachment proceedings; it also lay in a widely shared understand-

[41] *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 360–64 (2nd ed., Mineola, Foundation Press, 1973) [hereinafter Hart & Wechsler], for a summary of some of the leading views.

[42] United States v. Nixon, 418 U.S. 683 (1974).

ing among the American people that not even the President is above the law, and that the law is what the judges interpret it to be.

The Court has also intruded into the preserve of the Congress in ways that go beyond the invalidation of legislation. In the 1960's, for example, it held that the House of Representatives had violated the Constitution by refusing to seat a member who had been duly elected, for reasons other than a failure to meet the qualifications for membership (age, citizenship, and residence) specified in the Constitution.[43]

Most of the time, the Congress and the President are careful to avoid invading each other's constitutionally established zones of responsibility. Occasionally, however, the two political branches of the central government do come into conflict, and the judiciary is asked to intervene – either by one of those branches or by a private litigant who claims that congressional or presidential action is unconstitutional because it is taken outside the scope of the acting branch's authority. It is sometimes argued that the judiciary simply should step aside in such cases – that the courts have no business in serving as umpire when the two political branches come into fundamental constitutional conflict.[44] The result of such a course, naturally, would be resolution of the conflict in the political arena.

In fact, the Supreme Court has often played the role of umpire between the President and Congress. In the field of war and foreign affairs, the Court has tended to be strongly deferential to presidential power. A famous dictum of the Court referred to the President as "the sole organ of the federal government in the field of international relations,"[45] but that dictum was uttered in the context of presidential action taken under explicit congressional authorisation. From time to time, the Justices have indicated that war, or other serious international emergency, might confer on the President certain powers that otherwise plainly would lie within the exclusive purview of Congress. Indeed, President Harry S Truman's seizure of the nation's steel mills during the Korean War, which the Court held unconstitutional for want of congressional authorisation, might well have been upheld if a majority of the Justices had been persuaded that a genuine military emergency existed.[46] In the final moments of the ill-fated American presence in Vietnam, Congress adopted a "War Powers Resolution"[47] over President Nixon's veto. The resolution purports to require a President who commits troops to the field without a congressional declaration of war[48] to report to Congress, and further requires that the forces be

[43] Powell v. McCormack, 395 U.S. 486 (1969).

[44] *See, e.g.*, C. BLACK, THE PEOPLE AND THE COURT 93–94 (New York, Macmillan, 1960).

[45] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[46] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[47] Joint Resolution Concerning the War Powers of Congress and the President, Pub. L. No. 93–148, 87 Stat. 555 (1973).

[48] U.S. CONST. art. I gives Congress the power to declare war; the Constitution gives no such power to the President. Given modern military technology, obviously

recalled after sixty days unless Congress has declared war or has extended the sixty-day period or is physically unable to meet as a result of armed attack. Presidents since 1973 have called the resolution unconstitutional, and it is permissible to wonder whether the Supreme Court could ever effectively decide this issue in an actual case.

In domestic affairs, the Court has been asked to define the boundary between the presidential and congressional spheres with surprising frequency, and the occasions for such rulings have increased in recent years. Some spheres are held to be exclusively presidential: the power to remove "purely executive" officers, for example.[49] Other areas are exclusively legislative: the seizure of the steel mills in peacetime was held to be such a case.[50] Some conflicts remain unresolved by the Supreme Court: for example, the question whether a congressional committee can constitutionally compel testimony by a high executive official who claims "executive privilege,"[51] or the question of the President's power to impound funds appropriated by Congress, refusing to spend them as instructed.[52]

When the question of executive-legislative separation of powers is not one of conflict but of excessive coziness, the judiciary's recent tendency has been to look the other way. It has been nearly half a century since the Supreme Court last held a congressional law invalid on the ground that it delegated "legislative power" to the Executive.[53] Thus all manner of federal executive agencies are now routinely granted authority to issue regulations under the broadest "public interest" standards. These exercises of legislative rule-making are, of course, reviewed for conformity to the underlying acts of Congress, and the courts also review administrative adjudication (primarily for

it may be impossible for the President to consult Congress before committing the armed forces to repel an attack.

[49] *Compare* Myers v. United States, 272 U.S. 52 (1926) (President can remove postmaster without consent of the Senate, despite a congressional statute requiring such consent), *with* Wiener v. United States, 357 U.S. 349 (1958) (President has no such power to remove member of War Claims Commission, a quasi-judicial body).

[50] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *Cf.* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding President Carter's settlement of claims relating to the Iranian seizure of American hostages, on a theory of congressional acquiescence).

[51] *Compare* C. Black, *supra* note 44, *with* Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 Ohio St. L.J. 1, 33–40 (1974).

[52] *See generally* Mikva & Hertz, *Impoundment of Funds – The Courts, the Congress and the President: A Constitutional Triangle*, 69 Nw. U. L. Rev. 335 (1974); and The Congressional Budget and Impounding Control Act of 1974, Pub. L. No. 93–344, 88 Stat. 297 (1974).

[53] The last occasion was Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). However, as late as 1976 the Supreme Court held invalid a congressional provision for appointment of some members of the Federal Election Commission by officers of Congress, holding that the appointment power was vested exclusively in the President. Buckley v. Valeo, 424 U.S. 1 (1976).

procedural fairness, but also for substantive conformance to congressional policy). Yet judicial review of administrative action, however widespread it has become, has not resulted in any significant intrusion by the courts into the making of legislative policies by federal administrators.

B. The European Community: The Institutions and Their Inter-Relationship

1. The Community Law-Making Organs

a) The Community "Institutions"

Although the EEC Treaty has little by way of express constitutional provision, the introductory provisions contain an embryonic scheme of checks and balances, the potential significance of which is relatively unexplored. After establishing the Community in article 1, and setting out its purposes and activities in articles 2 and 3, the Treaty sets out the germ of the constitutional balance in articles 4 and 5.

Article 4(1) provides that the tasks entrusted to the Community shall be carried out by the following institutions: an Assembly (generally referred to as the European Parliament), a Council, a Commission, and a Court of Justice. It further provides that each institution shall act within the limits of the powers conferred upon it by the Treaty.

The significance of the concept of institution is therefore in part that it is the institutions which are required to carry out the tasks entrusted to the Community: when the Community acts, it acts through its institutions, and when an institution adopts a measure, it does so for the Community. Community legislation, for instance, may take the form of a regulation of the Council, or of a regulation of the Commission, but it is nonetheless a Community measure. This is a fact of particular significance for the Council, since the Council is in terms of its composition an inter-governmental body (the term "inter-governmental" here denoting a relationship between states of the kind generally found under international law, with no federal or supranational element). Thus the Council consists of representatives of sovereign states; yet it too is a Community institution, subject to the obligations of the Treaties and to the constraints of Community law.

From the point of view of Community legislation, the status of institution gives each body a special place in the law-making process; and also, to some extent, in the judicial process, including the judicial review of legislation.

i) The Council

In addition to its other powers, especially in respect of the Community's external relations (the treaty-making power)[54] and in the adoption of the Com-

[54] *See generally* Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution, infra* this vol., Bk. 3, at § III.A.3.b.

munity budget,[55] it is the Council which has the principal law-making power under the EEC Treaty.

By virtue of its composition – consisting as it does of representatives of the Member States, delegated by their respective Governments (article 2 of the Merger Treaty) – the Council is an inter-governmental body of the kind usually found in international organisations rather than in federations. But it is at the same time one of the four "institutions" of the Community (article 4(1) of the EEC Treaty) whose duty it is, as we have seen, to carry out "the tasks entrusted to the Community." Located close to the headquarters of the Commission in Brussels, it has its own staff, responsible to the Council as an institution rather than to the Member State Governments and forming part of the Community civil service, although civil servants from the Member States are commonly seconded to it on a temporary basis to work alongside the permanent career officials.

In contrast to the ECSC Treaty, where the Commission (originally the High Authority) has the principal regulatory role and the functions of the Council (originally the Special Council of Ministers) are supervisory and advisory, the EEC Treaty uniformly confers the principal law-making powers on the Council. Thus where the Treaty envisages that legislation would be necessary to implement the objectives of the Treaty, it regularly provides that the Council shall issue the necessary regulations or directives for that purpose; and only in the most exceptional cases are law-making powers conferred by the Treaty on the Commission.[56] This is understandable given the programmatic character and wide-ranging scope of the EEC Treaty.

At first sight, the voting rules laid down by the Treaty contain a significant supranational element: the general rule laid down by article 148(1) is decision by simple majority. Matters are not, however, what they seem. To begin with, in many cases the Treaty itself provides for decision by a qualified majority, whereby the votes of the Member States are weighted and a qualified majority is 45 out of a total of 63.[57] Second, in some cases the Treaty provides for unanimity: this is so, not only in such fundamental matters as the admission of new members to the Community (article 237) but also in less important matters, for example, in the drawing up of a general programme for the abolition of restrictions on freedom of establishment (article 54(1)) and on freedom to provide services (article 63(1)).

Furthermore, apart from the Treaty provisions, there has developed a convention that, where very important Member State interests are at stake, the Council will act unanimously.[58] Indeed, it seems that, in practice, the Council

[55] *See generally* Sopwith, *Legal Aspects of the Community Budget*, 17 C.M.L. Rev. 315 (1980).

[56] *See infra* text accompanying notes 66–72.

[57] For the weighting, *see* EEC Treaty art. 148(2); and for its effects, *see* T. Hartley, The Foundations of European Community Law 12–13 (Oxford, Clarendon P., 1981).

[58] *See, e.g.*, T. Hartley, *supra* note 57, at 13–14, citing the "Luxembourg Accords" (Bull. EC 3–1966, at p. 8).

rarely votes, and usually tries to reach a solution acceptable to all Member States. Thus in practice the Council, when acting as a legislative body, has come to resemble an inter-governmental organ rather than an institution with supranational attributes. It is understandable, therefore, that Ministers and officials of the Member States regularly speak, and no doubt think, in terms of negotiating with their partners with a view to reaching a common text, much as they would do in any other international organisation. The result has inevitably been to devalue the role of the Commission in the law-making process.[59]

Only where the time-table imposes imperative constraints, as in the adoption of the Community budget, or the annual fixing of farm prices, does the Council decide by a majority vote; and if the need for unanimity in other matters does not serve to block all legislative progress there, it is only because of the need from time to time to negotiate "package deals" whereby a Member State accepts some objectionable measures in order to obtain progress on other issues which it regards as important.

The methods used in the Council – such as the annual marathon sessions for fixing farm prices, which rely on attrition or even exhaustion as means of reaching agreement, and the haggling and horse-trading which are used to reach compromises, often at the lowest common denominator, in other areas – are conducive neither to the dignity and reputation of the Council as a legislature nor to the quality of the resultant legislation itself. Its methods are difficult, also, to square with the requirements of democracy. Negotiations and bargaining take place behind closed doors, and while the European Parliament must be consulted on most Commission proposals of importance,[60] its function is purely consultative, and its opinion may be disregarded. In practice, Ministers are more likely to be attentive to the opinion of their national Parliaments, which are likely to put national interest, or party considerations, above the Community interest.

ii) The European Parliament

The Parliament, the first of the institutions listed in article 4(1) of the EEC Treaty, consists of "representatives of the peoples of the States brought together in the Community" (article 137); initially those representatives were delegated from the Parliaments of the Member States, but they are now elected by direct universal suffrage,[61] the first "direct elections" having been held in 1979.

While the Parliament has real powers, especially in budgetary matters and in supervision of the Commission, unlike the U.S. Congress it has only a con-

[59] *See infra* § II.B.1.a.iii.

[60] *See infra* § II.B.1.a.ii.

[61] *See* Council Decision (ECSC, EEC, Euratom) No. 787/76 of 20 Sept. 1976, OJ No. L 278, 8 Oct. 1976, p. 1; and Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, *id.* at p. 5. This change closely parallels U.S. CONST. amend. XVII, adopted in 1913 to provide for direct election of members of the Senate.

sultative role in the law-making process. It has the right under various provisions of the Treaties to be consulted by the Council on proposals of the Commission before the Council adopts those proposals; but the Council is not bound to follow the opinion of the Parliament.

Nonetheless the Court has interpreted strictly the Council's duty to consult the Parliament, and in one of the *Isoglucose* cases the Court annulled a regulation of the Council on the ground that that duty had not been properly discharged.[62] The Court stated that the consultation of the Parliament is the means enabling the Parliament to participate effectively in the legislative process of the Community; that that power is an essential factor in the equilibrium between institutions intended by the Treaty; and that it is the reflection, albeit limited, of a fundamental democratic principle according to which the peoples participate in the exercise of power through a representative assembly.

The Parliament's limited role in the law-making process was intended to be strengthened by the introduction in 1975 of the conciliation procedure. This procedure, which was introduced by a Joint Declaration of the Parliament, Council and Commission,[63] is provided for cases where the Council intends to depart from the Opinion of the Parliament. The procedure can be used only for Community acts of general application which have appreciable financial implications. A Conciliation Committee is set up, consisting of the Council and representatives of the Parliament. The Commission also takes part. The aim of the procedure is to reconcile the positions of the Parliament and the Council, and when these positions are sufficiently close, after a period not normally to exceed three months, the Parliament may give a new Opinion.

iii) The Commission

The Commission, the institution at the heart of the entire Community structure, is a political institution but independent of the Member States. The independence of its members is rigorously prescribed by article 10 of the Merger Treaty. Its political character is evidenced especially by its responsibility to the European Parliament.

Beyond its functions in the administration of Community legislation and as an enforcement agency, which are considered briefly below, and a unique role as guardian of the Community interest foreshadowed in article 155 of the EEC Treaty, the Commission participates in a variety of ways in the Community law-making process.

(a) The "right of initiative." Generally,[64] but not always, [65] the Council can legislate only on the basis of a proposal from the Commission. The require-

[62] Case 138/79, Roquette Frères v. Council, [1980] ECR 3333; and Case 139/79, Maizena GmbH v. Council, [1980] ECR 3393.

[63] Of 4 March 1975. OJ No. C 89, 22 Apr. 1975, p. 1.

[64] *See, e.g.,* EEC Treaty arts. 20, 28, 33(2), 43(2), 44(5), 54(2), 56(2), 57, 63(2), 69, 75(1) & 101.

[65] For exceptional cases in the EEC Treaty where the Council can act without a proposal from the Commission, *see, e.g.,* arts. 73(2), 106(2), 108(2) & (3), 109, 111, 113, 114, 154 & 206.

ment of a Commission proposal is intended to ensure that measures adopted by the institution most responsive to the interests of the Member States also reflect the Community interest as seen by the institution which is the keeper of the Community conscience. The same purpose is intended to be served by the provisions for amendment of the Commission's proposal.

(b) Amendment of the Commission's proposal. Article 149 of the EEC Treaty provides that where the Council acts on a proposal from the Commission unanimity is required to amend that proposal; and that as long as the Council has not acted the Commission may alter its original proposal. The fact that the Commission can amend its proposal at any time, while the Council can do so only if it is unanimous, should strengthen the supranational element in the decision-making process. In practice, the position is different.

It is the voting practice in the Council which has largely determined the relative power of the Council and the Commission. The EEC Treaty frequently provides for the decision of the Council to be reached by either a simple or a qualified majority; the Treaty provides only occasionally for unanimity. But, as we have seen, unanimity is required to amend a Commission proposal. It is obvious that, if the voting rules laid down in the Treaty had been observed, it would have been relatively easy for the Commission to see its proposals adopted, and easier still for the Council to adopt the Commission's proposals than to amend them. But since, in practice, the Council has imposed on itself a requirement of unanimity, it becomes much more difficult for the Council to act at all on the Commission's proposals, and, where it does act, it is as easy for the Council to amend the Commission's proposals as to adopt them.

Nonetheless, the Commission retains an important role in the Council's deliberations. It is present throughout and can sometimes play the role of honest broker to put forward a solution which commands the consensus of the Council without compromising the Community interest. In a forum which resembles a diplomatic conference to a greater degree than the Treaties envisaged, it too can exercise diplomatic skills. But its real powers lie elsewhere.

(c) Original legislative powers. The Commission has few if any primary, *i.e.*, non-delegated, law-making powers or powers conferred directly by the Treaty.[66] In almost every case it can adopt only delegated legislation under powers conferred upon it by the Council.[67] The Treaty did, it is true, confer certain law-making powers to be exercised by the Commission during the transition period prescribed by article 8.[68] Usually, the powers were to be exercised by directives; but in article 48(3)(d) provision is made (and not limited to the transitional period) for "implementing regulations" to be drawn up by the Commission. Article 97, one of the tax provisions of the Treaty which has been superseded, did empower the Commission to address appropriate directives or deci-

[66] On the question whether legislation enacted under the Treaty should be regarded as primary or secondary, *see infra* text accompanying notes 103–07.

[67] *See infra* notes 73–78 and accompanying text.

[68] *See* EEC Treaty arts. 13(2), 33(7), 45(2) & 91(2).

sions to the State concerned; however, it seems clear that that article envisaged not a general law-making measure but a particular ad hoc direction to an individual Member State, similar in scope to an individual decision.

Article 90, which deals with the delicate position of public undertakings and other special categories of undertakings, is of great interest in this respect, since its third paragraph provides that

> The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

For many years the Commission took no measures under that provision but in 1980 it adopted what appeared to be a general law-making directive, Commission Directive No. 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings.[69] The Directive purported to impose on Member States at large certain obligations of a general character. Several Member States took proceedings, unsuccessfully, for the annulment of the Directive on the ground of lack of competence.[70]

Certainly in other areas of the Treaty the Commission can legislate only when powers are conferred on it for that purpose by the Council. Even in the field of competition, where the Commission has the widest enforcement powers and comes closest to acting as a federal agency,[71] it has only those delegated and limited powers specifically conferred by the Council.[72]

(d) Delegated legislation. As well as its direct participation and involvement in the enactment by the Council of primary legislation, the Commission may be given the power to adopt delegated or subordinate legislation. Although article 155 of the Treaty authorises the Commission only to "exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter," that provision does not preclude the Council from conferring on the Commission the power to draw up regulations.[73]

[69] OJ No. L 195, 29 July 1980, p. 35.

[70] Joined Cases 188 to 190/80, French Republic, Italian Republic and United Kingdom v. Commission, [1982] ECR 2545.

[71] *See infra* text accompanying note 80.

[72] *See, e.g.*, Council Regulation (EEC) No. 19/65 of 2 March 1965, art. 1, [1965] JO p. 533, 534, 6 March 1965 ([1965–66] OJ (spec. Eng. ed.) at p. 35, 36), and Council Regulation (EEC) No. 2821/71 of 20 Dec. 1971, art. 1., JO No. L 285, 29 Dec. 1971, p. 46, 47 ([1971] OJ (spec. Eng. ed.) at pp. 1032, 1033), on the application of art. 85(3) of the Treaty to categories of agreements, decisions and concerted practices (authorising the Commission by regulation to declare that art. 85(1) shall not apply to certain categories of agreements). *See also, e.g.*, Commission Regulation (EEC) No. 27 of 3 May 1962, [1962] JO p. 1118, 10 May 1962 ([1959–62] OJ (spec. Eng. ed.) at p. 132) and Commission Regulation (EEC) No. 99/63 of 25 July 1963, [1963] JO p. 2268, 20 Aug. 1963 ([1963–64] OJ (spec. Eng. ed.) at p. 47), both made under powers conferred by Council Regulation (EEC) No. 17, art. 24, [1962] JO pp. 204, 211 (21 Feb. 1962) ([1959–62] OJ (spec. Eng. ed.) at pp. 87, 93).

[73] Case 41/69, ACF Chemiefarma NV v. Commission, [1970] ECR 661, 688. In exercising these delegated powers, the Commission acts very much like the American

Conversely, where such powers are to be exercised subject to the "Management Committee" procedure or similar procedures,[74] *i.e.*, subject to the supervision of representatives of the Member States, the Court has held that that procedure cannot be regarded as an unwarranted restriction on the decision-making powers of the Commission or as jeopardising its independence.[75] The issue arises in the following way.

Usually, in conferring on the Commission the power to adopt delegated legislation, the Council requires the Commission to consult either the national authorities or a committee composed of representatives of the Member States. The variations on this theme provide an example of the different ways in which the supranational powers of the Commission are exercised within an intergovernmental framework. In some cases the committee is purely consultative, and while the Commission is obliged to consult it, the consultation has no further legal consequence.[76] In other cases, while the committee's opinion is not binding on the Commission, nevertheless if the Commission does not follow the committee's opinion the Council has the power to reverse the Commission's measure within a limited period.[77] In yet other cases, the Commission's draft may be put into effect only if it has first been approved by the committee; otherwise the matter must go to the Council for decision but if the Council fails to act within a prescribed period, the Commission may adopt the draft.[78] Voting within the committees is weighted in the same way as in the Council,[79] but the committees are usually chaired by a Commission official, who has no vote. Such legislative procedures are designed to preserve a delicate equilibrium between the Commission and the representatives of Member States.

(e) Executive powers. The Community does not operate directly upon all persons and property within the territory of the Community; instead, Community policies and Community law are normally implemented within their territories by the Member States. For practical purposes, under the EEC Treaty – the position is different under the ECSC Treaty – it is only in one field, namely that of competition, that the Community authorities operate directly within the territory of the Member States, with the Commission having direct powers of enforcement. Elsewhere the role of the Member State authorities is predominant; thus in customs matters, in agriculture, in the free move-

federal administrative agencies and executive departments when they issue administrative regulations pursuant to congressional authorisation.

[74] *See* P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 61–62 (3d ed., London, Sweet & Maxwell, 1980); T. HARTLEY, *supra* note 57, at 10–11.

[75] Case 25/70, Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co., [1970] ECR 1161, 1171.

[76] *See* P. MATHIJSEN, *supra* note 74, at 61 n.45. In the U.S. it is only rarely that Congress requires federal agencies to consult in such a manner with the states.

[77] This was the position in, *e.g.*, the *Köster* case. *See* Case 25/70, [1970] ECR 1161, 1171, and [1970] ECR 1140, 1142 (for the opinion of the A.G.).

[78] *See* P. MATHIJSEN, *supra* note 74, at 61 n.45.

[79] *See supra* note 57.

ment of goods and workers, and in other areas of the Treaty, the Member State authorities are responsible for implementing Community law. In all these areas, the Commission proposes the adoption of Community legislation by the Council, and the Commission may itself adopt subordinate, implementing legislation, but its role is in policy-making: the administration of Community policies is left to the Member State authorities. The Commission may intervene if a Member State fails in its duty of implementing Community law, and may take proceedings against the defaulter before the European Court; to that extent also the Commission has an enforcement role. But it does not enforce the law directly against individuals or companies. In competition law, however, the Commission has direct powers of enforcement against individuals and companies. It may open investigations, inspect books, take decisions, impose fines. In the field of competition, therefore, the Commission is, in effect, a federal agency. Even here, however, the Commission's decisions – and judgments of the Court – are ultimately enforceable only through the means provided by the law of the Member States.[80]

iv) The Court of Justice

There is no true reflection, in the Community judicial system, of the distinction between state courts and federal courts which is sometimes found in developed federal systems. Instead, there is, on the one hand, a single Community court, the Court of Justice of the European Communities, which has a limited but varied jurisdiction bestowed upon it by the Community Treaties and by certain other instruments. On the other hand, Community law is regularly applied by any of the myriad courts and tribunals of the Member States which, in the course of their daily business, may be faced with questions of Community law. The link between the two is provided by article 177 of the EEC Treaty and by certain other provisions, which, although only one aspect of the multifarious jurisdiction of the Court of Justice, are crucial in this respect, in that they enable the Member State courts and tribunals in every case, and oblige them in certain cases, to refer questions of Community law to the Court of Justice for a "preliminary ruling."[81] Even when such a reference is made, it remains for the State court to decide the case, by applying as it sees fit the ruling of the Court of Justice. There is thus a shared jurisdiction between the Community Court and the Member State courts.

The Court has at the same time a representative and a collegiate character. It is representative, not in a political sense, but in the sense that its members represent the different legal backgrounds of the Member States.[82] It is collegiate in that it operates as a relatively detached, if not cloistered, institution, enjoys a substantial *esprit de corps*, engenders a pro-Community ethos, and readily assimilates new and independent-minded members. It gives judgment in a single collective decision, no separate or dissenting opinions being permit-

[80] EEC Treaty arts. 187 & 192.

[81] *See infra* § III.A.2.b for further discussion.

[82] Regional balance is also a factor in appointments to the U.S. Supreme Court.

ted – a procedural device which has no doubt contributed to the integrationist character of its jurisprudence. However, for a tribunal whose functions are so politically sensitive, the independence of its members is inadequately guaranteed, the term of appointment being limited to six years but renewable.[83] In practice, though, appointments have almost always been renewed when the incumbent so wished.

The Court's procedure gives a significant role to the Commission, the Advocate General and the Member States. The Commission takes part in almost every case, and has a particularly influential role in references under article 177, where the role of the parties themselves is relatively limited.[84] It has a unique ability to explain to the Court what it sees as the origin and effects of the Community measure in question. Analysis of the positions it has taken in major constitutional cases reveals a consistent advocacy of an integrationist interpretation, often followed by the Court.[85]

Member States, which also have a privileged position, being entitled to take part in almost every case, have made much less use of their position, often intervening only when there appeared to be important short-term interests at stake. One's impression from reading the reports is that few Governments consider systematically whether to intervene, and, unless their own short-term interests are involved, will intervene on a regular basis only when major issues appear to arise. Certainly, however, the organisation of the Court's procedure is such as to give emphasis to the Community interest at issue in the litigation, and to possible conflicts between the Community and the Member States.

One of the Court's Advocates General delivers an opinion in every case, his opinion being very often, but not always, followed in the Court's judgment. In the leading constitutional cases the Judges have sometimes shown themselves more progressive than the Advocate General.[86]

In the exercise of its jurisdiction the Court of Justice may perform different functions. In some respects, it serves as a federal court: for example, determining with final authority, for all courts of the Community, questions of law, including questions of private law. In other respects, it serves as a constitutional court: as when it determines the compatibility with the Treaty of Community

[83] EEC Treaty art. 167. (In the U.S. federal judges are appointed for life "during good behavior.")

[84] Protocol on the Statute of the Court of Justice of the EEC, art. 20. In the U.S., the Solicitor General, an officer in the Justice Department (and thus subject to the President's direction), represents the U.S. before the Supreme Court, and often serves as *amicus curiae* in the Court in cases in which the U.S. is not a party.

[85] *See* Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AJIL 1 (1981); *cf.* C.-D. Ehlermann, The Role of the Legal Service of the Commission of the European Communities in the Creation of Community Law (U. of Exeter, 1981).

[86] *See* Stein, *supra* note 85, at 24–26; L.N. Brown & F.G. Jacobs, The Court of Justice of the European Communities 60–61 (2nd ed., London, Sweet & Maxwell, 1983).

legislation, or when it adjudicates on the division of competences between the Community and the Member States. The role of the Court and some of the constitutional doctrines which it has developed and promoted will be discussed in greater detail later.[87] For now it is enough to repeat the oft-made observation that the Court has played a dynamic part – and perhaps even the most significant part of all – in the process of Community integration.

b) Other Community Bodies: The Economic and Social Committee and COREPER

The panoply of Community bodies includes some which are not "institutions" within the meaning of article 4(1) of the EEC Treaty, but which have some part in the law-making process. The most important of these bodies are the Economic and Social Committee which, according to article 4(2), assists the Council and the Commission acting in an advisory capacity; and COREPER which although of considerable political importance, is not even a creature of the founding Treaties.

i) The Economic and Social Committee

This Committee, consisting of three groups (employers, workers and "other interests"), has a right to be consulted on many types of legislative proposals.[88] Its purpose is plainly to provide a Community, rather than a Member State, forum for consultation on socio-economic questions, reflecting the role of similarly composed bodies which perform a valuable consultative function in some of the Member States.

ii) COREPER (the Committee of Permanent Representatives of the Member States)

COREPER has taken over many of the law-making functions of the Council. Formally recognised in the Merger Treaty (article 4), it has acquired an institutional life of its own and, with its numerous sub-committees and working parties composed of State officials, it emphasises the inter-governmental character of the Community law-making process.

Kapteyn and VerLoren van Themaat's comments on the role of COREPER in the Community of the Six are no less true in the Community of Ten:

> The constantly increasing importance of the function of the *Committee of Permanent Representatives* in the decision-making process is not without some danger to the position of the Commission and to the institutional equilibrium in general. It should be stated at the outset that, at the present stage of integration, the Committee forms an indispensable link between the national capitals and the Community capital "Brussels".
>
> The members of the Committee (in contrast to the national Ministers and officials, who appear in Brussels intermittently) are permanently placed at the point of intersection of national and Community politics and are able to make an important contribution to better mutual understanding among the seven participants in the decision-making process and to create a reasonable negotiating climate.

[87] *Infra* §§ III.A.1.b & 2.b & III.B.2.

[88] *See* EEC Treaty arts. 193–198 and, *e.g.*, arts. 49, 54(1), 63(1), 75(1) & 100.

> It is precisely this favourable position which involves the risk of a shifting of the centre of gravity of the decision-making process to this Committee. The exclusive right of initiative of the Commission may be impaired if the Council orders the Committee to submit new or amended proposals to it, if it is unable to reach a decision on the basis of the Commission's proposals, or if the Committee works out counter-proposals on its own initiative .... Theoretically, everything may be in due order, for the Council takes the decision; but in actual fact the political decision-making no longer takes place in the institution which the Treaty designates for it, namely the Council.[89]

And of course nor does the Commission exercise the role ascribed by the Treaty.

Thus, the dyarchy of Council and Commission, embodying the symbiosis of inter-governmental and supranational elements, and each with its separate political responsibility, risks being superseded by an inter-governmental bureaucracy.

c) Non-Community Bodies: The European Council

Outside the framework of the Treaty institutions, but now themselves institutionalised, are the regular meetings of Heads of State and Government in the forum now called the "European Council." This innovation has further impaired the institutional structure of the Community, devaluing the Community Council and, to a lesser extent, the other institutions. On the other hand, by enabling decisions to be taken at the highest political level, it has unblocked the decision-making process and has made possible progress on such matters as the introduction of the European Monetary System which might otherwise have been indefinitely delayed in the normal institutional machinery.[90]

2. The Inter-Institutional Relationship: Checks and Balances

The pivot of the system of institutional checks and balances in the Community is to be found in the interplay of the Council with the three other institutions, all of which have a distinctly Community, as opposed to inter-governmental, character, often verging on the supranational: the European Parliament, the Commission and the Court of Justice. Of those, the Parliament and the Commission are political institutions which, although in some respects subordinate to the Council,[91] are nonetheless independent; while the Court of Justice has

[89] P. Kapteyn & P. VerLoren van Themaat, Introduction to the Law of the European Communities 150–51 (London/Deventer/Alphen a/d Rijn, Sweet & Maxwell/Kluwer/Samsom, 1973).

[90] *See* Report on European Institutions 15–26 (presented by the Committee of Three to the European Council, October 1979) (Council of the EC, Luxembourg, Office for Official Pubs. of the EC, 1980) (*"Report of the Three Wise Men"*). *See also* Stein, *supra* note 54, at § III.B.

[91] Formally all institutions are equal and that equality is frequently underlined in the Treaties: *see, e.g.*, on Council and Commission, Merger Treaty art. 15. *De facto*,

the supreme power of judicial review (as well as interpretation) of Council measures and of almost all other measures adopted under the Treaties.

Of particular interest in the present context is the Court's role and policy in inter-institutional disputes. The Court exercises a general power of supervision over the Council and Commission under articles 173 and 175 of the Treaty, under which it can entertain suits respectively for the annulment of acts of those institutions, or for declarations that one of them has unlawfully failed to act. Occasionally Council and Commission confront each other directly before the Court; but far more often differences between them come before the Court indirectly, as for example in references from Member State courts under article 177, or when the Court is asked for an opinion on a projected international agreement under article 228. Just as the Court has in general sought to promote the interest of the Community at the expense of the States, so its inter-institutional policy has incontestably favoured the weaker (and more Community-minded) institutions at the expense of the Council.

Such a policy has been apparent not only in the many cases where the Commission's stance has been vindicated by the Court,[92] but also in the very few cases where the Parliament has been involved. A striking example is provided by one of the *Isoglucose* cases,[93] where the Parliament intervened before the Court: here the Court upheld both the Parliament's right to intervene and its right to be properly consulted on proposed legislation.[94] As the weakest of all the institutions, in terms of formal powers, the Parliament has been treated with solicitude by the Court, a solicitude which culminated in the Court's recognizing the right of the Parliament to take part in proceedings which put its own limited sovereignty in issue, and in upholding the Parliament's submissions against those of the Commission.[95] Although such decisions are still too infrequent to support any firm conclusions, a tentative inference is that the Court's desire to promote the institutional equilibrium of the Community will lead it to prefer the weakest institution's perception of the Community interest. Such a hypothesis would have been tested in actions brought, unusually, by the Council against the Parliament and the Commission over the adoption of the Community budget,[96] but the dispute was ultimately settled on the political level and the actions were withdrawn.

however, some are more equal than others, and the Council's supremacy in the law-making process is incontestable.

[92] *See* for a particularly striking illustration, Case 22/70, Commission v. Council, [1971] ECR 263 *(ERTA)*.

[93] Case 138/79, Roquette Frères v. Council, [1980] ECR 3333; Case 139/79, Maizena GmbH v. Council, [1980] ECR 3393 (also discussed *supra* text accompanying note 62, and *infra* text accompanying note 102).

[94] *Id.* at 3357 & 3360–61; and 3420–21 & 3424–25. *See* Jacobs, *Isoglucose Resurgent: Two Powers of the European Parliament Upheld by the Court*, 18 C.M.L. Rev. 219 (1981).

[95] Case 208/80, Lord Bruce of Donington v. Aspden, [1981] ECR 2205.

[96] *See generally*, Sopwith, *supra* note 55, at 333–40. *See also* Editorial Comments, *The European Parliament Before the Court of Justice?*, 16 C.M.L. Rev. 175 (1979); *The 1980/1981 Budget Wrangle*, 18 C.M.L. Rev. 5 (1981).

Despite its limited formal powers, the Parliament does play a central role in the institutional balance, partly because it is designed to act as a counterweight against inter-governmental tendencies, and partly because of its perceived role as a democratic check on the exercise of the legislative and executive powers by the other two political institutions, a role whose importance has been enhanced, at least in the popular view, since the implementation of direct elections. However, the institutional role of the Parliament was not even notionally conceived on the basis of a separation of powers theory comparable to the one that inspired the American constitutional division of powers. Basically, the Parliament has no "legislative" powers comparable to those of the Congress in America; its institutional role relies instead on procedural mechanisms in the law-making processes which require the involvement of the Parliament on a consultative basis in the formative stages. Despite recent reforms increasing its budgetary powers, the Parliament remains essentially a consultative and supervisory body. But it is not without real influence, particularly in its relations with the Commission, since article 144 of the EEC Treaty provides that a motion of censure carried by a two-thirds majority of the votes cast, representing a majority of the members of the Parliament, shall cause the members of the Commission to resign as a body. This power is of considerable ritual significance, symbolising as it does the collective political responsibility of the Commission. But it is symbolic only since the Parliament has no power to appoint a new Commission; perhaps for this reason, the power has never been exercised. The Commission has, however, taken seriously its responsibility to Parliament especially in recent years.[97]

The relationship of the Parliament with the Council is quite different from its relationship with the Commission. The Treaty makes the Commission politically responsible to the Parliament, but is silent on its political relations with the Council. As well as giving the Parliament the power to dismiss the Commission, the Treaty requires the Commission to reply orally or in writing to questions put by the Parliament or its members (article 140, third paragraph). However, from the beginning the Parliament extended this obligation to the Council, with the latter's agreement. When, in 1962, the Parliament introduced the procedure of oral questions followed by a debate, that procedure was accepted by Council and Commission with the proviso, however, that, where the Council is concerned, the debate may not be concluded by a vote on a resolution concerning the debated question. Similarly when in 1973, after the first enlargement, the Parliament introduced the British institution of "Question Time," it was recognised that, while both Council and Commission would take part, only the answers of the Commission could give rise to debate. The distinction reflects the difference between the Parliament's relationship with the other institutions.[98] The relationship of the Parliament with the Council is

[97] For modest suggestions for improvements in Parliament-Commission relations, *see* REPORT ON EUROPEAN INSTITUTIONS, *supra* note 90, at 59–60.

[98] *See* P. MATHIJSEN, *supra* note 74, at 26.

one of political co-operation and partnership and tends to find expression in a dialogue between the two institutions. Once a year Parliament meets with the President of the Council, in the presence of the Commission, to discuss matters of general interest on which the Council has not yet decided – the so-called "colloquies." Similarly, a representative of the Council presents three times a year, to Parliament an oral report on the activities of the Council, and the President of the Council makes a statement to Parliament on the outcome of the meetings of the European Council. Similarly a "programme of the Presidency" is presented by the incoming President of the Council every six months, at the beginning of his six months' term, and a survey of significant developments at the end of the Presidency. Finally, the Chairman of the Conference of Foreign Ministers reports once a year on the progress of European political co-operation, this report may be followed by a debate. These addresses, more than any other form of co-operation, give the members of Parliament an opportunity to impress upon the Council their views on the future developments of the Community.[99]

The status of the Parliament as a Community institution also gives it a role in proceedings before the Court. Until recently, it had appeared only as the defendant in staff cases brought before the Court by its own officials. The Parliament's procedural status under the EEC Treaty is otherwise very limited, although it is interesting to note that under article 38 of the ECSC Treaty action for annulment may be brought against deliberations of the Parliament, and in 1981 such an action was brought by Luxembourg against the Parliament for the annulment of a resolution concerning the seat of the institutions.[100] In the EEC Treaty, article 173 provides only for annulment of acts of the Council and Commission. The Parliament, for its part, has no right to sue for annulment under article 173, nor does it have the right to submit observations on a reference for a preliminary ruling under article 177. But it probably does have, although it has only recently exercised, the right to sue for failure to act under article 175.[101] Under article 37 of the Statute of the Court, the "institutions" also have an important right of intervention in cases originating in the Court of Justice. In the *Isoglucose* case,[102] the Parliament for the first time sought, and was granted, leave to exercise that right, so that, with the Commission intervening on the other side in support of the Council, all four Community institutions were involved in the proceedings.

In discussing the institutional balance it is also relevant to consider the question whether Community legislation should be regarded as "primary legislation" or as "secondary legislation." The question does not arise in the rela-

[99] *Id.* at 26–27.

[100] Case 230/81, Luxembourg v. European Parliament, [1983] ECR 255. *See also* Case 108/83, Luxembourg v. European Parliament (Judgment of 10 Apr. 1984, not yet reported).

[101] Case 13/83, European Parliament v. Council, OJ No. C 49, 19 Feb. 1983, p. 9 (not yet decided).

[102] Case 138/79, Roquette Frères v. Council, [1980] ECR 3333, 3357; Case 139/79, Maizena GmbH v. Council, [1980] ECR 3393, 3420–21; also discussed *supra* text accompanying notes 62 & 93.

tionship between Community law and national law, for in that context the appropriate analogy is simply the relationship between federal legislation and state legislation. But it is relevant to the judicial review of Community legislation. It was raised, and resolved in a particularly interesting form in the *Köster* case,[103] which put in issue the legality of the "Management Committee" procedure. It was argued that that procedure distorted the institutional balance, in particular because the system in question should have been adopted by the Council on a proposal from the Commission and after consulting the Parliament.

However the Court held[104] that

> Both the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognised in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot therefore be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council according to the procedure in Article 43. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision. On the other hand, the provisions implementing the basic regulations may be adopted according to a procedure different from that in Article 43, either by the Council itself or by the Commission by virtue of an authorization complying with Article 155.

The question recurred in the context of an action for damages, the *Schöppenstedt* case, where Advocate General Roemer, who pointed out that it was a Community regulation which was alleged to be the cause of the loss, asked "whether non-contractual liability can arise at all from legislative measures."[105] He reached the conclusion, followed by the Court, that it could, even though in some Member States liability attached only to subordinate legislation.

His conclusion was also followed in an opinion delivered on the following day in the *Compagnie d'Approvisionnement* case by Advocate General Dutheillet de Lamothe, who pointed out that the earlier case was concerned with a regulation of the Council, and added:

> As these regulations are *sui generis*, this makes it difficult to apply to them the traditional distinctions made by our national systems of law between primary and subordinate legislation and complicates the problem.
>
> That difficulty does not arise in the present case in which the contested regulations are regulations of the Commission adopted under powers expressly conferred by the Council and are therefore unquestionably mere subordinate legislation.[106]

[103] Case 25/70, *Köster*, [1970] ECR 1161. *See supra* notes 75–77 and accompanying text.

[104] Case 25/70, *Köster*, [1970] ECR 1161, 1170.

[105] Case 5/71, Aktien-Zuckerfabrik Schöppenstedt v. Council, [1971] ECR 975, 988.

[106] Joined Cases 9 & 11/71, Compagnie d'Approvisionnement v. Commission, [1972] ECR 391, 410.

Some years later, without adverting to the earlier opinions, Advocate General Warner had no hesitation in analogising Council regulations to Parliamentary statutes. After surveying the limits on retroactive legislation under the laws of the Member States, he said:

> Where a provision of the Treaty directly authorizes the Council or the Commission to legislate, the analogy is with a national Parliament empowered to enact statutes. Subject to the limitation that legitimate expectations may not be defeated, the Institution concerned is free to legislate retroactively, but it will be presumed not to do so. Its acts will be held to have retroactive effect only if and in so far as their terms evince, either expressly or by necessary implication, a clear intention that they should have that effect. Where however the Commission needs the authority of the Council to legislate, it can only do so within the bounds of the authority expressly or by necessary implication conferred on it by the Council. It cannot therefore legislate retroactively unless thereunto so authorized by the Council.[107]

In most legal systems, it may be thought, the distinction between primary and secondary legislation is fundamental for the purposes of judicial review. It might have been thought relevant, in the Community system, at a number of points: for example, to the question whether legislation can be annulled, and in particular at the suit of an individual; to the question whether legislation can generate liability in damages; and even to the question of grounds of review; thus the possibility could be envisaged that secondary legislation might be annulled for infringement of the general principles of law, but primary legislation only for infringement of the Treaty. But the Treaty itself has made no such distinctions.

III. The "Federal" Relationship: Institutional and Doctrinal Devices for Integrating the Central and State Legal Systems

In the preceding section we have examined how the "federal" tension has been balanced in the structures of the central law-making institutions; in particular we have observed that the EC allows a greater institutional role to the Member States in central law-making than does the U.S. system. But the establishment of central law-making organs is only one facet of the complex process of integration through centralised law; of equal importance are the status and the effects attributed to such central law within the constituent states – how it is received and implemented, and the limits of its application. Effective legal integration is not achieved by the mere fact of central legislation; rather, the degree of integration is determined by the recognition and effect accorded to the acts of the central organs within the composite system. It is this aspect of integration which will be examined in this section.

[107] Case 7/76, IRCA v. Amministrazione delle Finanze dello Stato, [1976] ECR 1213, 1239.

The relationship between centre and state is, of course, predetermined by the constituent documents, which, with greater or lesser clarity, expressly or implicitly, lay down the principles and doctrines which are to govern the interaction of the legal systems. Thus, constitutional doctrines such as supremacy, implied powers, direct effect and pre-emption will be studied in this section. At the same time, it would be mistaken to concentrate exclusively on doctrinal instruments to the exclusion of institutional devices. We have, for instance, already seen how the central-state tension has influenced the institutional balance and how the "federal" balance is incorporated into the law-making process. When it comes to the reception and application of this centrally-made law throughout the union, however, the central institutional structure which plays the significant role is the judicial one: in the U.S., the Supreme Court and the federal court system; in the EC, the Court of Justice and the Member State courts. It is, therefore, perhaps no accident that one of the striking historical parallels which emerges from the comparison of the two systems is the importance of the role played by the courts in the legal integration process. In the United States, the federal judiciary and the Supreme Court in particular have contributed greatly to the strength of national institutions and the growth of national law. Similarly, in a shorter span of years, the European Court of Justice has played a leading role in the process of European integration.

A. Institutional Devices for Regulating the Centre-State Relationship

1. Checks and Balances

a) In the U.S. Federal System

Government in the United States, both at the national level and at state and local levels, has grown to enormous proportions in the middle years of the twentieth century. Considering the degree of dispersion of governmental powers, the wonder is that the process works at all. The Framers of the Constitution, conscious of the connections between concentrated powers and despotism, deliberately dispersed governmental powers. The term "checks and balances" is most frequently applied to the separation of powers in the central government, but the division of powers between the central government and the states can be seen in a similar light.

The most important doctrinal issues concerning the relations of federal and state legislative power are now settled, and the settlement has very nearly reached the point of allowing the national Congress to be the judge of its own legislative power.[108] For eight years one modern decision stood in lonely opposition to this conclusion. Congress extended the national minimum wage to the employees of state and local governments. In 1976 a bare majority of the

[108] *See* J. Choper, Judicial Review and the National Political Process (Chicago, U. Chi. P., 1980).

Supreme Court held this extension invalid, concluding that it exceeded the limits of the powers of Congress under the Commerce Clause.[109] All the Justices agreed that Congress was empowered by the Commerce Clause to impose the minimum wage on private employers. The majority nonetheless held that the law impermissibly impaired the "integral governmental functions" of state and local governments, by forcing the allocation to wages of money that might otherwise be used to support governmental operations. This invasion of the core of state sovereignty, said the majority, did "not comport with the federal system of government embodied in the Constitution."[110]

The 1976 case was decided by a 5–4 vote, with one member of the majority writing separately to note his inclination to reach a different conclusion in a case (such as environmental regulation) in which the national interests were demonstrably stronger. The Court itself, in a footnote, remarked that it was not deciding whether Congress might invade even the core of state sovereignty on the basis of some other power, such as the power to make conditional grants of money or the power to enforce the fourteenth amendment.[111] After a series of cases in which congressional regulations were sustained against the challenge that they impaired the states' traditional governmental functions, in 1985 the Supreme Court overruled its 1976 decision.[112] Again the vote was 5–4, and the dissenters strongly suggested that a reconstituted Court would restore the overruled decision's principle.

Even if that eventuality should come to pass, the chief restraints on the exercise of the power of Congress to unify law by adopting nationally uniform legislation are not constitutional but political. These political limitations are real enough. Congress has never evidenced a desire to become the nation's sole significant legislature. National legislation is far-reaching and important, but it is still "conceived and drafted on an *ad hoc* basis to accomplish limited objectives."[113] Thus many congressional statutes contain built-in limits on their coverage; for example, the Fair Labor Standards Act, which sets a nation-

[109] National League of Cities v. Usery, 426 U.S. 833 (1976).

[110] *Id.* at 852.

[111] *Id.* at n.17. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In many instances, the conditions attached to federal grants are negotiated by federal and state officials, thus reducing their potential for disrupting or burdening state governmental operations. Similar conditions may also be written into the contracts that the Federal Government makes with private parties. In recent years, the states have, in fact, been asking the Federal Government to take over some programmes, such as the administration of welfare benefits.

For a discussion of possible constitutional limits on congressional power to condition federal grants on the surrender of portions of state sovereignty, generally in accord with the conclusions in the text, *see* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1194, 1250–57 (1977).

[112] Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985).

[113] HART & WECHSLER, *supra* note 41, at 470–71.

al minimum wage, largely excludes agriculture from its reach.[114] The reach of other national legislation is limited by administrative regulation; the National Labor Relations Board, for example, disclaims jurisdiction over "unfair labor practices" by enterprises whose annual volume of interstate business falls below specified amounts of money.[115] Such disclaimers, of course, are an effective invitation to the exercise of state legislative power.[116]

Even when Congress does not explicitly exclude certain areas from the coverage of its legislation, it almost never legislates in such a way as to keep the state legislatures entirely out of a subject area. In *every* area in the following list of subjects – all regulated by major federal statutes – state law remains significant for large numbers of transactions and relationships: labour relations; social security, including unemployment compensation; trade regulation; banking; patents and copyright; bankruptcy; transportation regulation of all kinds, including regulation of aviation; environmental protection; civil rights and race relations.[117] There are a few areas in which only the Federal Government legislates: no state has an army, or conducts foreign relations; no state can, without permission of Congress, tax foreign imports or exports; no state can coin money. Apart from this narrow class of subjects, however, the states remain very much alive and sovereign – yet subject to federal legislative power when it is exercised.

The most important state legislation of all is the heart of the body of both private law and the criminal law. Given the sporadic and incomplete nature of federal legislation, it is state law that continues to govern the overwhelming majority of transactions and relationships: contracts, torts, property, family law, criminal law – all these are mainly state law, with minor exceptions. An interstate passenger train is regulated by federal law in many ways, but (a) when the train strikes an automobile at a crossing, state law sorts out the liabilities of the parties; (b) when one passenger on the train assaults another, state law defines the crime and sets the procedure for trial; and (c) when two passengers sign a contract over lunch in the dining car, state law governs the contract. Furthermore, if one of those contracting parties should sue the other on the basis of the contract, the search for the governing state law will begin in the law of the forum state, for even the subject of conflict of laws is still, unhappily, not yet national law.[118] The law of judicial procedure, both civil and

[114] 29 U.S.C. § 213 (1970).

[115] *See generally* R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 22–25 (St. Paul, West Pub. Co., 1976).

[116] The State of California has enacted a law regulating labour relations in the field of agriculture. Cal. Lab. Code §§ 1140 ff (West, Supp. 1983).

[117] One of the most important pieces of federal legislation is the federal income tax law. The states are free to raise their own taxes, provided that they do not unconstitutionally burden interstate commerce or impede some other national programme or policy.

[118] *See* Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. Rev. 1191 (1967). *See also generally* Hay, Lando & Rotunda, *Conflict of Laws as a Technique for Legal Integration*, *infra* this vol., Bk. 2.

criminal, is state law, except for the procedure followed in the federal courts. While there is a considerable harmony among the laws of the various states, the reasons lie in a process of parallel development and not in the exercise of national legislative power.[119]

b) In the European Community System

In a provision which is analogous to that of Article XIII of the Articles of Confederation which preceded the American Constitution, article 5 of the EEC Treaty provides:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Article 5 is not merely a statement of the obvious, or a reiteration of the principle "pacta sunt servanda."[120] While its implications are far from fully explored, it seems that it corresponds to the fundamental requirement in federal systems of loyalty to the federal principle, conveniently encapsulated in the German term *Bundestreu*, which in the Community context may be expressed by the term *Community loyalty*.[121] The obligation under article 5 is not merely to comply with the letter of the law but to comply with its spirit: and it is an obligation not merely for the executive, but for all Member State organs, including the Member State courts.[122]

One of the tasks of the Commission and Court is that of ensuring that Member States comply with their obligations under the Treaties. This is indeed the first head of jurisdiction assigned to the Court under the EEC Treaty (articles 169 to 171). In that actions may be brought against a Member State either by the Commission (under article 169) or by another Member State (under article 170) it might be regarded as a form of international jurisdiction of the classic kind.[123] A fundamental difference, however, lies in the fact that the ju-

[119] See *infra* § IV.

[120] There are as yet few indications in the case law of the scope of article 5, but for an indication of its potential force *see, e.g.*, Case 30/70, Otto Scheer v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1197, 1206; Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, [1976] ECR 1989, 1997; Joined Cases 3, 4 & 6/76, Kramer and Others, [1976] ECR 1279, 1311; Case 141/78, France v. United Kingdom, [1979] ECR 2923, 1942; Case 208/80, Lord Bruce of Donington v. Aspden, [1981] ECR 2205, 2218.

[121] A term also used in P. Kapteyn & P. VerLoren van Themaat, *supra* note 89, at 58.

[122] *See* Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, [1971] ECR 487

[123] Indeed, a type of jurisdiction comparable to that of the European Court of Human Rights, to which a case may be referred by the Commission of Human Rights

risdiction of the Community Court is automatic and follows immediately from membership of the Community. A judgment by the Court that a Member State is in default is a declaratory judgment, unsupported, except under the ECSC Treaty (article 88, third paragraph), by any provisions for sanctions. Although the Commission has exercised with increasing frequency its power to sue under article 169, judgments under this head of jurisdiction have not often contributed significantly to the development of the substantive law.

As a counterpart to this head of jurisdiction, the Court is required to ensure that the Community institutions act lawfully within the powers conferred by the Treaties and do not exceed their mandate. This judicial review of acts of the institutions is provided for by article 173 and, under the first paragraph of that article, Member States (as well as the Council or Commission) may take proceedings against an EC institution, and may do so without demonstrating any legal interest.[124]

Thus the power of the Commission to take proceedings against Member States for failure to observe their Treaty obligations is balanced by the power of Member States to sue for the annulment of measures taken by the Council or Commission. The checks and balances which were observed in the law-making process are thus preserved at the judicial level. Seen from another point of view, article 173 and article 169 of the EEC Treaty can be seen as carrying forward the reciprocal obligations of articles 4 and 5: the obligation on the institutions to further the Community's aims, but to do so within the limits of the powers conferred by the Treaty; and the obligation on Member States of "Community loyalty."

2. The Role of the Judicial System

In the European Community as in the United States, judicial institutions of the central authority have played an important role in the unification of law.[125] In both systems the central courts perform two functions that may overlap in a given case. First, each has a distinctively "federal" role, maintaining uniformity of decision concerning the law of the central authority. Second, each has a "constitutional" function, policing legislation of both the central authority and the constituent Member States for inconsistency with the basic charter – in the United States, the Constitution, and in Europe, the Treaties. Part of this "constitutional" function is, of course, also "federal" in character, for it is

or, in certain circumstances, by a state party to the Convention. *Compare also* U.S. CONST. art. III, granting original jurisdiction to the U.S. Supreme Court in cases in which a state is a party.

[124] This wide provision is without any parallel in the American practice, where in litigation between the states and the Federal Government, there is always the threshold requirement of a "case or controversy" which in turn invokes all the usual rules of standing, ripeness, mootness, etc. *See generally* HART & WECHSLER, *supra* note 41, at ch. 2.

[125] For a more detailed examination of the role of the judicial organs in integration in America and Europe, *see* Cappelletti & Golay, *supra* note 4.

concerned with ensuring that the "vertical" relationship established by the constituent documents is respected, and thus judicial review is an important device for maintaining the federal balance. In both America and Europe it is clear that the judicial *system* as such – institutionally and procedurally, irrespective of the substantive content of the judicial decisions – has played an important role in the integration procedure.

a) The "Federalising" Influence of the Judicial System in the U.S.A.

Two elements in the American judicial system have contributed to the "federalising" influence of the courts: first acceptance of the general power of judicial review; and second the existence of a separate federal court system.

From an early time, the American Supreme Court has asserted the power to hold unconstitutional – that is, to refuse to enforce – either an act of Congress or an act of a state legislature that violates the Constitution. The Court's exercise of this power of judicial review raises questions concerning all of the Constitution's major allocations of governmental power: the separation of powers among the branches of the central government; the division of legislative powers between Congress and the states; and the Constitution's direct limitations on governmental power in the Bill of Rights,[126] the Civil War Amendments,[127] and in other provisions restricting the central government and the states. We have already examined how the Supreme Court has influenced national law-making in two ways, both of which have resulted in increased centralisation of power. First, the Court in the modern era has broadly interpreted the powers expressly delegated by the states to Congress. Second, the Court has centralised power in itself. The latter development is reflected not only in the modern Court's expansive reading of the limits of the Bill of Rights but also in its extension of the Bill of Rights to the states.[128] We now turn to examine the Court's influence on central-state relations.

i) The nationalising influence of federal constitutional law

Much that is national law in the United States is constitutional law.[129] There is a sense in which it is properly said that constitutional law is shaped by Congress, the President, and state governments – and even by police officers, business corporations, and student protesters. But federal constitutional law in the form of rules and principles authoritatively applied to particular cases is law made by judges, and particularly by the Supreme Court of the United States. The centralising effects of the Supreme Court's decisions on federal/state allo-

[126] These are the first ten amendments to the Constitution, adopted in 1791, just two years after the Constitution went into effect.

[127] These are the thirteenth amendment, abolishing slavery; the fourteenth amendment, including the equal protection clause and a due process clause applicable to the states; and the fifteenth amendment, forbidding the denial or abridgement of the right to vote on account of race.

[128] *See* the discussion of the separation of powers in the U.S., *supra* § II.A.2.

[129] Each state has its own constitution, and thus a body of state constitutional law. We refer here to federal constitutional law.

cations of power will be discussed below.[130] We are concerned here with substantive restrictions on the powers of government, such as the freedom of speech or the freedom from official racial discrimination. In these areas of law, the extension of constitutional guarantees has a centralising effect, substituting a uniform nationwide rule for any contrary state law.

(a) Constitutional standards for state action. The Bill of Rights did not address the states, but rather limited the powers of Congress. Even Marshall, the architect of judicial nationalism, refused to take advantage of the generality of the language of most of the amendments in the Bill of Rights by applying their provisions to the states.[131] Until the late nineteenth century, substantive – as distinguished from federalistic – constitutional limitations on the states were only dimly perceived. Generalized notions of "fundamental law,"[132] or natural-law interpretations of the contract clause,[133] or abstractions about "jurisdiction"[134] were invoked from time to time by a Supreme Court that was groping for a coherent doctrine. It was the post-Civil War adoption of the fourteenth amendment, with its guarantees of equality and due process of law, that provided a doctrinal base not only for congressional civil rights legislation but for national judicial supervision of arbitrary state legislation.

The Supreme Court's earliest interpretation of the fourteenth amendment virtually limited its reach to the subject of racial equality.[135] A dissenting minority of Justices, however, saw in the amendment's broad language an opportunity to establish judicial supervision of state legislation as a guarantee against arbitrariness, particularly in the sphere of economic regulation. By century's end, the dissenters had become a majority. For nearly fifty years, the Court sat as a "super-legislature," ruling invalid social and economic legislation, of both the Congress and the state legislatures, when that legislation restricted economic liberties that were thought "fundamental" by a majority of Justices. During this era, nationally uniform rules governed a broad area of potential state legislation: the states could not regulate prices or set minimum wages; they could not protect workers against discharge for membership in labour unions.[136] The chief doctrinal vehicle was the guarantee of "due process of law," which the Court held to have substantive as well as procedural content.[137] Between 1890 and 1937, the Court issued more than 185 decisions

[130] *See infra* notes 192–99 and accompanying text.

[131] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[132] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *cf.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[133] *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[134] Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1855).

[135] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[136] The principal cases are summarised in G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 523–27. (10th ed., Mineola, Foundation Press, 1980). The leading case, which gave this era its name, was Lochner v. New York, 198 U.S. 45 (1905).

[137] There are parallel due process clauses in the fifth amendment (limiting the Federal Government) and the fourteenth amendment (limiting the states).

striking down state statutes on the basis of the due process and equal protection clauses. The Court's repeated references to "liberty of contract" made clear that the Constitution was perceived by a majority of the Court to embody classical liberal economic thought. There were important exceptions; neither property nor liberty of contract was an absolute. But a glance at the exceptional decisions upholding regulatory legislation such as zoning regulations on urban land use[138] or maximum hours for women workers[139] serves to highlight the fact that in this area the Constitution had become something very close to a collection of the Justices' personal preferences. Charles Evans Hughes, a former Justice, then Governor of New York (and later Chief Justice), said, "We are under a Constitution, but the Constitution is what the judges say it is."[140]

Throughout this period of dominance of the natural law doctrine of economic due process, some Justices continued to dissent from the substitution of the Supreme Court's wisdom for that of the various legislative bodies. With Justice Oliver Wendell Holmes, Jr., they argued that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[141] And in 1937, the same year in which the Supreme Court opened the door to greatly increased congressional power under the Commerce Clause, the Court also began to dismantle the doctrinal structure of economic due process. Since 1937, only one decision has struck down a state economic regulation on either due process or equal protection grounds,[142] and in 1976 that decision was itself overruled.[143]

The result of this judicial self-restraint is that, in the area of economic regulation, the former nationally uniform rules of economic liberty have been replaced by state legislative diversity. The states are free to experiment – to serve as legislative "laboratories," as Justice Louis Brandeis called them – provided that their experimentation does not fall afoul of the implied limitations of the Commerce Clause or other grants of power to Congress. The proviso is significant; every national administration since the 1930's, including even the present one, has accepted major responsibility for the health of the national economy, and congressional regulation now dominates the field of economic regulation.

(b) Human rights: examples of national standards set by the Supreme Court.[144] The major constitutional changes of 1937 amounted to an abdication by the Supreme Court from its role as super-legislature only in the area of economic

[138] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[139] Muller v. Oregon, 208 U.S. 412 (1908).
[140] Speech at Elmira, New York, May 3, 1907.
[141] Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion).
[142] Morey v. Doud, 354 U.S. 457 (1957) (equal protection).
[143] New Orleans v. Dukes, 427 U.S. 297 (1976).
[144] For a more detailed discussion of human rights issues in legal integration in the U.S. and Europe, *see* Frowein, Schulhofer & Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration, infra* this vol., Bk. 3.

regulation. In those areas that can be described as areas of human rights, the Court has greatly expanded the reach of federal constitutional guarantees. This constitutional expansion implies a correspondingly expanded power of the federal judiciary, and also the replacement of diverse state-law rules with nationally uniform rules of constitutional law. We shall discuss four such areas: criminal procedure, freedom of expression, the equal protection of the laws, and personal rights such as privacy and the freedom of intimate association. In all these areas the past half-century has seen a process of constitutional growth that dwarfs, in comparison, the previous half-century's growth of economic due process.

(i) Criminal procedure and the "incorporation" debate.[145] The Bill of Rights, we have seen, was directed against congressional invasions of individual liberty, and not against the states. But the development of constitutional protections against "arbitrary" state interference with economic liberties created doctrinal underpinnings for similar protections of other liberties. In 1925, the Supreme Court recognised that the guarantees of freedom of speech and the press were protected by the due process clause of the fourteenth amendment against state infringement.[146] Thus another aspect of "substantive" due process came to birth, to take its place alongside the guarantees of economic liberty that had been found in the due process clause. "Procedural" due process – a guarantee of fundamental procedural fairness, particularly in criminal prosecutions – also received new impetus for expansion in the 1920's.[147] When the Supreme Court discarded the economic-liberty content of due process in the late 1930's, not only was there no similar abandonment of due process limitations on the states in the areas of freedom of expression and criminal procedure, but further expansion of those guarantees resulted.

This growth in uniform national standards of personal freedom produced a running doctrinal controversy among the Justices of the Supreme Court and among professional commentators on the Court's work. The issue, stated simply, was this: Does the fourteenth amendment "incorporate" the Bill of Rights making it applicable to the states?[148] The Supreme Court never adopted the position that the entire Bill of Rights can be read as limiting the states. But the heart of that position came to be law. Piece by piece, every important guarantee of the Bill of Rights was held applicable to the states. In the area of the criminal process, this development has extended to the guarantee against unreasonable search and seizure of persons and property, the privilege against self-incrimination, the right to confront the witnesses brought against one, the right to counsel, and the right to jury trial. All these rights, formerly re-

[145] The particular problems of criminal procedure and incorporation are discussed in greater detail by Schulhofer in *id.* at § III. Incorporation is also analysed in more detail in Cappelletti & Golay, *supra* note 4, at nn.178–88 and accompanying text.

[146] Gitlow v. New York, 268 U.S. 652, 666 (1925) (dictum).

[147] The first major case was Moore v. Dempsey, 261 U.S. 86 (1923).

[148] The debate is fairly summarised in the various opinions in Adamson v. California, 332 U.S. 46 (1947).

garded as guarantees only against the Federal Government, have been incorporated into the fourteenth amendment's protections against state infringement.[149] The portions of the Bill of Rights that have not been made applicable to the states are of marginal importance.[150] While the dispute continues over the appropriate doctrinal explanation for this extension of federal law, in practical effect the dispute has been settled in favour of the total incorporation position. State courts and local police officers now must govern their daily conduct with an eye to federal standards, often in the form of rather detailed rules,[151] set by the Supreme Court.

Those Justices who opposed the doctrine of incorporation took the position that the fourteenth amendment served not as a mechanical connection between the Bill of Rights and the state governments, but instead as a guarantee of "the fundamentals of ordered liberty," which might or might not be coextensive with the particular guarantees of liberty that restrained the Federal Government.[152] Their objective, readily discernible in their opinions, was to maintain the flexibility that would allow the states broad latitude to set policy relating to criminal justice. The argument was, as they saw it, an argument over state sovereignty, similar to the dispute over the substantive reach of the due process clause in economic matters. The proponents of the incorporation doctrine, on the other hand, saw in the "fundamentals of ordered liberty" approach a return to a natural law doctrine that would permit the Court "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well the Federal Government."[153] Thus, as often happens in disputes both doctrinal and otherwise, both sides were appealing to the same abstraction; here the abstraction was judicial self-restraint.

(ii) The freedom of expression. The progressive incorporation of the guarantees of fairness in the criminal process into the fourteenth amendment had a slow beginning, and came to be accomplished only with a whirlwind of judicial activity in the 1960's. In the area of freedom of expression, the developments have been more steady and gradual. After the Supreme Court's 1925 recognition that the freedoms of speech and of the press were guaranteed against state infringement, the question of "incorporation" of the first amendment into the fourteenth amendment rarely arose.[154] Instead, with a majority

[149] *See generally* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

[150] Two provisions have been left out: the "right" to be indicted by a grand jury (rather than prosecuted under a prosecuting attorney's complaint), and the right to jury trial in civil actions at common law where the amount in controversy exceeds twenty dollars. These provisions, of course, do apply in federal courts.

[151] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[152] *E.g.*, Palko v. Connecticut, 302 U.S. 319 (1937).

[153] Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting).

[154] For expressions of doubt, *see* Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting); Roth v. United States, and Alberts v. California, 354 U.S.

of the Court assuming that speech and the press and political association were equally protected against the federal and state governments, the Court focused on a series of discrete issues concerning the substance of those freedoms. Was labour picketing, for example, protected speech?[155] Could a member of an evangelical religious sect be convicted, consistent with the first amendment, for selling religious literature door to door, in violation of a city ordinance against any such selling?[156] Could a school board constitutionally dismiss a child from school for refusing on religious grounds to salute the flag?[157] Those questions were typical of the first amendment issues before the Court in the 1940's , and (also typically) each of them was decided in favour of the asserted freedom. In the 1950's such questions were replaced at the centre of the first amendment stage by questions concerning the relation between internal security and the freedom of political expression or association. During that decade, when the Cold War was at its coldest, the Supreme Court's performance in first amendment cases was mixed. The Court avoided direct confrontation with the political freedoms by giving a narrow interpretation to congressional statutes, tailoring them to restrict their reach while preserving their theoretical constitutionality.[158] The 1960's saw a return to the same kind of vigorous protection of the freedom of political expression by the Court that had characterised the 1940's, and surely the most important reason was that many of the issues of political freedom arose out of incidents in the movement for racial equality.[159] More recently, while the Supreme Court's performance in first amendment cases is properly described as "undulatory," dissident political expression has continued to find protection from a Court often labeled as conservative.[160]

The protection afforded by the judiciary, of course, is protection according to a single, uniform body of national constitutional law. An example can be found in the law of defamation. Until 1964, there were two competing lines of decisional authority in the state courts on the extent of the privilege of "fair comment" on the conduct of public officials. Courts in a number of states had held that the privilege to make a good faith but defamatory statement about an official's performance of his or her duties extended not only to statements

476, 496 (1957) (Harlan, J., dissenting and concurring); Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306 (1949). For a more detailed account of the development of the protection of freedom of expression, *see* Frowein, Schulhofer & Shapiro, *supra* note 144, at § III (by Martin Shapiro).

155 Thornhill v. Alabama, 310 U.S. 88 (1940) (yes).

156 Martin v. City of Struthers, 319 U.S. 141 (1943) (no).

157 West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943) (no).

158 *E.g.*, Yates v. United States, 354 U.S. 298 (1957); Greene v. McElroy, 360 U.S. 474 (1959).

159 *See* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (Columbus, Ohio State U.P., 1965).

160 *See* Choper, *The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*, 30 SYRACUSE L. REV. 767, 782 (1979).

of opinion or evaluation, but also to honestly mistaken statements of fact. A large majority of the courts, however, had limited the privilege to the expression of opinion or criticism, denying any such privilege in cases of misstatements of fact.[161] By a single decision in 1964, the former "minority" rule became *the* rule; the Supreme Court held that any lesser privilege would violate the guarantees of freedom of speech and press.[162] Thus a Common Law question of private law, about which courts might differ, overnight became governed by a uniform national rule of constitutional law.

(iii) The equal protection of the laws. During the 1960's, we have seen, the Supreme Court's record in the areas of criminal justice and political freedom was one of great activism. But we have not yet discussed the area that has provided the most fertile ground for constitutional growth during the period of leadership of Chief Justice Earl Warren in the years 1953–1969. That area, as everyone knows, is the area of equality. The movement for racial equality has been the main motivating force bringing cases to the Court for decision, but by no means has the recent expansion of the constitutional principle of equality been limited to matters relating to race.

Still, the story begins with the subject of racial equality, for the fourteenth amendment was adopted after the Civil War primarily for the purpose of achieving equality among the races. That amendment not only included the guarantee of due process of law, but also forbade a state to deny to any person "the equal protection of the laws." Furthermore, Congress was given power to enforce the amendment by legislation. However, the Supreme Court virtually emasculated the equal protection clause in two decisions of the late nineteenth century. First, the Court held that Congress could enforce the fourteenth amendment only against "state action" (official state denials of equal protection of the laws), and not against private acts of racial discrimination.[163] Then, the Court upheld a state law requiring racial segregation on railroads, provided that the facilities furnished each race were "equal."[164] The result of these two key decisions, reinforced by others, was to turn the question of race relations over to the states, and particularly to the Southern states which had maintained slavery up to the Civil War. Thus there was little national uniformity in the law of race relations, or, to put it less abstractly, both the Congress and the federal courts were prevented from playing their intended roles in the struggle for racial equality.

This dismal picture, it will be seen, is composed of two elements: the content of equality in the fourteenth amendment was narrowly defined, and the amendment's reach was limited to cases involving official acts that were racially discriminatory. Beginning in the 1940's, the Supreme Court began slowly to weaken the force of the latter limitation. Thus "private" political par-

[161] *See* W. Prosser, The Law of Torts 814 (3d ed., St. Paul, West Pub. Co., 1964).
[162] New York Times Co. v. Sullivan, 376 U.S. 255 (1964).
[163] The Civil Rights Cases, 109 U.S. 3 (1883).
[164] Plessy v. Ferguson, 163 U.S. 537 (1896).

ties were required to open their primary elections to all persons, regardless of race,[165] and provisions in "private" contracts or deeds restricting land ownership to whites were held unenforceable by state courts.[166] In a variety of ways, the Warren Court promoted the constitutionalising of private groups and relationships. While the Supreme Court in the 1970's reasserted the state action limitation on judicial enforcement of the fourteenth amendment in several decisions,[167] the Court has continued to validate the extension of national *legislative* power to prohibit private racial discrimination.[168]

In a parallel development, the Warren Court greatly expanded the substantive content of equal protection. The school segregation decision of 1954[169] and its progeny laid to rest the old "separate-but-equal" principle, and laid the doctrinal basis for an affirmative duty of school boards to dismantle segregated school systems by assuring the actual integration of the races in the schools.[170] State laws forbidding racial intermarriage were held invalid,[171] as was state-sponsored segregation in official buildings and privately owned hotels, restaurants, and other places of public accommodation.[172]

Beyond the race cases, the Warren Court expanded the content of the constitutional minimum of equality in the electoral process. A poll tax, even so low a tax as to be largely a symbol, cannot constitutionally be made a condition on voting.[173] In the drawing of boundaries of electoral districts, both for congressional elections and for elections of the state legislatures, the principle of substantial equality must control: one person, one vote.[174] Unreasonable difficulties may not be placed in the way of minority political parties that seek a place on the ballot.[175] The resulting principle was (and is) that the courts will examine with "strict scrutiny" any discrimination resting on a "suspect" classification (*e.g.*, race), or resulting in a denial of a "fundamental" interest.[176]

These constitutional developments not only imply a greatly expanded doctrine of equal protection; they also imply greatly increased policy-making powers for the judiciary. The new substantive equal protection is as readily adaptable to judicial supremacy as was the old substantive due process in hands of judges who sought to promote economic liberty.[177] The recent major-

[165] Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).
[166] Shelley v. Kraemer, 334 U.S. 1 (1948).
[167] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).
[168] *See infra* notes 247–56 and accompanying text.
[169] Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955).
[170] Green v. County School Board, 391 U.S. 430 (1968).
[171] Loving v. Virginia, 388 U.S. 1 (1967).
[172] *See* the decisions collected in G. GUNTHER, *supra* note 136, at 762, 1005–07.
[173] Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).
[174] Reynolds v. Sims, 377 U.S. 533 (1964).
[175] *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).
[176] *See Developments in the Law – Equal Protection*, 82 HARV. L. REV. 1065 (1969).
[177] *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

ity of the Supreme Court has decided to call at least a temporary halt to this extension of judicial power – and correspondingly, to the imposition of progressively more uniform national standards of equality.[178] But the decisions of the Warren era have not been overruled; they have merely failed to win extension to their broader implications.

In several respects, the Supreme Court in the 1970's did extend the reach of the equal protection clause. Judicial scrutiny of state legislation was heightened when the state discriminated against women,[179] against aliens,[180] or against illegitimates.[181] None of these forms of discrimination was fully assimilated to the doctrine governing racial discrimination,[182] but all of them have been subjected to constitutional review at a level that has produced significant national uniformities of law.

(iv) Rights of "privacy" and intimate association. The Supreme Court's contributions to egalitarian political movements in the United States are hard to measure, but unquestionably great. *Brown v. Board of Education*,[183] the school segregation case, not only provided a basis in traditional legitimacy for the movement for racial equality; along with its successor decisions, it also laid a doctrinal foundation for thinking about any form of systematic disadvantage imposed by American society. One by-product of this egalitarianism was the recognition of new personal liberties as constitutional rights. This development began in the name of a right of privacy; it now can be seen to embrace other constitutional values, too, including an emerging freedom of intimate association.

The modern decisions begin in 1965 with *Griswold v. Connecticut*,[184] which invalidated the conviction of a birth control clinic's medical and administrative staff under state laws that had been interpreted by state courts to prohibit the furnishing of birth control information and devices. It was true, the Court said, that the statutes did not violate any of the specific guarantees of the Bill of Rights (nearly all of which, by 1965, were in process of being "incorporated" into the fourteenth amendment and applied to the states). However, the Court concluded, the various specific guarantees have "penumbras, formed by em-

[178] *E.g.*, Evans v. Abney, 396 U.S. 435 (1970); Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[179] *E.g.*, Craig v. Boren, 429 U.S. 190 (1976).

[180] *E.g., In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973). *But see* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979), marking a period of retrenchment.

[181] *Compare* Trimble v. Gordon, 430 U.S. 762 (1977), *with* Lalli v. Lalli, 439 U.S. 259 (1978).

[182] The Court's equal protection decisions employ a sliding scale of standards of judicial scrutiny. The more a legislative classification is analogous to a "suspect" classification (such as race), the stricter the scrutiny. Similarly, scrutiny is heightened as more important individual interests are at stake.

[183] 347 U.S. 483 (1954), 349 U.S. 294 (1955).

[184] 381 U.S. 479 (1965).

anations from those guarantees, that help give them life and substance."[185] The first amendment protects various types of freedom of association, including associational privacy; other guarantees against unreasonable searches and seizures and against compulsory self-incrimination similarly protect privacy. Considered together, these provisions create a constitutional right of privacy; the birth control case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Indeed, the right of marital privacy is "older than the Bill of Rights."[186] The previous diversity of state legislation was thus replaced by a uniform national rule, through the process of a broadened interpretation of the guarantees of the national Constitution.

Eight years later, the Supreme Court, drawing on the *Griswold* decision, radically changed the law governing abortion in the United States. Until 1973, the various state laws on the subject ranged from the highly restrictive rule making abortion a crime unless it were performed to save the mother's life to the very liberal rule allowing a woman to choose to terminate her pregnancy at any time during the first half of the normal forty-week term. At a single stroke, the Supreme Court invalidated the more restrictive abortion laws that had been operative in a majority of the states.[187] The Court did not feel compelled to locate the right of privacy in a particular textual source, but did express a preference for the protection of "liberty" in the fourteenth amendment's due process clause.

The abortion decision has been under steady political fire from the day of its announcement; proposals for amending the Constitution to "overrule" it have gathered considerable support. Yet almost none of the opposition focuses on concerns about federalism or state autonomy; indeed, one of the proposed amendments would forbid abortion throughout the nation, substituting one nationally uniform rule for another. For a half-century, the dominance of national law-making power has been accepted as part of the normal political environment.

Whatever the modern constitutional right to "privacy" may come to mean in other contexts, its central meaning in the *Griswold* decision gave protection to the marital relationship. Today the constitutional "right to marry" is well established.[188] Of course the existence of this right does not imply that a four-year-old boy has a right to marry his sister; this right, like others, is subject to regulation that serves important governmental objectives. To say that there is a constitutional right to marry is merely to say that when the state seeks to limit that right, it must offer justification for doing so, in proportion to the degree of the restriction. In recent years the Supreme Court has also given constitutional protection to various other forms of family relationships, including

[185] *Id.* at 484.
[186] *Id.* at 485.
[187] Roe v. Wade, 410 U.S. 113 (1973).
[188] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

the parent-child relationship.[189] If we pursue the question why the Court has regarded these interests as "fundamental," deserving close judicial scrutiny of justifications for their restriction, we are led to explore the values that underlie marriage and family relationships. The values of intimate association defy precise description, let alone measurement. Yet it is possible to identify at least certain core values of intimate association that have found recognition in judicial opinions. Chief among these values are: (i) the society of intimates, including personal access to them;[190] (ii) caring and commitment; (iii) intimacy, in both its senses, *i.e.*, privacy and closeness of association; and (iv) self-identification, the shaping of one's personal identity through close association with another or others.

It is readily seen that these values are to be found not only in traditional marriages and families, but in all manner of intimate associations: the couple who live together without marrying, the homosexual couple; the commune; the relationship between an "illegitimate" child and his or her parent(s).[191] The Supreme Court has had the opportunity to face a number of issues raised by such cases, but as yet has not directly confronted them. A great many lower courts have dealt with these issues, with mixed results for the freedom of intimate association. It is easy to see the potential of this field for judicial intervention into the field of legislative choice. The Supreme Court's current majority has been reluctant, for the most part, to extend judicial power to new areas. But this particular area has special appeal, and it would not be surprising if the Court in the near future were to take further cautious steps along the path that *Griswold* opened. Such a development could, no doubt, be characterised as furthering legal integration. What is clear is that in "privacy", as in other areas, with each advance of constitutional law into new territory, the diversity of state law has diminished, and the uniformity of national law has increased.

ii) The federal court system

In carrying out both the "federal" and the "constitutional" judicial function, the Supreme Court is joined by a nationwide body of lower federal courts whose judges are appointed by the President with Senate approval, and which operate separately from the courts of the states. The existence of this federal court system has proved fundamental to the development of the federal legal system in America.

A major reason for establishing a separate federal judiciary was to counter "the prevalency of a local spirit"[192] among state courts. Thus the Constitution

[189] *See e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Stanley v. Illinois, 405 U.S. 645 (1972). *See generally* Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329; *Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156 (1980).

[190] An example of a case implicating this interest would be the claim of a prisoner to the right to be visited by members of his family.

[191] *See generally* Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

[192] The Federalist No. 81, at 486 (A. Hamilton) (C. Rossiter ed., New York, New American Library, 1961).

authorised Congress to confer jurisdiction on the federal courts in cases in which the opposing parties were citizens of different states, and from the beginning Congress has established that type of jurisdiction. A more important motive for creating a federal judiciary was that state judges, lacking security of tenure, would be "too little independent to be relied upon for an inflexible execution of national laws."[193] The Constitution thus authorised Congress to give the federal courts jurisdiction over cases involving the United States as a party, and in cases arising under the Constitution or under federal laws. The fact is, however, that there were precious few federal laws in the nation's early years, and it was not until after the nationalising influence of the Civil War that Congress conferred on the federal courts a generalised "federal question" jurisdiction – that is, jurisdiction over cases arising under the Constitution and laws of the United States.[194] Today we have no difficulty in appreciating the Framers' conception of the federal courts as instruments for maintaining the supremacy of federal law.

The Supreme Court of the United States sits not only at the apex of the pyramid of federal courts but also as the final appellate court in cases involving federal law that arise in the state courts.[195] The decision of a state's highest court concerning a question of federal law can be reviewed by the Supreme Court, with or without the state court's blessings – in strong contrast to the jurisdiction of the European Court of Justice. Early in the nineteenth century, some state courts and legislatures challenged the power of the Supreme Court to take appeals from state court decisions. It is a measure of the strength of the federal judiciary that these challenges were largely settled by decisions of the Supreme Court itself. Justice Joseph Story, writing for the Court, concluded that if state court decisions on questions of federal law were to be final, with no review in the national Supreme Court, then there might be as many interpretations of statutes and treaties of the United States – or even of the Constitution – as there were state supreme courts. Story properly argued that the nation needed "uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." To achieve that objective, the nation required a "revising authority to control these jarring and discordant judgments, and harmonize them into uniformity."[196]

The Supreme Court's appellate jurisdiction over state court judgments on questions of federal law is essential not only for the uniformity of interpretation of federal law, but also for the supremacy of federal law over inconsistent state law. A state criminal statute that violated the federal Constitution might

[193] *Id.* at 486.

[194] This jurisdiction was established in 1875, and ultimately brought about substantial increases in the workload – and importance – of the federal courts. For a more detailed account of the stages in the development of the federal court system, *see* Cappelletti & Golay, *supra* note 4, at § IV.B.

[195] *See supra* note 35.

[196] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

never be challenged before a federal tribunal, absent that jurisdiction.[197] As it is, the Supremacy Clause,[198] which provides the substantive basis for the supremacy of federal legislation (including lawfully issued federal administrative regulations), finds in the Supreme Court's appellate jurisdiction an institutional mechanism for translating that supremacy into case-by-case reality. Unlike the European Court of Justice,[199] both the Supreme Court and the lower federal courts have power to effectuate their judgments by issuing enforceable orders directly to private individuals or officials of the states.

iii) The concept of a Federal Common Law

A true believer in judicial nationalism would promote the doctrine that there is a "general common law," apart from the common law of each of the several states, that should govern decisions by the federal courts in cases not governed by statute. Justice Story was just such a true believer; he saw in the idea of a Federal Common Law an opportunity for the federal judiciary to serve as a unifying force. The notion builds on the idea of an American Common Law, developed in parallel by the several states, as an outgrowth of the introduction into the colonies of the English Common Law – a unifying idea even today. What Story sought to achieve, however, went far beyond the legal harmonization that might result when a New York court drew on a Massachusetts precedent. Story envisioned nothing less than a uniform national common law governing commerce, developed under the supervision of the federal courts.[200]

Story found an opportunity to make his view into law in the 1842 decision of *Swift v. Tyson*.[201] A lower federal court in New York took jurisdiction over an action on the basis of the parties' diverse state citizenship; the judges of that court certified to the Supreme Court a question concerning the law of negotiable instruments. Justice Story, for the Court, examined the New York precedents on the question and found them indecisive. In any event, he said, "admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law."[202] Story's answer, of course, was negative. A federal court in a diversity-of-citizenship case was to apply the

[197] One alternative is the use of the federal courts to grant writs of habeas corpus to set aside state court convictions that violate the Constitution. That jurisdiction, too, is conferred by congressional statute. *See* 28 U.S.C. § 2254 (1970) for the modern version.

[198] U.S. CONST. art. VI, cl. 2.

[199] For the enforcement powers in the EC and the implementation of court decisions concerning Community law, *see supra* text accompanying note 80, and *infra* text accompanying notes 218–21.

[200] In 1812, the Supreme Court held that there were no federal common law crimes. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812). Although this decision has been criticised, it remains good law, outside federal enclaves such as the District of Columbia.

[201] 41 U.S. (16 Pet.) 1 (1842).

[202] *Id.* at 18.

"general commercial law," even if the decision of state courts (which were also open to the plaintiffs in such cases) were contrary to that general law.

The rule of *Swift v. Tyson* was subjected, over the years, to three major criticisms, one philosophical and two practical: (1) If law be perceived, not as Natural Law theorists like Story perceived it, but as the command of a sovereign, then it must be the command of a particular, identifiable sovereign.[203] In the century following *Swift v. Tyson*, it was assumed that the subjects of the "general commercial law" fell within the legislative competence of the state legislatures, not the Congress. (2) The rule applied to a broad area of Common Law dealing with commercial subjects, but not to the law of property or other "local" common law issues. Inevitably cases would arise along the borderlands between these two zones, with resulting uncertainty as to the law which a federal court should apply. (3) Most important of all, the rule encouraged litigants to select a state or federal court on the basis of the rules of law that each court might be predicted to apply to their cases. This forum-shopping opportunity meant that while the "general commercial law" might be uniform from one federal court to another, the result of a case in a given state might vary, depending on whether it was brought in a state or federal court. Thus there would be two rules of law, "one for co-citizens and diverse citizens who cannot get into a federal court, and the other for diverse citizens who can."[204] So long as state courts continued to exercise jurisdiction over commercial matters that were insulated from appellate review by the Supreme Court, Story's dream of uniformity of commercial law could not be realized.

After a century, the Supreme Court overruled *Swift v. Tyson*.[205] Now, when a federal court decides a case not governed by statute, it normally must follow the decisions of the courts of the state in which it sits.[206] If there is any "general commercial law" today, it is to be found either in acts of Congress or in the parallelism to be found in state common law precedents or in the adoption by the states of uniform legislation such as the Uniform Commercial Code.

The "Federal Common Law" nonetheless remains alive, although reduced in stature. Much as they did in the commercial law area for a century, the Federal courts continue to fashion judge-made Common Law rules of nationally uniform application in a number of fields: maritime cases; cases in which state governments are in contention with each other; certain cases in the area of for-

[203] *See, e.g.*, the dissenting opinion of Justice Oliver Wendell Holmes, Jr., in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533–34 (1928).

[204] HART & WECHSLER, *supra* note 41, at 698. The diversity-of-citizenship jurisdiction has always been limited to cases in which the amount in controversy exceeds a specified dollar figure. Hence some diverse citizens have been barred from suing in federal courts.

[205] The blow fell in Erie R.R. v. Tompkins, 304 U.S. 817 (1938).

[206] There is one major exception: federal courts will follow the Federal Rules of Civil Procedure even where state procedural rules would produce significantly different results. Hanna v. Plumer, 380 U.S. 460 (1965).

eign relations; and some cases in which Congress has invited the federal courts to develop a body of decisional law.[207] Apart from these limited fields, however, "the American Common Law" is the law of the several states, and its most authoritative interpreters are the highest state courts.[208]

b) The European Community: Judicial Enforcement Mechanisms

In the Community, there is no dual system of state and federal courts, although, as we shall see in greater detail in the next section, the duality in the legal system is substantially similar to that in America. Unless the matter falls within the original jurisdiction of the Court of Justice, even where the opposing parties are citizens of different Member States or where issues of Community law are involved, it is the Member State courts which have jurisdiction, whereas most cases involving an EC institution as a direct party will fall within the jurisdiction of the Court of Justice. Despite this dispersal of the "federal" judicial power throughout every court and tribunal of every Member State, the judicial decision system is able to act as an integrational force, primarily because of the centralising relationship existing between the Court of Justice and the Member State courts, a partnership which has been able to develop because of the procedure for references for preliminary rulings which enables the Court of Justice to play a formative role in the determination of Community questions even in Member State courts.

Article 177 of the EEC Treaty gives the Court of Justice jurisdiction to rule, on a reference from a court or tribunal of a Member State, on any question of interpretation of Community law (whether interpretation of the Treaty itself or of measures taken by the institutions under the Treaty), and on questions of the validity, or legality, of those measures. Recognising that such questions will normally have to be decided by State courts in proceedings which will also raise questions of fact and often also questions of State law, the Treaty does not provide for any means of appeal to the European Court; rather, it provides for questions of Community law to be resolved by the Court in the course of the proceedings before the State court, those proceedings being stayed while the European Court answers the questions referred. In so doing it provides indirectly for a form of constitutional review, since questions of *validity* enable it to review the legality of Community measures in the same way as it could do in a direct action under article 173; and also provides indirectly for a form of federal control of the Member States, since questions of *interpretation* will often arise where the acts of Member States are challenged in the national courts as being contrary to Community law.

[207] *See* Friendly, *In Praise of* Erie – *and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 Harv. L. Rev. 1 (1957); Hart & Wechsler, *supra* note 41, at 756–832.

[208] The U.S. Supreme Court will not review a decision of a state court that rests independently on a ground based on state law, even when there is a federal issue in the case. *See* Cappelletti & Golay, *supra* note 4, at § IV.B.3.a.

The first and overt function of the article 177 procedure is to secure the uniform application of Community law by the courts and tribunals of the Member States. "Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community."[209] In this respect the function of article 177 in developing a uniform body of law throughout the Community may be compared with the appellate function played by the U.S. Supreme Court.[210] And it may be contrasted with other methods for achieving the unification of law, such as treaties and conventions drawn up within such organisations as Unidroit, the Council of Europe, the Hague Conference and UNCITRAL, where the objective of unification is sometimes defeated by the very fact that the provisions in question are interpreted unilaterally by the State courts without any mechanism for providing a single authoritative and binding interpretation.[211] Comparison may be made also with certain EEC Conventions which, not being Community acts, are not subject to the article 177 jurisdiction. Thus, for the EEC Judgments Convention[212] and the Community Patent Convention[213] the Member States have agreed to confer a similar jurisdiction on the Court of Justice, while for the EEC Obligations Convention no such agreement has been reached.[214]

Where the Court of Justice has the task of ruling on the interpretation of Community law, or of the supplementary conventions, with a view to their uniform application, its position may be compared with that of a federal supreme court, although its role is limited to the interpretation of the law, the application of its rulings being reserved to the Member State courts. In another respect its role is wider, since a case does not have to be taken all the way through the hierarchy of State courts before reaching it, but can usually be referred by a court or tribunal at any level in the State judicial system.

[209] Case 166/73, Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1974] ECR 33, 38.

[210] For the appellate jurisdiction of the U.S. Supreme Court over cases arising in state courts and presenting issues of federal law, *see supra* text accompanying notes 195–99. *See also* Cappelletti & Golay, *supra* note 4, at § IV.B.3.

[211] *See generally* Gaja, Hay & Rotunda, *Instruments for Legal Integration in the European Community – A Review*, *infra* this vol., Bk. 2, at § IV.B.

[212] Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ No. C 97, 11 Apr. 1983, p. 2 at p. 23 (1968 text as amended by the Conventions of 9 Oct. 1978 and 25 Oct. 1982, on the accession of DK, IRL and UK, and GR).

[213] Convention for the European Patent for the Common Market (Community Patent Convention), Part VI, art. 73, OJ No. L 17, 26 Jan. 1976, p.1, at p.19.

[214] Convention on the Law Applicable to Contractual Obligations (opened for signature in Rome on 19 June 1980), OJ No. L 266, 9 Oct. 1980, p.1. *But see* the Joint Declaration annexed to the Convention, in which signatories declare themselves ready "to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice . . . and, if necessary, to negotiate an agreement to this effect." *Id.* at 17.

The second important function of the article 177 procedure is a "constitutional" function, enabling the Court of Justice to control whether acts of the Community institutions, or (indirectly) of the Member States, comply with the Treaty requirements. This is itself a dual function as it controls both Community administrators and legislators and the States. References on validity put in issue the legality under the Treaty of measures of the Council or Commission and enable the Court to control the constitutionality of those measures. It compensates to some extent for the limited access of the individual in a direct action under article 173. A person aggrieved by a Community measure who does not have the necessary standing to sue in the European Court may be able to attack it indirectly by taking proceedings in the Member State court. In particular, while under article 173 he can attack only a decision, or a measure tantamount to a decision, he may indirectly be able to challenge Community legislation in the form of a regulation, or possibly a directive. The first *Isoglucose* cases provide a good example. Between 1975-1977 the Council, in an attempt to alleviate the Community sugar surplus, enacted a series of regulations imposing a levy on the production of isoglucose, a starch-based substitute for liquid sugar. It came to a sticky end. A direct action by one of the isoglucose manufacturers – brought under article 173 for annulment of one of the regulations – was unsuccessful, the applicant not having the standing to sue for annulment of a measure of general application.[215] But in proceedings launched in the Member State courts, the question of the validity of two of the regulations was referred to the European Court under article 177, and this time the challenge succeeded.[216] One of the regulations was declared invalid as being discriminatory, with the result that the isoglucose manufacturers were exonerated from the levy until a new regulation adopted in 1979 imposed a levy at a much lower rate, a regulation which was itself annulled on different grounds in subsequent proceedings.[217]

While a reference on validity may thus put in issue the legality, or constitutionality, of Community legislation, references on the interpretation of Community law may also put in issue – although they do not always do so – the legality of measures adopted by Member States. And just as a reference on validity indirectly extends the possibilities of judicial review of Community acts beyond the limits set by article 173, so a reference on interpretation extends the review of the conduct of Member States beyond the limited and discretionary infringement procedure under article 169. That was expressly recognised by the Court in 1963 when it declared in *Van Gend en Loos* that "the vigilance

[215] Case 101/76, Koninklijke Scholten Honig N.V. v. Council and Commission, [1977] ECR 797.

[216] Joined Cases 103 & 145/77, Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce; Tunnel Refineries Ltd. v. Intervention Board for Agricultural Produce, [1978] ECR 2037.

[217] Case 138/79, Roquette Frères v. Council, [1980] ECR 3333; and Case 139/79, Maizena GmbH v. Council, [1980] ECR 3393 (discussed *supra* text accompanying note 62). Both cases were brought under EEC Treaty art. 173.

of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States."[218]

The effectiveness of the reference on interpretation for securing the implementation by Member States of Community law can be illustrated by the decision of the European Court in 1979 on the U.K. prohibition of the import of potatoes. That prohibition was challenged in the English High Court in 1978 by a would-be importer of Dutch potatoes, who sought a declaration that it was contrary to Community law. The British Government sought to justify the ban on the ground that the terms of the Act of Accession permitted restrictions on trade in potatoes even after the end of the transitional period. The question of interpretation of the Act of Accession was referred to the European Court, and subsequently, for good measure, the Commission also initiated proceedings under article 169. The Court found against the British Government and the Plaintiff obtained his declaration in the High Court with immediate effect.[219]

It is particularly significant in this context that France defied the corresponding judgment of the Court over imports of "sheep-meat." There proceedings were taken under article 169 by the Commission alone, and France was able to defy the Court's judgment with apparent impunity.[220] If the would-be importers of lamb and mutton had been able to get a prompt remedy from the French courts it is difficult to see how the French authorities could have continued to obstruct the imports.[221] Here too, action by vigilant individuals might have provided a more "effective supervision" of the observance by Member States of their obligations under Community law.

For, while it is often pointed out that there are no sanctions available to enforce the judgments of the Court in proceedings brought against Member States by the Commission, it is sometimes forgotten that the remedies available to individuals in their own courts, coupled with a reference on interpretation under article 177, provide a unique means of obtaining a *domestic* remedy to enforce a *Community* right. That of course is on the assumption that the domestic court will accept and apply the ruling of the European Court – not a large assumption, perhaps, once it has taken the initial decision to refer. Whether a Member State can continue to maintain measures contrary to Community law will then depend only on whether the matter can be brought before its own courts. But often the measures will themselves be dependent upon decisions of the courts, as when a contravention is made a criminal offence,

[218] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1, 13.

[219] Case 118/78, C. J. Meijer BV v. Department of Trade and Others, [1979] ECR 1387; Case 231/78, Commission v. United Kingdom, [1979] ECR 1447.

[220] Case 232/78, Commission v. France, [1979] ECR 2729; *cf.* Joined Cases 24/80R & 97/80R, Commission v. France, [1980] ECR 1319.

[221] For further comment on Joined Cases 24/80R & 97/80R, *see* Hartley, *Interim Measures Against France in the "Lamb War,"* 5 EUR. L. REV. 363 (1980).

which will be enforceable only through the courts. In other cases, where the measures are applied administratively, the individual may be able to challenge their implementation in the courts.

Of the two aspects of article 177, the reference on validity and the reference on interpretation, the latter, securing in many cases compliance by Member States, is undoubtedly of more fundamental importance for the coherence of the Community. One is irresistibly reminded of the words spoken in a different context by that great American jurist Oliver Wendell Holmes, Jr., who said that he did not think the United States would have come to an end if the Supreme Court lost its power to declare an Act of Congress void, but the Union would be imperilled if the courts could not make that declaration as to the laws of the several states.[222]

It is this aspect also which underlines the contrast between the Community and a true federal system. While in a strictly federal system the federal solution must always in the event of conflict prevail – a fact guaranteed by the Supremacy Clause of the U.S. Constitution – the relation between the Community Court and the courts of the Member States has been characterised as one of cooperation rather than subordination. A neat compromise is embodied in the solution whereby article 177 gives the courts of Member States a discretion whether to refer to the European Court but obliges the courts of last instance to do so. But there is no remedy if the court of last instance declines. At least in those cases where a reference on interpretation puts in issue the legality of measures of the Member States, a more truly federal solution would give the right of appeal to the European Court against a refusal by the court of last instance to refer.

The Community judicial system established under article 177 is complemented by two aspects of the original jurisdiction of the Court of Justice which are relevant in this context, namely the jurisdiction to review acts of the Member States under articles 169–171 (where the Court cannot annul, but can only render a declaratory judgment); and jurisdiction to review acts of the Community institutions under articles 173–176. No more need be said in this context about the article 169 procedure, which was already discussed earlier.[223] But the article 173 procedure does merit some further consideration.

Article 173 is of particular interest from a federal viewpoint, since it is not limited to actions by States but also confers, by its second paragraph, a limited access to the Court on "private parties." Article 173 gives the individual, it is true, a more limited access than he enjoys under the corresponding provisions of the earlier ECSC Treaty article 33; but there the right of access was in any event confined, under the terms of article 80, to undertakings engaged in production in the coal or the steel industry within, broadly speaking, the Member States. Under the EEC Treaty there is no such restriction: the Treaty covers the whole of the economic life of the Community, and the Court is open, po-

[222] O. W. Holmes, Jr., *Law and the Court*, in Collected Legal Papers 291, 295–96 (New York, Peter Smith, 1952; 1920 reprint).

[223] *Supra* text accompanying notes 123–24.

tentially, to the whole world. It is not surprising, therefore, that the conditions of admissibility of an action are more restrictively defined. In addition, under the ECSC Treaty, the coal and steel sectors were to be administered to a substantial extent by the Commission itself under principles laid down in the Treaty, while the EEC Treaty provided only a framework and envisaged, inevitably, the principal role for the Member States in implementing Community policies and Community law. Moreover the additional requirement imposed by article 173, that the individual must be able to show that the measure he is challenging (if not addressed to him) is not merely of "individual concern" but also of "direct concern," may be described as a federal criterion, since it describes precisely the case where the Community is exercising its powers directly over the individual, leaving no discretion to the Member States in their implementation of Community law. A question of particular interest here is the comparison between the right of access of the individual under article 173 and that which would be found in a developed federal system.[224]

While the limits on the access of individuals to the Court may understandably be criticised, it must be borne in mind that there are other, indirect, ways by which the individual can obtain an effective remedy before the Court for illegal Community action, including the article 177 procedure. Indeed, it is illuminating to compare the scope of judicial review of Community measures under articles 173 and 177 respectively.[225] An immediately obvious difference, of great importance for the protection of individual rights, is the availability of the article 177 procedure without the narrow restrictions on *locus standi* imposed by article 173, second paragraph: thus the individual can even obtain, by a ruling under article 177, the annulment of a regulation. And one can say "annulment" because (and here there is similarity rather than difference) a ruling that a measure is invalid may be tantamount to annulment pure and simple. The Court has gone so far as to rule, under article 177, that a contested regulation was "null and void."[226] In other cases, however, the Court has qualified or circumscribed the effects of invalidity under article 177.[227] Again, a challenge to the legality of a Community measure under article 177 is not subject to the severe limitation period imposed by the Treaties on direct actions (two months under article 173 of the EEC Treaty; only one month under article 33, the corresponding article, of the ECSC Treaty), although that very fact has led the Court, in some cases, to qualify the effects of its ruling so as not to distort unduly transactions entered into before the date of its ruling.[228]

[224] *See* Stein & Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 AJIL 219 (1976).

[225] It will be appreciated that only the most significant forms of review are examined here: similar questions could be raised under other provisions of the Treaty, *e.g.*, arts. 178, 184 & 215.

[226] Case 114/76, Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG, [1977] ECR 1211, 1222.

[227] *See, e.g.*, Case 109/79, Maiseries de Beauce v. ONIC, [1980] ECR 2883.

[228] *See, e.g., id.*

Other differences between articles 173 and 177 may be less immediately obvious. It might be assumed that the same types of Community action are open to review under both articles, but there may be exceptions. For example, in the case of international agreements concluded by the Community the position is not yet certain. Omissions or failures to act may be open to challenge, if not under article 173, then under article 175, but there appears to be no way in which an omission or failure to act can be reviewed under article 177.[229]

In addition, it seems generally to be assumed that the grounds of review are the same under articles 173 and 177, but this may not be so. An apparent exception of some interest arises from the Court's holding that, for an action to succeed under article 173, the plaintiff must have an interest, not only in the result of the action, but also in the ground on which the measure in question is challenged.[230] This holding would seem to have no application under article 177, since the submission of a question of validity by the Member State court will be sufficient to confer jurisdiction, and the position of the parties before the State court is irrelevant. Conversely, where the plaintiff relies on an international agreement to invalidate a Community measure, the Court has held that he can do so under article 177 only where the provisions of the agreement in question themselves have direct effect;[231] but it is not certain whether that holding would also apply in proceedings under article 173. As a final illustration, the time factor may be relevant; it might be suggested that a Community measure which was valid at the date of its adoption but which subsequently became incompatible with Community law as the result of developments in the law could be held invalid under article 177 even though it could not have been annulled under article 173.[232]

B. Doctrinal Devices for Regulating the Centre-State Legal Relationship

The coexistence of two or more law-makers in a unified (but not unitary) legal system creates a potential for conflicts which require rules to determine which of two conflicting laws will apply in a given situation. When the conflict arises between laws promulgated by different levels of government, each with its own legally-sanctioned sphere of activity, the problem lies not in the mere *conflict of laws*, but in the resolution of conflicts over the *division of competences* between one level of government and another. We have already examined some of the institutional devices used to regulate this division of competences. In particular we have noted the central integrative role played by the judicial system in assuring that the centrally made law is effective throughout the "un-

[229] *See* Case 46/75, IBC v. Commission, [1976] ECR 65, *per* A.G. Warner at 86–87.
[230] *See* Case 90/74, Deboeck v. Commission, [1975] ECR 1123.
[231] Joined Cases 21 to 24/72, International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit, [1972] ECR 1219, 1227–28.
[232] *Cf.* T. Hartley, *supra* note 57, at 142–44.

ion." We now turn to examine some of the constitutional doctrines which have evolved to deal with the consequences of this conflict within the legal system.

1. The United States

a) Supremacy of Federal Law

The Supremacy Clause of the Constitution, unlike the more hortatory provisions of article 5 of the EEC Treaty, requires the law of the states to give way to the Constitution itself and to laws and treaties made by the Federal Government in pursuance of the Constitution.[233] It is, of course, the supremacy of the Constitution that is one of the foundations for the function of judicial review in the first place, but references to the Supremacy Clause in American commentary usually refer to the relation between acts of Congress and state legislation, and to the supremacy of the former over the latter. This order of precedence obviously applies only to *valid* acts of Congress; thus in many a case of conflict between central and state legislation the real question before the courts is the validity of the congressional statute. The theory today is still that Congress properly acts only in the spheres in which legislative powers have been conferred on it by the Constitution, and that the states retain residual legislative power. Yet in the past half-century this theory has come to be little more than a formal bow in the direction of state sovereignty. The legislative power of Congress is now seen to be practically unrestricted by any judicially enforced constitutional limits. During this era, much of the uniformity of law in the United States has been produced by congressional legislation. But it is the Supreme Court's broad reading of the powers delegated to Congress that has put the final stamp of approval on this political development.

b) The Allocation of Competences: Express and Implied Powers

The doctrinal origins of today's federalism can be found in the early nineteenth century. John Marshall was Chief Justice from 1801 to 1835, a "formative era" not only for American constitutional law but also for an economy that was national in scope. Marshall dominated the Supreme Court as no other Chief Justice has ever done, impressing on the Court and the nation his dynamic view of the Constitution,[234] and his expansive view of national power.[235]

The constitutional text, after setting out a list of legislative powers of Congress, adds the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[236] In 1819 Marshall's Court upheld the power of Congress to establish a (largely private) corpora-

[233] U.S. Const. art. VI, cl. 2. For EEC Treaty art. 5, *see supra* text accompanying note 120.

[234] In a famous opinion he remarked, "we must never forget that it is *a constitution* we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[235] Marshall's Court also began the process of imposing constitutional limits on state power. *See infra* § III.B.1.c.

[236] U.S. Const. art. I, § 8.

tion to serve as a national bank.[237] The power to charter corporations was not granted to Congress in express terms, but Marshall pointed to the powers to regulate commerce, to tax, to borrow, and to regulate currency, and concluded that chartering a bank, like any other useful means for carrying out those powers, was authorised by the Constitution. This doctrine of "implied powers"[238] was supplemented by the "necessary and proper" clause, which Marshall read broadly, emphasising the word "proper" and de-emphasising the word "necessary": any means "appropriate" for carrying out the enumerated powers were constitutionally available to Congress.

By the end of the century, Marshall's broad interpretation of congressional power had given way to a more restrictive view, which prevailed until the 1930's. Congress itself for nearly a century had taken a narrow view of its constitutional responsibilities to the national economy; its first major national regulatory law was adopted in 1887, when the Interstate Commerce Act established a national administrative agency to regulate interstate railroads.[239] This law was, in the most literal terms, a regulation of interstate commerce. But the Supreme Court in the early twentieth century continued to hold that manufacturing and agriculture were not the sort of "commerce" that Congress was authorised to regulate.[240] So matters stood until the Great Depression.

That economic crisis brought to power a President and a Congress who shared the belief that the national economy urgently required direction from the Federal Government. From 1933 on, Congress enacted a series of regulatory statutes ranging over the whole economy. For four years a 5–4 majority of the Supreme Court held to its restrictive interpretation of the powers of Congress, but in 1937, before President Franklin Roosevelt had made a single appointment to the Court, one Justice had a change of heart.[241] The "New Deal" legislative programme now began to receive the Court's blessing, and by 1941 the "constitutional revolution" of 1937 was fully consolidated.[242]

[237] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[238] The doctrine is independent of the "necessary and proper" clause. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13–14 (Baton Rouge, Louisiana State U.P., 1969).

[239] The other early major congressional regulatory law was the Sherman Antitrust Act, adopted in 1890. It is of note that anti-monopoly legislation has also been an early priority for European legislation. *See* EEC Treaty art. 3(f) which places the "institution of a system ensuring that competition in the common market is not distorted" among the "activities" to be pursued for "the purposes set out in Article 2." *See generally* D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 247 (London, Sweet & Maxwell, 1980).

[240] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

[241] *See* National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937). For a brief summary of President Roosevelt's "court-packing" plan, *see* G. GUNTHER, *supra* note 136, at 150–52.

[242] United States v. Darby, 312 U.S. 100 (1941) marks the final turnaround. The decision was unanimous. President Roosevelt made seven appointments to the Court in a five-year period.

The Commerce Clause was the chief constitutional foundation for congressional law-making in areas such as wage and price regulations and labour relations law. The theory was that Congress could regulate not only interstate commerce itself, but any local activity which, in combination with similar activities elsewhere, might have a substantial effect on interstate commerce. This theory, which finds its roots in the early decisions of John Marshall,[243] has had its ups and downs, but has reached its greatest extent in the present day. Now, in the name of the Commerce Clause, Congress can constitutionally punish extortion committed by an isolated "loan shark,"[244] or prohibit racial segregation in a local restaurant.[245] There is today no practical limit on the constitutional power of Congress to regulate the private sector of the economy; the effective limits on that regulation are political.[246]

Apart from the commerce power, Congress has other tools for achieving national legal uniformity. The power to tax and spend money, for example, has not only made possible a uniform national system of social security, but permitted an indirect form of national regulation through the imposition of conditions on the recipients of federal money. The most successful remedial technique for desegregating Southern schools, for example, was the withholding of federal grants from local school boards that continued to maintain segregation. And when Government deals with private persons or companies by way of contract, it can (and does) require the contractors to observe a great many regulatory requirements, such as a minimum-wage rule for employees and a policy of racial nondiscrimination in hiring. It is nonetheless true that many such conditions, imposed by the central government, are worked out in advance by negotiation between federal officials and representatives of the state agencies directly affected. The willingness of the federal officials to engage in this negotiation attests to the political strength of state and local interests in Congress.

Another area in which Congress is today recognised as having wide powers is the protection of civil rights. The climactic centralising political phenomenon in American history was the Civil War. When the eleven Southern states at-

[243] *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[244] Perez v. United States, 402 U.S. 146 (1971).

[245] Katzenbach v. McClung, 379 U.S. 294 (1964).

[246] *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); J. CHOPER, *supra* note 108, at ch. 4. The qualification that needs to be added is the Court's recent flirtation with a "new federalism" in its decision in National League of Cities v. Usery, 426 U.S. 833 (1976), discussed *supra*, text accompanying notes 109–11. This decision was overruled in 1985. *See supra* note 112 and accompanying text.

It remains true that much of the enforcement of congressional environmental legislation, for example, remains the responsibility of state officials who may or may not greet that responsibility with enthusiasm. The federal environmental bureaucracy is very small in number.

tempted to secede from the union, they formed what they called a confederacy – and, not incidentally, patterned their constitution on the United States Constitution. The confederacy ended in military rout; Northern troops continued to occupy the South for more than a decade after the War's end in 1865. During this period of Reconstruction, three major constitutional amendments were adopted: the thirteenth amendment abolished slavery; the fourteenth amendment conferred citizenship on persons born in the United States, and guaranteed all persons against denials by the states of due process of law or the equal protection of the laws; and the fifteenth amendment prohibited racial discrimination in both state and national elections. Each of these amendments empowered Congress to enforce its terms by appropriate legislation. The early assumption was that Congress would take primary responsibility for protecting civil rights, and especially racial equality. Beginning in 1866, only a year after the Civil War ended, Congress did enact a series of laws aimed at assuring equal treatment for blacks and whites in a wide area of civil relationships including contracts, property ownership, access to the courts, and security of the person.[247] These civil guarantees were supported by a provision making it a federal crime for any person, acting "under color of any law, statute, ordinance, regulation, or custom," wilfully to deprive a citizen of his or her rights under the Constitution or under federal law.[248] In 1871 this criminal statute was supplemented by a federal civil remedy (damages or injunctive relief) for similar invasions of constitutional or statutory federal rights.[249]

These Civil Rights Acts of the Reconstruction era were, for a century, given narrow interpretations by the Supreme Court. Some of their applications were even held unconstitutional.[250] A major limiting factor was the "state action" doctrine, limiting congressional power under the fourteenth amendment to the "correction" of official state denials of due process or equal protection, and excluding congressional remedies for private acts of racial discrimination. In the 1960's, however, both Congress and the Supreme Court again became active in the defence of racial equality against private discrimination. The Civil Rights Act of 1964[251] prohibited both public and private racial discrimination in places of public accommodation (hotels, theatres, restaurants and similar places); in employment; and in the operations of both public and private recipients of federal funds. The Supreme Court quickly upheld the power of Congress to adopt this law – not as an enforcement of the fourteenth amendment but as a regulation of interstate commerce.[252]

Shortly thereafter the Court strongly hinted that Congress had the power to enforce fourteenth amendment rights against private as well as public inva-

[247] The laws are collected in G. GUNTHER, *supra* note 136, at 974–77.
[248] Civil Rights Act of 1866, 14 Stat. 27, 18 U.S.C. § 242 (1970).
[249] Ku Klux Klan Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983 (1970).
[250] *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).
[251] 78 Statutes at Large 241, 42 U.S.C. §§ 2000a–2000a–6 (1970).
[252] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

sions.[253] The Court has not pursued this line of analysis, however, for it soon found another theoretical basis for congressional protection of racial equality. The thirteenth amendment was held to empower Congress to prohibit not only slavery itself, but also the "badges and incidents" of slavery, including racial discrimination. Because that amendment contains no "state action" limitation, Congress thus had the power to forbid a wide range of private conduct that was racially discriminatory. The 1866 Civil Rights Act was held to constitute a broad prohibition against refusals to sell property or limit contractual dealings on the basis of race, and validated in those applications on the basis of the thirteenth amendment.[254] While it is doubtful that the framers of the Reconstruction legislation had any such results in mind,[255] there is no doubt that the words of those statutes readily bear the meanings the modern Court has given then. In doctrinal terms, the important change in the century since Reconstruction has been the recognition of new content in the idea of equal citizenship.[256]

c) Implied Limitations on the States and Pre-Emption[257]

i) Implied limitations on the states

The earliest important uses of judicial review to promote national integration appeared in decisions of the Supreme Court striking down state laws that impeded the operation of a national free trade area. As "implied powers" had been a doctrinal vehicle for extending congressional powers, so "implied limitations" were found to restrict the states.[258] The very grant of power to Congress (notably, the power to regulate interstate and foreign commerce) was found to contain, by implication, a prohibition against those state regulations, including taxation, that conflicted with the congressional *power* – not merely with the power's exercise,[259] but with its mere existence. Even when Congress

[253] United States v. Guest, 383 U.S. 745 (1966).

[254] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Runyon v. McCrary, 427 U.S. 160 (1976).

[255] *See* Casper, Jones v. Mayer: *Clio, Bemused and Confused Muse,* 1968 SUP. CT. REV. 89; 1 C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 1207–59 (New York, Macmillan, 1971) (History of the Supreme Court of the United States, vol. - VI).

[256] *See* Karst, *The Supreme Court, 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1 (1977). When the discrimination is racial, Congress has a broad charter under amendment XIV to redefine even the substance of equal protection. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).

[257] In American usage, the term "pre-emption" denotes the displacement of state law by a congressional *statute,* not by the existence of a power in Congress to legislate. The latter would be called an "implied limitation" on the states.

[258] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). The Constitution also limits the states explicitly in several ways: no state can make treaties with foreign nations, coin money, maintain a peacetime army, etc.

[259] When Congress exercises its power, the issue becomes one of pre-emption. *See* the discussion *infra* at § III.B.1.c.ii.

had not acted, a state law might or might not be invalid on this theory. By the middle of the nineteenth century, the Supreme Court had worked out a formula permitting a practical accommodation of state and national interests in such cases.[260]

From that time forward, the states have been permitted to legislate, even though their laws may impose some burden on interstate or foreign commerce, so long as their legislation (a) is not pre-empted by congressional legislation; (b) does not discriminate against such commerce (for example, by levying a 3% sales tax on goods produced in the state and a 6% tax on goods produced elsewhere); and (c) does not impose an "undue" or "unreasonable" burden on such commerce. Just what *is* an undue burden on commerce is nowhere defined with precision; instead, various Supreme Court opinions have identified a number of factors relevant to this determination. The factors include not only the degree to which the local regulation either impedes the flow of commerce or makes it more costly, but also the importance of the local interest (the reasons for the state legislation) and the availability of alternative ways of achieving the local purposes without placing so great a burden on commerce.[261]

While this lack of precision might seem chaotic to some observers, the system manages to work. First, lines of judicial precedent have become established, and state legislators are now aware that some laws present "easy cases" either for upholding or for invalidation. Particularly in the area of state taxation, the Supreme Court has worked out a rather detailed scheme for permitting the states to collect the revenue they need, including interstate commerce's "fair share," without permitting a repetition of the kind of "toll taking" taxation imposed by certain favoured states – Rhode Island, with its important port, was an example – during the time between Independence and the adoption of the Constitution. Second, the expansion of congressional power to regulate commerce[262] means that Congress itself can intervene to re-order matters if the Supreme Court imposes too many or too few restrictions on state legislative power. Those restrictions, it will be remembered, are imposed by the Court in the name of protecting congressional power.

ii) Pre-emption of state laws

By way of highlighting the latter point, the Supreme Court itself has recently tended to rest a number of its decisions striking down state regulations affecting commerce on the ground of pre-emption by federal law. The easiest case for application of the pre-emption theory is the case in which state law con-

[260] The leading early case is Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[261] Some representative modern decisions are: Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Hughes v. Oklahoma, 441 U.S. 322 (1979); Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

[262] *See supra* § III.B.1.b.

flicts directly with federal law – as when a state law requires a certain label on a drug sold to consumers, while federal law forbids the use of that same label. Obviously, if Congress has acted within the scope of its powers, the state law must give way.[263] The other easy case is that in which Congress has specifically authorised the state to regulate commerce in a particular way. In such a case, even though the Supreme Court might, in the absence of the congressional authorisation, view the state law as an undue burden on commerce, the Court will uphold the state law, by way of effectuating congressional policy.[264] Many cases arise, however, in which Congress has not made clear its intentions either to authorise or forbid state legislation. In such a case, while the Supreme Court tends to announce its decision as a construction of the congressional statute, it seems plain that the Court is using the same sort of balance-of-factors approach that it uses in deciding the "undue burden" cases.[265]

iii) The extent of the limits on the states

Given this doctrinal framework, what are the substantive areas in which state legislation tends to be held valid in the face of constitutional challenges based on the pre-emption theory or on the "undue burden" theory? The strongest local interests, one may infer from the Supreme Court's decisions, are the interests in health and safety. Yet even these interests may fail to justify serious state restrictions on interstate commerce. Thus a law of the State of Arizona limiting the length of railroad trains was struck down, even though it was defended in the name of safety, because it required the reassembly of trains at the state's borders, thus dramatically increasing the costs of interstate transportation.[266] (The Court also seemed unimpressed by the safety argument, perhaps regarding the law as having been designed mainly to produce jobs for railroad workers by increasing the number of trains.) The promotion of economic interests that are local, on the other hand, is viewed with suspicion by the Court, surely because it approaches the borderland of the rule prohibiting discrimination against interstate commerce.[267] Even here, however, it is possible to find decisions upholding local regulations designed to serve strictly economic ends. Thus a law of the State of California controlling the prices of raisins and drastically limiting the quantity of raisins available for export to other states or abroad was upheld.[268] Significantly, the Court found its main justification for the decision in congressional policy, discerned in a series of federal laws not directly concerned with raisins. The decision reinforces the view,

[263] *See, e.g.*, United States v. Sullivan, 332 U.S. 689 (1948).

[264] Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

[265] *See* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

[266] Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

[267] *Compare* H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949), *with* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Discrimination against out-of-state citizens (natural persons, not corporations) may also violate the privileges and immunities clause of art. IV. *See* Toomer v. Witsell, 334 U.S. 385 (1948).

[268] Parker v. Brown, 317 U.S. 341 (1943).

often expressed by the Court itself, that it is *congressional policy* which the Court defends in protecting the national economy against stifling local legislation.

2. The European Community

While an abstract ruling on the interpretation of Community law alone would have given the Court of Justice a central place in the Community legal system, comparable in some respects with the position of a federal supreme court, the Court of Justice has not limited itself, in the exercise of its article 177 jurisdiction, to ruling on interpretation alone, but has had occasion to deal also with the *effects* of Community law. In so doing, it has developed doctrines which, given the distinction we have drawn above between the federal and constitutional functions, can be described as doctrines of a constitutional character: doctrines such as those of the direct effect of Community law, and of the primacy of Community law. The Court has thus assumed the role of a federal *constitutional* court. These doctrines, and their constitutional implications, will be examined briefly below.

a) Supremacy and Direct Effect

i) The primacy of Community law

There is no express provision in the Community Treaties – as might have been expected if they had been intended as a fully developed constitution – for the primacy of Community law over Member State law. As with other fundamental elements of the Community system, the primacy of Community law is a principle developed by the Court. The principle so developed can be encapsulated in three propositions. First, primacy is predicated, not only of the Treaties, but of Community legislation – indeed, how else could regulations be directly applicable in all Member States, as article 189 of the EEC Treaty requires?[269] Second, Community law prevails even over the Member State constitutions,[270] so that, by a combination of these two propositions, the humblest Community provision prevails over the highest Member State law. Third, every Member State court must apply Community law itself, in its entirety, and must accordingly "set aside," even if not so empowered under State law, any conflicting provision of State law, whether prior or subsequent to the Community rule.[271]

However, while the Court unquestionably has the last word on the *interpretation* of Community law, it may not always have the last word on its *effect*. This is so because it falls to the Member State courts to apply Community law and to give effect to the Court's rulings, and because, in contrast with a feder-

[269] A point taken by the Court in Case 6/64, Costa v. ENEL, [1964] ECR 585, 594.

[270] Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125, 1134.

[271] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., [1978] ECR 629, 644.

al system, the State courts are courts of coordinate jurisdiction, not inferior courts. Moreover, Community law and Member State law are coordinate, independent systems of law, so that the relationship between them has to be seen, not only from the point of view of Community law, but also from the point of view of State law, which has not always accepted without reservation the primacy of Community law. And the latter aspect – the viewpoint of State law – is itself not a single aspect but ten potentially different aspects, since each of the ten Member States might adopt a different response.

But the same fact perhaps contains the resolution of the conflict: that it is inherent in the very nature of the Community that the relationship cannot logically be determined by the several laws of the Member States, but must be determined by Community law. A supremacy clause, it might therefore be argued, is strictly speaking superfluous, and one is reminded of Justice Story's commentary on the Supremacy Clause in article VI of the United States Constitution, to the effect that the propriety of that clause "would seem to result from the very nature of the constitution."[272] As a former President of the European Commission said of that comment, "It is surely this same juridical and constitutional logic which led to the case law of the European Court on the primacy of Community law over conflicting national provisions."[273] So although the Community judicial structure departs from the federal model, the result in terms of primacy is the federal result: *Bundesrecht bricht Landesrecht.*

ii) Direct effect

The principal respect in which the Community operates directly within the territory of the Member States is in the exercise of its legislative powers, mainly *via* the regulation, but also by means of the directive and decision.

(a) Regulations. Where the Council or Commission legislates by means of a regulation, Community legislation is directly applicable in all Member States.[274] It is thus an instrument of a federal character.

As early as 1957, the *Rapporteur* in the French National Assembly, commenting on the bill authorising the President of the French Republic to ratify the EEC Treaty, said of the regulation that it is

> the truly "European" power. By its use, the Community acquires the right to legislate directly for the peoples of the Member States, without going through the national channels. In spheres where the power to make regulations is provided for, there is a possible and real delegation of the Member States' sovereignty for the benefit of the EEC.[275]

[272] 2 J. Story, Commentaries on the Constitution of the United States 639 (3rd ed., Boston, Little, Brown & Co., 1858).

[273] Roy Jenkins, Address to the U.K. Association for European Law, King's College London, Nov. 1979. (Transcript published in 32 King's Counsel 3 (1980) (Journal of Faculty of Laws, King's College, London)).

[274] EEC Treaty art. 189.

[275] 1957 JORF, III, Docs. Ass. Nat. annexe, No. 5266, p. 2365 (rapport de M. Savary concernant un projet de loi autorisant le Président de la République à ratifier

Some further features of Community regulations are of particular interest for the purposes of this study.

First, as a consequence of their direct applicability, the Court has held that implementing measures by Member States to give effect to regulations within the State legal systems are not only unnecessary, but are actually prohibited.[276] A distinction must be drawn here, however, between different kinds of implementing measures. Member States are not permitted to "implement" regulations by enacting them as State legislation.[277] On the other hand, in many cases Member States may, or must, adopt internal measures to give effect to regulations; the more so because the Community system does not normally provide for federal-style implementation, and the administration of Community legislation within the Member States is normally a matter for the State authorities. But again, in any legislative measures which Member States adopt to give effect to regulations, the States may not add to, vary or qualify the Community provisions. The result is that the scope of Member States' obligations to give effect to regulations may at times be uncertain: they may be in default either for not doing enough to give effect to regulations, or for going too far, and the borderline may be difficult to draw.[278] Finally, a regulation may have a pre-emptive effect, precluding Member States from legislating at all in the area covered by the regulation.[279]

(b) Directives. Directives are undeniably a form of Community legislation, yet, because they leave to Member States the choice of means of implementation and are binding only as to the result to be achieved,[280] they are less like a federal instrument. Instead, they resemble rather a traditional international treaty instrument which is binding on the State but whose internal effects are dependent upon the means of implementation. However, the Court has held that individuals may, in certain circumstances, be able to rely upon the provisions of a directive before Member State courts, regardless of the means of implementation chosen, or even of whether the Member State has implemented it at all. In thus giving "direct effect" to certain provisions of directives, the Court has approximated them to regulations or to federal legislation.[281]

... le traité instituant la C.E.E.) (Debate of the National Assembly, Ordinary Session 1956–57, sitting of 26 June 1957) (quoted in J.-V. Louis, The Community Legal Order 54 (European Perspectives Series, EC Commission, Luxembourg, Office for Official Pubs. of the EC, 1980)).

[276] Case 39/72, Commission v. Italy, [1973] ECR 101.

[277] *Id.* at 114.

[278] *See, e.g.*, Case 40/69, Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollmann, [1970] ECR 69; Case 34/73, Fogli Variola S.p.A. v. Amministrazione Italiana delle Finanze, [1973] ECR 981; the authorities cited by Warner, A.G., in Case 94/77, Fratelli Zerbone S.n.c. v. Amministrazione delle Finanze dello Stato, [1978] ECR 99, 126–27; and Case 31/78, Bussone v. Italian Ministry for Agriculture and Forestry, [1978] ECR 2429.

[279] *See infra* § III.B.2.c.

[280] EEC Treaty art. 189.

[281] On the direct effect of directives, *see, e.g.*, J. Usher, European Community Law

While the regulation, being directly applicable, can be regarded as a federal instrument, the Court has enlarged the reach of Community law by attributing "direct effect" to directives and decisions also, and to the Treaty itself.[282] In consequence, individuals can rely in certain circumstances on the provisions of Community legislation in the Member State courts, even in the absence of the Member State legislation required to implement it. Once again the Court has gone beyond the abstract question of interpretation to rule on the effects of Community law, and has done so with significant constitutional implications, even though, again, in practice if not in theory, it falls to the Member State courts to decide whether to recognise the effects so attributed.[283]

b) The Allocation of Powers: Express and Implied Powers

In contrast with a federal system, there is in the Community no explicit constitutional division of powers between the central authority and the Member States. Instead, specific legislative competences are attributed to the Community institutions, especially to the Council. The question may then arise whether that competence is exclusive, and in what respects and under what conditions the competences of the Member States are limited or altogether removed.

Initially it will be sufficient to recall the judgment of the Court of Justice in *Costa v. ENEL* which made it clear that the attribution of powers to the Community institutions entailed a corresponding limitation on the sovereignty of the Member States.

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[284]

AND NATIONAL LAW: THE IRREVERSIBLE TRANSFER? 19–30, 70–82 (London, Allen & Unwin, 1981). For a more reserved view of the federal potential of direct effect of directives *see* Gaja, Hay & Rotunda, *supra* note 211, at nn.46–58.

[282] *See generally* T. HARTLEY, *supra* note 57, ch. 7. For a critique, *see* Hamson, *Methods of Interpretation – A Critical Assessment of the Results,* in COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, JUDICIAL AND ACADEMIC CONFERENCE, 27–28 SEPT. 1976: REPORTS II–1 (Luxembourg, Office for Official Publications of EC, 1976).

[283] Notably in the *Cohn-Bendit* case the French *Conseil d'Etat* refused to accept the case law of the Court of Justice on the direct effect of directives: CE(F), Judgment of 22 Dec. 1978, Ministre de l'intérieur v. Cohn-Bendit, [1978] Rec. Leb. 524, [1980] 1 C.M.L.R. 543. *See* Boulouis, *L'applicabilité directe des directives. A propos d'un arrêt Cohn-Bendit du Conseil d'Etat,* 1979 R.M.C. 104.

[284] Case 6/64, Costa v. ENEL, [1964] ECR 585, 593.

One other judgment of the Court is of particular significance as dealing with the question whether the transfer of power was reversible. The case concerned the chapter of the Euratom Treaty dealing with supplies, a chapter which had to be reviewed within a certain period. Could it be inferred, from the failure of the institutions in this respect, that the powers in question had reverted to the Member States? The Court held that it could not. Repeating some parts of its judgment in *Costa v. ENEL*, it added:

> Powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, except by virtue of an express provision of the Treaty.[285]

As well as the powers expressly conferred on the Community by the Treaties, the Court has recognised the doctrine of implied powers, as have other constitutional courts, including the U.S. Supreme Court.

In the allocation of powers to the Community, article 235 is of central importance. It provides that

> If action by the Community should prove necessary to attein, 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 Assembly, take the appropriate measures.

While the scope of article 235 is not free from controversy, it has been used for the preparation and adoption of measures relating to energy policy, the protection of the environment, Community borrowing, the European Monetary Cooperation Fund, and for action in other areas where there was no specific Treaty basis. It is comparable in some respects with the "necessary and proper" clause in the U.S. Constitution.[286]

c) Pre-Emption

Apart from one pioneering study,[287] there has been little analysis of the application within the Community of the doctrine of pre-emption familiar to U.S. constitutional lawyers.

For the purposes of this chapter, the idea will be treated as going beyond the principle of the primacy of Community law over Member State law; it will be taken to refer to cases where the Member States are precluded from legislating, not because legislation would conflict with Community law, but because the competence in question is an exclusively Community competence. It may be illustrated by four areas of Community law.

The first and perhaps the clearest illustration is provided by the common

[285] Case 7/71, Commission v. France, [1971] ECR 1003, 1010.

[286] *See supra* text accompanying notes 236–38.

[287] Waelbroeck, *The Emergent Doctrine of Community Pre-Emption - Consent and Redelegation*, in 2 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 548 (T. Sandalow & E. Stein eds., Oxford/New York, Clarendon P., 1982).

agricultural policy, under which the Community has adopted, for most agricultural products, a "common organisation of the market" or Community-wide marketing system. Although the Court has not been entirely consistent in this respect,[288] it has in some cases appeared to take the view that the very existence of such a common organisation precludes, in principle, the adoption of Member State legislation within the whole field covered by the common organisation.

A second example of pre-emption is provided by the common commercial policy.[289] Here the Court has applied, in effect, a doctrine of pre-emption even though the Treaty contains no express limitation on the treaty-making or legislative competence of the Member States. An early example was the second *Diamantarbeiders* case,[290] where the Court held that the Member States were precluded, despite the absence of any express provisions in the Treaty or in Community legislation, from unilaterally modifying the level of protection afforded by the Common Customs Tariff.

A third example comes not from a particular area of the law, but from the character of a particular Community instrument, the regulation, which has been described above as a characteristically federal instrument. As such, it precludes Member States from legislating, even so as to reproduce in their own statute book the very terms of the regulation, so that it is clear that the prohibition goes beyond the enforcement of the primacy of the Community rule.

In this last respect the regulation can be distinguished from the directive, yet even directives may provide a fourth example of pre-emption. Directives for the harmonisation of legislation, adopted under article 100 of the EEC Treaty, have been regarded as constituting an irreversible transfer of powers from the Member States to the Community,[291] leaving the Member States powerless to legislate in the areas so transferred.

3. Comparison of the EC and the Council of Europe Models

A comparison of the Community with the Council of Europe may demonstrate the vital role which the "constitutional" provisions outlined above play in the integration process; moreover it appears the best illustration of the ways in which the Community system departs from a traditional inter-governmental model.

[288] *See id.* at 555–67; Usher, *The Effect of Common Organisations and Policies on the Powers of a Member State*, 2 EUR. L. REV. 428 (1977); J. USHER, *supra* note 281, at 43–55.

[289] Waelbroeck, *supra* note 287, at 553–54; J. USHER, *supra* note 281, at 55–70.

[290] Joined Cases 37 & 38/73, Sociaal Fonds Voor de Diamantarbeiders v. NV Indiamex and Association de fait de Belder, [1973] ECR 1609.

[291] Leleux, *Le rapprochement des Législations dans la CEE*, 4 C.D.E. 219 (1968). The House of Lords Select Committee on the EC has taken the view that the exercise by the Council of its powers under EEC Treaty art. 100 "causes an irreversible removal of legislative power from the United Kingdom Parliament." H.L. SELECT COMMITTEE ON THE EC, APPROXIMATION OF LAWS UNDER ARTICLE 100 OF THE EEC TREATY (22nd Report, Session 1977–78) (London, H.M.S.O., 1978).

The Council of Europe is, of course, a separate organisation, founded in 1949 – two years before the signing of the ECSC Treaty – and includes all the Member States of the Community among its twenty-one members. It has a developed institutional structure, and is active in some of the same areas as the EEC.[292] In addition to its classic inter-governmental organ, the Committee of Ministers, the Council of Europe was given a second organ, the Consultative Assembly (now known as the Parliamentary Assembly), composed of delegates from the State parliaments. The Assembly, although only a deliberative body, has been responsible for many successful initiatives. There is in addition a wide range of institutionalised bodies established under Council of Europe Conventions and Agreements, the best known of which are undoubtedly the European Court and Commission of Human Rights established under the European Convention on Human Rights.

Initially, however, what is most striking is the range of differences between the Council of Europe system and the Community system, of which the following are merely examples:

(i) Conventions and agreements drawn up within the framework of the Council of Europe are not "acts" of the organisation,[293] but have legal significance only in relation to those States which choose to sign and be bound by them.

(ii) There is no general procedure for supervising the implementation of the agreements, although ad hoc machinery, sometimes of a very effective kind, has been established in separate cases, *e.g.*, under the European Convention on Human Rights, the European Social Charter, the European Convention on Establishment and the European Convention on State Immunity.

(iii) The agreements do not form part of the domestic law of those States which ratify them unless, and except to the extent that, the domestic law of those States so provides.

(iv) There is no mechanism whereby, if the agreements fall to be applied in the domestic courts, their uniform interpretation can be secured.

Consequently, while all the agreements can be regarded as in some sense a contribution to the "greater unity" between its Members the achievement

[292] On the Council of Europe, *see generally* A. H. Robertson, European Institutions 36–71 (London/New York, Stevens & Sons/M. Bender, 1973), and bibliography given therein.

[293] *See* Golsong, *Quelques remarques à propos de l'élaboration et de la nature juridique des traités conclus au sein du Conseil de l'Europe*, in Mélanges offerts à Polys Modinos 51, 53 (Paris, Pedone, 1968); and *Ouverture à la signature des états membres de conventions et d'accords adoptés au sein du Conseil de l'Europe*, in 2 Miscellanea W. J. Ganshof van der Meersch 151, 155 (Brussels/Paris, Bruylant/Libraire générale de droit et de jurisprudence, 1972); F.W. Hondius, La préparation et la gestion des traités conclus dans le cadre du Conseil d'Europe 283 (Paris, Univ. de Clermont, fascicule 16, 1979).

of which is the principal aim of the Council of Europe and which is recalled in the preamble to many of the agreements, from a constitutional viewpoint those agreements may seem to constitute very little by way of advance from the classical international law model.

Yet they do have the advantage of a stable organisational setting, which has made possible the development of standard practices in treaty-making, and has certainly facilitated the conclusion of agreements, when compared with the process that produces most ad hoc multilateral treaties.

Moreover they have certain advantages compared to the relatively monolithic structure of the Community system, particularly the advantages of flexibility. The Ministers may adopt an agreement which they are not all immediately ready to sign, and the organisation does not need to move at the pace of the slowest member. Even within a particular "sub-system," such as the European Convention on Human Rights, there are advantages in allowing States to accept progressively the different stages of implementation, for example, initially ratifying the Convention, but only subsequently accepting the jurisdiction of the Commission to receive individual applications.

IV. Further Mechanisms for Integrating State Legal Systems

A. The Limits of Central Law-Making in an Integrated Pluralist Society: The U.S. Experience

To say that federal law-making *power* is dominant in the United States is not to say that federal *law* dominates. It is still true, after all the expansion of federal regulation in the U.S. in this century, that federal law is designed "to accomplish limited objectives."[294] National law-making need not be comprehensive, for it "builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose."[295]

In view of the tremendous centralisation of legislative power in the national Congress, why is it that so much of the actual law-making is left to the states? The answer begins in the U.S. Common Law tradition. All the states except one (Louisiana) are Common Law states. By the time that national legislative power was recognised to be all-embracing, there already existed a massive body of judge-made law in each state, with many more similarities than differences between states. In the larger states, however, this body of Common Law was supplemented by a considerable body of statutory law. These products of the state legislatures were far less uniform from state to state, and, by definition, were suitable subjects for the enactment of statutes. Why did the Congress not displace these statutes with its own? In some subject areas, the Congress has done so; banking law is an example in which national law is consider-

[294] HART & WECHSLER, *supra* note 41, at 470–71.
[295] *Id.* at 471.

ably more significant than state law. Mainly, however, the reason for congressional inactivity can be found in the dynamics of the legislative process.

Three decades ago, Herbert Wechsler published a thoughtful article entitled, "The Political Safeguards of Federalism."[296] He pointed to the importance of the role assigned to the states in the selection of people to man the institutions of the central government: the Congress, and even the Presidency itself. Anyone who has dealt with the Congress knows how sensitive its members are to local sentiment. Any "intrusive" law that passes the Congress, Wechsler pointed out, must have widespread support in many local communities. The key word is "intrusive." An enormous percentage of the body of private law is not intrusive, in Wechsler's sense; it does not excite passion, or even very much public interest. Could not Congress enact a code of tort law, without its members feeling any political heat from the people back home? Yes, certainly; but no bill passes the Congress unless someone pushes it. There is no lobby of potential automobile accident victims, for example. (There is a lobby of insurance companies. If that lobby were to work seriously for the passage of, say, a "no fault" automobile compensation statute, such a statute might pass the Congress. But there is an opposing lobby of personal-injury-litigation lawyers.) The very inertia of the legislative process has made it natural for Congress to leave such issues alone. "As a state legislature views the common law as something to be left alone unless a need for change has been established, so Congress has traditionally viewed the governance of matters by the states."[297] The vast body of state law remains untouched by Congress because there is no politically good reason for making a change. "A page of history," Holmes reminded us, "is worth a volume of logic."[298]

A tour through an American law library would confirm that the greatest proportion of law in the country is state law. On the surface, this fact suggests a considerable potential for disharmony in law, but the potential has not been realised. The variations in state law are sometimes significant, but in the perspective of comparative law most such variations are seen as variations in detail. The reasons begin in the American colonies' acceptance of English modes of legal thought and practice, and in the early dominance of English legal writings. After Independence, the publication of a number of systematic treatises on various fields of American law played a role in harmonising law among the states.[299] Today law students in the United States study a national body of law; judges in one state cite decisions by other states' courts as persuasive authorities; and a huge body of literature, from national case digests to nationally oriented law reviews, reinforces the assumption that there is such a thing as American law. "The Restatement of the Law," a systematic, analyti-

[296] 54 COLUM L. REV. 543 (1954).

[297] *Id.* at 545.

[298] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[299] *See generally* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 13–292 (New York, Simon & Schuster, 1973). *See also* Friedman & Teubner, *Legal Education and Legal Integration: European Hopes and American Experience, infra* this vol., Bk. 3.

cal statement of the rules and principles of the American Common Law, began publication in 1932. The uniform law movement has had major successes in codifying a body of commercial law that previously was judge-made.

B. Harmonisation and Approximation: The Potential for Central Control in an Integrating Society

Just as in the U.S. federal system the substantive scope of federal law is limited, although its constitutional significance is profound, so too in the Community system the direct reach of Community legislation is relatively narrow. What is, however, striking in the Community system is that, apart from attempts at the unification of law outside the Treaties, the EEC Treaty itself provides a vehicle for the harmonisation of law over a potentially very wide area. In particular, article 100 of the Treaty provides:

> The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
>
> The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

While the scope of article 100 is still a matter of controversy,[300] the powers conferred by it, sometimes supplemented by resort to article 235, have been used for the adoption of directives covering a very wide field of activities, including, most frequently, the elimination of technical barriers to inter-State trade, but also in such areas as protection of the environment and protection of the consumer. These provisions have thus formed the basis not merely for the coordination of existing national rules, but for the adoption of new Community policies: even, in some areas, where no Member State legislation previously existed.

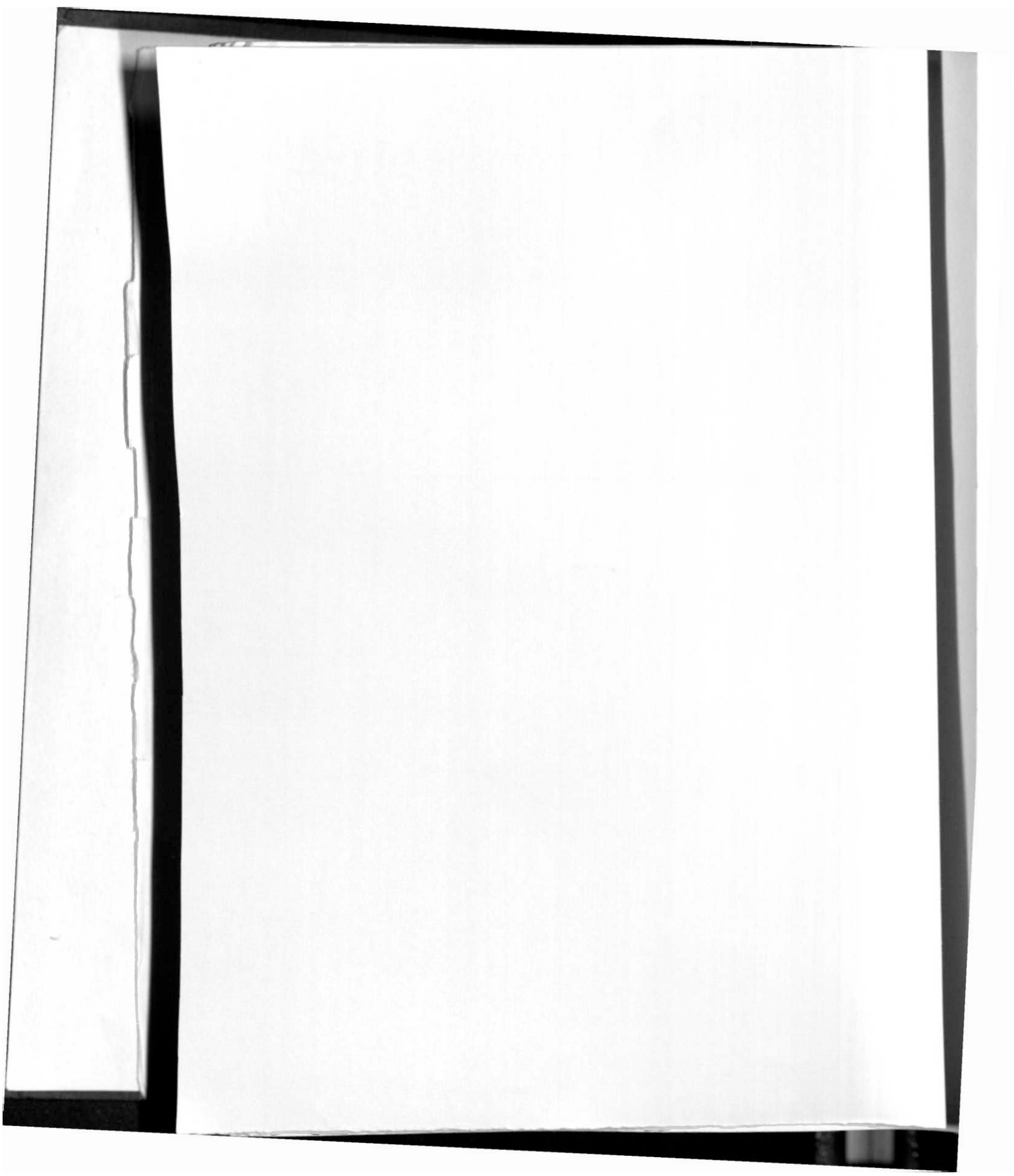
What is significant, for present purposes, in such measures is that, while they require Member State legislation for their implementation, they are nonetheless Community measures, subject to the jurisdiction of the Court of Justice. In contrast, therefore, to other methods of harmonisation, the treaty mechanisms of supervision by the Commission and of interpretation under the guidance of the Court are available to ensure their uniform application. The effectiveness and implications of these mechanisms have been considered earlier in this paper. The Court has even been prepared in certain circumstances to assign direct effect to harmonisation directives, in the absence of implementing Member State legislation.[301]

[300] *See* H.L. SELECT COMMITTEE ON THE EC, *supra* note 291; and for a reply *see* Close, *Harmonisation of Laws: Use or Abuse of Powers Under the EEC Treaty?*, 3 EUR. L. REV. 461 (1978).

[301] Case 38/77, Enka BV v. Inspecteur der Invoerrechten en Accijnzen, Arnhem, [1977] ECR 2203; Case 148/78, *Ratti*, [1979] ECR 1629.

On the other hand, the measures adopted by Member States to implement harmonisation directives are Member State law, not Community law. This too is significant; for whereas the uniform body of law considered in the earlier part of this study is a single system of law, analogous to federal law in a federal system, the harmonisation of Member State law has a very different dimension: it represents, not the creation of a single legal system, but the coordination of parallel systems of Member State law.

The harmonisation of state law is therefore of particular interest because it makes possible the unification of law in a different sense from that considered earlier: not the creation of a single uniform law, but the coordination of systems which remain separate and independent at the Member State level, while the process of coordination is protected at the Community level by the mechanisms of the Community legal system, and the interpretation of the instruments of harmonisation remains within the jurisdiction of the Court of Justice.



The Federal Economy: Law and Economic Integration and the Positive State – The U.S.A. and Europe Compared in an Economic Perspective

THOMAS HELLER* and JACQUES PELKMANS**

I. Introduction

Efforts in the United States and Europe to create a single national polity have invariably relied in good part upon an economic justification for integration. In addition, the emergence in this century of a large measure of centralized economic power in America has provided a stimulus or model for the more recent thrust toward European community. Following World War II, it seemed to many that the material success of the United States was dependent upon: (1) its legal commitments to internal free trade and unrestricted mobility of factors of production; and (2) the increasing recognition across American history of the virtues of national control of public economic policies. However, in the last decade, the relative slowing of the rate at which a centralized polity is being constructed in Europe has engendered a series of questions about both the desirability and possibility of full integration, as well as the applicability of the North American model to other political contexts. In turn, this discussion of the transferability of the institutional solutions to economic problems reached in the United States has led to a reexamination of the nature of the American experience.

The overall purpose of the following two sections of this chapter is to consider aspects of the contemporary situation in Europe in the light of a reevaluation of both the economic theory of integration and the legal and political history of the American central state. Both authors begin by recognizing the standard accounts of traditional legal and economic analysis which indicate that the arguments for integration and increasing centralization are compelling. These arguments emphasize the economic benefits of the dissolution of

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local obstacles to free competitive activity and the political backwardness of attempts to impose decentralized legal controls which restrict trade and mobility.[1] Consistent with such economic theory and attendant to the political purpose of reducing nationalistic rivalries, it must be acknowledged that the European Community (EC) has made very substantial progress toward its initially foreshadowed goal of an integrated polity. Without any wish to demean these achievements, sections II and III take as their central focus those issues which are more contestable. Emphasis is given to questions including: (1) the value of and prospects for the next margin of increased integration; (2) explanations of the institutional patterns of integration which have been established in each region relative to models of complete integration or alternative, but discarded, institutional arrangements; and, (3) the stability of these patterns in the light of expectable economic dynamics. The purpose of this introduction is to briefly summarize some principal similarities in the conclusions reached by the two authors and to make clearer the sources of the differences reflected in their styles and concerns.

The core of agreement in the two parts of this study is located in their willingness to criticize the orthodox accounts of economic and legal integration and to reconceive the divergent experiences of Europe and the United States with relation to the quite different historical circumstances in which consolidation has developed. Pelkmans' discussion of the European Community suggests that realization of the economic benefits potentially available in the suspension of trade and other frontier barriers depends upon a complex series of factors. These include the relative value of internal trade created versus external trade disrupted and the degree of the imperfection of product and factor markets within the new union. Integration also raises the political and legal problem of compensation for persons and firms whose protected status and expectations justified by pre-Community national laws have been upset. However, by far the most important moment of Pelkmans' critique is the problematic nature of the effort to put together the functioning economies of mixed or interventionist national systems.

The orthodox account of integration envisioned that a superior economic use of resources could be obtained by the dismantling of national barriers to the movement of goods and factors of production such as tariffs and immigration controls. This process of the opening of borders or political frontiers Pelkmans calls negative integration. Classical theory of customs unions centered on negative integration and did not give explicit consideration to the positive or interventionist role of contemporary governments in economic affairs. There was insufficient attention paid to the possibility that negative integration would be unacceptable to mixed or regulatory states whose domestic policy efforts could be rendered ineffective by open borders. Pelkmans' revision of the history of European integration dwells upon the actual complexity of integrating mixed sovereign nations with deep and established commitments to

[1] *See infra* § II.A (by Heller) and § III.A.2 (by Pelkmans).

positive allocational, redistributional, and stabilizational programs. In this historical context, neither the economic case for integration nor the political road toward integration will be as clear or as easy as the standard account assumed.

In a related, but differently generated inquiry, Heller examines another aspect of the problem of economic integration in the light of the development of the positive or interventionist state. Pelkmans' analysis begins in the economics of customs unions and proceeds to elucidate the complications in that theory produced by the historical presence of mixed (positive) systems of government and its implications for the application of an economic theory of federalism in Europe. Heller starts rather within the economics of federalism – an aspect of the theory of the positive state – and asks about the viability of that theory under historical conditions of a pre-existing, substantial negative market integration.[2] The theory of fiscal federalism assumes that a modern government will intervene in private markets to provide public goods, force the internalization of social costs, redistribute wealth, and employ macro-economic instruments to control economic growth, price stability, employment levels and the balance of payments. The normative goal of a federalist economic analysis is to determine the optimal assignment of these different tasks to central and more local political units. The direction of this line of argument is to point out that full centralization of the powers of the positive state is not necessarily the most economically beneficial institutional arrangement which is possible.

Heller's principal conclusions which derive from the economics of federalism are two. First, there is no purely economic or technical theorem which will determine a single optimal system of the distribution of legal powers. Thus policy-makers seeking to discover the most desirable degree of integration of several states which routinely engage in public economic interventions will come upon no algorithmic solution, free of normative politics, to their inquiry. Second, if substantial powers of economic action are assigned to relatively more local political units, then the negative integration, represented by an open border policy, of these local units may impede their ability to attain their local economic objectives. This tension between negative integration and decentralization of positive policy is used to understand the particular historical situations which determined the form taken by current America federalism. Specifically it is argued that the nineteenth century legal commitment to open borders between the American states necessitated the adoption of a political strategy which centralized substantial economic powers in Washington. In turn, homogenization of national policy permitted the effective pursuit of certain public functions of market correction and macro-economic adjustments appropriate to a modern economy whose efficient operation requires a mixture of governmental and private activity.

The most central analytical insight which unifies the two parts of the paper is their shared critical attention to the nature of the linkage between economic

[2] *See infra* § II.B (by Heller).

integration and the twentieth century positive state. Many of the seeming disparities in emphasis are directly attributable to the alternative historical sequences in which Europe and America confronted the difficulties posed by this problematic relationship. The perspective of this chapter – a stress upon the theoretical interconnectedness of economic common market or open border arrangements and the implementation of positive state policies – can be contrasted to the more standard account which describes a progressive scale of increasing integration. In this standard formulation, there are posited to exist successive and independent stages of integration. The initial stages concern negative integration or the creation of free trade areas. The latter culminate in a centralization of all public economic interventions which may be called full positive integration.[3] It is usually implied that a mature regional polity has confronted these stages sequentially and passed, rather inexorably, from the first removal of economic frontiers toward the emergence of a unified regulatory government in the service of a growing global increase in economic welfare. The difficulty with this scenario is that it corresponds to neither the historical reality of Europe nor that of the United States.

The negative and positive aspects of economic integration appear as sequential and dichotomous because this arrangement replicates the development of economic theory. A diachronic separation of stages of open markets and integrated interventions mirrors the historical order in which the neoclassical economic theory of the positive state was accepted after the completed establishment of the classical theory which considered the welfare gains available in unrestricted economic exchange. However, since the case for the interventionary or mixed state is now theoretically orthodox, both papers insist that the relative degrees of negative and positive integration will affect one another in substantial ways. As Pelkmans shows theoretically,[4] and as Heller argues historically,[5] there is a dynamic interconnection between these facets of integration. It is suggested, for example, that a polity cannot combine over time a policy of fully open borders and the disintegration or decentralization of many positive state functions.[6] The connectedness of these conditions may well lead to either: (1) an abandonment of positive policy initiatives combined with a continuation of open borders; or (2) a continuation of open borders combined with a centralization or integration of positive policy; or (3) a continuation of disintegrated (non-central) positive policy combined with a withdrawal from open borders.

The theoretical interrelation of positive state action and negative integration places within a single framework the analysis of the American and European experiences in this century. At the same time, differences in the historical circumstances in which the resolution of these problems was confronted has pro-

[3] *See infra* §§ III.B.2 and III.B.4 (by Pelkmans).
[4] *See infra* § III.B, *esp.* at § III.B.2.b; 3.a; 3.c; 4.c (by Pelkmans).
[5] *See infra* § II.B (by Heller).
[6] This decentralization may produce improvements in welfare according to the economic theory of federalism. *See infra* § II (by Heller).

duced and is producing apparently variant institutional solutions. Pelkmans argues that Europe remains in a pre-federal or pseudo-common market condition. The emergent question for the EC is how to integrate ten economies which are all committed in important ways to state planning and intervention. This situation must be contrasted with the history of the United States in which a commitment to open borders was legally certified before the issue of the coordination of any positive economic activity by the several American states was seriously considered. Europe's current decline in the rate of centralizing may come precisely from the continued adherence of the Member State Governments to their long established national independence in allocational, distributional and stabilizational policy. Pelkmans points out that this adherence is reflected in the Treaty of Rome and is supported by the incentive system of national politics.[7] In this context, since free movement of goods and capital can tend to undercut the effectiveness of Member States' independent macro-economic controls, there may develop a reluctance to move toward full market interdependence or open borders. One can see in the continuing existence of indirect barriers to trade as well as in the impediments to cross-border movements of population and firms, the effects upon the EC of the potential for tensions which plagues the process of negative integration between independent positive states.

For Pelkmans, a further movement of European economic integration toward a full implementation of market interdependence would seem to demand a more substantial commitment toward a concurrent growth in policy interdependence or positive integration. However, since common positive policy can only be established by a consensus of the Member States, the lack of agreement among EC Members about the optimal forms or levels of public interventions has acted to forestall a more complete integration. This more complex economic perspective may help not only to explain the present pace of European integration but may also describe the principal line of threat to the EC's ability to cohere in the future. Since the economic theory of federalism does not demonstrate that an increased centralization of positive state policy will raise overall welfare levels,[8] this indeterminacy reinforces the reluctance of Member States to render control to Brussels over national corrective and macro-economic policies. On the other hand, any ongoing legal and political commitment to national policy independence may induce a build-up of local economic pressures which favor incomplete market interdependence and a return to indirect or, even, overt protective border controls.

The EC's contemporary institutional evolution may be illuminated by emphasizing that the Member States had a firmly rooted history of interventionist activities which preexisted their effort to integrate markets. The converse historical situation may better characterize the environment in which the modern form of American federalism has been shaped. To induce from the Ameri-

[7] *See infra* § III.C.1.c, C.3.b and C.4.a (by Pelkmans).
[8] *See infra* § II.B (by Heller).

can experience a progression through a set of stages toward centralized or positive integration is to miss the contingency of the circumstances which produced the current institutional structure. It is also to infer a false sense of certitude about the economic desirability and permanence of that arrangement. The major argument of the Heller essay is that the history of centralized government in the United States should not be read as a narrative of an increasing recognition of the virtues of greater integration. The paper suggests that it was not the enlightened pursuit of some globally optimal economic condition which led to the institutionalization first of market interdependence in the creation of a common market and subsequently of policy interdependence in forming a national positive state. On the contrary, it was the economic dynamics which attended the efforts of the state (decentralized) governments to implement positive or market corrective policy in the name of local optimization of resource use – a strategy consistent with pure economic theory of federalism – which ultimately produced the concentration of interventionist power at the center.

As in the case of contemporary Europe, these economic dynamics related to the interconnectedness of market and policy integration. The emergence of the American positive state occurred well after the firm legal institutionalization of market interdependence in an open internal borders policy. This actualization of negative integration represented a reification of nineteenth century liberal economics and ideology in a continent without a history of separate cultural traditions. The efforts of the American states to impose allocative, distributional or stabilizational policies on their local economies would have required in important cases a reevaluation of the functionality of open borders which American legal authorities were unprepared to make. It was only in the context of a potentially ineffective program of policy independence of the decentralized (state) governments that the advocates of interventionist economics reemphasized a quest to establish positive policy interdependence through the predominance of centralized power in Washington. Heller argues that the success of this strategy turned upon idiosyncrasies of American political history and legal doctrine. However, the core comparative point is that the evolution of a mixed or positive economy in the United States was constrained toward its present integrated form by the strength of the pre-existing commitment to an internal open borders policy. If there was to be an exercise of economic power at any level of American government, some substantial positive integration or policy interdependence was necessitated by the primordial fact of an unchallengeable and legally enforced market interdependence.

In Europe the problem has been the integration of established mixed economies. In the United States the problem was the emergence of a mixed economy in the face of an established negative integration of markets. The current institutions of the EC may be understood to result from the fact that the preceding policy independence of the Member States has made full market integration problematic. Alternatively, in the United States the nature of the positive state which has emerged can be analyzed with reference to the fact that pre-existing market interdependence made problematic the attempts to

achieve local policy independence in the early part of this century. This is not to argue that either the institutional arrangements of the EC or those of the United States can be shown theoretically to be economically superior. Nor can either be predicted to be stable in its current form. It is simply to integrate separate institutional histories by means of a relatively unorthodox analytical perspective.

While part of the differing emphases of the two parts of this study is tied to the variant historical sequences of integration in Western economies, a second disparity of style may be traced to the alternate disciplinary frameworks favored by the authors. Pelkmans is an economist looking outward toward legal institutions. Heller is a lawyer writing, loosely, within the recent, parochial, and yet somewhat imperialistic American practice termed law and economics. This difference in academic tradition and method has produced effects which should be noted at the outset. Pelkmans' approach is basically normative and institutional. The analysis seeks first to determine those orderings of resources which are economically more beneficial. It then inquires whether particular existent or proposed legal arrangements are likely to realize or impede the institutionalization of the optimal economic arrangements. There are no particular causal hypotheses about the historical priority of legal, political, or economic factors. The analysis is primarily technical in the sense that it investigates a means/end or instrumental relationship. Pelkmans assumes that integration is neither economically preferable nor politically likely. Rather, he focuses more upon the relative appropriateness or lack of fit between a possible set of economic objectives and the legal order which attends it. The paper implies that the divergence between the norm of full integration and the form of the EC institutions which have now emerged reflects not irrationality of design so much as a problematic degree of political commitment to the objective usually presumed to be pursued. Although the fundamental relationship between law and economics is instrumental and not located within a more general theory of social and political organization, Pelkmans' method assures that his uncertainty about the probability of full economic integration will necessarily raise questions about the desirability of a more full legal integration.

Pelkmans' approach, if not his conclusions, will not be unfamiliar to readers on both sides of the Atlantic. American law and economics, as used in Heller's study, is a more pretentious and contestable venture. In this particular mode, it may be best understood as a type of structural explanation which attempts to offer a unified account of political, economic, and legal institutions. This assimilation occurs through a theoretical reduction of each set of institutions to a concurrent aspect of a single cultural form. This argument does not suggest a causal priority for legal, political, or economic factors per se. Rather, modern legal and economic theory are both described as manifestations of a broader cultural or symbolic expression labelled liberalism. The essential unity of the disciplines lies in their common reference to a consistent set of analytical categories which reflects a particular account of human experience: one that stresses the voluntaristic activities of individual subjects and constructs social relations as the aggregate of free exchanges between these actors.

Within this cultural framework, economics emerges as the set of technical operations which are needed to define social well-being solely by reference to the aggregation of exogenously defined individual preferences. Legal theory provides the principal ideological representation both of the autonomous subject (through the concepts of personal property rights) and of the priority of non-coercive transactions (in the concepts of contract). Finally, the political process which determines economic policy is not a disjointed or theoretically unconstrained set of institutions which engages in collective normative choice. Rather, in a constitutional perspective, legitimate political operations are limited to the creation of projects, responsive to constituent (consumer) preference, in those instances in which private markets fail accurately to aggregate desires. Where law and economics is treated as an integrated theory of the state, institutional politics only complements economics. This genre of analysis speaks in the metaphor of the necessary, if tortuous, evolution of social institutions toward a concretization, through progressively better approximations, of the ideological structure which is the motive force of historical explanation. It privileges, or offers no deconstructive account of, idealistic or cultural variables. The central issues for presentation in the paper are: (1) the internal coherence of the liberal theory of legal institutions; and (2) the particular forms in which the theoretical structure is actualized across the American historical experience.

The limitations of this method are the limits of all structural analysis. There is no attempt in the essay to offer causal hypotheses about the generation of the cultural conjunct labelled liberalism. Nor is there a careful effort to describe either a phenomenology of political action or a psychology of the subject which would indicate how idealistic structures manifest themselves in the desires and actions of historically concrete actors. This, and other structural explanations, are not responsive to our experience of the indeterminacy or openness of future action – an experience best captured by phenomenological accounts. Instead, it puts forward an abstracted account of completed actions which are reconstructed to permit historical explanation. The structure cannot capture the fullness of the experience of the contemporary; it redefines and relights the understanding of the past. The criteria for evaluating such generalized analysis is less its definitiveness than its aesthetic coherence and power to illumine anew.

In this regard, the justification for the use of this method in the comparative study of economic and legal integration may be more appropriate to the American case than to the European. The practice of law and economics as a general social theory is an answer to questions thrown up by the particular cultural history of the United States. Moreover, the account of liberalism as a relatively pure narrative of the subject may be taken seriously only in America. The ideological images of one culture often seem ludicrous to those not native to it. That the invocation of inappropriate imagery has the potential to produce unhappy moments of explanation may be particularly noticeable in contrasting two divergent symbolic expressions of the state-individual relationship. American law and economics treats the intervention of the public sector

in economic affairs as a last resort which follows the acknowledged failure of private or market solutions. State economic action is seen as an anomalous event intended to restore the uses of resources which would have been produced had individual preferences been correctly implemented. The priority of the individual over the social is registered in this description of the state as remedial agent even as it is admitted that the role of the positive state is fully legitimate.

The European concept of the mixed state can imply almost a complete reversal of this ordering. In European political and ideological discourse, the social construction of the content of individual life is a far more familiar notion. Often, the use of a market solution to economic problems is there treated as a last resort to the technical difficulties of planning. One might suggest the European tradition of objective or causal accounts of individual action – whether Marxist, structuralist, or psychoanalytic – renders unbelievable a legal economics which founds its ideology in subjectivity. The argument of Heller's essay is not that laissez-faire or any other theoretically necessary moment of the history of legal culture ever materially existed in the United States. The caution is that it may never have existed even ideologically in Europe.

It is not the structuralist method of the essay which will be strange to some European readers. It is the foreign content of the imagery. At the same time, in conclusion, it may be pointed out that a voluntaristic narrative of subjective action is increasingly expressed in the human rights jurisprudence of EC legal institutions. Law and economics may also provide an adequate theoretical vehicle to account for the interactions of individual national states seeking to institutionalize consensual decision processes among themselves. Should these perspectives be found useful, the complementarity of the two sections may extend well beyond their joint attention to the variant consequences which attend the problematic interrelation of the theory of the positive state and the economics of integration.

II. Legal Theory and the Political Economy of American Federalism (*by* THOMAS HELLER)*

This paper analyzes the problem of the substantial variation across American history in the institutional relationship between the national and the state governments. What most calls for explanation is why the structure of American federalism has increasingly concentrated power to control economic affairs at the centralized level of government. The growth in the relative power and absolute level of activity in Washington has often been taken to be the result of a process that seeks to maximize national economic welfare. A thrust toward centralization is argued to have begun in the nineteenth century with the efforts of the Federal Government to overcome the tendencies of the various states to impose local monopolizing restrictions upon free economic exchange. After the drive against the decentralization of public power had led to the perfection of the national customs union, the twentieth century quest for efficiency resulted in the enactment of progressive market corrective regulation and taxation by a centralized administrative state. Complementary theories of both restricted and interventionist liberal government have been advanced to explain the propriety of a shift toward central control in the name of improved economic allocation and growth.

I will argue below that there is no convincing account given either by an economic theory of optimal intergovernmental relations or by a constitutional history of contractual understandings at the foundation of the United States which can provide a normative basis for the particular forms of institutional practice now existing.[1] In this study I will assume that it is a more useful strategy to analyze positively the historical development of the American federal system than to search on for a coherent normative description of some ideal form of governmental structure. However, my history is to be distinguished from the several more established accounts of federalism by a number of characteristics. A sketch of three such alternative explanations may bring out the particularities of this argument.

What might be termed a *progressive* narrative has often been traced to the nationalist arguments of Alexander Hamilton. This narrative is fundamentally liberal in that it posits the ideal condition of government as individualist and contractual.[2] However, correct liberal principles are believed to be institutionalized only in the operations of the national government. At the economic level, these principles have produced a sequential adoption of free trade and centralized regulation. Each of these policies reflected in its time period the liberal solution to the problem of economic efficiency that was appropriate to the dominant understanding in economic theory of the correct role of government. In contrast to its representation of the central government as the institutionalized structure of liberal principles, the progressive account treats decen-

* Please note that due to their complexity and length the notes to this section are, exceptionally, printed at the end of the section, *infra* pp. 279–317.

tralized (state) governments as imperfect articulations of legitimate public forms. State policy is pictured as the product of private, local interests seeking monopolistic advantage. The same dichotomization of national versus local activity is mirrored with regard to culture. National is identified with universal; state with particular. Since liberal society is understood to represent the emergence of the autonomous individual from the limitations imposed by traditional or pre-modern cultural forms, modernity implies the abandonment of the divisive separatism which the predominance of multiple local cultures could threaten. The progressive account has a teleological flavor that superimposes a cultural passage from reaction to modernity upon the historical struggle of the national to displace the local within the federal structure.

A second liberal narrative is the *conservative* or Jeffersonian variant of federalist history. While this account shares with the Progressives the view that liberal principles constitute legitimate governmental behavior, there is a reversal of the political locale at which this desirable activity takes place. Decentralized institutions are now imagined to instantiate liberal structure. While conservatives agree that the history of federalism has been a conflict between national and state power, they reevaluate the triumph of the center as a perversion of true liberal theory. Only a reversal of the contemporary dominance of the national government would permit a return to a purer opportunity to create a policy based in consensus. Even for those conservatives who adopt a wholly conflictualist position, *i.e.*, that all forms of government ought to be sharply limited because of the contradiction between ideal liberal principles and the inevitable distortion of actual policies by self-interest, the rollback of federal power in favor of local control is preferred due to the relative inability of the states to effectively implement the positive policies they enact.

A third narrative explaining the structure of American federalism is essentially *Marxist*. It is non-liberal in that the image of society as a contractual obligation between consenting individuals is reduced to an epiphenomenal consciousness produced by the deeper structure of historical materialism. Federalism is again interpreted as a conflict between state and national governments. However, the struggle is not a contest of ideal liberal forms versus either premodernity or a centralizing perversion, but as one of institutions controlled by different class interests. Marxists have frequently sided with conservative liberals in bemoaning the triumph of the center since they believe the state governments more likely to be the instrument of popular than of capitalist classes.[3]

The account of federalism's history I wish to offer is dissimilar to all of the outlined narratives. First, I will argue that the theoretical possibility of a dual federalism must be taken seriously. This is to say that I assume that both national and state governments have the institutional capabilities to implement those principles which define the proper operation of a liberal state. This assumption will distinguish my narrative from those progressive accounts which tend to deny this capacity to the state governments; from those conservative accounts which tend to deny it to the center; and from anti-liberal accounts which tend to deny it altogether. Second, I argue that the variation in the insti-

tutions of federalism ought to be explained with reference to cultural or idealistic elements including legal theory, legal doctrine and political or aesthetic traditions. The increase of centralization is understood as a function of changes in the general theory of the state and in the ideologies of the preferred locations for the exercise of public power among the different levels of federalized governments. This idealistic and consensual tone separates this history from materialistic accounts which emphasize a purer narrative of conflict and see in cultural explanation largely the smokescreen of false consciousness. At the same time the complexity of the interrelations among cultural elements moves it away from other liberal histories which tend to treat the translation from a general ideal structure to either state or national institutional practices as straightforward or unproblematic.

A third characteristic of this history rejects the generally accepted theme that American centralization of public economic functions should be seen as the outcome of an enduring war between nationalists and localists. Centralization is treated as an aspect of the political struggle of different regional interests. This regional conflict does not signify a pure anti-liberal or coercive explanation of centralization. Rather the conflict was generated by contradictions within the internal organization of the federal liberal state. Centralization is not only the denouement (comic or tragic) of a morality tale of liberal and anti-liberal forces. Rather my argument leads to ironic reflection on the possibilities of a stable institutional order. Finally, I will find it desirable to reverse the analytical priority with which both standard economic theory and progressive histories approach the question of federalism. Instead of beginning with a national sovereign unit and inquiring about a desirable level of decentralization, American federalism is analyzed by starting with a collection of states with claims to a substantial number of attributes of sovereignty. In this way the relevant inquiry focuses on the question of how the powers of the positive state became as heavily concentrated as they are in the United States. What is to be explained is more the centralization than the fragmentation of authority. My hope is that this inversion of the more normal approach to issues of sovereignty in federal systems will not simply be historically illuminating, but will render the analysis of American institutional development more relevant to contemporary efforts to integrate sovereign nation states in regional systems like the European Community or, ultimately, a wider global economy.

This paper will sketch out the idealist thesis of the development of centralized federal power in America. This thesis traces a movement from a general theory of the liberal state toward particularized institutional outcomes. The process which determines legal practices is, however, not one of a simple elaboration of canonical interpretations of the structural principles of liberalism. Rather, it emphasizes the ambiguity which attends the translation of an ideal cultural order to specific institutions – an ambiguity which reflects an unavoidable discontinuity between theory and practice. It would be appropriate in a full discussion of this thesis to reflect upon the methodological issues in the construction of the interrelations of the elements of such a structuralist ac-

count. The general legal order, the political ideology through which its institutions are evaluated, and the influence of established legal doctrines should be individually examined with particular reference to this explanation of the variations in the patterns of the distribution of federal power. To facilitate the flow of the narrative account, I will defer to a separate essay both the problem of method and the defense of this form of idealist history as a response and complement to the histories of federalism which have gone before.[4]

A. The Thesis Defined

The central thesis of this essay is that the explanation of the contemporary institutional form and historical dynamics of federalism in the United States begins with the theory of the liberal state. This theory reflects fundamental American cultural commitments that have been variably translated into institutional practices in accord with an evolving understanding of the appropriate relationship between government and individual. The thesis divides the history of this evolution into three periods – developmental state, mature liberal or negative state, and the positive state – to correspond to significant shifts in the interpretation of legal theory. However, the primary initial emphasis falls upon the constancy of the liberal imagery of the ideal form of social relations – a constancy which renders unitary the history of American federalism.

The liberal legal structure may be described as the juxtaposition of three cultural representations.[5] The first is a commitment to a subjective (existential or phenomenological) discourse to account for the central aspects of human experience.[6] At the core of a liberal representation of human activity, social events are spoken of as though they were the products of the undetermined choice of conscious and, ultimately, responsible actors. Second, this autonomous consciousness is located by liberal theory at the level of the individual rather than at the level of a cultural or even universal spirit. Legal and moral recognition and blame are accorded by political theory to individual subjects. Conversely, deterministic accounts of individual behavior within institutions such as the legal system which play an important role in the reproduction of liberal ideology must be limited to marginal aspects of social experience.[7]

Finally, liberal culture incorporates a bifurcated theory of philosophical truth. Privileged access to or knowledge of states of subjective consciousness are available only to the individual subject. The normative power of liberal theory depends on one's ability to "know one's own mind." Verification of all other types of claims to truth turns upon their submission to canons of logical and/or empirical method. Positive or objective knowledge constitutes a public knowledge to be sharply distinguished from private normative judgments. Public or social reference to privately accessible mental states is permitted only when such states are behaviorally manifested and may be treated as empirical data generated outside of and registered within the public institutional system. Legitimate collective actions are reached through the analytically (logically) correct aggregation of revealed individual preferences so that decisions

conform to the canons of objective validity. Only thus may they escape characterization as discretionary or epistemologically arbitrary.[8]

The elaboration of a theory of social relations which instantiated these representations of experience resulted in an image of politics as contractually organized. Liberal legal institutions originate in the constitutional choice of autonomous individuals seeking to improve by collective action upon the level of well-being they could have achieved by means only of their isolated endeavors. Collective institutions must be constituted so that they may not coercively deprive cooperating subjects of the endowments (material and moral) which they bring to the social contract. It is necessary that liberal theory define the role of government as restricted. Public action is limited to a series of technical operations which are procedurally legitimated because they aggregate in an empirically verifiable process the normative preferences of the constituent individuals. Social choice is additive, deriving its entire authority from the moral autonomy of the private subjects in whom legal sovereignty originates. The institutional system makes no legitimating claim to any form of religious or other substantive (first order) claim to value which could authoritatively define collective welfare. The justification for governmental action in liberal culture reflects a second order level of normative power related to the *procedural* capacity of legal institutions both to protect individuals against involuntary deprivations of their endowments and to aid them to realize the projects which they find meaningful.

All the forms of the liberal state are pre-eminently limited governments in the sense that properly constituted public action may make no reference except to the aggregation of citizen preferences. However, the history of the forms of the appropriate legal institutions which implement the principles of liberalism has been complex. The primary duty of any liberal state is the protection of individual rights to personal safety and property. The origin of these rights has been variously located in accounts stressing natural law, anarchistic equilibrium, or a wide variety of historical or hypothetical consent theories. Whatever the substantive merits of these competing arguments, the constitutive entitlements both assure that individuals have a secured space for their projects of self-realization and establish an initial distribution of wealth against which future gains in citizen welfare can be measured. The second purpose of the liberal state is the construction and maintenance of efficient markets that facilitate consensual exchanges of legitimately held property rights. Increases in social welfare are defined solely by consensual transactions of those who own a society's resources according to the predominant constitutional theory. Normative preferences become manifest in the contractual exchanges voluntarily agreed to by all property holders affected by a proposed change.

The formative history of the liberal state was characterized by affirmative efforts to abolish both feudal restraints on the ability to transfer resources and mercantile state practices intended to monopolize sectors of the economy. Once such residual elements of pre-liberal order were removed, classical liberalism entered a mature period in which governmental intervention in the political economy was restricted. It was generally held that public interference in

working markets would paternalistically deny the individual's capacity to express her freedom and cause uses of resources that deviated from their socially preferred employment. Theoretically, the negative state may be seen as a utopian moment of the individualist or liberal social order. This moment institutionalized the welfare theories promised by classical free trade models and preceded the acceptance of later economic arguments that efficient allocations and unregulated markets might, for technical reasons, be often at odds.

The emergent legal theory of the positive or interventionary state was built upon the newer liberal economics emphasizing imperfect competition and other market inadequacies. The concept of a mixed public and private economy is now recognized as a necessary condition for the maximization of welfare. The expanded role of state authority is justified by distinct stabilizational, allocational, and redistributional functions.[9] As the role of the state expands in pursuit of welfare maximization, the complexity of the legal theory adequate to assure effective economic policy grows apace. Controls over tax rates, public expenditure levels, and monetary supplies afford power over macro-economic variables. The market's imposition of external costs which expropriate recognized property rights without compensation may be limited either by regulation of the production process or by taxes which force producers to take into account non-marketized or social costs. Allocational inefficiency caused by contracts based upon inadequate information is attacked by means of consumer, labor and investor protection laws. Goods and services of a collective character which are under-supplied by markets may be publicly produced or subsidized by tax-expenditures, direct payments, or grants of monopoly privileges such as patents. Redistribution may be accomplished by direct grants in cash or kind, tax relief, or the alteration of productive returns. Once an interventionary model of state and economy was adopted, there emerged numerous functionally substitutable legal powers consistent in theory with the public pursuit of individually desired preferences.

In an economic account of the history of the liberal state, the emergence of positive regulatory government reflects a progressively deepening understanding of neoclassical economic theory. What is constant throughout this history are the basic postulates of an individualist, consensual social order. Liberalism consistently has conceived of the state as a contractually founded organization intended to facilitate actual markets where they work well and imitate perfect market solutions where they do not. This interpretation draws both the negative and the positive states into a continuous and unified account of modern economic history. While empirical and technical questions about the correctness of any particular set of legal policies will always be debatable, the general structure and historical evolution of the liberal state is reasonably understandable. Within this overall framework, there are no evident injunctions about a theory of optimal government size or federalism. The economics of the positive state simply indicates, without more, that any operative level of government ought to assume an active role to increase the well-being of its inhabitants. However, economic theory does suggest that even if we begin our account of liberal government with a fully centralized state, some decentrali-

zation of public power would be likely to improve the public allocation of resources.

The economic theory of federalism is a branch of the economics of the positive state. As long as private markets efficiently allocate goods and services through the price system, the variant preferences and resource valuations of different individuals will be institutionalized by means of a network of consensual transactions. However, when public interventionary policies supply collective goods financed through tax payments or collectively regulate or subsidize production, there is a loss of the certainty that all economic transactions will continue to respect legitimate economic rights. The existence in public sector controls of coerced purchases through taxes and of the alteration of productive decisions by means of regulations or social cost charges raises the possibility that transactions undertaken in order to correct market inefficiencies may be less than optimal themselves.

The probability that collective reallocations of resources will lead to inefficient solutions is increased when there is substantial heterogeneity among individuals living in a single political constituency.[10] In such a case, the values placed by consumers upon the collective goods they wish to buy or by owners upon the non-marketized property rights they are willing to sell will vary. To the extent that legal boundaries of jurisdictions encompass homogeneous populations with similar public goods preferences and asset valuations, it is more likely that the uniform prices coercively paid as taxes or involuntarily received through social cost control instruments can replicate the welfare effects of efficient private markets. The economic theory of federalism suggests that if there are numerous governments with variant tax/expenditure practices and disparate regulatory programs, individuals can by choosing their jurisdiction of residence seek to reduce the likelihood that they will be the victims of the waste or exploitation of what they own. In effect, individuals are invited to choose a complete and preformed package of social goods and bads from among a substantial variety of political jurisdictions, just as they would any other commodity which can adequately be supplied in private markets.[11]

The prime insight of federalist theory is that for many commodities and factors in the public sector, the most efficient global use of resources is often likely to demand a series of local optimizations. Although there may be particular goods (*e.g.*, military defense) where national preferences are homogeneous or whose external effects would extend across many smaller jurisdictions, it is evident that efficiency would suggest that much public activity be carried out at a sub-national level. It is intuitive that the amounts individuals desire to expend for representative collective goods such as public security, education, public health, and wealth redistribution would vary widely across a large population. Similarly, an averaged quantity of such goods purchased by a single national government would not be likely to be optimal. It is equally logical to believe that the valuation of environmental or other non-marketized property rights would vary with taste and income. Since it is commonly asserted that the value placed upon environmental assets rises with wealth, it would follow that different governments could procure efficient levels of production by enacting lo-

cally optimal social cost taxes or regulatory laws. The technical elaborations of the theory of fiscal federalism are intended to determine the configuration of the optimal size of governments.[12] One need not become enmeshed in these unresolved complexities to accept the core argument that economic efficiency suggests that liberal sovereignty be dispersed across multiple levels of overlapping jurisdictions.

While there are practical problems with this model of public economic choice relating to social barriers to mobility, the underlying motivation behind an economic theory of federalism is not hard to grasp. Federalism is an aspect of the theory of the positive state that seeks to create a more efficient use of resources than can private markets. From the viewpoint of economic rationality, the legal problem of federalism can be stated in the following way. Beginning with a centralized national sovereign which is committed to correct positive intervention to improve resource allocations and which has constituted a distribution of legal rights, it will make sense to provide for the varied preferences of dissimilar individuals by establishing some decentralization of market corrective powers. This assertion is technical or pre-political and will be true for any social contract theory of the state. Although there is an overwhelming economic case for federalism in some shape, both the indeterminacy of applied economics practice and the ambiguities which have beclouded the political history of federalism deny the inference that one certain constitutional structure of American federalism can be determined with reference to economic theory.

In a sense, the economic account of federalism contradicts its constitutional history. Economic analysis begins in full centralization and makes the case for some degree of decentralization. Historically, economic integration has more often involved a partial surrender of power by pre-existing states with pretensions to sovereignty. Sovereignty implies a legal authority to determine a theory of legitimate property endowments. However, unless an economist knows the initial distribution of wealth (property), she cannot speak about efficient resource uses. In other words, the distribution of sovereignty must precede the determination of economic well-being. Economic theory cannot decide the initial pattern of political power. At the same time an understanding of the evolving economics of the theory of the liberal state impedes one's ability to argue that the American states have contractually yielded their sovereignty in some unambiguous and timeless sense. States which had a limited or negative view of their own economic role might well have supported a constitutional agreement that established a free trade area among themselves. States with an interventionist or positive understanding of their economic duties might be much less amenable to mutual inter-penetration of their domestic markets. Consequently, to interpret the constitutional bargain by which states agreed to surrender some aspects of their sovereignty, one would have to adopt a theory of textual interpretation which either attenuated or ignored the problem of historical change. In other words it is empirically indeterminate if the Constitution is the bargain made in light of a particular historical understanding of liberal structure or the changing series of bargains that would have been made given the evolving understanding of the practices consistent with that structure.

B. The Evolution of the Liberal State

The developmental period before the Civil War of the American liberal state was characterized by a relatively activist public sector. However, the theoretical justification for this activity was quite different from the rationales that would later emerge to legitimize the economic controls of the positive liberal state. Generally, the purpose of governmental involvement in the early liberal epoch was to establish the legal and economic infrastructure to support the growth of competitive markets and not to regulate continually their mature, but imperfect operation. The developmental state was not to be a permanent intervenor in private economic affairs so much as a temporary protector and facilitator of juvenile liberal institutions. The state acted with one eye looking backward toward the abolition of pre-liberal practices and the other looking forward to its own withdrawal as liberalism flowered. The principal components of this developmental program included legally defining the property rights that demarcated the boundaries within which subjects could constitute their existence in autonomous economic and political projects. In addition, an institutional regime was set up to minimize legal and transactional barriers to the free exchange of legitimately owned assets. The construction of an effective market was essential to gaining the promised benefits of welfare growth through the unhindered movement of goods and factors across the nation. Trade expansion depended upon a positive governmental effort to create a legal doctrine assuring open economic borders and otherwise to dismantle precapitalist restrictions upon the alienation of resources. Early developmental activism was conceptually in accord with liberal theory in that it represented the image of the rights-bearing subject, established the scope of the subject's sphere of free choice, and built the institutions of free exchange and social cooperation which would maximize aggregate well-being.

During the initial period of the construction of liberal institutions there was no particularly coherent account of federalism which assigned developmental tasks to either the state or national governments. Beyond the basic images of the social priority of the individual subject presented in the national Bill of Rights, the definition of the institutions of property and contract was left to state courts and legislatures.[13] However, the extension of the economic principle of free markets across state frontiers was recognized to be necessarily a national responsibility. Governmental measures which closed state borders or imposed import and transit duties were understood to be pre-liberal or mercantilist practices designed to create local monopolies on behalf of special interests. The legitimate activism of the early liberal state was aimed at the creation of markets. It was, correspondingly, impermissible for states to disrupt their operations once established. An anti-protectionist federal jurisprudence based largely on a negative or open-borders interpretation of the Commerce Clause of the national Constitution emerged as the doctrinal representation of mature liberal exchange.[14]

In a contradictory fashion, however, states were permitted to subsidize industry.[15] They engaged in the development of social overhead capital such as

transportation networks and the extension of indirect cash grants. This form of protecting local firms until they developed competitive capacity is a standard aspect of liberal development economics and was complemented in the nineteenth century United States by a relatively high national tariff. It was apparently not well understood that, in general, subsidization can have economically distortive effects similar to those of border controls or taxes.[16] Consequently, no restrictive legal doctrine emerged against state subsidy grants which were not complemented by border restrictions. Although this doctrinal inconsistency between forms of public intervention in private markets would persist beyond the developmental period, the partial abandonment of a pure free trade principle was probably mitigated by perceptions of the temporary character of infant industry programs. Once competitive firms and markets were established, it could be assumed government would withdraw from its early activist stance.

Similarly, the proper sphere of the activism of the national government was not theoretically well-defined. The central government subsidized growth through the First and Second National Banks, by provision of an infrastructure in the western territories, and by maintenance of the external tariff. No careful theory of federalism demarcating exact competences of state and central government emerged because, again, a complex idea of intergovernmental relations is only necessary where there exists a complex and ongoing role for the public sector. Rather arbitrary assignments of powers were tolerable where the exercise of these powers was understood to be limited in nature and time. What emerged from the developmental period was a recognition of consensual spheres of federal authority within a mature liberal state. While the basic legal administration of markets would be left to state institutions, centralized agencies were charged with the maintenance of the interstate customs union as well as the broadest collective functions such as war and foreign relations. Federalism would fade as a theoretical issue as the maturing state receded toward its night watchman responsibilities.

The recession of governmental activity in favor of unregulated private markets constitutes the ideal typical case of the negative liberal state. The importance and even the reality of this moment in the evolution of liberal structure has been often criticized. It is true that public action never wholly ceased in any historical period. In addition, the negative state appears to be an aberrational form of liberalism because it was preceded and followed by activist public economic interventions. However, the mature liberal state defined not so much an historical period as it did an ideologically central moment. It marked the instance in which liberal theory seemed most free of internal contradictions and in which legal doctrine most clearly represented the cultural principles of subjective freedom and objective social process. The historical bracketing of mature liberalism by activist states does not render it a theoretical anomaly because the two periods of activism had essentially different justifications for public economic policy. It is only by attending to the structural centrality of the negative liberal state in the creation of U.S. legal doctrine that the dilemmas of the later evolution of the positive federalist system can become apparent.

The conceptual transition from the developmental to the mature liberal state was marked by the promulgation of constitutional opinions that restricted the justifiable range of public market interventions of both the state and national governments. At the state or decentralized level, the principle of non-interference with private contractual arrangements or resource endowments was expressed in expansive interpretations of the guarantees of liberty and due process in the national Constitution.[17] The late nineteenth century brought forth a jurisprudence which recognized a maximal commitment to unregulated markets as a means of increasing social welfare and gave the widest scope to narratives of human behavior as freely chosen. Determinist accounts which described social relations as the objective products of class, gender, culture or race were not seriously represented in legal discourse even for groups seemingly marginal in American life.[18] At the national level, the uncontrolled movement of goods and productive factors such as labor and capital was insured by strict continuation of an interstate open borders policy. Conversely, key initial thrusts to impose centralized regulation were rebuffed under a restrictive interpretation of the scope of positive national power based on the Commerce Clause.[19] The epoch of the negative state witnessed a conceptual harmonization of the legal doctrine controlling both intra- and interstate exchange. Non-intervention in private markets prevailed both in state domestic and external economies in such a way that the doctrine of open borders complemented and reinforced the general legal practices of the liberal social order.

The attempts of decentralized governments to impose either regulatory measures or controls upon interstate trade and mobility were most frequently argued by theorists of the mature liberal state to be monopolizing or economically perverse. Inasmuch as the institutions of free trade were believed to be efficient, deviations therefrom were logically understood to be the products of efforts to capture the apparatus of the state for coercive purposes. The theory of the negative state led naturally to the adoption of political ideologies which interpreted state action beyond minimalist market preservation as illegitimate and distortive. Conflictualist images of the public policy process extended to both state and national governments.[20] However, no serious discussion of the administrative capacity of political institutions to adequately implement liberal principles was encouraged since the potentially desirable sphere of positive action was restricted. Similarly, the need for an important theory of federalism was essentially obviated by the narrow scope of the general theory of the state.[21] Unlike regulatory interventions and border controls which were substantially inhibited by legal doctrine, there was less focus on the legal propriety of tax subsidy and direct transfer programs. Although some state use of indirect and cash grants was struck down as unconstitutional, the legal tradition which permitted such activity was largely unexamined.[22] While it would have made for a more consistent negative jurisprudence to see these subsidies and redistributions as unnecessary and coercive, the relatively small magnitude of such endeavors never forced a complete reappraisal of the permissive legal doctrine that had been produced in the developmental stage of liberal theory.

The watershed change in the evolution of American federalism has been the emergence in the twentieth century of a liberal theory of positive government. Most of the momentous alterations in institutional practice originated from the analytical insight that unregulated markets are unlikely to maximize the value which society can derive from its resources. This conclusion is not due to some abandonment of the liberal principle that all valid normative judgments must be made by individual subjects. Instead, it is based on technical propositions of economics which argue that efficient resource use requires public correction of certain private markets. Intervention is appropriate in those instances in which uncontrolled exchange will tend to expropriate from owners certain classes of assets or to underproduce particular types of goods that consumers desire to purchase. Positive governmental action that protects defined property rights is theoretically mandated to force economic actors to account for the non-market costs engendered by their projects. Non-discriminatory intervention by means of regulation or taxes to force the internationalization of social costs would logically be complemented by subsidy programs aimed at increasing the output of collective goods.

In addition to the shifts in the theory of the role of the state which are attributable to the limitations of free markets in creating an optimal level of social welfare, the transformation of the twentieth century liberal state is manifested in a partially increased tolerance for objectivist narratives of human experience. Unregulated contract received its moral force from the presumed expression of subjective autonomy contained therein. This legitimative power behind the free market was sapped by the growing reference to deterministic accounts of economic behavior. In the first years of the twentieth century the content of an exchange was more frequently characterized as the result of the enforced conditions derived from the initial social position of actors. Social statuses were in turn produced by a variety of objective structures. To reduce the threat implicit in such accounts that they might deconstruct the dominant cultural discourse of subjectivism, their use had to be limited to the description of the condition of groups – like women, children, or recent immigrants – not at the ideological core of the liberal system. Nevertheless, even in a marginalized form, they helped legitimate a number of regulatory programs designed to restore or elevate oppressed elements of the society to the status of full subjectivity.[23]

These technical amendments and changes in accepted discourse led to a reappraisal of much of the legal doctrine of the negative state. Even during mature liberalism, some state intervention to protect public health and safety had been preserved as a legitimate form of intervention against social cost. Social benefit programs in the form of subsidies also provided a doctrinal base on which the positive state could be grafted. Doctrinal change or reemphasis did not represent any general normative discontinuity in the theory of the liberal state. The standard of constitutional propriety always remained the aggregation of individual welfare. Nevertheless, the theoretical corrections which justified the expansion of the state imposed contradictions in operation which have led to complexities in institutional practices.[24]

The problem of economic reallocation by means of public correction of markets to account for the costs of assets and the demand for products not registered in private transactions calls attention to one source of analytical difficulties. The government possesses no adequate objective measure of the type required by liberal method to measure these non-marketized prices. Yet prices are the behavioral indicators of the normative evaluations of individual subjects and so provide the referents for the liberal phenomenological discourse. The lack of an empirically verifiable indicator of such values produces uncertainty about the efficiency creating or distorting effects of any public intervention. Moreover, once it is understood that misallocations may distort the operation of some private markets, it is no longer technically obvious that any other corrections will improve the overall economic situation.[25] Again, ambiguity about the effect on aggregate welfare of each positive program is introduced by the same set of economic theories that demands such interventions.

The dilemma of the theory of the positive liberal state is that its translation into concrete institutional structures is clouded by its internal contradictions. The complexity of the theory in effect impedes its determinate or objective application. The negative state in its institutional commitment to perfect private markets had seemed to eliminate the methodological problems internal to liberal theory. However, in the light of the advancing understanding of economics, it had also eliminated the possibility of efficient uses of resources. The simpler ideal market theory which undergirded the negative state possessed the virtue of applicability because pure competitive exchange removed the need for political speculation and conflict over the value of the movement of resources. It did so by not seeing critical deviant cases of market failure whose recognition over time came to destroy the social meaning economics was constructed to signify.

The consequences of the evolution in the theory of the liberal state have been the proliferation of its institutional forms in the current era. First, since it will regularly be indeterminate whether a particular regulatory or subsidizing measure is corrective or monopolizing, judicial authorities actively reviewing such legislation must make an interpretative judgment on the likelihood that legal institutions are consensual or coercive. The output of the positive state must be filtered through competing ideologies of institutional performance before its final shape can be determined. This interpretive openness afflicts equally the evaluation of the capacities of state and national governments to institutionalize liberal principles. The proliferation of ideological traditions within contemporary liberalism was one factor in the production of unstable and complex patterns of variation in both legal doctrine and federalist relations.

Second, the theory of the positive state generates a serious problem of federalism since it must be determined at which level of government interventionary powers are to be located. However, once it is decided, as the economic theory of federalism would suggest, that substantial market corrective capacity be exercised by decentralized units, there is a need to reevaluate the constitutional structure of the interstate liberal economy. Open state borders, which

complemented the internal market structure of negative states, may undermine the capacity of positive states to effectuate their domestic programs. In the twentieth century, major segments of American legal doctrine were altered to facilitate the regulation of internal markets. However, the failure to reexamine, in the light of the reworked theory of the liberal state, the legal practices which governed interstate relations led to the particular institutional pattern American federalism has taken. The persistence of a conceptual inconsistency between important areas of constitutional practice which were not rethought and the reinterpreted structure of liberal government channeled positive intervention in the economy into a centralized form.

C. Political Ideology and Governmental Structure in the Advanced Liberal State

The increasing acceptance by legal authorities of the internal transformation of the structure of liberalism that legitimated the positive state opened up a space for interpretive choice. Since there was no objective method of verifying the accuracy of legislative and administrative techniques in aggregating constituent desires, it was always possible that those institutions were either correcting real market problems or distorting efficient economic arrangements. In reviewing the product of governmental processes, courts adopted one of two contradictory, but coherent narratives which concerned institutional competence.[26] In those situations in which it was felt that agencies of the positive state aggregated preferences and accounted for property values in accordance with the principles of liberal theory, courts could apply available legal rules consistent with a long-standing political tradition within liberal thought which we can label Lockian. By Lockian I mean only that we could describe the outcome of institutional processes of market intervention to replicate that result which would have been reached in perfectly functioning private markets.

On the other hand, in those situations in which it was felt that governmental action represented a movement away from an existing private market solution which approximated the ideal standard of efficient resource allocation, courts could refer to alternative constitutional doctrine restricting public action. Such doctrine would be more consistent with a Hobbesian tradition of political ideology that signifies that positive governmental interventions approximate results which would have been achieved through illegitimate and coercive resource transfers inconsistent with liberal principles. As the Lockian ideology sees government as the necessary complement to consensual processes of resource exchange, the Hobbesian sees the state as an instrument of expropriation whose appropriation is the object of ongoing conflict between limited, special interest groups. Since the liberal standard of perfectly functioning private markets against which one measures institutional competence cannot be canonically applied in practice, to decide a case is effectively to invoke one of these two well-developed political traditions. Either will be plausible in any important instance of positive intervention.

The possibilities created by the existence of two competing political ideologies and two interpretations of the institutional structure of the liberal state may be represented in the way shown in Table 1.

Table 1: Government Theory and Political Ideology

Government Theory	*Political Ideology*	
	Lockian	Hobbesian
Negative	Legal doctrine restricts government action as inappropriate	Legal doctrine restricts government action as inappropriate and distortive
Positive	Legal doctrine approves government action as appropriate and corrective	Legal doctrine restricts government action as distortive in practice though theoretically possible

It is evident that only when courts both accepted the theory of the positive state and adopted a Lockian political ideology was a reevaluation of pre-existing (negative state) legal doctrine necessary. However, this analysis must be extended in the context of a federal system to account for the political characterization of the institutional capacities of different levels of government. Even within the category of positive government theory, there are a variety of combinations available:

	National Positive Government	*State Positive Government*
	1. *Hobbesian*	*Hobbesian*
Political	2. *Lockian*	*Hobbesian*
Ideologies	3. *Hobbesian*	*Lockian*
	4. *Lockian*	*Lockian*

To understand the variable patterns of federal institutions in the United States and the alternative accounts of increasing centralization, the significance and dynamics of each of these possibilities merit examination.

The judgment that neither the state nor national government possesses the competence to institutionalize positive liberal principles would suggest no more than the continuation of the negative state. Unless it added some corollary hypothesis of a greater relative capacity of the national government to

produce more extensive losses, it would see the centralization of power as no better or worse than localized exercises of positive intervention. Although there is no longer commonly a direct appeal to this purely conflictual view of liberal institutions, this position can be reached in indirect fashion. If it is perceived that Lockian state governments cannot effectively enforce certain positive programs, legal doctrine which denies a complementary interventionary power to the national government yields the result of no public action. This is the functional equivalent of classical mature liberalism.

The orthodox "progressive" account of centralization reflects the combination Lockian national/Hobbesian state. This reading closes the path to a serious theory of federalism since decentralized state processes are characterized as anti-liberal. An adoption of this position would also render rational the twentieth century adherence to the negative state legal doctrine of open state borders. There would be no need under a progressive reading to reevaluate the open border doctrine since the effectiveness of uniform, centralized regulatory or transfer policies would not be diminished by the free interstate mobility of goods or factors of production. In spite of this correspondence and of the prominence of the progressive political argument for the growth of centralized positive authority, legal practice has not directly reflected this narrative. A Lockian/Hobbesian stance would imply the development of legal doctrine which accorded the full panoply of positive instruments to the national government and restricted the interventionary powers of the states. It should be noted, however, that constitutional adjudicators in the United States have not produced such a pattern of doctrinal practices.[27] The actual relocation of positive power from the states to the center is not due to legal judgments of state institutional incompetence so much as to the local inability to exercise a variety of positive legal powers which have long been recognized as theirs.

The pairing Hobbesian national/Lockian state is the narrative account normally invoked by the conservative tradition within liberalism. While this reading, like the progressive, obviates the need for a complex theory of federalism, it differs in that it accords with the predominant judicial ideologies in the pre-1937 era of American jurisprudence. Doctrinal development in this period increasingly recognized a series of general interventionary powers in state governments while continuing to restrict national regulations under narrow interpretations of the Commerce Clause and other enabling authority.[28] The consequence of institutionalizing the positive liberal state through a mediating conservative tradition would be to foster a series of diverse and decentralized programs of market correction. Given an assumption that states accurately reflect citizen preferences in their policy processes, this would tend to lead toward a maximization of social welfare in accordance with the economic theory of federalism. However, the argument of this paper is that this conservative solution was not stable due to the dehabilitating impact of the legal doctrine of open state borders on much of this desired decentralized intervention. In this latter regard, the adoption of the conservative account would not necessarily produce a different outcome than an adherence to a purely consensual ideology of federalist government.

The final narrative – Lockian national/Lockian state – would represent the most utopian variant of liberal theory. While its political expression in the United States in this century has not been as usual as the progressive or conservative readings, it remains a useful account to analyze.[29] The progressive and conservative ideologies of government avoid the complexities of the interaction between positive government theory and the theory of federalism because each incorporates a political tradition which assumes the institutional incapacity of one of the contending levels of government. To use a political ideology which consistently treats different governments as Lockian causes the difficulties of this interaction to become more clear. My argument is that even if we had begun with a purely consensual account of the federal state, it would have been unstable because of the inconsistency between such a reading and the unexamined aspects of earlier legal practice. The open borders doctrine would have undercut the effectiveness of much of the interventionary policy of the Lockian states.[30] In turn, this would have led them to pervert or render conflictual the institutional processes of the national government.

A consensual view of the national government would assign it the institutional capacity to aggregate in its constitutionally defined sphere the preferences of the national citizenry. However, in the context of an open interstate economy, competitive pressures could force Lockian states, seeking only to maximize their internal welfare through regulation, to seek to gain control over national policy in order to impose on their potential competitors their preferred level of intervention. This argument implies a convergence between the conservative account and the purely consensual account. In the former, the national state is initially assumed to be Hobbesian; in the latter it is transformed into a coercive instrument in those cases where decentralized positive policy is made ineffective, by the conjuncture of prevailing economic conditions and the continuation of a legal doctrine of full exchange.

This is not to assert that the problem in the liberal theory of positive federal government could have been easily resolved by revoking the nineteenth century legal doctrine of open borders and creating some greater measure of disintegration within the existing customs union.[31] Such a reexamination of prior law could have been more consistent with the theoretical shift to the structure of the positive state. At the same time, it would have had the effect of extending the ambiguity which now attends the economic characterization of internal market interventions (regulation) as inefficient or monopolistic to external market interventions (border controls). The consequence of removing the inconsistency between the reformed intrastate legal structure and the unexamined interstate legal doctrine would have been the emergence in a second area of a basic contradiction in the theory of the liberal state. The admission of a wider economic disintegration would have subjected the regulation of interstate commerce to the political uncertainty caused by the liberal commitment to both a subjective discourse (individual choice) and an objective method (empirical verification of preferences in a non-market context).

D. The Role of Legal Doctrine in American Federalism

The problem posed by the maintenance of the open borders doctrine – a doctrine fully consistent with the theory of negative government – upon the institutional patterns of positive American federalism will arise in either the conservative or the more utopian Lockian reading of governmental activity. We may hypothesize that if state powers to regulate in pursuit of local welfare gains are at once legally permitted and economically ineffective a number of different results may occur. First, a tendency to reexamine the propriety of border controls may increase. Disintegration of actual, or failures to integrate potential, economic unions may be a strategy favored to protect disparate local interventionary policies that can be undercut by the free movement of goods and productive factors. Where sovereign power clearly resides within the multiple jurisdictions of a positive federal union, there is the definite possibility that the advantages of economic integration will be valued less highly than the loss of regulatory or redistributive autonomy. This phenomenon may be operative in the slowed momentum toward fuller union and the persistence of indirect national trade controls in the European Community. The pressure toward autarchy is also increasingly evident in the demands for increased protectionism at the United States border in the form of new restrictions upon trade, immigration and capital outflow in order to limit the redistribution of national production away from U.S. labor.

A second possibility is sometimes referred to as a "race to the bottom." In this scenario, the competitive pressures generated by the threat of the importation of lower cost, unregulated products or the out-migration of regulated factors of production to more profitable locations across open frontiers, causes an abandonment of regulation. The level of market correction is reduced to that desired by the least regulatory competitive jurisdiction. This represents a welfare loss to all those states which would consensually have chosen a higher degree of internal market intervention. Since it is usually assumed that higher optimal levels of intervention are positively correlated with rising jurisdictional wealth, this race to the bottom would often produce a transfer of welfare from more developed to less developed economic regions.[32]

A third possibility is represented by the growth of centralized government. The inconsistency between open borders and decentralized positive autonomy could be overcome by the elimination of the importance of frontiers. The appropriation of the central government's interventionary apparatus to impose uniform levels of regulation or redistribution would eliminate the competitive advantage of less controlled production by states preferring lower levels of regulation and reduce the likelihood of the out-migration of labor and capital. A strategy which transformed the central state into a coercive instrument for the general imposition of the corrective policies which are optimal solutions only in particular regions would be more likely to occur where dominant power was concentrated in the economically more advanced areas. Since less developed regions could pursue their economic preferences by means of an open border, race-to-the-bottom strategy, centralization would be more likely to in-

dicate the ability of the advanced core to impose its desires through uniform positive legislation on the less advanced periphery.

In the account of centralization as a cartel representing the interests of advanced regions and acting as a surrogate for effective, decentralized Lockian intervention there is no need to present a crudely Hobbesian view of national power. The economic transfers which are imposed are not merely simple expropriations of the resources of others. They must be understood as part of a dynamic process which begins in decentralized attempts to improve local welfare. Nor is this account of the emergence of central power purely Lockian or progressive since the political history of uniform regulation does not reflect a process of the global aggregation of the desires of a national citizenry. Such a global process would be appropriate in defining efficient policy only in those areas of public control assigned initially to the center by some normative theory of federalism. An increasing centralization of collective economic intervention will be exposed to economic criticism since it will produce involuntary transfers of wealth and allocative inefficiencies in comparison with an ideal federal structure that imagines an hypothetical series of locally differentiated market corrections. Given the force of this critique, neither a strategy of creating uniformity nor one of a race to the bottom can necessarily provide a stable solution to the quest for a preferred institutional form of a positive, federal government.

It is critical to the hypothesis that centralization within the American federal structure is a surrogate for local market intervention to demonstrate that regulatory controls were rendered ineffective by economic competition. A logical precondition for ineffective state policy would be the continuation of the constitutional commitment to open economic exchange developed in the negative state and less obviously appropriate for a reworked positive federal system.[33] Conversely, in those situations where the legal doctrine of open borders was reshaped to be more consistent with the theory of positive federal government or where for non-legal reasons local controls were economically effective, there would be less need for a strategy to gain control of the national government in order to impose uniform interventionary policies. In some classes of market correction, state regulation did prove sufficient. After the demise of the limited state and under a Lockian reading of their powers, state governments were permitted to prohibit the marketing of dangerous or defective goods and to enact taxes upon the sale of a product to deal with the problem of external costs associated with product quality. As long as such regulations and/or excises were reasonably related to the protection of legitimate property rights and did not discriminate in their application between products produced within and those originating outside of the controlling jurisdiction, local regulation of final product quality was constitutional. Such regulation normally imposed no immediate injury on local producers since all products sold in markets of the regulating state would be subject to the same burden. With quality regulation in general, no border barrier would be necessary for effective decentralized regulation within an open system since the administration of regulation occurs at the point of marketing or possession of the products.

In those cases where the object of market intervention is not product quality but the conditions under which production takes place, the legal problem is more complex. Controls over intrastate production issues like environmental pollution, worker health and safety, or the distributional share of different sectors may be imposed upon local firms. However, unless state borders are closed to (or compensating duties are placed upon) external goods produced under less costly conditions, there may be competitive losses to the intervening economy. Since the political consequences of direct economic impoverishment are rarely palatable to sovereign entities, the entry of goods combined with the exit of capital will threaten the viability of this class of regulatory efforts.

Effective border control may be available through several indirect forms. First, as is currently the case in the European Community, there may be a proliferation of local codes of product quality controls.[34] These possess a constitutional legal form since they regulate local markets, but may indirectly discriminate against foreign produced goods. Although ersatz quality controls are usually felt to be inefficient and monopolizing, they could be second-best substitutes for direct border controls or compensating duties where the latter would be protective of locally efficient policies regulating productive conditions.[35] Second, it is conceivable that an adroit combination of legal subsidies and non-discriminatory excise taxes could achieve economic results substantially equivalent to state regulation complemented by legally prohibited border controls. If the extra cost imposed upon in-state firms by local regulation of productive conditions were offset by some form of direct or indirect subsidy to these firms, the anti-competitive effect of the optimizing intervention would be offset. If the subsidy were funded by an excise on the sale of the regulated product, the distributive effects of the program would approximate decentralized regulation and disintegration. In this case, two legally approved forms – production subsidies and non-discriminatory excises – would be combined to reach an otherwise unachievable object. It is, of course, possible that, with open borders, burdened consumers would migrate from the subsidizing state. This is both relatively more unlikely than capital migrating out and no different from the result that would obtain if regulation and border controls on lower cost imports were employed. Finally, in those instances where there exists some local competitive advantage which results in economic rents being received by in-state firms, legal regulation of the social costs of production would not necessarily cause production to decline or migrate elsewhere. It is not the adequacy of legal doctrine which yields this outcome. It is simply the positive economics of certain markets which would, in the relevant range of regulatory costs, permit the effectiveness of these programs.

After it had been generally recognized that positive governmental action was required to institutionalize an ideal liberal social organization, American constitutional doctrine continued to forbid the overt enactment of border controls or compensating duties. States could not limit the import of commodities produced under unregulated or even subsidized conditions in other states. Discriminatory regulations of product quality have continued to be threatened

with nullification under the negative or free trade interpretation of the Commerce Clause. At the same time, state governments did not seriously experiment with alternative legal devices to effect indirect border closure. Carefully constructed subsidy/excise tax programs have rarely been tried. Moreover, the economic threat of viable interstate competition gradually increased due to improved facilities for interstate transportation, growth in information quality about market opportunities, and the administrative capacity to manage firms with multi-state operations.[36] All of these factors tended to focus the attention of states desiring to regulate their domestic conditions of production upon a strategy of imposing uniform market corrections through national legislation.[37]

The same economic dynamics that inhibited decentralized programs from regulating conditions of production operated to limit the effective local use of redistributional or stabilizational legislation. Interventions offering wealth transfers in the context of open borders threatened both the out-migration of taxed producers or the in-migration of benefit recipients.[38] While the interstate flight of capital in the short-run was often economically unrealistic, long-run possibilities were uncertain. In-migration of persons sufficiently poor to be the objects of redistribution seemed even more likely to take place due to their lack of economic ties to their areas of origin. Finally, as theories of macro-economic adjustment became more popular in this century, states discovered an additional difficulty imposed by interstate trade and unified capital markets. The ability of public expenditures to create multiplier effects in the state economy was sharply curtailed by the openness of the local economy to imports and other foreign transactions.[39] In the absence of a legal capacity to increase disintegration in order to protect the capacity of advanced state economies to regulate production, redistribute wealth, or engage in macro-economic adjustment, the surrogate of centralized control was generated by the needs of *state government.*[40] Under this hypothesis, the growth in national power should have been initially concentrated differentially in its early period in those areas of positive legislation where effective local intervention was inhibited by the unreworked constitutional doctrine of open borders.

E. Theoretical Possibilities and Historical Outcomes

In the period that followed the shift in the understanding of the appropriate governmental institutions for modern liberalism, legal doctrine had to be adjusted to permit the economic activities of the positive state. However, this era has been marked by instability of federal structure due to the theoretical incompatibility between the attribution of market corrective legal powers to the individual states of the union and the residual jurisprudence of the negative state that preserved open economic boundaries. The instabilities inherent in the effort to economically integrate separate positive governments may become manifest whether one begins in a classical conservative or purely Lockian reading of the relative capacities of state and national institutions. The tra-

ditional American conservative interpretation of federal relations, which seeks to restrict large concentrations of governmental power and has preferred regulation at the state level alone, is unstable because it degenerates effectively into two different institutional arrangements. Conservative analysis customarily characterizes the national legislative process as Hobbesian, the local process as Lockian. Since in important areas of positive state powers (*e.g.*, regulation of the conditions of production or redistribution) decentralized intervention can be ineffective, legal doctrine that dehabilitates national regulation will produce in those areas a situation, substantially similar to the nineteenth century negative government, in which states cannot regulate because of open borders and the central government may not regulate by law. Formal legal doctrine effectively permitted many key positive powers of regulation to be exercised constitutionally only at the state level in the period before 1937.[41] The ideology of Hobbesian national/Lockian state also seems to be the motivating image behind current conservative reform programs such as New Federalism.[42] However, in great part, a stable Hobbesian national/Lockian state position is chimerical since economic forces can transform it into the destruction of an effective positive government at any level of federal structure.

The second scenario that originates in a conservative narrative may be represented by the shift in constitutional doctrine after 1937 which authorized the general positive power of the national government. In this situation, it is argued that the basic nature of the centralized process is Hobbesian. It is at the same time recognized that restrictive legal doctrine consistent with the interpretation Hobbesian national/Lockian state will lead to a pattern functionally equivalent to Hobbesian national/Hobbesian state. Consequently, to preserve the possibility of positive government, constitutional authorities will interpret the conflictual processes of the national government as if they were Lockian. This leads to the formal legal pattern which characterizes the contemporary American state as Lockian national/Lockian state. Effectively, due to the inabilities of states to implement much of their formal positive array of powers, the predictable outcome will frequently be equivalent to Lockian national/Hobbesian state. The appearance of this effective outcome suggests the progressive narrative of federalist history of increasing centralization. However, the reality of the growth of national power is neither a progressive elimination of the states' formal capacities nor a conservative conspiracy of monopolists at the center. The current pattern of the effective distribution of power – Lockian national/Hobbesian state – could be the consequence of a combination of a theoretical recognition of the internal contradictions of the conservative account of the preferable federal structure and a political reluctance to return to the epoch of negative government.

A dynamic similar to that of conservative liberalism will occur even if the account of American federalism assumes only pure Lockian institutions. The relative ineffectiveness of certain state economic controls in the legal context of open borders will make the national government an object of conflict among states that struggle to gain access to its legally recognized regulatory powers. Thus, what originates as Lockian national/Lockian state will become

Hobbesian national/Lockian state as states contend in the national arena to impose their locally desired levels of centralized economic activity uniformly upon their competitors. However, the pattern Hobbesian national/Lockian state may also become unstable because it is economically inefficient relative to the optimal level of decentralization imagined by the theory of fiscal federalism and politically coerces regional interests in a way that contradicts liberal constitutional ideals. This instability in turn could result in an ongoing dynamic that occasions the replay of structural arrangements rejected in earlier periods. The possibilities may be summed up in the way illustrated in Table 2.

Table 2: Federal Government Theory and Political Ideology

		State Power to Intervene	
		Permitted	Disallowed
National Power to Intervene	Permitted	Positive government and Lockian national/ Lockian state (positive government) 3	Positive government and Lockian national/ Hobbesian state (progressive) 4
	Disallowed	2 Positive government and Hobbesian national/ Lockian state (conservative)	1 Negative government or Hobbesian national/ Hobbesian state (negative government)

The box marked No. 1 represents an ideal of the negative state in which Due Process and Commerce Clause doctrines were used to preserve an important private sphere of unregulated market transactions. This aspiration was not derived from any theory of federalism but from a particular economic theory of the state. In the second square, the situation which corresponded to the pre-1937 era would be located. The theory of positive government permitted large areas of intervention to states alone. National action was restricted due to a political ideology of distrust that the process that produced legislation at that level of government did not correspond to liberal principles. In the presence of open borders the effectiveness of such a conjunction was too weak to make it politically tenable over time. It would have been tranformed effectively either into box No. 1 if no shift in legal doctrine took place or into box No. 3 by a legal recognition of the constitutionality of national economic controls. However, box No. 3, which describes the mainstream current formal constitutional structure of American federalism, is also unstable in two ways. In the conservative account of the origins of box No. 3, it represents a commitment

to some form of the positive government in spite of incapacity of the states to regulate effectively their domestic markets. The practical state of affairs is actually described by box No. 4 for critical areas of regulatory, redistributive, and stabilizational programs. If the box No. 3 condition originates in a pure Lockian account, conflict among states to appropriate the center and impose national uniformity will be politically and economically delegitimated by Lockian constitutional principles. Pressure will arise to shift federal institutional structures from box No. 3 to box No. 2 to limit regional coercion and reinstitute locally optimal levels of regulation. Again, the possible outcomes of the dynamics beginning in box No. 2 are No. 1 or No. 4.[43] In the absence of a fifth alternative allowing positive states to achieve partial disintegration of the economic union in pursuit of local market corrections – an alternative discredited by the defeat of its Southern adherents in the Civil War – only boxes No. 1 or No. 4 seem to present realistic solutions to the dilemmas of positive federal government.[44] However, this model is indeterminate as to which will prevail in the short-run and suggests that in the longer-run neither will be stable.

Whether an account of history of modern American federalism begins with political judgments that correspond to box No. 2 or No. 3, one emergent position is the effective centralization of economic controls. The process that results in this outcome distinguishes these narratives from a simple orthodox progressive justification of the growth of national power. The instability that attends the attempt to decentralize the authority of positive government in an integrated multi-jurisdictional economy makes possible mutually inconsistent endings to the structural history (*i.e.*, preservation of essential aspects of the negative state; centralizing positive state). Which of these options eventuates depends upon both political power and legal practice. A centralized solution for modern federalism demands first that constitutional doctrine be interpreted so as to permit the exercise of interventionary power at the center. In addition, concentration of regulatory control at the national level requires that states with relatively more interventionist programs prevail in the political conflict over the direction of national policy. In the United States, this conflict may be characterized as a struggle between the regional economies of the Northern and Southern/Western sectors in the period after the Civil War.[45] The strategy which allowed the Northern states to overcome their local inability to regulate effectively their domestic economies by creating uniform market conditions from the center was feasible because the more advanced core region was able to mobilize (in the period following the Civil War dispersal of Southern political power) a Congressional coalition with sufficient strength to impose its will on the American periphery.[46] Economic transfers flowed to the core from the peripheral sectors whose development was slowed by unwanted restrictions on their local production. Conversely, the core was able to avoid the loss of wealth potential in either a race to the bottom that would have decontrolled key areas of Northern economies or in the out-migration of production had the core persisted in non-uniform intervention.

The implementation of much of the national regulatory program was delayed by the courts due to the particular composition of the core region coali-

tion that had appropriated the faculties of the national state. Because of the visible presence of corporatist elements in the forces seeking centralized controls, constitutional restrictions were maintained until 1937 against important forms of national positive power at the heart of the core region's interests. The shift of judicial ideology in the later New Deal – which recharacterized national regulation as the product of Lockian rather than Hobbesian processes – followed upon the rejection of the overtly corporatist aspects of the early New Deal proposals. Only when the taint of anti-liberal politics was expunged from the legislation that centralized economic controls was the core region granted constitutional sanction to proceed with the full panoply of practices it needed to reduce the competitive advantage of the less developed state economies. In effect, a political shift in the New Deal ideology that underlay the increasing centralization of power from corporatism to welfare state (progressive) liberalism coincided with a reworking of judicial interpretation. An effective positive national government (box No. 4) was legally recognized in return for the abandonment of the form of explicitly corporatist institutions favored by important segments of advanced capitalist interests.[47]

Since the New Deal, the constitutional doctrine that treats the national government as Lockian, by permitting concurrent state and national regulation, has remained in place as national authority has been consolidated and extended. However, this judicial transformation of conflictual regional struggles to control the center for local purposes into an image of national consensus has not led to the end of political efforts to reverse this expansion. With the demographic movement of population to the South and West and the economic development of these regions through public (defense) investment, there has been a shift of power toward regions which have reified their traditional localistic ideologies. The calls for a new federalism based upon a diminution of nationally uniform economic policies represent a reassertion of decentralized sovereignty against the domination of the former core which expressed itself in the thrust toward centralized regulation. This tendency has been reinforced by the argument that the post-New Deal administrative institutions now reduce the competitiveness of the American economy and have been captured by entrenched special interest groups in a neo-corporate regulatory process.[48] Given the instability of the pro-state/anti-national position (box No. 2), the effective result of this reaction would be a return to a more substantially negative government – one in which the constitutional capacity of the center is granted but not exercised and the positive legal power of the states is recognized but not exercisable.

The recent suggestions that the post-1937 understandings that established a centralized positive, liberal government are unsatisfactory should not have been unexpected. Whether the pattern of federalist institutions which emerged from the untenable configuration Hobbesian national/Lockian state was initially progressive or functionally equivalent in important ways to the negative state, either result would have been unstable. This instability may be traced back to the contradictions in the theory of economically open and politically positive governments with sovereign pretentions. A negative state will be open

to telling criticism because its operations cannot be considered efficient once the theory of positive liberal government has been recognized. Its persistence would depend on a continued political adherence to an ideological tradition that asserts, without possibility of empirical demonstration, that all public economic intervention is worse than free market allocation. As the memory of poor government fades in an era of the negative state, the utopian hope for an ideal liberal state of Lockian character will gradually displace Hobbesian narratives. At the same time, the progressive resolution of the problem of ineffective state regulations is unstable since it is from the outset a second-best result. The uniform imposition of economic controls that are optimal only for particular regions is both illegitimate as coercive and inefficient relative to an ideal standard recognizing local differences. The centralizing outcome is no more than a fictional recharacterization of non-liberal conflict as liberal consensus. Its continuation depends upon repressive political power in the hands of those whose preferred programs have been nationally enacted. The contemporary pattern of the centralized concentration of positive economic power in the American federal system is the product of specific historical contingencies. In the absence of a reconsideration of the doctrinal legal barriers to increased disintegration of the economic union, an abandonment of the legitimating ideals of decentralized sovereignty, or the substantial undermining of effective national regulatory power by growing international competition, these institutional practices will be open to continued variability due to structural problems in the theory of liberal government.

Notes

[1] *See infra* pp. 259–61.

[2] *See infra* notes 5–8 and accompanying text for further definition of liberalism. *See also* Heller, *Structuralism and Critique*, 36 Stan. L. Rev. 127, 172–81 (1984).

[3] *See, e.g.*, G. Kolko, The Triumph of Conservatism (Glencoe, Free Press, 1963); J. Weinstein, The Corporate Ideal in the Liberal State 1900–18 (Boston, Beacon Press, 1968).

[4] *See* Heller, *supra* note 2, at 130–72.

[5] I use the term liberal to describe the conjunction of basic cultural principles in American history only with considerable reservations. Liberalism has been used in both complementary and deprecatory senses to label a great many distinct, and sometimes opposed, political and social positions. I mean the term to refer to the somewhat idiosyncratic definition of a particular system of cultural representations described in the text. Consequently, I include as liberals both conservatives who tend to more libertarian interpretations of liberal thought and also progressives (often called "liberals" in America) who tend to favor programs of public economic intervention and redistribution which derive from their stress on market failures and historical imperfections within liberalism. My concept of the liberal state, similarly, may include a variety of governmental forms stretching from a classic laissez-faire arrangement to a fully articulated positive regulatory or welfare state. What principally unifies all liberalisms is the commitment to a procedural definition of the ideal state of social relations. Variations in liberal political philosophy and state organization stem from the

open nature of the interpretive process by which institutional practices have been derived from the more abstract central cultural representations. The history of these variations in America is the major focus of this essay.

It may be more useful in describing liberalism to point out what is excluded from its coverage. Most importantly, non-liberals center their political philosophies and theories of institutional design on some substantive definition (normative, historical, or empirical) of the collective good. In this sense American conservatism tends to split into two contradictory positions. Liberal conservatives are those who do not favor substantial governmental, particularly national, action but define the social good with reference only to the aggregation of individuals' preferences. Organic conservatives are non-liberal and advocate the collective protection and reproduction of substantive moral positions (often religious) which may have once constituted a near universal consensus in nineteenth century America. I use the term conservative in my essay only to refer to a tradition within liberalism. I recognize, however, that there exists within American history a non-liberal strain of thought which sees itself as *conserving* an earlier substantive agreement. The contradictions within the American right have become much more apparent as this putative consensus has clearly diminished. On this latter point *see id.* at 136–38 n.15.

[6] For my purposes, a discourse is one of a set of (often mutually exclusive) possible co-representations of human experience. Each such representation is an abstraction expressing a partial aspect of the fullness of experienced events. Such abstractions serve both to organize the disorder of and accord meaning to experience. Each discourse, though it contradicts alternative accounts of events, may be described by reference to the internal consistency of the central terms (internal grammar) that compose its particular historical narrative. Existential phenomenology is a discourse which explains the production of action by making a primary reference to the effects of consciousness or intentionality. These states of consciousness are not in turn reduced by any direct account of their own production which refers to some prior explanatory variable factor (*e.g.*, materialism, reductive biology) not itself described as a moment of consciousness. Most contemporary phenomenologies have spoken of an individual consciousness, rather than of a *Weltgeist* or *Volksgeist* favored in nineteenth century phenomenological discourse. The principal contrast in this paper to subjective discourse is, naturally, any discourse of the object which reduces consciousness to an epiphenomenal artifact. *See id.* at 134–44.

[7] *See id.* at 184–85.

[8] Positive or objective method within liberal culture may be seen as unitary in spite of the fact that the dualist liberal epistemology insists upon the definition of several qualitatively different modes of knowledge. Liberal method privileges or accords truth value to both direct perceptions of the external or non-mentalistic world and immediate apperception of an inner non-factual realm. The objective validity of a claim depends ultimately on the recognition of an autonomy which separates the substance of the claim from the procedure by which it is asserted. Thus, an empirical fact is a claim which is autonomous of theory. Similarly, logical relations are not mediated by language and history. Finally, desire or intention is autonomous of social causation and is known by the desiring subject through an unmediated (Cartesian) intuition. Normative judgment (desire) is arbitrary as facts are not, but may be apprehended by the subject and, when confessed, empirically recognized by society.

Liberal method insists that collective decisional processes avoid all conclusions arrived at by means of procedures involving the mediated or non-determinate interpretation of empirical data. Only directly apprehended facts may be logically manipulated to generate legitimate public action. While all of these pretensions to autonomy

may be criticized with relative ease in a post-positivist period, the historical importance of liberal method as an ideal should not be ignored. First, the American vision of law has insisted on its conformity to the methods of a unified science. Classical liberal theory insisted that the law be made a gapless, formal conceptual order in which legal rules were derived from rationally or empirically established principles (a theory of rights). Rules to cover anomalous cases were logically derivable from known principles and in turn, determined canonical or non-discretionary decisions for each set of empirically ascertainable facts. The reworking of a pure conceptual order into the technical operations of contemporary law and economics represents the post-realist reassertion of the necessity of an objective legal method within liberalism. At the same time, the criticism of the possibility of objectivism in law can do much to explain the dynamics of the evolution of legal doctrine. Courts, faced with the contradictions of the demands of positive method and the reality of indeterminate legal standards that made significant reference to the unverifiable subjective intentions of legal actors, at times have adopted strategies of restricted judicial action or limited institutional competence to maintain the legitimacy of their decisions. The contradictions between liberal objectivist method and liberal intentionalist discourse opened a space within the law wherein the debate over the proper structure of institutions which characterized the odyssey of American federalism was worked out over time. *See id.* at 181–82 n.94.

[9] R. & P. Musgrave, Public Finance in Theory and Practice 3–20 (New York, McGraw Hill, 1973). Stabilization involves the use of monetary and fiscal instruments to adjust the overall level of prices, incomes, and employment. Allocative policies are designed to deal with technical impediments to efficient market operations. Policy intervention is needed to remove or constrain monopoly, to correct for information inadequacies and to adjust market defined resource uses to account for negative and positive external effects. Because certain costs of production (negative externalities) are not reflected in market prices, free markets will yield an excessive quantity of certain goods or services produced under uncontrolled conditions. Conversely, because markets do not adequately measure the full benefits (positive externalities) associated with other goods and services, the supply of some commodities must be supplemented by public production or subsidy. The redistribution of wealth to defined subsections of the population may be justfied because it is a social good chronically undersupplied by private or charitable transfers. Alternatively, there may be arguments about consensual principles of social justice or remedial rectifications of past injustice which are felt to require collective readjustments of ownership rights.

[10] *See* W. Oates, Fiscal Federalism 3–20 (New York, Harcourt Brace Jovanovich, 1972).

[11] Tiebout, *Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

[12] *See* W. Oates, *supra* note 10, at 31–64.

[13] The legal attention of the early liberal state was centered upon the basic redefinition of private and public entitlements. Property rights were frequently assigned to individuals and entities by the adjudication of common law compensation claims as well as by the emendation of statutes. Since the right to property is defined by the ability to freely exploit its productive capacity, legal demarcation of the boundaries within which resource use was held not to cause compensatable harm to the projects of others established the redrawn map of entitlements. *See* Horwitz, *The Emergence of an Instrumental Conception of American Law*, 1780–1820, in Law in American History 287–328 (D. Fleming & B. Bailyn eds., Boston, Little, Brown, 1971).

[14] Following the general outlines of international trade theory, it was assumed that the creation of a free trade area complemented by internal factor mobility would pro-

duce increased welfare. There was little recognition or debate of the sort suggested by contemporary optimal customs union theory (*see infra* § III) that the trade creating effects of the unrestricted domestic market might be outweighed by the trade diverting effects of the common external tariff that was early established. Consequently, legal doctrine treated the level of the external tariff as a political decision outside of its purview and concentrated upon the establishment of a unified internal market.

The state grant of an exclusive charter to ferry from New York to New Jersey was held unconstitutional under the Commerce Clause (U.S. CONST. art. 1, § 8, cl. 3) because it was inconsistent with pre-existing Congressional regulation of these matters. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Commerce Clause generally covered state regulation or chartering to directly control trade in the space of other states or in areas reserved to the National Government, such as navigable waters. Overtly discriminatory regulation aimed at foreign goods, such as import license requirements or exclusive taxes on out-of-state traders, were also struck down explicitly. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887). However, the argument that the Commerce Clause prohibited all state regulation or taxation of interstate commerce in exclusion of the local police power was not accepted in the absence of express or implicit Congressional pre-emption of the area. The License Cases, 46 U.S. (5 How.) 504 (1847). The notion of dual or concurrent regulatory power was explicitly endorsed in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). The failure to articulate a clear mapping of the relative jurisdictions of state and federal regulatory power during this period did not present a serious problem. Control over state discriminatory legislation increasingly came to be located in the Due Process Clause and obviated the need for Commerce Clause clarification. The national free trade area was more often preserved with reference to a general theory of government than with reference to a specific theory of federalism. As the liberal economy matured, the question of the comparative merits of state or national interventionary policy paled before the elaboration of the jurisprudence of constitutionally restricted government. *See* Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 126–28.

[15] Subsidies were provided directly through the development of specialized social overhead capital and below market lending, or more indirectly by the grant of monopoly charters or eminent domain privileges to private enterprises. *See* J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM 3–32 (Madison, U. Wis. P., 1956); S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION (Philadelphia, Lippincott, 1971); Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, in LAW IN AMERICAN HISTORY, *supra* note 13. These grants and monopolies that afforded supra-competitive profits were justified as temporary expedients to allow infant industries to establish market positions in a manner analogous to the external tariff operating at the national level throughout the 19th century. Since the border tax and import quota instruments available to the central government were constitutionally barred to state governments, subsidies emerged as the principal protectionist device used by decentralized economic policy-makers. As the national tariff was reduced at the close of the developmental era of American capitalism in the late 19th century, the widespread use of state subsidies and monopolies also declined in more mature market conditions. *See* R. PASTOR, CONGRESS AND THE POLITICS OF UNITED STATES FOREIGN ECONOMIC POLICY 1929–1976, at 73–77 (Berkeley, U. Cal. P., 1980).

[16] Discriminatory barriers to trade are most visibly imposed through tariffs, import duties and quotas. However, similar, if not identical, protection of local firms can be and is achieved through a wide variety of non-tariff trade barriers. This problem is

particularly recognizable to policy-makers in the EC. *See* R. BALDWIN, NON-TARIFF DISTORTIONS OF INTERNATIONAL TRADE 10–12, 143–48 (Washington, D.C., Brookings Inst., 1970). In the U.S., the trade distorting effects of state regulatory standards on product quality have been the most usual focus of judicial attention. Functionally analogous subsidies and complementary financing arrangements have, on the other hand, not been frequently employed in spite of the fact that no serious legal disabilities have been imposed on their use. Consider for example a state standard recently declared unconstitutional in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). The Supreme Court held that a North Carolina statute which forbade the sale of apples bearing any grade other than that of the U.S. Department of Agriculture served no consumer protection purpose and operated to reduce the sale of imported apples in North Carolina. If we assume the discriminatory standard operated as a tariff, the most likely effect would have been a rise in the price (or decline in the quality) of apples to North Carolina consumers, some substitution of other products for apples depending on their price elasticity, and a loss in national economic welfare. If North Carolina had offered a subsidy to its apple producers of an appropriate amount, presumably a price/quality relation between domestic and imported apples comparable to the post-tariff position could have been achieved. Again, global welfare would decline and the cost of the price reduction would fall on the tax base which financed the subsidy. If the financing were tied to a general (non-discriminatory) excise on imported and local apples, the cost of the discrimination in substitution effects and direct costs would shift back toward the North Carolina apple consumers who bore the local burden of the tariff. That subsidies and other non-tariff barriers are important sources of economic disintegration in need of legal control in a unified economic system has been the principal focus of the Tokyo Round of international negotiations under the General Agreement on Tariffs and Trade (GATT). *See* R. BALDWIN, THE MULTINATIONAL TRADE NEGOTIATIONS: TOWARD GREATER LIBERALIZATION 9–16 (Washington, D.C., Am. Enterprise Inst., 1979). The checkered legal situation in the U.S. that controls some trade distortions and does not attend to others is discussed further *infra* note 29.

[17] The limitation of private action by state use of regulatory controls was not seriously challenged until the latter part of the 19th century. The relatively low-level resort by the states to their taxing and spending powers was not legally restricted in any direct fashion. The concept of due process, which after 1870 was used to control these state faculties and otherwise limit market corrective practices, was at first understood to demand only that public institutions adhere to procedural regularities. The "public interest" doctrine did not occasion serious constitutional review of its enactments until its use grew to become the foundation for more extensive use of regulation after the Civil War. *See generally* S. FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1864–1901 (Ann Arbor, U. Mich. P., 1956).

The principal public limitations upon private uses were the "police power" and the doctrine of resources "affected with a public interest." The former was a general legislative power accorded to the several states to pursue all reasonable and wholesome laws judged to be "for the good and welfare of the commonwealth." Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). However, the normal resort to the police power concerned health and safety regulation to protect those who bore what are now called the external costs generated by the economic activities of others. The police power was initially the predominant form of internalizing non-market costs that threatened the natural law entitlement to

personal bodily integrity. It became apparent later in the 19th century that the early understanding of the police power centered upon third party protection. As states more frequently invoked the power to regulate the conditions of exchange of persons who were actual parties to contracts (such as workers and employers), courts began to increase the use of doctrines such as due process and assumption of risk to restrict public control and to certify that free choice was the paradigmatic legal form of a liberal social order.

An early acknowledgment of the legal form appropriate to mature liberalism was the concept of an unwritten constitution of general principles of governmental limitation. *See* S. FINE, *supra* this note, at 121; *see also* C. TIDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND A CRIMINAL STANDPOINT 1–16 (St. Louis, Thomas, 1886). Vested rights were held to be beyond legislative interference in such an uncodified structure of a liberal government – a structure illustrated but not exhausted by the written constitution. *See* The Sinking Fund Cases, 99 U.S. 700, 733 (1879). For those unused to such abstract canons of interpretation, the grounding of rights theory was initially in the Privileges and Immunities Clause and ultimately in the liberty and due process language of the fourteenth amendment. *Compare* the dissent in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) *to* that in Munn v. Illinois, 94 U.S. 113 (1877). Property had been interpreted to refer to material assets in pre-Civil War legal doctrine. As it was reconceived, in a more modern economic usage, to be any potential flow of value whether or not material, the concept of protected property rights assumed a wholly general place in liberal theory. Liberty and due process also were reinterpreted to accord with individualist ideology. Liberty, which had referred to traditional personal freedoms, grew to encompass freedom of contract to consensually exchange resources in pursuit of economically preferred arrangements. Allgeyer v. Louisiana, 165 U.S. 578 (1897); Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886). As long as contract was seen as the expression of subjective autonomy, laws disrupting its operation would only repress self-actualization.

At the same time, although due process had only been a procedural guarantee that public action had no special or discriminatory character, in the period of judicial activism after 1870, legislative enactments which restricted the scope of acknowledged substantive rights without appropriate compensation were held to deny due process regardless of the propriety of their legal form. *See* Davidson v. New Orleans, 96 U.S. 97 (1877); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Chicago, Milw. & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890). More importantly, the doctrine became the central defense against the effort to deny autonomy through paternalistic legislation. The reach of due process was revised to assure protection against the arbitrary power of government to alter legal discourse. No law could be truly general, and of proper form, unless it was based on a rational classification of its objects. Those legal distinctions that regulated the contractual exchanges into which persons entered denied the autonomy or capacity for full subjectivity of the regulated segments of the population. Only distinctions which were "natural" or "sui generis" such as "infancy" or "insanity" were regarded as properly reflecting the division of humanity into those with full and partial subjectivity. Since other categorizations in laws specially protecting women, or workers, or bakers, or the poor, divided up the universe of individuals by reference to other schemes of objective determination, they were in contradiction with the traditional practices of subjectivist legal discourse. Due process was denied by such classifications since they were based upon an "arbitrary" or unproven acceptance of some set of hypotheses of objective differentiation which clashed with orthodox significations. Due process became the

symbolic center of liberalism. It was not so much a functional operator as it was the arena in which the essential constituents of liberal culture – its linguistic categories and consensualist legitimating forms – were represented as idealizations.

During much of the period from 1870 to 1937, considerations of federalism did not importantly limit states in the exercise of their legal powers. The Commerce Clause presented no serious barrier to local enactments under the police power which controlled or taxed the sale of goods recognized as health or safety hazards or deemed to pose a threat of fraud upon consumers. Relatively few state statutes were unconstitutional because they touched upon inherently national subjects, had a "direct effect" on interstate trade, or were pre-empted by federal legislation. *See* Di Santo v. Pennsylvania, 273 U.S. 34 (1927); Hall v. DeCuir, 95 U.S. 485 (1877); and *see generally* P. Benson, The Supreme Court and the Commerce Clause 1937–1970, at 36–38 (New York, Dunellen, 1970). However, the fact that state action did not confront legal obstacles derived from the Commerce Clause was due more to overkill than to a serious consideration of the meaning of federalism. It was the concentration of judicial analysis upon the fourteenth amendment which made superfluous most other constitutional issues. While the general commitment to unregulated markets never obviated the possibility of legitimate state use of the police power, the broad trend of judicial action in the face of increasingly more imaginative expressions of legislative ambitions was to define an expansive sphere of economic activity exclusively reserved for private enterprise. Within this private domain, legislatures were adjudged to be without power to "regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract." People v. Budd, 117 N.Y. 1, 15 (1889).

Since, prior to 1914, under federal law only those cases holding state laws to be constitutional could be appealed to federal courts, most declarations that regulatory laws were unconstitutional because they paternalistically superseded contractually arranged terms of work or exchange remained outside the federal system. *See In re* Jacobs, 98 N.Y. 98 (1885) and state court cases cited in S. Fine, *supra* this note, at 159–60. Related restrictions on state commitments to subsidize indirectly, expend tax funds, extend state credit, or support needy individuals, were at times also used. *See* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); Opinion of the Justices, 58 Me. 590 (1871); People v. Salem, 20 Mich. 452, 484–85 (1870); State *ex rel.* Griffith v. Osawkee Township, 14 Kan. 418 (1875).

[18] The most contested terrain over which the constitutional limits of regulation was fought concerned the control of economic production. State protective legislation was most often justified by implicit assumptions about information failure in private contracts establishing work conditions. If workers entering into contracts for labor did not comprehend health or other long-term costs associated with their work, they would supply an excessive amount of labor at the wage being paid. Legally defined contract terms could raise wages to risk level (minimum wage) or lower risk to bargained wage levels (*e.g.*, hours laws) to produce the efficient use of resources which would have prevailed in fully-informed markets. Finally, much progressive legislation was premised on a different form of social analysis describing a wide segment of human activity as the product of objective determination. Particularly with regard to the urban masses of foreign origin, many increasingly spoke of conditions caused by cultural socialization and economic class. Reformers, newly armed with the emerging discourse of social science, refused to acknowledge that the life situation of the poor resulted from a series of autonomously chosen contractual acts which merited moral and legal respect. Consistent with the terms of their reworked speech practice, Progressives sought to *restructure* the environment in which this *behavior* occurred.

There was no general abandonment of the ideal of subjective freedom for all individuals as a goal to which social conditioning should aspire. Progressivism simply limited the immediate accordance of the privilege (and burdens) of full subjectivity to a smaller, more culturally mature, portion of the population. *See* R. HOFSTADTER, THE AGE OF REFORM 174–214 (New York, Vantage, 1955). *See also* R. BREMNER, FROM THE DEPTHS (New York, N.Y.U.P., 1964); S. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW (Chicago, University of Chicago Press, 1968).

Nevertheless, judicial opposition to regulation of workplace conditions expressed a continuing mainstream unwillingness to easily accept the implications of this change in discourse. A statute restricting the maximum number of hours women could work was outlawed as class legislation in Illinois in 1895. Ritchie v. People, 155 Ill. 98, 107 (1895). An anti-night-work law for women was held unconstitutional in New York as late as 1907. People v. Williams, 189 N.Y. 131 (1907). On the evolution of special legislation for children and women *see* 3 J. COMMONS *et al.*, HISTORY OF LABOR IN THE UNITED STATES 1896–1932, at 403–500 (New York, MacMillian, 1935). Ohio courts voided a state law requiring overtime pay for railroad workers. Wheeling Bridge Co. v. Gilmore, 8 Ohio C.C. 658 (1844). Colorado rejected an eight-hour law for miners. *In re* Morgan, 26 Colo. 415 (1899). The validity of laws limiting hours for men employed on public works was initially rejected as were general eight-hour laws for men. *Ex parte* C.J. Kuback, 85 Cal. 274 (1890); Drew v. Smith, 38 Cal. 325 (1869); United States v. Northern Commercial Co., 6 Alaska 94 (1918). *See also* 3 J. COMMONS *et al., supra* this note, at 540–63. All of these tendencies found reinforcement and precedent when the U.S. Supreme Court implicitly questioned the validity of a number of state laws controlling hours by overturning the regulation of bakers' hours on the ground that such control had no true instrumental relation with public health and safety. Lochner v. New York, 198 U.S. 45 (1905).

Laws directly affecting compensation were more regularly rejected than those passed under the pretext of public safety. Unemployment compensation laws were not seriously attempted until 1932. *See* D. NELSON, UNEMPLOYMENT INSURANCE: THE AMERICAN EXPERIENCE 1915–1935, at 162–91 (Madison, U. Wis. P., 1969). An Arizona old age pension law passed in 1915 was declared unconstitutionally vague a year later, in Board of Control v. Buckstegge, 18 Ariz. 277 (1916). Other pension systems were denied on the grounds that states could not use funds for charitable purposes. *See* 3 J. COMMONS *et al., supra* this note, at 611–24. Workmen's compensation was held to be illegal in Maryland in 1904 and in New York in 1911. Ives v. South Buffalo Ry., 201 N.Y. 271 (1911); 3 J. COMMONS *et al., supra* this note, at 564–610. Various state courts disallowed statutes regulating the medium in which wages might be paid, the time of payment, and the manner in which wages were calculated. *See* 3 J. COMMONS *et al., supra* this note, at 664–65. Although minimum wage laws were passed in 15 states from 1912 to 1923, they were ruled contrary to freedom of contract by the Supreme Court in Adkins v. Children's Hospital, 261 U.S. 525 (1923); *see also* 3 J. COMMON *et al., supra* this note, at 501–39. After 1923, 6 states' wages laws were declared unconstitutional based on *Adkins*. As late as 1936 a requirement of a "fair" minimum wage was rejected. Morehead v. New York *ex rel.* Tepaldo, 298 U.S. 587 (1936). State protection of workers through price controls on employment agency fees was upset as regulation of a private business in 1928. Ribnik v. McBride, 277 U.S. 350 (1928). There was also a certain ambiguity with respect to the place of unions within the demarcated sphere of private activity. All of these improvements of work conditions were available through private contracts reached through employee unions. However, state legislation designed to facilitate union organization was as like-

ly to run afoul of the fourteenth amendment as were direct state enactments of contractual terms for all workers.

[19] Politically, the development of federal police power controls lagged behind state legislation. Beyond the local arena, the costs of forming pro-regulatory political coalitions were high. The occasion for bearing these large expenses may not have been apparent until state intervention proved to be relatively ineffective in a number of important types of policy concerning, principally, the regulation of production. Once it was perceived that nationally uniform market corrections were the most viable means of pursuing local optima, the forum for political struggle over economic legislation became the centralized state. However, during the period of negative state theory, the evolution of legal doctrine had limited the capacity of the federal government to fulfil this surrogate role. It was not until these legal impediments to national regulation were overturned that the contemporary federalist structure was put in place. In practice, even after courts accepted the propriety of growing state power, the Federal Government's interventionary capacity remained throttled. There resulted a strange condition in which in defined areas neither state nor federal government could legislate. The central state had the economic power to control, but it often lacked the legal faculty. Local government increasingly had formal legal power, but it often lacked the economic strength to make it work. It was this difficulty which was ended by the reform of the legal doctrine on federal power after 1937.

It is possible to imagine that the jurisprudence of the negative state could have been based on the theory of federalism rather than on the general structure of the theory of rights. In other words, instead of relying on the Due Process Clause of the fourteenth amendment, courts could have restricted the activity of decentralized government by arguing that all important state interventions burden interstate commerce because of the effect of regulation on the relative prices of commodities and factors of production. This broad reading of the Commerce Clause to control state governments might, however, have implied that the size of the public sphere could be large so long as economic power was exercised by the National Government. Because it was politically troublesome to take on the unarticulated issue of the breadth of the general powers of the National Government, courts worked with the liberal theory of private rights to limit state positive action. There remains one vestige of the failure to develop the Commerce Clause argument. When the Due Process Clause no longer was used to control state legislation, the Commerce Clause did not provide a well thought out doctrine on which to base the substantive review of local regulations. *See infra* note 29.

There were no correlative drawbacks for the global theory of the negative state if courts relied upon the Commerce Clause to restrict the regulatory power of the National Government. Since the states were excluded from the private sphere by the fourteenth amendment, to use the Commerce Clause to bar national regulation would preserve a domain of pure individual freedom. It would have been possible to invoke other aspects of the Constitution, including the Due Process Clause of the fifth amendment, to limit the scope of the welfare powers of the Congress to that granted to the state police power. The Supreme Court did not address the question of national-individual relations directly. Rather, it chose to focus on the issue of national-state relations in its interpretations of the Commerce Clause and the tenth amendment. Nevertheless, the adjudication of federal structure was initially a second forum for the adjudication of the structural question of proper legal economic theory. When considered together with the history of Due Process doctrine at the state level, the imposition of obstacles to national action, based on the Commerce Clause, need not be interpreted as a serious statement about federalist theory at all.

The legal institutionalization of the negative state followed different doctrinal paths with respect to state and federal government. Over time, this led to a difference in the constitutional scope of the regulatory powers permitted the two levels. However, in the early period of mature liberal jurisprudence, there was substantial overlap between the types of market corrections allowed to either government. The legitimate federal regulation of interstate commerce was basically coextensive with the residual police power always recognized in the states. *See infra* note 21. Valid federal legislation controlled the sale or distribution of goods which were immediately dangerous to health and safety or which would be likely to cause users under their influence to injure the rights of others. Since the injuries to private rights which these goods portended occurred not during their production, but were associated with the consumption qualities of the goods themselves, the legal harm clearly occurred after passage through interstate trade. In this class of federal police-type regulation were laws which prohibited the interstate shipment of diseased livestock (Reid v. Colorado, 187 U.S. 137 (1902)); lottery tickets (Champion v. Ames, 188 U.S. 321 (1903)); adulterated and misbranded articles (Hipolite Egg Co. v. United States, 220 U.S. 45 (1911)); women for immoral purposes (Hoke v. United States, 227 U.S. 308 (1913)); intoxicating liquors (Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311 (1917); United States v. Hill, 248 U.S. 420 (1918); McCormack & Co. v. Brown, 286 U.S. 131 (1931)); diseased plants (Oregon & Washington R & N v. Washington, 270 U.S. 87 (1926)); and livestock prepared for market under unhealthful conditions (Stafford v. Wallace, 258 U.S. 495 (1922)). A related type of constitutional federal regulation concerned the transport of items which were produced, prior to shipment, in violation of the law of the state where they originated. *See, e.g.*, Brooks v. United States, 267 U.S. 432 (1925) (upholding federal control of the shipment of stolen motor vehicles); Gooch v. United States, 297 U.S. 124 (1936) (on kidnapped persons). Here there was no conflict over the regulation of production between the states of origin and destination. Federal power simply supported recognized state power over criminal activity. An exception to this statement is the banning of convict-made goods from commerce sustained in Kentucky Whip and Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937). However by the time of this holding in 1937, the traditional Commerce Clause restrictions on federal power were dissolving rapidly.

Finally, just as a state police power to prohibit or control monopoly practices through antitrust and rate regulation was recognized as necessary to the operation of the competitive markets, the extension of this traditional power to the federal level was acknowledged in the Sherman Antitrust and Interstate Commerce Acts. On the other hand, a restrictive constitutional interpretation of the meaning of the term "commerce" placed beyond the reach of federal controls the regulation of the same conditions of production that the states were unable to effectively control because of the Due Process Clause. Commerce was held to include only the transportation of goods and commodities as distinguished from the provision of services or the manufacture of the commodities themselves. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Federal Baseball Club v. National League, 259 U.S. 200 (1922); United States v. Knight, 156 U.S. 1 (1895). This narrow reading of the Commerce Clause became linked to the general argument that the tenth amendment of the Constitution had reserved certain aspects of governmental power over local affairs to the states alone. The limited reading of the concept of commerce became the doctrinal reflection of an asserted agreement on the allocation of powers under federalism. Prior to the growth of state power to regulate local conditions of production such as wages, hours, and occupational safety, the segregation of manufacture from commerce meant that no agency of government could intrude upon freedom of contract con-

cerning production. (The principal exception to this claim is the direct control by the Federal Government of conditions of production in the railroad industry. *See* Wilson v. New, 243 U.S. 332 (1917). The railroad industry had acquired over time almost the status of a public enterprise through long-standing regulation. It had been recognized that where the Federal Government was cast in the role of proprietor of an enterprise it could in that role set such contract terms as desired. *See* Atkin v. Kansas, 191 U.S. 202 (1903).)

As the legal structure of the positive state was increasingly accepted with respect to state regulation after 1900, the continuing application of the doctrine of local production seemed to present a pure issue of federalist structure. However, as a practical rather than a formal matter, it served to preserve the negative state by its economic effects. This can be illustrated with respect to its most (in)famous invocation in the *Child Labor* cases. Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922). The police power to regulate child labor had long been accepted as a legitimate state prerogative. However, in 1917, the national legislature was ruled to have no capacity to prohibit the interstate shipment of goods produced by children legally under state law. Although it was argued that the federal law was invalid under the Due Process Clause of the fifth amendment, the Court opinion was based on the doctrine of local production and the tenth amendment's implicit reservation of powers to the states. In terms of the formal law, all that the case held was that the regulation of production by children, although within the public sphere, was a matter for decentralized choice.

Effectively, the elimination of uniform (federal) legislation made variable local (state) regulation extremely difficult to enact or sustain due to competitive pressures to produce goods as cheaply as possible. Once it was clear that the commerce power of the Federal Government was restricted even with respect to child labor, there was no evident course by which reform-minded states could regulate local conditions of production without exposing themselves to economic harm. The doctrine of local production effectively created a no-man's-land within the theory of the positive state. Although the regulatory powers of the states were legally conceded on a wider scale, the limited reach of the Federal Government preserved the existence of the negative state in that class of uncontrolled market transactions where the state police power had previously been excluded. The restrictive reading of the Commerce Clause would maintain the traditional sphere of free contract while it remained the analogue within the federal system of the fading doctrine of substantive due process within the state system.

[20] Distrust of state action became manifest in an increased willingness of courts to review the substantive justifications for the exercise of state legal faculties. The early position on standards of review was exemplified by the Supreme Court's refusal to declare unconstitutional the supervision of railroad rates by Illinois. Munn v. Illinois, 94 U.S. 113 (1877). *See* S. FINE, *supra* note 17, at 125–26, 132–34. The majority opinion suggested the proper remedy for unacceptable legislative action was resort to the polls instead of to the courts. The contraction of the realm of the political in favor of that of the legal emerged quickly after 1877 when the Court reversed its attitude. It ruled exercises of state power such as the assessment of real estate values for drainage, the grant of monopoly to a slaughtering company, and ultimately railroad rate regulation were proper subjects for case-to-case judicial scrutiny on due process grounds. Davidson v. New Orleans, 96 U.S. 97 (1877); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Chicago, Milw., & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890). The last two cases were particularly significant because the assertive review led to the overturning of two practices which had been specifically legally tol-

erated under the previous standards of passivity espoused by the Court. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Munn v. Illinois, 94 U.S. 113 (1877).

The suspicion attached to state interventions in markets extended beyond the police power to other tools which previously merited no serious constitutional examination. The use of eminent domain powers by or on behalf of private commercial ends was restricted. As the need for development subsidies became less apparent, such extensions of public powers to private interests were more regularly interpreted as instances of special interest legislation. Similarly, the interests of entrepreneurs and investors – the talismen of vulgar economic explanations of post-Civil War jurisprudence – were harmed by new limitations on state tax and borrowing powers. It was held that states could not be required to tax in order to redeem public bonds issued in aid of private manufacturing, nor could they be forced to continue to subsidize such firms through previously promised tax exemptions. Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874). Against claims that these repudiations would violate the Contract Clause of the federal Constitution, courts found that states could not permanently alienate their taxing powers.

These odd doctrines are consistent with views that any particular state legislature was likely to become corrupted by special or monopolizing interests. To hold later legislatures to such illicit bargains would be inefficient. The effect of permitting repudiation would be to diminish investor or firm willingness to enter contracts with the state and indirectly restrict its monopolizing powers. The abilities of the state to expend taxed or borrowed funds for such activities as loans or grants to manufacturers and other private businesses, to pledge credit for railroads, to establish public enterprises, or to support needy individuals were also at times denied. *See supra* note 18. The relatively consistently expressed Hobbesian interpretations of the state as private instrument may reflect a retrograde adoption of a mercantile theory of state economic action. If so, it is a different type of reaction than that which usually characterizes interpretations of laissez-faire jurisprudence.

[21] The classical sphere of constitutional public regulation at both the state and federal levels – police power protection of the health and safety of the general public – was reaffirmed by the Supreme Court throughout the late 19th century. *See* Barbier v. Connolly, 113 U.S. 27 (1885); Mugler v. Kansas, 123 U.S. 623 (1887); Powell v. Pennsylvania, 127 U.S. 678 (1888). First, the sale of products which were inherently dangerous to their users was preventable. This class of goods was to be distinguished from non-dangerous goods produced under harmful conditions. Second, productive conditions were subject to the police power if they posed a threat to the health or safety of parties not involved in the production. Presumably, adulterated and defective goods would likely be purchased by persons without adequate information. Moreover, such commodities could spread harm to non-contracting parties through illness or accident. On the other hand, dangerous conditions of production seemed to impinge only upon workers who contracted for risk. As long as transaction costs were low and individuals had internalized all potential costs, further regulation was assumed to be inefficient.

In the early 20th century, the need for the police power to be justified by a direct analogy to the quarantine of adulterated goods was relaxed. Any properly defined property right whose loss was not compensated in market transactions could be secured by public action. Although the protection of rights other than bodily health raised innovative and troublesome questions of the distribution of entitlements, the police power was gradually extended to prevent the infringement of postulated rights to moral or environmental quality.

The bannings of lotteries, liquor, obscene materials, and transportation of persons for immoral purposes under the federal police power exemplify this growth of recognized moral property rights. It could be pointed out that these might also be conceived as instrumentally, if relatively remotely, related to traditional rights to material and bodily property through the prevention of crime, accident, or poverty. *See* Champion v. Ames, 188 U.S. 321 (1903); Hoke v. United States, 227 U.S. 308 (1913); Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311 (1917). State land use regulation on environmental grounds was common after Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

During the period between 1900 and 1937, as courts increasingly permitted an incremental expansion of state interventions in previously exempted classes of private transactions, issues of federalism's distribution of public powers became more pressing. The reach of state police powers was enlarged by a freer interpretation of the instrumental connection between third party protection and such laws as the regulation of working hours or occupational licensing. *See* Bunting v. Oregon, 243 U.S. 426 (1917). Particularly in the regulation of hazardous activities like buses and railroads, statutes controlling all facets of working conditions, including even wage-fixing, were upheld on safety grounds. *See* Smith v. Texas, 233 U.S. 630 (1914). The widest expansion of the residual police power came from an implicit recognition that information failures affected production as well as consumption decisions. Industrial safety and accident legislation, statutes modifying common law rules restricting employer liability for accidents, and even workmen's compensation laws were less and less frequently struck down as paternalistic. *See* Chicago, Burlington & Quincy R.R. v. McGuire, 219 U.S. 549 (1911); New York Central R.R. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakley, 243 U.S. 210 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917). The growing disparity between the expanding constitutional authority of the states and the continuing restriction of national power in the Commerce Clause in the tenth amendment led to the political instability of this pattern of federalism. *See infra* note 28.

[22] The early history of national capacity to control economic affairs by means of the fiscal and monetary instruments that dominate contemporary policy does not clearly presage a commitment to a centralized structure of federalism. Indeed, the initial strengthening of the power of Washington to tax, spend, and regulate the money supply may be better related to the substantive politics of economic development and waging war than to optimal federalist design. The Constitution deprives the states of power to "coin money" or "make any thing but gold and silver coin a tender in payment of debts." U.S. CONST. art. 1, § 10, cl. 1. It makes a correlative grant to the Federal Government of the coinage and the regulation of the value of money. U.S. CONST. art. 1, § 8, cl. 2. These provisions resulted from particular political concerns of factional economic interests. During the period of the Articles of Confederation, some states had inflated the money supply through paper issues intended to provide agricultural credit. The experience of creditor classes, fearing repayment of debts in depreciated currency, represented an important impetus in the abolition of a direct local power to create money. Subsequently, odd coalitions of ideological and economic interests emerged in the struggle over the extent of national power to actively manage credit policy for developmental purposes. The First National Bank was supported from 1808–1835 principally by enthusiasts of industrialization and poorer farmers. Ranged against these were more traditional financiers and agricultural democrats opposed to the cultural implications of modernization. The Bank issue was frequently presented as a federalist question over whether the Federal Government possessed the constitutional capacity to charter such a policy-making, semi-public institution. It

is more plausible that the argument was always more one of substantive developmental economics and political ideology than one of the principles of governmental structure. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (Chapel Hill, U. N.C. P., 1969); J. HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970 (Lincoln, U. Neb. P., 1973); B. HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (Princeton, Princeton U.P. 1957); B. HAMMOND, SOVEREIGNTY AND THE EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR (Princeton, Princeton U.P., 1970).

The demise of the Second National Bank ushered in a period of substantial decentralization of banking controls. States, though unable to issue money, could charter state banks capable of creating credit and notes. The proliferation of these instruments led to a relatively free market in money which responded to local demands and production programs until the Civil War. The reassertion of centralization was caused by the Union's need to finance military operations through the issue of a federal paper currency or "greenbacks." In order to assure a willingness to accept this rapidly inflating medium, the Congress imposed a prohibitorily expensive tax on the emission of state bank notes. The constitutionality of this tax was upheld in Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869). Once this continuing tax had precluded local issue all subsequent controversy over the size of the currency supply, whether in silver or paper or gold, was a federal matter. However, it was only in the context of twentieth century political controversies of a regionalist character about monetary policy that these national powers would be brought into serious use. *See infra* note 40.

The taxing power is a second attribute of the positive state which has become concentrated at the federal level through an extended process. An increase in the output of collective goods, (including redistribution), by either public production or private subsidy, depends upon the capacity to exploit a broad revenue base without creating excessive distortion of economic activity. The constitutional taxing power of the state was always recognized. However, the Federal Government was prohibited from laying direct taxes unless they were apportioned among states in accordance with their populations. U.S. CONST. art 1, § 9, cl. 3. This clause seems to have been intended to impede the ability of Northern states to redistribute slave wealth by means of property taxes. Due to the limited scope of federal activity, it was not legally tested until the Civil War. As with the monetary power, the need for war finance resulted in the imposition of an income tax deemed to be legal. Collector v. Hubbard, 79 U.S. (12 Wall.) 1 (1870). It was discontinued shortly after the war's end.

The initial attempt to reinstitute a broad-based federal tax was declared unconstitutional in 1894. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). A movement originating within Progressive circles culminated in the passage of the sixteenth amendment which reversed the judicial holding. The amendment and the subsequent passage of the corporate and individual income taxes may well be understood as quasi-anti-monopoly laws. The taxes fell almost completely upon the relatively higher incomes which Progressives felt were accumulated by the owners of corporate and trust wealth. Progressive states, like Wisconsin, contemporaneously enacted local low-level income taxes. However, the effectiveness of more substantial state levies was always problematic because of their limited reach and the threat of out-migration.

The political struggles over national integration and industrial organization initially firmly established the legal viability of the centralized taxing power. However, the expansion of the income tax from an antitrust complement to a mass tax capable of supporting the general expenditure purposes of the positive federal state began in World War I. National military requirements led to a large increase in tax rates and

coverage. This substantial increase in revenues furnished the potential power to fund grant-in-aid and redistributional programs essential to a centralized Federal Government. However, until 1937, there remained constitutional doubts about the ability of the Federal Government to use taxation to achieve regulatory goals. Federal excise and privilege taxes, even at prohibitive levels, had been permitted on deceptive or dangerous products. *In re* Kellock, 165 U.S. 526 (1897); McCray v. United States, 195 U.S. 27 (1904); United States v. Doremus, 249 U.S. 86 (1919). Nevertheless, Congress' attempt to cure the Commerce Clause defects in the Child Labor Act with a tax on child-produced articles was held unconstitutional. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922). The tenth amendment doctrine of unreachable purposes beyond national legislation was interpreted in parallel fashion to insure that the effective control of conditions of production was not part of the public sphere. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). The reversal of these restrictions in Helvering v. Davis, 301 U.S. 619 (1937) and Steward Machine Co. v. Davis 301 U.S. 548 (1937) established for the first time a plenary federal tax/expenditure power.

[23] The recognition of legal categorizations previously considered "unnatural" represented aspects of personal activity as socially determined to further justify positive state action. It had always been understood that states could regulate productive enterprises involving children. People v. Ewer, 141 N.Y. 129 (1894); Sturges & Burn Manufacturing Co. v. Beauchamp, 231 U.S. 320 (1913). The logic of denying to children the contractual capacity of fully mature subjects is obvious. The legal concept of age of majority is the legal boundary between transactions which deserve moral respect (and define economic welfare) and those which are the non-autonomous products of causal factors like socialization. Just as children's contracts could be restructured because of their failure to attain full subjectivity, in the early 20th century protectionist treatment was often extended to women and occasionally to the working class. The type of regulations which were routinely unconstitutional for adult males were found within the scope of police power when applied to women. Sex was widely upheld as a constitutionally relevant distinction for general hours regulation, anti-night work controls, and even, for a period, minimum wages. Muller v. Oregon, 208 U.S. 412 (1908); Radice v. New York, 264 U.S. 292 (1924); Stettler v. O'Hara, 69 Or. 519 (1914) and 243 U.S. 629 (1917). The combined effect of different theories of property rights, market failures, and cultural characterizations gradually led to a continual expansion of the police power at the state level. What remained the preserve of the core sphere of pure private action was the wage bargain of the adult male. However, its function was more and more that of a symbol of a comprehensible, liberal utopia which had been lost.

[24] The principal contradiction that I can explore in this essay stems from the fact that liberalism combines two types of privileged knowledge. The liberal discourse of subjectivity assumes the intuitive or unmediated knowledge of one's own intentions or mental states. Liberal method, on the other hand, is objectivist and committed to empirical and logical standards for ascertaining what is true. These forms of knowing can be in harmony in the case of observed confessions of intent. What is possible is the empirical registration of autophenomenological descriptions. A perfectly functioning economic market would afford such an index. However, the use of confession or autophenomenological accounts will not be a socially adequate mechanism in cases where individuals may be tactically engaged in deceptive behavior. In such cases, which are to be expected in defined aspects of economic activity, some surrogate for revealed intentions must be discovered if the social decision is to retain an objective legitimation. Having abandoned the Inquisition, economic theory has not yet dis-

covered any voting or other behavioral mechanism which can induce the revelation of preferences when markets fail to do so. *See* Sullivan. *An Epistemological Nightmare*, in D. HOFSTADTER & D. DENNETT, THE MIND'S I: FANTASIES AND REFLECTIONS OF SELF AND SOUL 415–27 (New York, Basic Bks., 1981).

The search for the positive method to know the phenomenological processes of another (heterophenomenology) has usually led in the direction of *Verstehen* or other claims to empathetic understanding. Beginning with behavioral indicators, such methods posit a reconstruction of the mental states of others which brought about such behavior. The indeterminacy of the interpretative activity in these reconstructions has led to a frank recognition of the importance of the mediation of the observor. Radical accounts of hermeneutic method have increasingly stressed the centrality of interpretive agreement to heterophenomenology. Accounts of the consciousness of others are possible but share many of the characteristics of agreement on meaning that we often attribute to the construction of narrative. I do not say this to denigrate the validity of such endeavors but to point out the contrasts to traditional liberal method implied by a lack of a method based on confession. We need only to take note of the difference between the type of agreement one has about an empirical event if one holds a correspondence view of reality and the agreement which we reach that some other conscious being has a particular intention in mind in a particular case. The latter instance acknowledging the fiction-like character of our knowledge of the consciousness of others may be valid, but it is post-liberal. *See* R. PALMER, HERMENEUTICS 162–217 (Evanston, Nw. U.P., 1969).

These contradictions in a liberal social order between subjective discourse and objective method caused difficulties and divisions in the legal doctrine that sought to institutionalize liberal principles. As an example, constitutional authorities in the 19th century split on the propriety of judicial review of state police power actions. Those courts which focused attention on the implicit constitutional standard that legislatures must aggregate subjective intention to produce valid legislation often distrusted this translation and ruled against state police power action. Other courts, more concerned with legal process problems in the courts, felt judicial action could only be legitimate when it complemented an objectively specifiable standard. Review of legislative conformity to an inexact standard such as the general welfare was, therefore, to be avoided. Such acceptance of the action of a regulatory state comes not from any belief in the propriety of legislative behavior so much as from a desire to preserve the classical canons of objectivist judicial method in the ideologically central constitutional area.

These contradictions have not been resolved by later developments in liberalism. Simple empiricism depends on a discredited dichotomy between facts and theory. Alternatively, we may note that the autophenomenology with which I began the problem is chimerical. It is not simple knowledge of the unconfessed consciousness of others alone which is representational. A similar fiction-like accounting may be necessary in knowing ourselves. But to assert that we need a new heterophenomenological method only strikes at liberalism's subjectivist ontology from another direction. In effect, each form of knowledge – autophenomenology and empiricism – privileged by liberalism must be criticized. A proto-liberal theory may be reconstituted on a heterophenomenological basis. This reworked liberalism may reject the older assertions of the ontological priority of individual subjects and the unmediated relation between concepts and the world. Instead it may claim no more than that it emerges as only one of a set of possible representations (cultures). Its legitimation in this view lies not in its non-contingent or autonomous presentation of reality but in some historical process of the flow of discourse. My structural account of liberalism is one such view. Howev-

er, my sense is that such a mannerist sketch of what liberalism once was cannot long remain interesting. *See* Heller, *supra* note 2, at 165 n.68 & 190 n.103.

[25] *See generally* Heller, *The Importance of Normative Decisionmaking: The Limitations of Legal Economies as a Basis for a Liberal Jurisprudence*, 1979 Wis. L. Rev. 385, 395–468.

[26] I will use the terms ideology or textual tradition interchangeably in referring to these possible responses to public economic interventions. Either ideology or textual tradition is a concept which stresses that these contradictory positions are narrative-like representations of historical events and not verifiable empirical hypotheses. By referring to ideology and textual tradition interchangeably I wish to point out that one can begin to account for the invocation of one position rather than the other by referring to either political (ideology) or aesthetic (textual tradition) principles of choice between representations. Why the analysis incorporates at this level of explanation either of these phenomenological narratives stressing judicial *choice* itself requires further methodological discussion.

[27] The legal doctrine of pre-emption, if expansively interpreted, would afford a constitutional basis for a system of relatively exclusive national economic regulation. It is uncontested that states may not pass legislation which directly conflicts with or contradicts national statutory controls. A broad reading of pre-emption could imply that a failure by the Federal Government to intervene in particular markets might be held to represent an affirmative decision about the desirable level of regulation in a unified national market. This implicit act of pre-emption would negate the possibility of varied local policies. However, the modern history of judicial construction of pre-emption has not usually functioned as an instrument for promoting an increasingly comprehensive centralization of government structure.

Prior to the 1930's, following an expansive theory of federal pre-emption, the Supreme Court asked solely whether Congress had legislated on the same subject matter dealt with by state law. *See* Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain*, 32 Kan. L. Rev. 111, 137–47 (1983). However, the use of pre-emption to restrict state power in the face of national legislation was limited due to the even broader constitutional controls on federal power under the Commerce and Due Process Clauses. The pre-1930 situation preserved state autonomy by juxtaposing broad pre-emption and narrow federal power. Since 1930 while national regulatory capabilities have been expanded, the effect of pre-emption has been substantially scaled back. Contemporary pre-emption doctrine in the economic field has generally required a clear and explicit Congressional intent to void local powers. In those cases where state legislation has been declared unconstitutional, the analysis of the state legislation has often focused on a lack of substantive rationality in the state controls that signalled a discriminatory intent against foreign commerce. *See* Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Campbell v. Hussey, 368 U.S. 297 (1961). Courts have most often used pre-emption to support a structure of concurrent regulation in which national legislation establishes a minimum level of market correction which states may exceed if they choose to do so. DeCanas v. Bica, 424 U.S. 351 (1976); Pacific Gas and Electric Co. v. California State Energy Conservation and Development Commission, 103 S.Ct. 1713 (1983). As a matter of formal law, pre-emption has not compelled a positively integrated single standard of market correction. Rather, its narrow interpretation has been far more consistent with a decentralized theory of federalism.

[28] Doctrinal restriction of the regulatory power of the Federal Government under the Commerce Clause and the tenth amendment continued until the period of the

Second New Deal in 1937. *See* A. SCHLESINGER, THE POLITICS OF UPHEAVAL 447–96 (Boston, Houghton, 1960). The economic dynamics of this form of federal structure produced a politically unstable situation in which pro-regulatory states were far more able to achieve their locally desired interventionary goals in some classes of regulation than in other sectors. The initial outpouring of regulatory legislation which took place at the close of the 19th century was overwhelmingly at the state level. By 1900, 42 states had established boards of health, 27 had food and drug acts, 29 had pure milk laws, and a substantial number of Northern states regulated individual commodities such as butter substitutes. Conservation and management laws for state park systems were set up. Morality legislation on the prohibition of alcohol, obscenity, gambling, lotteries, prize fighting, and cigarettes, was at times implemented.

All this type of regulation was potentially effective though decentralized. With adequate internal enforcement, a state could assure that within its boundaries the proscribed goods or activity would not appear. Neither would such control subject the local economy to disruption. Foreign and local producers of milk, for example, had to meet the same quality standards. Although the out-migration of persons or firms opposed to life under the regulated condition was possible, there was no systematic reason to expect such losses to take place. The fact that such controls did not seriously weaken the interstate competitive position of local firms or necessarily depress the relative rate of return available to in-state producers led to a general absence of political pressure for federal intervention in these fields. (The principal exceptions to this generalization are the federal passage of the Pure Food and Drug Act, the anti-lottery acts and eventually alcohol prohibition. The federal morality legislation has been described as a consequence of symbolic or cultural politics in which national legislation was coercively imposed to reflect the absolute value position of religious factions. *See* J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (Urbana, U. Ill. P., 1963).)

On the other hand, state laws which regulated the conditions of production did not have such benign economic effects. By 1877, 1,639 separate state laws governing such conditions had been passed. Unless these laws were trivial or regulated a market which was only local, they carried the potential that the policy of the regulating state would be undercut by goods competition and factor movement. *See infra* note 36. This area of regulation – the control of labor, wages, hours, means of payment, attachment of wages, conspiracy, industrial accidents, inspection and workshop safety, sweatshops, yellow-dog contracts, blacklisting, strike-breaking, pensions, and unemployment – became the center of the Progressive and New Deal movements to create supplementary centralized power.

The history of child labor controls in the 20th century traces the economic and political dynamics of the legislation of aspects of the conditions of production. The limitation of the number of hours and the types of occupations at which children could work was widely perceived as a desirable market correction. State regulatory acts were passed in two waves, and never encountered a serious barrier of unconstitutionality. *See* S. WOOD, *supra* note 18, at 22. However, these state laws both varied substantially in their terms of protection for children and were generally poorly enforced. Wide regional disparities especially marked coverage and administrative standards. In particular, Southern states failed to reach Northern legislative standards in the textile industry. The result of this situation was that regulated industry, facing the asserted competitive pressure of goods produced by cheaper labor, argued simultaneously for relief from state law or the enactment of nationally uniform standards. The first federal legislation – the Keating-Owen Bill founded on the Commerce Clause – though passed in 1916 over Southern opposition, was declared uncon-

stitutional by the U.S. Supreme Court two years later. Hammer v. Dagenhart, 247 U.S. 251 (1918). New federal regulation based on the taxing power was reenacted and again declared unconstitutional in 1922. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922). Subsequently, child labor controls were the object of an unsuccessful constitutional amendment and included in industry codes developed under the National Recovery Administration. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Finally, they were implemented and sustained as part of the Fair Labor Standards Act in the Second New Deal.

The development of a centralized federal regulatory structure in such cases was dependent upon three factors: (1) the maintenance of a national open borders doctrine; (2) the removal of Constitutional barriers to national control over conditions of production; and (3) the political homogenization of locally diverse economic policies by centralized legislation. The history of American centralized regulation is more a process of the coercive reconciliation of state policies than one of consensual national optimization. The rationality of the current arrangement was dictated by competitive economic pressures. Once a number of states demanded that important levels of internal reallocation should occur, substantial segments of that regulation had to be national. Federal positive integration is the most logical solution within a customs union containing both viable economic competitors and populations with heterogeneous preferences for economic policy. This does not mean that the regulatory (or redistributive/stabilizational) enactments which produce national uniformity are efficient in some global sense. Presumably, there are many different optima depending upon the different potential distributions of sovereignty. The actual pattern of federal integrative action which eventually emerged was basically consistent with the local corrective programs of the relatively more advanced industrial or core region of the polity. However, whether such regulation would occur at all was a matter of coercive politics.

[29] The actual legal structure of economic regulation in the U.S. is quite mixed at the present time. In the era since 1937, when the restrictions imposed upon the Federal Government by the Due Process and Commerce Clauses were removed and neither the Due Process Clause nor an expansive doctrine of pre-emption has seriously hindered state legislation, the best description of the overall system would emphasize the existence of concurrent regulatory jurisdiction between state and national governments. These concurrent powers to pursue optimizing corrective policies extend to regulatory, taxing and subsidy instruments. The principal limitations on state economic policy come from the constitutional prohibition against tariffs, import duties or quotas against out-of-state products. This bar upon economic legislation explicitly discriminating against foreign goods has been extended in numerous instances to state regulatory measures which are judged to have been intended to implicitly protect local production. The constitutional doctrine of contemporary federalism basically reflects the confused administrative, theoretical and historical problems that now attend legal institutionalization of economic integration.

First, it is nearly always problematic whether it is administratively possible to distinguish discriminatory legislation that creates local income transfers but reduces global welfare from welfare increasing market corrections. This administrative problem is present whether economic interventions take the surrogate forms of regulatory standards, taxes or subsidy/expenditure programs. Second, as a matter of economic theory, economic controls that countervail or offset "unfair" competitive advantages available in foreign jurisdictions are as necessary to protecting welfare improving interventions by decentralized governments as are controls over product quality. To the extent that legal doctrine permits non-discriminatory regulatory controls over

product quality and simultaneously forbids the use of border controls or countervailing duties against imported goods produced under conditions less strictly regulated than those of the countervailing jurisdiction, decentralized economic regimes are only partially effective. The second problem – the continuation of the open borders doctrine developed in the less regulatory environment of the 19th century – reduces the scope of the administrative problem of segregating discriminatory from non-discriminatory local controls. It does so at the cost of eliminating theoretically justifiable forms (countervailing controls) of economic legislation permitted in more recently designed systems of economic integration such as GATT or American international trade legislation. *See* G. Hufbauer & J. Erb, Subsidies in International Trade (Cambridge, MIT P., 1984).

The final problem of the current constitutional order of economic federalism in the U.S. is that it is inconsistent. Although individual states cannot countervail foreign competition or discriminatorily protect local markets by tax or regulation, functionally equivalent results may often be available through subsidy/expenditure programs or even direct state ownership of economic resources and production by state firms. There is then some continuing measure of disintegration possible if such constitutionally permitted surrogates are used by economically aggressive or creative state planners. The extent of these disintegrative tactics is limited by the ability of subsidy recipients to migrate into subsidizing states and by the disposition in American political culture against government ownership and enterprise. This inconsistent treatment of functionally substitutable forms of economic intervention is outlined in the remainder of this note. In summary, it might be said that while product quality regulatory standards and taxes are examined for inefficient protectionism on a case by case basis, countervailing measures are too broadly banned and tax/expenditure programs are too easily accepted. Why such a situation persists is a matter for debate.

a) Regulatory Standards

The negative Commerce Clause, the principal source of the 19th century open borders doctrine, continues to prohibit the enactment by the states of legislation that overtly discriminates against goods or services imported from out of state. *See* Tushnet, *supra* note 14, at 125–30, 133–40. *See also* Buck v. Kuykendahl, 267 U.S. 307 (1925). Although it is a constitutional exercise of state power to control the sale of goods for product quality or safety or to limit entry to a profession or industry in order to regulate quality or prevent excessive competition, the program must consider local and out-of-state goods, individuals and firms on an equal or non-discriminatory basis. Minnesota v. Clover Leaf Creamery, 445 U.S. 949 (1981); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939); Nebbia v. New York, 291 U.S. 502 (1934); Bradley v. Public Utilities Comm'n, 289 U.S. 92 (1933). State legislation is not invalid simply because the economic effects of market interventions which do increase local health, safety or consumer knowledge fall more heavily on out-of-state firms. Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963); Parker v. Brown, 317 U.S. 341 (1943). However, regulatory standards continue to be examined for implicit discriminatory purpose even where the statutory language is literally written in general terms. In numerous instances where states are unable to demonstrate that an asserted market correction falling unevenly on foreign producers advances consumer welfare or is the more reasonable means of producing a desirable end, courts continue to assume that an absence of substantively acceptable justification for a particular regulation implies an illicit protectionist purpose. Kassell v. Consol. Freightways, Inc., 450 U.S. 662 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Raymond

Motor Transport Inc. v. Rice, 434 U.S. 429 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Pike v. Bruce Church, 397 U.S. 137 (1970); Great A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); Bibb. v. Navaho Freight Lines, 359 U.S. 520 (1959). Case by case examination of substantive rationality and legislative discriminatory intent does not extend to permit countervailing regulation of out-of-state goods produced under competitive conditions different from those prevailing in the regulating state. In Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), legislation that imposed minimum prices on all milk sold in the regulating state in order to preserve production against depressed prices in local agricultural markets was treated as the equivalent of a countervailing duty on unregulated import milk and declared unconstitutional. Similarly state regulation which might attempt to impose quantitative limits or increase the production costs of goods produced out of state under relaxed environmental, occupational health and safety, or labor regulation would contravene Commerce Clause doctrine even though its intended and actual effect was the preservation of the competitive position of in-state production operating in a locally efficiency-increasing regulated market.

b) Taxes

In general, the jurisprudence of state taxation powers is quite close to that of state regulatory standards. In the absence of constitutional powers to impose quotas or control the import of goods produced by unregulated firms, the use of countervailing taxes to equalize final prices of domestically regulated and foreign unregulated goods would be a logical alternative. However, the only explicit countervailing duty that has been permitted is the use tax on imported goods that offsets the sales tax imposed on goods marketed domestically. Henneford v. Silas Mason Co., 300 U.S. 577 (1937). *Cf.* Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) (upholding a use tax which did not allow a credit against the use tax for sales tax paid in the state of origin – a result inconsistent with a countervailing duty theory). There has been no more widespread effort to extend the principle of the use tax to other border charges to compensate for the local cost of environmental or labor policies. It is simply assumed that such charges remain as unconstitutional in the regulatory state as they were when they were seen as forms of mercantile protectionism by laissez-faire legal economics and were banned by the import-export clause of the federal Constitution. However, the enactment of that clause was primarily aimed at charges on goods in transit that might be imposed by port states. In any case the abolition of internal tariffs was an aspect of the theory of negative government open, but never subjected, to reinterpretation after the change in the legal structure of government in this century.

Without recognition of a serious theory of countervailing duties, the principal constitutional inquiry in state tax concerns their implicit or explicit discriminatory impact on interstate commerce. State taxes are permissible, even if they burden disproportionately out-of-state firms or individuals, if they do not discriminate against interstate commerce, if they are fairly apportioned, if they are applied to an activity with a substantial nexus with the taxing state, and if they are fairly related to services provided by the state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, at 287 (1977). Overtly discriminatory taxes have been struck down in Boston Stock Exch. v. State Tax. Comm'n, 429 U.S. 318 (1977) and Dayton Power & Light Co. v. Lindley, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979). These were limited taxes falling overwhelmingly on out-of-state products or services that imposed no special social costs domestically and were direct economic substitutes for in-state industries. Fair apportionment refers to the duplication of taxes upon firms subject to taxes in multiple juris-

dictions. Gross revenue taxes or sales taxes on a firm's entire receipts, taxation of assets in transit, or franchise taxes on the privilege of doing business will, if applied in numerous states concurrently, tax interstate business more heavily than intrastate firms, and have often been held illegal. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938); Adams Mfg. Co. v. Storen, 304 U.S. 307 (1937). More recent cases have centered on the problem of defining fair apportionment in the context of state income tax laws which each apportion an interstate firm's income but do so under substantially different formulae. *See* Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) and Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980); ASARCO, Inc. v. Idaho Tax Comm'n, 458 U.S. 307 (1982); F.W. Woolworth Co. v. Tax and Revenue Dep't 458 U.S. 354 (1982).

Although the lack of a "nexus" between the taxing jurisdiction and the activity being taxed has been found in only one recent case (*see* National Bellas Hass v. Dep't of Revenue of Illinois, 386 U.S. 753 (1967)), the issue of the fair relation of taxes to services has received more attention. It is considered constitutional to charge out-of-state operators user fees or benefit taxes for services received. Evansville Airport v. Delta Airlines, Inc., 405 U.S. 707 (1972); Clark v. Paul Grey, Inc., 306 U.S. 583 (1939); Dixie Ohio Express Co. v. State Comm'n, 306 U.S. 72 (1939); Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950). Such charges need not have an exact relation to cost and will conflict with the Commerce Clause only if they are imposed on foreign firms alone or imposed at a rate wholly unrelated to the value of the service provided. *See* McCarroll v. Dixie Greyhound Lines, 306 U.S. 176 (1940); Hale v. Binco Trading, 306 U.S. 375 (1939); Ingels v. Morf, 300 U.S. 290 (1937). Similarly, out-of-state firms may be forced to pay social cost taxes uniformly levelled on domestic and foreign producers engaged in activities characterized by negative externalities. This is true even if the firms engaging in these regulated activities are overwhelmingly out-of-state. State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Great A & P Tea Co. v. Alice Lee Grosjean, 301 U.S. 417 (1937). The loose connection between taxes and benefits is most recently illustrated in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). The incidence of a Montana severance tax on coal arguably came to rest largely on out-of-state consumers of power generated with the coal. While most prior litigation focused on the formal and not the effective incidence of state taxes and thereby concerned discrimination against out-of-state producers, it was contended in the *Commonwealth Edison* case that exportation of the tax to those receiving no Montana services violated the fair relation test. While the economics of this case are complex and may be better discussed in connection with the issue of state sovereignty and economic rents (*see infra* this note), the decision upholding even a tax heavily borne in other jurisdictions reinforces a judicial reluctance already apparent in the recent apportionment cases to become enmeshed in a case by case review of taxes that do not discriminate on the surface. Consequently, while taxes may still not formally countervail out-of-state less regulated production, there is substantial leeway in enacting a wide variety of state taxes to fund expenditure programs that may have countervailing effects on interstate competition.

c) Subsidies and State Production

In the case of Hicklin v. Orbeck, 437 U.S. 518 (1978), the Supreme Court ruled unconstitutional an Alaska regulatory statute which claimed that Alaska, as owner of substantial oil and gas deposits within the state, could require private employers extracting or piping oil and gas under arrangements with the state to hire Alaska residents in preference to non-residents for in-state work. This protection of Alaskan la-

bor was held to be inconsistent with the Privileges and Immunities Clause of the Constitution ("The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.) If read broadly this clause could severely limit the ability of the states to carry out domestic economic policy by a variety of subsidy devices that afford substantially functionally equivalent means to reach objectives not permitted through market regulations. In the *Hicklin* situation, for example, Alaska might have favored local labor by carrying out production and distribution activities in the oil and gas industry through a state enterprise. Its preference for Alaska workers would have imposed the same costs on consumers or capital rents as did its forbidden regulation of private employers. Similarly, the state could have provided free or low cost training services for local residents to become oil workers. Subsidized education externalizes the cost of reproducing human capital to the industry and could have resulted in a "market" preference for Alaskans. Alternatively, private firms hiring Alaskan workers might have received cash subsidies or tax credits for preferring local labor. If these subsidy programs were financed by the appropriate taxes on oil and gas consumers or producers, the effects of the unconstitutional regulation could again have been approached. Nevertheless, there is extensive precedent that suggests that state enterprise and subsidy programs contravene neither the Commerce Clause nor the Privileges and Immunities Clause, as do many regulatory and taxing programs. The inconsistency that exists between the treatment of formally distinguishable, but economically similar, legal controls would seem to establish opportunities for states to evade constitutional controls against discriminatory behavior. At the same time, since the ability of states to protect local market correction with taxes and regulations that countervail the competitive advantages of non-regulating jurisdictions is limited, the effect of equivalent subsidy measures may be to move toward a more disintegrated national market consistent with a federalist structure emphasizing decentralized positive government.

When states participate directly in the market as economic firms, their behavior is limited by federal regulatory statutes but largely exempt from the constitutional barriers that restrict state discriminatory commercial actions. When acting as a buyer of goods and services for publically supplied commodities (*e.g.*, education), a state may confine its purchases to local suppliers. American Yearbook Co. v. Askew, 409 U.S. 904 (1972), (mem.), *aff'g*, 339 F. Supp. 719 (M.D. Fla. 1972). Similarly, where the state of Maryland did not directly engage in the business of disposing of wrecked autos, but sought to increase the output of the industry in order to internalize social benefit associated with environmental value, the restriction of a complex conditional subsidy for the delivery of untitled wrecks to Maryland processors alone was held a constitutional expenditure of state funds. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). Where the state acts as a seller rather than a purchaser in private markets, its control over its own resources of product is like that of a private firm. Where Virginia clearly owned certain tidebeds, it could forbid non-residents from planting their oysters within them. McCready v. Virginia, 94 U.S. 391 (1877). More recently, South Dakota, as owner of a cement plant was allowed to prefer private in-state purchasers of its product. Reeves, Inc. v. State, 447 U.S. 429 (1980). Finally, although the Supreme Court has never ruled on a state policy favoring residents for public employment, such restrictions are probably constitutional. *See* Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 546–48 (1981). Since the only reason to buy or sell in a restricted market is to subsidize selected subsets of sellers or purchasers, the analogy between a state enterprise and a private firm is strained in these situations.

If the powers of direct state ownership of resources and production of goods and

services can be used to prefer state residents, it is a matter of form and not substance to constitutionally limit equivalent instruments. This proposition suggests that the potential equivalence of the economic effect of direct production and of either supplier or conditional subsidies to private enterprise has properly been given consistent treatment. However, numerous anomalies still exist between direct state enterprise and other legal forms of "ownership." In financial theory ownership concerns the right to appropriate the economic surplus associated with an asset above its costs of (re)production. If the state acts as an entrepreneur directly, it can take this surplus and distribute it preferentially to its residents in a variety of ways. However, there is continuing uncertainty if the state can constitutionally appropriate this surplus by taxation (*see supra* this note) or do so by imposing discriminatory conditions on licensees of state resources. It now seems certain that the state cannot argue that it is the owner in trust of natural resources so that it may control the distribution of surplus to in-state residents since this would be virtually indistinguishable from police power controls which may not directly discriminate under the Commerce Clause. Hughes v. Oklahoma, 441 U.S. 322 (1979); Pennsylvania v. West Virginia, 262 U.S. 553 (1923). Somewhere between direct state appropriation of economic value as a firm (which is unrestricted) and indirect regulatory takings of that value under the police power and its analogous equivalents (which is forbidden), the boundaries of an integrated and disintegrated national market remain unclearly drawn. The irony of the present situation is less in the contradictory legal rules that map out economic practice than in the bizarre incentives to socialize state production in the United States to carry out local economic policies.

Just as subsidization of local economic factors can be carried out indirectly through state enterprises, it is also generally constitutional to restrict direct subsidies of services, cash, or tax-expenditure grants to a state's residents. In at least that set of cases where a state does not monopolize production of a fundamentally needed good or service, it may limit the free or below-cost provision of that commodity to its citizens. Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978); Vladnis v. Kline, 412 U.S. 441 (1973). Even though there is no necessity to demonstrate that the tax cost of these services is borne exclusively by in-state taxpayers, there is a general presumption that a loose connection between public expenditure programs and tax charges supports a distinction between residents and foreigners. Similarly, welfare benefits and other cash payments may be restricted to the inhabitants of a jurisdiction. *See* Varat, *supra* this note, at 524, and more generally at 530–40. The ability to use subsidies as relatively exact substitutes for regulation and taxes depends on several factors. As pointed out above (*see* note 16) the distributional effect of a subsidy's alteration of market allocations can only approximate that of other interventionary instruments if it is adequately correlated with the taxes that finance it. In addition, the definition of residency that creates eligibility to receive a subsidy is constitutionally broad. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); *Vladnis*, 412 U.S. 441 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969). Because residency is not difficult to achieve, to the extent that there is substantial mobility of individuals, collective distributional goals may be hard to reach. It, nevertheless, remains basically true that many local discriminatory or countervailing objectives which are legally unavailable by means of regulation or border controls remain achievable constitutionally by means of tax/subsidy policies or the direct socialization of production.

d) Complexity and Current Practice

The oddity of the contemporary federal structure of economic power may suggest a variety of explanatory accounts. To extend differential treatment to functionally

similar policy instruments is not only inconsistent with the normative ideal of a rationally integrated legal order, but presents an invitation to formalism for states seeking to avoid constitutional limits on their local powers. While political traditions and other factors external to the legal system may constrain the ability or willingness of states to engage in legally permissible behavior, the mere fact of the persistent juxtaposition of contradictory legal doctrines merits some attention. Some of the current mapping of acceptable and barred instruments may reflect the reified legal practices of the historical eras in which their constitutionality was principally determined. For example, much of the initial toleration of subsidies or state enterprises originated in the early developmental period of American history when temporary market intervention was seen as standard practice. The expansion of the use of expenditure policy in this century was essentially post-New Deal – a period in which serious reexamination of positive governmental power at any level became relatively less frequent. Alternatively, much of contemporary regulation doctrine locates its precedence in the classical negative government doctrine decided in the years around the turn of this century and continues to reflect the uncertainty then prominent about the purposes of governmental action.

To rationalize these functionally related doctrines would not necessarily lead to clearly predictable legal practice. In theoretical terms trade-altering effects of governmental interventions could be divided into discriminatory and efficiency-enhancing classes. Efficiency enhancement would be related to social cost reduction (by standards or tax charges), subsidies to increase the production of collective goods or offset the higher than competitive costs that may beset an industry for a variety of reasons (*e.g.*, monopolized prices due to protection of supply imports), or subsidies and/or import restrictions to establish a market position for new production characterized by substantial economies of scale or steeply sloping learning curves. Discrimination, on the other hand, would be associated with the use of these same import, subsidy, tax and standards devices to increase the gain to local producers at the cost of a greater reduction in global welfare. Local losses from such discrimination might or might not be compensated out of gains depending upon the local political process. It is essential to note that the logic of market correction cannot be tied to any particular types of implementing policy. Standards, taxes and subsidies can all be efficiency-enhancing in the proper circumstances. Moreover, while these instruments may be adequate in themselves to produce effective local controls (*e.g.*, controls over the quality of goods locally sold), they may require complementary import controls or countervailing duties to protect local production against what will appear locally to be subsidized (*i.e.*, unregulated or untaxed) foreign production. The propriety of the border controls will depend on their association with efficiency-enhancing local market intervention.

The seeming irrationality of constitutional practice in the U.S. is twofold. First, all import protection or countervailing duties are prohibited without inquiry as to the justification for their existence. The result is to undercut the effectiveness of much state level intervention by enhancing the competitive position of unburdened imported products or, less frequently, to divert such intervention toward permitted controls such as tax/subsidy or state enterprise. At the same time, subsidies and state production are judically protected although their effects may well be discriminatory. Codes which regulate such practices as national subsidies and government procurement in order to avoid distortive trade practices are recognized increasingly as essential in international trade law. Their absence in American constitutional law is anomalous. Only state regulatory controls, where they may function effectively, have their constitutionality adjudged by a case by case examination of the discriminatory or efficien-

cy-enhancing purposes they serve. However, such an ideally stated legal norm does not relieve the serious dilemmas of constitutional (or international trade) practice in segregating out the permissible from the outlawed examplars of positive intervention. Both administrative complexities and conceptual confusions lead to a reiteration of the contradictory practices that will continue to characterize U.S. federal structure.

It might be argued that the contemporary legal structure of American federalism is irrational in the sense that it simultaneously decries and invites disintegration of a single national market. However, the complexity is probably as much the result of theoretical ambiguity as any other factor. The problem of the optimal degree of economic integration of sovereign political entities is a much more debatable issue in an era of positive government than it was in the 19th century. As current efforts to establish regional economic unions like the EC or wider integrative structures like the GATT and its associated financial institutions demonstrate, the question of determining the meaning of a concept of global efficiency among regulatory and developmental states remains problematic. While it is relatively easy to assert that the framers of the American Constitution established a federal structure built on a single national sovereignty and complete economic integration, it is also simplistic. Economic theory has evolved beyond its early state in which the distribution of sovereignty was not an important issue because liberal governments did not regularly engage in cost benefit analyses that might reflect different distributions of rents and entitlements. It is not clear how the constituent states of the U.S. would have confronted contemporary issues involving the pursuit of local economic optima that reflect diverse local evaluations of collective costs and benefits had they thought of the preferred federal constitution of an association of activist states. This is not to argue against constitutional doctrines that mandate a relatively complete economic integration of the U.S. At the same time, the ambiguity surrounding current legal doctrine of federal structure cannot be wished away by references to an uninformed account of a historical constitution that eliminated any possibility of state economic policies that follow more autarchic or disintegrative lines.

Ambiguity about the scope of state economic power and the decentralization of American sovereignty can be illustrated through numerous recent cases. In *Commonwealth Edison*, 453 U.S. 609 (1981), the power of the state of Montana to impose a(n) (export) tax whose effective incidence fell overwhelmingly on out-of-state final consumers of Montana coal was challenged as unconstitutional. Although the economics of the case are not simple (*see* analysis in Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Market for Energy Supplies*, 53 Colo. L. Rev. 281, 289–94 (1981)), the most interesting situation would assume that Montana was attempting to extract the economic rents or quasi-rents associated with its coal production. A severance tax designed to extract long-term rents in inelastic natural resource markets or even an attempt to control quasi-rents available because of cost plus regulated utility contracts would redistribute wealth (consumer surplus) toward Montana from outside with no necessary loss in global efficiency. (Ironically, had Montana simply nationalized the coal industry and charged purchasers monopoly prices, the constitutional issue probably would not have arisen.) The tax arguably was a charge on potential capital profits of Montana firms which were not sufficiently exploited. The key point is that such appropriation of rents is fully accepted as an attribute of sovereignty in international resource production as OPEC will testify. When the Supreme Court rejected the constitutional challenge in *Commonweath Edison*, it may have simply been recognizing that states have retained substantial elements of economic sovereignty in instances where resource allocation is not affected by economic policy.

The harder issue deriving from ambiguity about the distribution of sovereignty in contemporary federalism involves the definition of efficient outcomes in interventionary economies. Consider as an example a classic regulatory case such as Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). Arizona chose to place limitations upon the maximum number of railroad cars which could constitute a train passing through its territory. The number was lower than that permitted by neighboring states, but did not explicitly contravene any national regulation. The presumptive justification for the rule was increased safety through decreased railroad accidents. The Arizona law was adjudged to be inconsistent with the Constitution since it placed a burden upon, or discriminated against, interstate commerce and so disrupted the free trade area. The logic of such a holding, if not its specific application to these facts, is not hard to construct. In perfect markets, the Arizona law could have been intended to increase the local competitive advantage of Arizona producers. Either if the consumption of out-of-state goods delivered by railroad was price elastic and prices rose to cover increased rail costs of operation, or if goods shippers shifted their means of transportation from national rail companies to Arizona-based substitutes, Arizona interests could benefit because of the regulation. Even if this should result in higher prices to Arizona consumers, the legislation could have been the result of a consensual Arizona redistributional judgment or special interest control of the local law-making body. Whether we define the foreign goods being prejudiced as the commodities shipped by rail or the transportation services employed, there exists a classic local distortion of resource allocations inconsistent with free trade theory.

It is also possible to argue that Arizonans have a higher valuation for safety than do the inhabitants of other states. In this case, several optimizing solutions are feasible. First, the state could assign entitlements to the general public to be free of the moral cost of seeing the injury of others. These moral charges are frequently translated into governmental relief programs for the victims of industrial or other accidents. Whether there are tax costs or simply moral losses at stake, regulation could force the internalization of these costs to the railroad industry. If we assume that Arizona has the power to recognize this pattern of entitlements and has accurately valued these costs of production, the use of the Commerce Clause to strike down an effective Arizona program of market correction would terminate a locally efficient solution.

Alternatively, Arizona could reinterpret the definition of the commodities being produced in the transportation market. Rail services could be understood to comprise part of a tied package with units of public safety. Consumers in Arizona might wish to buy a package with a larger public safety component than persons in other jurisdictions. This increased quantity of safety could be acquired through tax subsidies to the railroads to pay the marginal costs of additional precautions. It is also possible Arizona consumers might be willing to pay higher prices for the joint commodities in question to cover the increased costs associated with the marginal increment of safety. Given the fact that railroad prices are regulated, that legally imposed costs would enter the rate base, and that the demand for the class of rail delivered goods may be relatively inelastic, the purchase of the collective good – public safety – in this fashion may even approximate an efficient system of benefit charges. Again, the efficient supply to the local market of the joint commodity of private services and public safety demands local production under different conditions from out-of-state production.

Objections to the increased costs caused by multiple local regulatory standards are often spoken of as efficiency losses. The fact that a national firm may incur higher average production costs to supply differently regulated markets is in itself neither good nor bad. The situation may be compared to a firm supplying two products which are not joint, but involve two lines of production with different characteristics. If Ar-

izonans wanted only large cars and Californians only small, no automobile company would claim it was economically inefficient to produce different goods because higher total costs were required. Even if the result of the heterogeneous demand were local production by different firms for the two distinct product markets, there is no welfare loss involved. Defining efficiency in these cases is purely a function of the distribution of sovereignty and the concomitant entitlement, recognition and compensation patterns associated therewith. Until these theoretical problems of federal structure are confronted at a normative or political level, technical resolution of the doctrinal issues in the constitution of American federalism will remain chimerical.

[30] Most simply put, open borders allow the importation of goods produced under unregulated conditions. Such goods would gain a competitive advantage depending on the additional costs of regulation. Conversely, open borders would permit the emigration of productive factors from states with relatively more restrictive interventionary or redistributive policies. The conclusion that decentralized regulation may be undercut by competition depends on a series of empirical findings about market conditions. Factors must actually be mobile; regulation must truly be cost increasing rather than efficiency increasing or product quality improving as it has sometimes been; and, the cost increasing effects must not be less than economic rents being received by producers because of locational or other regulatory advantages specific to the newly regulating jurisdiction.

[31] By disintegration, I do not mean the establishment of wholly autarchic state economies. Rather, I refer only to the constitutional possibility of specific regulation of trade relations on a bilateral or multilateral basis. Such a regime, in part like the current international trade system, implies at least the capacity to threaten border restrictions to protect domestic economic policy. Disintegration, however, has not been a strategy pursued in the United States. Congress would seem to have the constitutional authority to restrict the scope of the Commerce Clause and permit local border controls. This option has not been seriously considered. I might speculate that any such initiative would have been inhibited by the regional dynamics of American federalism. For Congress to so act in favor of pro-regulatory states, they would have to gain political control of the central legislature. Having gained such hypothetical control in a regional struggle, it is likely that those states would not limit their exercise of power to permit disintegration. Rather, they might prefer to enact uniform, nationwide market regulation which would protect both their own markets and the competitive value of their exports into those states which preferred less regulation. In other words, the struggle to overcome open borders would probably lead directly to centralized controls in those cases where pro-regulatory regions would triumph politically. Conversely, where open borders have not been so completely implemented in an economic union, the result of a pro-regulatory regional triumph might do no more than preserve partial disintegration of the status quo.

[32] A variant of this scenario of North to South transfer of wealth would be that the Northern pro-regulatory regions maintain their higher levels of domestic market controls in the face of effective external competition. This would lead to an increase in imports and an emigration of factors until the decline in ability to trade or loss of the productive base yielded a new equilibrium or altered the domestic taste for interventionary policies. This form of impoverishment seems to be even less politically palatable to states with sovereign pretensions than is a race to the bottom.

[33] I do not mean to argue that there is any one to one, or canonical correspondence between legal structure and legal practice as represented in doctrine. My belief is just the opposite. Legal practice is always under-determined by legal structure as there are always available multiple coherent interpretations in moving from a given level of

theoretical abstraction to a particularized practice. This openness of interpretation or under-determination is exemplified in this essay in the existence of mutually exclusive traditions of political ideology within liberal law. However, the persistence of apparent inconsistencies between structure and legal doctrine (*e.g.*, open borders and decentralized positive powers) or between legal practices (*e.g.*, the illegality of border controls and the legality of functionally equivalent subsidy/excise forms of regulation) may be represented also as judicial mistakes, evidence of contradiction within structural principles, or as traces of multiple structures coexisting within a given culture. The relation of legal doctrine to legal theory will always be a complex and ambiguous relation due to general methodological problems in the determination of applicable structural legal principles and their retranslation to particularized legal practices. My point here is that a substantial reworking of legal theory such as the passage from a negative to a positive state would present an appropriate occasion upon which to reorder whatever forms of doctrine had been elaborated during the preceding period. The analysis of the specific doctrines that emerged and the forms of their incoherences are objects for other historical narratives. *See* Heller, *supra* note 2, at 155–60, 184–92.

[34] *See infra* § III.

[35] For example, in Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963), a California regulation of the quality of avocados sold in California was challenged as discriminatory against imported fruit. It is possible that the controls had less to do with consumer protection of food quality than with excluding commodities produced under less regulated working conditions. Since California has been more active in encouraging the organization of agricultural labor than many other farm states, the distributional gains won by local farm workers could be insured only by discouraging the consumption of lower cost competitive products. Since, as discussed *supra* note 29, the direct imposition of border controls or countervailing duties is not constitutionally permitted to California, ersatz quality controls may offer the next best solution.

[36] The effect of economic competition from states which did not enact regulation that arguably would raise costs of production was to produce distinct patterns in the early history of activist government in America. The most important of these were: (1) a deterrent upon pro-activist legislatures caused by the constantly voiced threat of out-migration by local firms; (2) wide variation in the statutory controls that were passed to mitigate the competitive impact; (3) inadequate enforcement of regulatory laws where enacted; and (4) the formation of a regional coalition of Progressive states that settled on a politics of increasing centralization in order to make productive conditions nationally uniform.

A first discernible pattern in what I will term progressive legislation is that regulation originated in and often remained largely restricted to Northern and some Western states. For example, women's hour controls, one of the first accepted forms of intervention, existed in some form by 1896 in Connecticut, Illinois, Louisiana, Maine, Massachusetts, New Hampshire, New Jersey, North Dakota, Oklahoma, Rhode Island, South Dakota, Virginia and Wisconsin. Old age pension laws, long an object of labor concern, were passed prior to the federal Social Security Act in Montana, Nevada, Pennsylvania, Wisconsin, Delaware, Idaho, Massachusetts, New Hampshire, New Jersey, New York, West Virginia, Kentucky, Colorado, Maryland, California, Minnesota, Utah and Wyoming. Public works hours limitation laws – the principal form of men's hour legislation – had been enacted in 1932 in 27 states, including Arizona, California, Texas, Colorado, Delaware, Idaho, Nevada, Indiana, Wisconsin, Wyoming, Kansas, Kentucky, Maryland, New York, Massachusetts, Utah, Missouri,

Minnesota, Montana, Ohio, New Jersey, Pennsylvania, Washington, Oklahoma, West Virginia, Oregon and Illinois. Minimum wage legislation was passed from 1913 to 1923 in 15 states: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Minnesota, Nebraska, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, and Wisconsin. Only 18 states, concentrated in the same regional pattern of distribution, possessed (ineffective) anti-injunction statutes to aid labor unions. Only Wisconsin dared to experiment with unemployment insurance legislation before 1933. These statutes and the subsequent account of their enforcement are detailed in 3 J. COMMONS *et al., supra* note 18, at 403–500 & 600–49.

The second characteristic of the initial period of state regulation was the extreme variation in the substantive content of the intervention. What appeared on examination of the statute alone to be important statutory adjustments of the terms of employment contracts often turned out to be of little consequence. Legislation replete with exceptions and limitations of application was common even for those types of regulation which were enacted by the great majority of the states. Although child labor laws were enacted in all regions, in 1924 only 13 states (none in the South) had rules which measured up to proposed federal standards. While women's hours legislation spread to 40 states by 1918, coverage by industry, size of firm, and hours maxima varied enormously. For example, the prohibition of night work for women existed by 1933 in 12 states which were all, save South Carolina, in the North, West and Midwest. Among minimum wage laws, those of Massachusetts and Nebraska were enforceable only by publicity; Colorado never fixed a legal wage; Arizona, South Dakota and Utah failed to set up a wage commission and their inflexible rate soon fell far behind market prices. On the pattern of high regional variability in post-1937 state minimum wage legislation, *see* R. RATNER, A MODEST MAGNA CARTA: THE RISE AND GROWTH OF WAGE AND HOUR STANDARD LAW 1900–1973 (Ann Arbor, U. Mich. Microfilms, 1978).

Even where state reform seemed most generally effective, in workmen's compensation, the actual situation was one of very mixed results. Of the 45 state systems which existed by 1933, only 13 required compulsory participation. These were arranged in the usual regional pattern: Arizona, California, Idaho, Illinois, Maryland, New York, Ohio, Oklahoma, Utah, Washington, Wisconsin and Wyoming. In states with elective arrangements, workers could be forced to contract out of coverage to secure a job. Laws differed substantially on benefit levels, insurance schemes, waivers, exemptions of farms, households and small businesses, and modes of enforcement. It has been estimated that at the beginning of the New Deal 25% to 30% of all workers remained categorically excluded. Definitions of injuries covered and exemptions for types of causal responsibility varied from state-to-state. Only 10 Northern states and Kentucky covered occupational diseases at all by 1933. Especially in those instances when the regional character of progressive legislation seemed formally contradicted by general passage, an analogous pattern of effective reform often reappeared on more detailed evaluation of the regulatory scheme.

A third aspect of regional differentiation in state positive government relates to the administrative enforcement of legislation on the books. Although factory safety laws of numerous types were passed heavily in 1911–1913, effectiveness was rare due to the lack of mode of enforcement for anything beyond worker complaints or self-help. The delegation of affirmative inspection and enforcement powers for hours and safety legislation to administrative commissions was begun in Wisconsin in 1911. It grew in the familiar geographical distribution to include 19 states by 1933. However, these commissions were often poorly financed, not aggressive in their behavior, and willing to leave all initiative in pursuing serious change to the state legislatures. The

overall picture of local interventions in production markets can be described as the enactment of a patchwork of regulatory controls as a matter of formal law within a bloc of regional, relatively progressive states, and a much more limited effective alteration of pre-existing industrial practice.

The advance which had begun in the period before World War I was stilled in the stall of legislative progress in the 1920's. This loss of Progressive impetus was caused both by a continuing rural domination of some state governments and by the growing fear of interstate competition. This effect was more apparent as the regional pattern of legislation became more settled. There was active opposition to the enforcement of statutory norms which created no economic disincentives so long as they were empty. Testimony to the chilling power of interstate competition was also visible in the mixed reception given to cost increasing regulation or tax increasing redistributive programs in the advanced industrial states anxious about the emigration of industry. Massachusetts minimum hour legislation for women almost was repealed as both depression in local textiles and Southern competition increased. In New York and Ohio, minimum wage legislation made no headway in the 1920's in part due to potential loss of industrial jobs. Oregon in 1923 passed 8-hour legislation for saw mills and lumber camps to take effect on the enactment of similar legislation, which was not forthcoming, in California, Washington, and Idaho. Workmen's compensation benefits were set low by state commissions and were not upgraded to match inflation because of fear of competitive pressures. The result was that in most areas the bulk of the burden of industrial accidents remained as much upon the workman as it had before the wave of state progressive reform. Governor Franklin Roosevelt of New York tried to convene an interstate conference in 1931 to overcome through cooperation the competitive obstacles to any state consideration of unemployment compensation. The failure of the effort highlighted the fact that the Progressive coalition had to make use of federal power to overcome the limits of local regulation made untenable by the continuation of free trade and movement between regions.

[37] This thrust to uniformity of control would have existed even in the presence of effective compensating border restrictions for those states whose firms depended heavily upon exports into unregulated regions. Exports would have been subject to competitive disadvantage without national controls. Out-migration from states with domestically effective regulation, similar to that now experienced by firms serving international markets, may still have been experienced. This pressure to secure centralized regulation for export purposes, however, would have been mitigated for at least two reasons. First, most purchasing power in the U.S. at the time of the growth of centralization in the early 20th century was located in those advanced states which preferred reasonably similar levels of regulation of local conditions of production. Effective border controls upon goods produced in substandard conditions would have been sufficient to protect the position of regulated firms in the most important regional markets. Second, large, export heavy firms would generally prefer for economic reasons to set up direct production facilities for peripheral markets in those areas. Since reexport to regulated states would be restricted by border controls, it is likely that the loss of production to non-regulating regions would have been similar to what would have occurred in the absence of regulation. This is not to deny that exporting firms would have placed political pressure on their home jurisdictions to equalize production costs in all markets. This pressure only complemented the drive to centralization caused by legal doctrine that eliminated more disintegrative strategies for modern federal systems.

[38] Direct controls over the entry or exit of individuals or firms have consistently been prohibited under the Privileges and Immunities Clause of the Constitution. *See*

discussion *supra* note 29. Legal restrictions designed to tax or indirectly control the migration out of a political jurisdiction of human or corporate capital that arguably has benefited from subsidized public goods in its initial location has recently been discussed both at the international and interstate levels. The constitutionality of such latter indirect restrictions has not been litigated. *See* W. Böhning, Toward a System of Recompense for International Labor Migration (Geneva, ILO, 1982); Aaron *Plant Closings: American and Comparative Perspectives,* 59 Chi.-Kent L. Rev. 942 (1983).

[39] R. McKinnon & W. Oates, The Implications of International Economic Integration for Monetary, Fiscal, and Exchange-Rate Policy (16 Princeton Stud. in Int'l Finance, Princeton, Princeton Univ., Dep't Econ., 1966).

[40] Following the centralization of the power to regulate monetary policy during the Civil War, the rationalization of the controls over all forms of money, including bank credit based on a modern checking system, was concentrated at the national level. The establishment of the Federal Reserve system that carries out stabilizational policy may be seen as a response to the inability of states to control increasingly national financial markets. Alternatively, it has been argued that centralized banking was the result of the efforts of a banking/advanced industrialist elite, centered in the northeastern urban centers, to use federal power to forestall the growth of competitive credit policies favored by states in peripheral regions. *See* G. Kolko, The Triumph of Conservatism 217–54 (New York, Free P., 1963); *see also, generally,* L. Goodwyn, Democratic Promise, The Populist Movement in America (New York, O.U.P., 1976). The history of monetary reform, like that of much of the regulatory legislation to emerge in the early 20th century, was marked by this ambiguity about whether its origins lay in corporatism or a positive liberal state. Whatever the favored explanation, economic crises stimulated the first extensive use of the money supply as an instrument of macro-economic policy. The Federal Reserve's active participation in open market operations and the federal adoption of deficit spending programs was associated with the *Mariner Eccles* group in the New Deal. *See* A. Schlesinger, *supra* note 28, at 237–41 & 291–301. It was evident by this point that sub-national polities lacked not only the legal capacity to create money for macro-economic ends, but did not possess any borrowing capacity due to local tax systems too weak to assure repayment. States which understood the logic of stabilizational theory had no real recourse except to endorse an active central involvement in both anti-deflationary enterprises in the 1930's and anti-inflationary efforts in the post-World War II years.

Similarly, during the economic crisis after 1930, states found their fiscal structures, which relied upon property and sales taxes, inadequate to meet relief, job-creation, and other public spending needs. It was evident from historical experience that only a uniform system of taxation could effectively appropriate a substantial percentage of economic production in the absence of local border controls to regulate the movement of both taxpayers and expenditure beneficiaries. With the explosion of state activity during and after the New Deal came the permanent institutionalization of a national progressive tax to permit redistributional and other market-correcting expenditures. A centralized federal structure with respect to taxation has represented the only arrangement of governmental power which has produced the necessary revenues for the operation of the positive state.

[41] The correspondence of substantial areas of constitutional doctrine to a Hobbesian structure of federalism until 1937 was due less to a pure, reactionary form of conservatism in the courts than a more complicated political alignment of 19th century Conservatives and one wing of 20th century Progressivism. American Progressivism represented a temporary coalescence of two nascent forms of familiar contemporary

political ideology. This touching of the immature elaborations of essentially opposed outlooks on modern society pulled together aspects of early advanced liberalism and a proto-corporatism in an alliance that could not persevere. Progressivism combined the initial responses of theorists who recognized that the shift into mass industrial society would require systematic changes with the optimistic wish that technical dexterity could resolve the emergent questions. By the time of the New Deal, there was already a consciousness of ambiguity about the purpose and meaning of the Progressive legislative program that established positive centralized government. Within the political coalition, which had formed sequentially at state and national levels to secure this legislation, it was a matter of open interpretation whether what was being pursued was the outline of the pluralist welfare state or an, as yet, unnamed vision of corporatism.

For the sake of historical argument, one could collapse the interests backing the activist state into two groups. The first thrust came from persons essentially concerned with the distribution of wealth and political power in advanced capitalist regions. There was a humanistic impulse that the urban conditions under which large segments of the working population were living were no longer justifiable in a society with rapidly growing national wealth. Organized and influenced heavily by social workers and Northern ex-populists, this element of Progressivism never coherently articulated a theory of regulatory legislation. When reinterpreted in terms of the theory of the positive liberal state which was the outcome of their efforts, it might seem that humanist Progressives sought a redistribution of income and power to the laboring sectors for several reasons. There was a strong reaffirmation in social gospel Protestantism of the charitable or religious impulse to share. *See* R. BREMNER, *supra* note 18, at 201–68. This doctrinal emphasis was consistent with the economic proposition that at higher income positions, individuals are more likely to become altruistic and support the public transfer of more resources to the poor. In addition, there was a widespread belief that the existence of monopoly had created a substantial pool of windfall profits. The expropriation of such express profits through a combination of virulent antitrust action, political reform, taxation, and direct work-place regulation especially motivated the Progressives who would end in the Wilsonian or New Freedom wing of the movement.

At the same time, many of these same Progressives were ambivalent about the wisdom of state intervention in markets. On the one hand, they were strongly paternalistic toward the lower classes and reluctant to acquiesce in the proposition that free private contracts would maximize social welfare. Consequently, there was unquestioned support of initatives for state and federal regulations of hours, wages and the other conditions of production. Both Wilsonian Democrats like Brandeis and Republican Progressives of the La Follette group were clear that unregulated exchange could not deal with the complexities of an advanced society. On the other hand, many Northern Progressives maintained a compelling fear of the power of positive government. There was a nostalgic longing, represented by the anti-monopoly policy, to reestablish the small scale firms of the 19th century economy which would mitigate the need for intervention. This conflict of desire within the liberally committed element of Progressivism would at the time of the New Deal separate the New Freedom wing into those who reluctantly accepted the permanent necessity of the positive state and those who aligned themselves with more reactionary elements. *See* O. GRAHAM, AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL (New York, O.U.P., 1967).

The second element of the pro-intervention coalition that acquired political power in the industrial core region of the United States was not explicitly redistributive in

its goals. It was composed of segments of the most advanced industrial and finance capitalist class and its academic allies. In a sense, the development of corporatism was the response to modernity of that aspect of national capital which took the Marxist class analysis seriously. Fearful of the effects of excessive competition upon profit and economic stability and apprehensive of the possibility that an exacerbation of class conflict would disturb industrial peace, certain elite business interests turned to a restructuring of the political-economic order to forestall these events. The proto-corporatist program, which appeared under rubrics such as the New Nationalism at the federal level or New Emphasis among more decentralized corporate groups, asserted the inevitability of concentration of economic and bureaucratic power in modern industrial society. It, therefore, sought in a variety of ways to accommodate the institutions of a purer competitive capitalism to these changes. *See* D. NELSON, *supra* note 18, at 28–63 & 104–28; *see also* J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900–1918, at 3–39 & 139–71 (Boston, Beacon, 1968); G. KOLKO, *supra* note 40, at 190–216.

Although antitrust enforcement to reestablish earlier market organization was no part of this element of Progressivism, there was a willingness to admit the quasi-public nature of national corporate power. These organizations were not to be viewed as traditional capitalist firms run solely for the maximization of profit. Instead, corporate policy was to represent a harmonized amalgam of the interests of ownership, labor and the state. In return for immunization against the irrational conflict of atomistic competition, national capital would share political and economic power through a process of ongoing public management and the internal adjustment of functional, rather than class, economic interests. In this structural reformation, governmental interventions to improve workplace conditions, wages, pensions and labor rights were understood as a foundation on which lasting industrial cooperation and peace could be built.

These practical tendencies were reinforced by academic developments in the fields of economics and industrial socio-psychology. Economists like John Commons of the National Commerce Foundation and organizational theorists including Frederick Taylor argued that prevailing forms of industrial structure and labor treatment were inefficient, even from the standpoint of corporate profit. They suggested that technical improvements in work conditions and compensation packages should be voluntarily undertaken and politically supported by progressive employers interested in maximizing long-term returns. The development of a strong academic faith in the abilities of positivist social research to regulate in a scientific administration what had been formerly given to the free play of the market welded the disparate desires for social welfare and economic stability into a single program of purportedly efficient character. From this perspective, whether the intentions of those who backed the regulatory program of the positive state were humanist or profit-centered was irrelevant. Social conflict was reconceived as the product of past misunderstanding.

The initial political programs of Progressivism were sufficiently confused to obscure the differences in liberal and corporatist institutional philosophies which ultimately had to surface. The tensions within this alliance showed themselves in a variety of splits over the content of Progressive legislation. The passage in 1914 of the Clayton Act, which established the Federal Trade Commission, was marked by a struggle over whether the Commission was to be an antitrust organization or a corporate institution to coordinate oligopolistic programs. *See* J. WEINSTEIN, *supra* this note, at 62–91; and S. FINE, *supra* note 17, at 390–91. Similarly, at the state level, the coalition elements divorced on such matters as the nature of the proper form of unemployment insurance. Although all Progressives agreed on the desirability of some type of protec-

tion, corporatists and New Emphasis employers sought to base reform upon firm-by-firm reserves, experience rating of past firm histories, and joint employer/employee contributions. The concept behind such legislation was to create sets of correlative incentives for labor and capital to end joblessness through industrial planning. Redistributionist and anti-monopolist progressives, including social workers and some unionists, favored the pooling of funds across firms, generalized contribution rates, and payments from employers and the tax base alone. *See* D. NELSON, *supra* note 18, at 162–91. Controversies such as these may have in the 1920's hindered the local passage of the more sophisticated aspects of the legislative program and helped account for the loss of impetus at the state level. Nevertheless, it is fair to note that the Progressive union continued to define the dominant interests of the core region up to the New Deal period.

The final episode in the construction of the contemporary federalist state was occasioned by the onset of economic depression. The New Deal was a sequential set of experiments with the different contending forms of institutional response to the economic and social problems of advanced capitalism. Extensive centralization and increased positive integration were the result of a political process which turned to both corporatism and liberalism to escape the immediate crisis. Although there were always theoretical cross-currents and a singular lack of coherent programmatic direction during this entire period, the early years of the New Deal were essentially dominated by the corporatist line of Progressive thought. National unification of market regulation was imposed through the codes of the National Recovery Administration and the Agricultural Adjustment Act. The setting of a single uniform standard for issues such as wages, production, work conditions, and competition was delegated to industry councils and negotiated in an ongoing public-private dialogue which obliterated any qualitative distinction between state and economy. However, this institutionalization of New Nationalist philosophy rather quickly drove important segments of the New Freedom progressives into the coalition which opposed the creation of an encompassing regulatory state. Many former Wilsonians were obsessed with the apprehension that the positive state had become a tool of monopoly interests in both the industrial and agricultural sectors. *See* E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY POWER 19–148 & 283–382 (Princeton, Princeton U.P., 1966). For these Progressives, including judges with constitutional authority, their ideological opposition to empowered corporatism outweighed the benefit of federal achievement of uniform legislation in overcoming the limitations of state regulatory power and produced an enigmatic adherence to a Hobbesian politics until the specter of corporatism was dispelled in 1936. *See infra* note 47.

[42] The Conservative impetus to restore political conditions similar to those that prevailed before the New Deal has been briefly mirrored in constitutional doctrine. The idea that the tenth amendment limited the expansive interpretation of the Commerce Clause and thereby carved out an area of governmental power exclusively allocated to the states was revived in National League of Cities v. Usery, 426 U.S. 833 (1976). Expansion of the *Usery* doctrine could have reraised the problem of the effectiveness of exclusive state legislation, but subsequent cases tended to relegate the holding to an aberrational status by indicating that the Court had decided not to again take the tenth amendment seriously (*see, e.g.*, Equal Employment Opportunity Comm'n v. Wyoming, 103 S.Ct. 1054 (1983); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981)) and *Usery* was eventually overruled in Garcia v. San Antonio Metropolitan Transit Authority *et al.*, 105 S. Ct. 1005 (1985).

[43] The current push for increased decentralization of national controls involves a coalition of liberal idealists and pure Hobbesian conservatives. The idealists seek to

gain the economic and political gains that correspond to an optimal federal allocation of positive powers. The more libertarian proponents of the Reagan administration's "New Federalism" would be ideologically content if state regulation proved once again to be ineffective and the aggregate amount of governmental intervention in markets shrunk back toward late 19th century levels.

[44] It should be pointed out that the lessened degree of autarchy of the American economy from the global system may increasingly call into question the stability of the solution held out in box No. 4. International competition from regimes with less regulatory and distribution controls than those worked out in the United States in the first part of this century may cause the reenactment on a global scale of the federal drama domestically played as the century winds down. *See* the conclusions to this chapter (*infra* § IV) for further discussion of this issue.

[45] The formal legal powers to tax, spend, and fix the money supply were clearly granted to the Federal Government at the time of the original Constitution. The extension of those powers to support the previously unimagined scope of the positive state was, nevertheless, a bitterly divided contest of uncertain outcome. The general outline of the historical events which determined the modern federal structure can be retraced in the evolution of the regulatory capacities of the national state. In this case in particular, critical attention must be given to the prolonged effects of the Civil War. First, the War can be interpreted as the resolution of the political question whether there would be an economic option of federal disintegration. The nullification argument of the seceding states was essentially a claim for sovereignty at the local level. The Northern victory destroyed any strong future constitutional claim to the states' rights or disintegration position. Border controls – a customary attribute of sovereignty – seem to have been swept away as a possibility along with any broader rights to disassociate market ties. The range of alternative legal responses to protect the local policies of the emerging positive state within the preserved customs union was importantly narrowed after the Civil War.

Second, the Civil War placed a coalition of Northern interests, united by a firm regional mentality, in control of federal power. Politically, the nation became divided into sectors of core and periphery in such a way that the core endowed itself with the sense that it represented the authentic national culture. Most importantly, because of their disparate conditions of industrial development, core and peripheral regions split on their attitude to the program of the positive state. My argument is not that the core was internally united on policy. It was not. Rather, the more advanced core region saw the Federal Government as a tool for the enforcement of whatever answers to the problem of state theory at which it would be able to arrive. As a consequence, when Northern states were unable to implement their local regulatory programs due to open borders, the coercive use of federal power to create uniformity presented itself as a viable political option.

[46] The centralization of power, in its enduring form, may be better explained as a facet of developmental or regional economics than as a theoretically driven conception of federal structure. The conditions for regional conflict became increasingly severe as the post-Civil War period progressed. As transportation costs diminished, the potential for interstate competition grew. There were no important productive sectors favored by natural advantages large enough to insulate the developed core industries against imports from peripheral areas. Although large scale business in the North frequently was corporatist and sided with Progressive humanists in backing economic regulation, non-national or small scale firms usually rejected public control of markets as a matter of political ideology. However, in those states (*see supra* note 36) where the Progressive coalition enacted regulatory legislation, all domestic

businessmen were led to support federal regulation to relieve themselves of the competitive pressures of imports. The humanist/corporatist coalition was thus joined by traditional business interests of core states on the issue of positive national integration.

Outside the core region, a contrary phenomenon took place. Firms, with national pretensions in the developing South, were opposed to any form of regulation due to its distributive effects. Peripheral corporate interests behaved as classic infant industries seeking to accumulate capital and compensate for developmental lag relative to Northern firms. Because core-backed regulatory programs often had the effect of reducing entrepreneurial profits, these measures were understood by development capital to be anti-growth. Whether legislation controlling the conditions of production was justified as a form of market correction related to information failure or as a response to economic demand for collective income transfers, the negative impact on accumulation would be similar. Southern and other marginal industry insisted upon local solutions to its development problems. The periphery interpreted federal regulation as no more than a core attempt to eliminate competition by denying to newer firms the cost advantages capable of equalizing the power of mature capital and trained labor.

Liberal commentators who have excoriated as reactionary the regional opposition to the Progressive program of centralized regulation never focused upon the confused structural condition of American federalist government. A state cannot pretend to a decentralization of positive policy, be driven by disparate regional economic demands, and remain legally committed to free trade. Without the border barriers which now separate developing and developed nations, widely varying decentralized policies could not be simultaneously sustained. In this case, a political decision must be reached about whether centralized power will be coercively employed to enforce some set of local preferences. There is no magic in the recitation of constitutional clauses as justification for the exercise of this power. The emergence of American federalism represented the triumph of developed states over developing states in the particular historical circumstances of a differentially maturing industrial economy. For detailed accounts, arguing that the growth of centralized regulation and monetary programs represented continuing political defeat for more radical popular interests concentrated on the American periphery, *see* L. Goodwyn, *supra* note 40, at 275–514; G. Kolko, *supra* note 40, at 279–305.

[47] The abandonment of formal American corporatism was hastened by the lack of rapid economic recovery under the First New Deal (1933–36). This failure was abetted by the orthodox monetary theories of the reigning business interests who sought a balanced budget. When Roosevelt turned against his former corporatist allies in the 1935–37 period and embraced the more individualistically oriented heritage of populism, it was necessary to both rebuild political support and to reformulate a regulatory program. This program relied upon legislation that reduced both the proto-socialist role of government as an employer and its proto-corporatist role as the co-determinant of industrial policy. The shift was typified by the abandonment of the public and quasi-public institutions set up in the Works Progress Administration and National Recovery Act Councils in favor of the less direct economic intervention, like Social Security relief, the Fair Labor Standards Act or the National Labor Relations Act. A newly constituted Democratic coalition replaced the corporatist interests that rejected both pluralist politics and the institutionalization of general transfer programs in the later New Deal.

Installed to power were organized labor, supporters of deficit spending, and those New Freedomites willing to experiment with regulation in spite of their distrust of

the regulatory state. In the face of continuing economic crisis, most unionists gave up any sense of political competition with federal regulation. They increasingly concentrated their attention on the representation of skilled elite labor unaffected by most progressive reforms and traded their electoral support for federal assurance of a protected status within centrally structured markets. In addition, a new group of quasi-Keynesian followers of Mariner Eccles argued that the positive and active state alone had the fiscal and monetary power to reinflate the economy. The second phase of the New Deal closed off the possibility of American socialism or corporatism. It opted for a positive, individualist state committed to market correction through pluralist politics. The institutionalization of centralized federal structure was a product of the historical process which eliminated all non-liberal solutions to the problems of modernity.

It is usually argued that the Supreme Court reinterpreted, under political pressure, its restrictive constitutional doctrine after 1937 to accede to the predominant power of the national state. However, it seems more interesting to substitute for this capitulation hypothesis an analysis allowing more structural continuity. The initial judicial rejection of the theory of the positive national state may well have been replaced by its later rejection of the ideology of the corporatist state. What may have changed after 1936 was the corporatist imagery of the New Deal itself. This would have permitted courts to restore the consensualist view of federal action which had prevented their acquiescence in the product of the national legislature. It was not the delegated power of the Congress as embodied in the N.R.A.'s industry written codes which was ultimately approved by the Supreme Court. Only directly legislated statutes such as the National Labor Relations Act passed out of the shadow of unconstitutionality.

Whether it was the ideology of the New Deal or the politics of the Court that changed, the decimation of the legal doctrine which obstructed the development of the federal positive state was rapid. The national regulation of bargaining and employment practices (NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)); of maximum hours, child labor and minimum wages (United States v. Darby, 312 U.S. 100 (1941)); and of agricultural marketing and production (Mulford v. Smith, 307 U.S. 38 (1939)); were upheld under the Commerce Clause. In each instance what was previously categorized as local production and assigned exclusively to state control was held to affect interstate commerce. Federal regulation of the conditions of production was justified by the interactive relation of prices upon the volume of commodities traded in integrated markets. Wickard v. Filburn, 317 U.S. 111 (1942). At the same time the tenth amendment was reinterpreted so that it no longer referred to a positive assertion of state or, implicitly, individual rights. Instead it tautologically noted that any residual powers not accorded to the National Government remained the prerogative of the states. The reach of federal legislation, based on the broadened Commerce Clause and unhindered by serious due process restrictions, was made practically adequate for all varieties of economic regulation.

With regard to economic legislation, the predominant characteristic of the period following 1937 has been the removal of serious constitutional barriers to national regulation, taxation and stabilization controls. A doctrine that assertive substantive judicial review of centralized legislation would be withdrawn was announced in 1937. United States v. Carolene Products, 304 U.S. 144 (1937). This decision was later buttressed by the increased use of procedural limitations, such as the denial of standing against parties seeking remedy against economic or fiscal measures. *See* Heller, *Public Interest Law and Federal Income Taxes*, in PUBLIC INTEREST LAW 459–61 (B. Weisbrod *et al.*, Berkeley, U. Cal. P., 1978). Since the interventionary capacities of the states had been legally acknowledged by this time, a dual system of formal powers

came into being. However, the freeing of federal power had two direct effects. First, as new types of uniform corrective and redistributive legislation became practicable, it made real the possibility of a complete positive state. Second, the focus of interventionary politics moved away from state capitals and toward Washington. Since the effectiveness of local market controls remained limited due to the economic openness, both special interests seeking monopolistic advantage and coalitions of states seeking to expand local welfare turned to the Federal Government. In effect, once the legal obstacles to federal control were taken down, the continuing adherence to the doctrinal structure of negative integration stimulated the growth of the Federal Government. In this sense, national power is not the contradiction of state power, but its complementary fulfillment.

[48] The rejection of both socialism and corporatism since the Second New Deal has meant that the ideological legitimation of political institutions in the United States refers exclusively to the liberal theory of positive government. Especially following the identification of corporatist social organization with the defeated powers in World War II, to assert that governmental institutions delegate aspects of the process of economic management to publically empowered sectoral coalitions of producer interests is to imply that regulation has been "captured" and is malfunctioning. At the ideological level, the description of corporatist-like procedures in regulation leads to a Hobbesian interpretation of institutionalized liberal politics and suggests that the recession of interventionary public activity would be the preferred state of affairs. Much of the current attack on positive government is based upon the perception that the day-to-day operations of regulatory agencies are essentially corporatist in reality. It is the gap between the liberal form that legitimates regulation and the corporatist distortion of the optimal liberal output that is at the core of the deregulation movement. *See* P. MacAvoy, The Regulated Industries and the Economy (New York, Norton, 1979); Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 1 (1971); Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. & Mgmt. Sci. 335 (1975).

The call for a return to pre-regulatory solutions stems from the existence of a corporatist phenomenology that characterizes the contemporary politics of regulation. Such accounts of how economic management actually proceeds may give credence to the basic hypothesis of American Progressives that pluralist institutions attempting to aggregate multiple demands would become politically untenable. The technocratic theories of early proto-corporatists were based on the perception that modern government would face a demand overload if it simply reacted to the claims made upon it. Instead, they proposed that the corporatist state must shape, organize, and control demand to fit it to institutional capacity. While neo-corporatism has not achieved the measure of academic and ideological legitimacy in the U.S. that it has reacquired in Western Europe, a complex and uncertain relationship between liberalism, corporatism and the transformation of the character of positive government continues to add to the instability of American political theory and the institutional structures which reflect it. *See* Offe, *Attributions of Public Status to Interest Groups: Observations on the West German Case*, and Schmitter, *Interest Intermediation and Regime Governability in Contemporary Western Europe and North America*, in Organizing Interests in Western Europe 123–58 & 287–330 (S. Berger ed., New York, C.U.P., 1981).

III. The Institutional Economics of European Integration (*by* Jacques Pelkmans)*

A. Introduction

1. Purpose and Methodology

No general view on the relationship between the law and institutions of the European Community and the scope and nature of economic integration among the Ten has ever been adequately developed, either by legal scholars or economists. A review of accepted economic theories in particular, although necessary, only serves to reveal their painful insufficiency, and a careful analysis of their relevance for the European Community demonstrates the need for their rather drastic revision and extension.

This study first will provide an extensive theoretical analysis of market integration as pursued by public policy-makers. It sets forth a sequence of market integration, although it recognizes that this sequence is not mandatory and that national public decision-makers do often derogate from it. Some economic and political problems resulting from gaps and omissions in implementing or adopting the described sequence are then briefly indicated. In addition, the (political and institutional) inhibitions to going beyond market integration toward macro-economic integration are investigated.

The second part of this study will employ the theory advanced in the first part as an analytical tool for dissecting the "economic constitution" of the European Community. It argues that economic integration in the EC has been caught in a capsule of fairly precisely defined ambitions beyond which the EC cannot proceed unless extreme assumptions of union (or integrationist) loyalty are made. The elements of this capsule are set out in some detail and the conditions necessary for assuring stability (and which are necessary to prevent disintegration) are briefly discussed.

2. Definition and Economic Significance of Economic Integration

Economic integration is defined as the elimination of economic frontiers between two or more economies. An *economic frontier*, in turn, is defined as any demarcation over which mobilities of goods, services and factors of production are relatively low. On both sides of the "frontier," the determination of prices and the quality of goods, services and factors is only marginally influenced by the flows over the "frontier." There is no a priori reason for assuming that economic frontiers coincide with territorial frontiers: countries are demarcated by territorial frontiers and economies by economic frontiers, which may or may not coincide. The term "economic area" will be used to denote an area

* The author gratefully acknowledges the Publisher's permission to adapt parts of his book Market Integration in the European Community (London/The Hague/Boston, Nijhoff, 1984) for use in this section.

demarcated by economic frontiers, irrespective of territorial or political frontiers.

The fundamental significance of economic integration is that differences in prices of equivalent goods, services and factors of production be decreased to the irreducible minima arising from spatial differentiation. With the equalization of product and factor prices over the integrated "economic area," no further resource savings can be made in respect of a given production which implies that the highest possible efficiency has been achieved. Of course, there is nothing inherently "good" in removing literally every economic frontier, as there will be, at any given point in time, social or non-material reasons for imperfections in mobilities. Economic integration might even collide with cultural or religious values. However, assuming a minimum homogeneity of such values, or at least absence of fundamental value conflicts, a case can be made that, under certain conditions, economic integration improves the "welfare" of the integrating economies.

By far the most important set of economic justifications for the integration of markets is customs union theory, and its numerous extensions.[1] Of course, it should be clear that the economic theory of customs union cannot provide ready and exact answers on the quantitative effects upon trade, production and the efficiency of the use of resources, and hence on the level of national and union income over time. Nevertheless, the net efficiency gains (that translate into income increments if there are no off-setting adjustment costs) of the formation of a customs union among previously rather protectionist and not-too-large countries can be expected to be rather substantial. There are three such effects. First, there are a number of negative and positive so-called "allocative" efficiency effects (including the well-known trade creation and trade diversion effects – all of these under the specific assumption that costs per unit are either constant or increasing with output) that might well have resulted in a positive net gain for the particular tariff and country-size configuration that characterized the EC of 1958–1970. This view is confirmed by empirical work on the integration of industrial product markets in the EC. However, the "allocative" effects are not sizeable. Second, and of much greater importance, are various scale effects that imply efficiency gains that are a large multiple of the allocative effects. Third, there are reasons to expect that the much greater import competition and export opportunities in a customs union compel firms to increase their efforts to lower the costs per unit of output by removing managerial slack and luxuries and mending traditional ways of operating production, distribution, sales, marketing and administration (quite irrespective of the scale of output). This can have sizeable positive efficiency effects as well.

Other beneficial effects include the following. In a large number of industrial products, the combination of product differentiation and scale economies

[1] What is briefly summed up here is analyzed in detail in J. Pelkmans, Market Integration in the European Community (London/The Hague/Boston, Nijhoff, 1984).

will tend to heighten so-called "intra-industry specialization," a trade pattern that decreases the costs of adjustment both of labor and of firms to the new union-wide division of labor, while yielding a widening of product choice in every member state, without foregoing the scale effects (this has been observed for the EC as well). Export opportunities, particularly if based on scale economies, will engender an upward jump in physical investment (*e.g.*, buildings, machinery) as well as in road haulage and heavy transport equipment. In turn this tends to generate important multiplier effects throughout the economy, causing further augmentation of economic growth. Finally, the legally secure form of product market enlargement that a customs union represents, will have positive effects on the propensity of firms to invest in innovative activities as well as on the speed of technology diffusion, whether via imitation or via direct investment (both by firms from Member States and from outside). Direct investments over a large market space – with secure access everywhere – may also lead to a finer intra-firm division of labor over a number of plants throughout the union that is inachievable in ordinary international trade.

Of course, the extent to which these beneficial effects actually take place depends above all on the extent to which the economic frontiers in the union can in fact be removed.

Economic frontiers can be created by private and/or public agents. The process of eliminating economic frontiers has very different properties dependent on whether the "frontiers" are due to the behavior of private agents or to the rules or policy of public agents.

a) Integration by Private Agents – Market-Integration-from-Below

Private economic behavior engendering or sustaining economic frontiers may result from lethargy; from linguistic, cultural, religious or social resistance to integration; from a lack of social and physical infrastructures or a failure of communications networks (perhaps also due to natural barriers such as mountains, swamps or seas); but also from the concentration in terms of wealth and property of economic power – and of the decision-making power flowing therefrom – in certain firms or even individuals. The term *market-integration-from-below* is used to comprise all activities of private economic agents, directly or indirectly geared to supply-and-demand conditions in the entire European Community. This could refer to further price convergence of identical or similar products, to wider product choice, to wider ranges of quality, to larger spectra of tastes, to greater variation in marketing, or even to a greater spread in the location of production and the use of technology. Of course, "private" agents may be used to include public agents or publicly owned firms, at least when acting in their capacity of normal market participants reacting to price, quantity and quality signals.

b) Integration by Public Agents – Economic-Integration-from-Above

Economic frontiers also arise from the rules set by, and the behavior of, public economic agents. *Economic-integration-from-above* comprises the elimination of public economic frontiers. In the mixed economies of today this encom-

passes an enormous spectrum of activities. A useful distinction can be made between "market integration-from-above" and "macro-economic integration."

i) Market-integration-from-above

Market-integration-from-above is defined as all activities of the public economic agents of the participating economies to eliminate legal, administrative and political obstacles to mobility over the integrating economic area (the "union" or "community") and, whenever desired, to allocate and regulate jointly through common institutions. Market-integration-from-above can be negative or positive: *negative* integration denotes the removal of discrimination in national economic rules and policies under joint and authoritative surveillance; *positive* integration refers to the transfer of public market-rule-making and policy-making powers from the participating polities to the union level.[2]

ii) Macro-economic integration

Macro-economic integration comprises the transfer of responsibility for aggregate distribution and stabilization policies to the union level. By nature, it is a form of positive integration.

B. A Theory of Market-Integration-from-Above – Integrating the Public Economic Functions of Mixed Economies

1. Cooperation versus Integration – A Political Decision[3]

It is not obvious why, or to what extent, politicians in countries with mixed economies and representative government should agree to the constraining rules of a higher Treaty with respect to certain national economic policy instruments or to the transfer of parts of domestic jurisdiction to a common tier of government. Let us assume that in determining their position on economic policy politicians maximize the probability of getting (re-)elected subject to (vague) ideological constraints of the political party to which they belong. The role of politicians in economic decision-making is of special importance in Western Europe where the "electoral profile" of a politician is, to a substantial degree, determined by the positions which (s)he takes with regard to the interaction of private/public economic relations. However, the taking of such positions can only be credible if the politician can in principle claim access to a set of policy instruments perceived by voters as achieving the desired objectives. It seems reasonable to suppose that the large majority of European politi-

[2] The terms "positive" and "negative" integration were developed in J. TINBERGEN, INTERNATIONAL ECONOMIC INTEGRATION (Amsterdam, North Holland, 1954); and Pinder, *Positive Integration and Negative Integration: Some Problems of Economic Union in the E.E.C.*, 24 WORLD TODAY 88 (1968).

[3] This section draws from Pelkmans, *The Assignment of Public Functions in Economic Integration*, 21 J. C. M. STUD. 97 (1982–83).

cians and voters have rejected economic autarchy or outright conflictual international economic policies, for either (good) functional or historical reasons. The relevant options are therefore cooperation or integration.

For politicians the distinction between cooperation and integration is crucial. It is in their interest to minimize the number and confine the relevance of international policy commitments, and to maximize the number and scope of safeguards, escape clauses and loopholes in order to maintain the highest possible discretion compatible with international economic openness. Since many countries' politicians would presumably take a similar stance, the creation of international economic rules is only possible if constraining commitments are undertaken simultaneously and "free riding" is effectively contained. The stability of such economic *cooperation* can be high under special circumstances – such as hegemony – but stability would normally be under permanent threat in a world of mixed economies. The tendencies to be expected in cooperative situations include a minimal subjection to international rules and automatic domestic application, which touch upon the autonomy and discretionary capacity of domestic politicians, and a heavy reliance on continuous negotiation and conflict management which provide more room for maneuver on the pressing items in short term national policy-making.

The significance of (economic) *integration* for politicians is quite different to that of cooperation. When mixed economies integrate, a requirement is the believable and permanent *constraint* of at least some domestic policy instruments combined with the irrevocable *transfer* of one or more important elements of national jurisdiction to a common institution. This combination of stringent decreases in domestic economic autonomy makes integration in mixed economies rather demanding. Indeed, mere reliance on negative integration *without* any transfer to a common institution normally cannot be expected to be compatible with a mixed economic order. Hence, economic integration induces intense politicization, both of the initial bargaining leading to the basic integration treaty and of the ensuing implementation process. Every move in negative integration definitely reduces national options for market intervention – with exceptions being negotiable only in extreme cases and subject to common approval – while every step of positive integration carves out instruments of domestic jurisdiction which are in turn transferred to the union level. In economic cooperation one can avoid or minimize such profound politicization by making adherence by participating economies subject to ample safeguard and escape clauses, by negotiating non-mandatory agreements, and by maintaining possibilities for "opting out."

Given these assumptions the following institutional properties of integration of mixed economies can now be expected:

(1) A treaty comprising stringent commitments with respect to the *transfer* of certain economic functions to central public agents and the *constraint* of some national instruments;
(2) A minimal presence of loopholes, and of safeguard and escape clauses;
(3) Common and mandatory supervision of the escape and safeguard clauses, and possibly even central *ex ante* authorization;

(4) No possibilities for "opting out" with respect to the "core" functions transferred (although more leniency will be expected on a plethora of supplementary cooperative ventures, supporting integration but not essential for it);
(5) Unlimited duration of the commitments (the extensive subjection to common rules and common management of the union requires such a degree of political commitment and legal change that no country would be credible when insisting on an expiration date);
(6) A precise prescription of the procedures and steps in the transition period (the most sensitive issue here is the positive duty to implement either liberalization or transfer, with safeguards subject to common authorization); and
(7) Rather sophisticated modes of judicial review. A central court is more likely to be established the more ambitious the integration venture is, especially in a larger group. (An inferior substitute would be a complex web of arbiters, expert panels and administrative lawyers, possibly combined with political rather than judicial review; but, the greater the complexity and the more numerous the countries, the less practical this solution becomes.)

Going beyond economic cooperation, despite their political accountability at home, is rather daring for politicians in a mixed economy with representative government. The expected institutional properties of economic integration should be viewed in this light. They serve to prevent "free riding" and confirm by political deeds the necessary "integration loyalty" that is solemnly proclaimed in the beginning. But the analysis also indicates that politicians will view economic cooperation as an alternative to economic integration in those cases where politicization of integrative options prevents stable and credible arrangements. In the European Community this permanent tension between economic integration and cooperation plays a central role, as will be shown below.[4]

2. The Conventional Stages of Economic Integration

a) The Balassaïn Model

Given a stringent legal framework for economic integration, what will the stages of economic integration be? The question is particularly pressing if one discards the option of a "big-bang" federal solution with a full-fledged economic and monetary union, and instead, focuses on a time-sequential process of integration with only the initial stages being well-defined and firmly agreed. The gap between economic theory and practice is quite large on this point. There exists a traditional perspective on the question, still widely held by economists.[5] In part, it extends even to international economic law. It con-

[4] *See infra* § C.

[5] *See, e.g.*, D. SWANN, THE ECONOMICS OF THE COMMON MARKET (4th ed., Harmondsworth, Penguin, 1978); THE ECONOMICS OF THE EUROPEAN COMMUNITY (A. El-Agraa ed., Oxford, Allan, 1980); P. ROBSON, THE ECONOMICS OF INTERNATIONAL INTEGRATION (London, Allen & Unwin, 1980).

sists of Bela Balassa's distinction of five stages that has gained wide acceptance.[6] According to Balassa the integration process may run through:

> a free trade area, a customs union, a common market, an economic union and complete economic integration. In a free trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against non-members. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with non-member countries. A higher form of economic integration is attained in a common market where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination that was due to disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social and counter-cyclical policies and requires the setting-up of a supranational authority whose decisions are binding for the member states.[7]

b) A Critique of the Balassaïn Model – The Alleged Dichotomy of European Economic Integration

The Balassaïn presentation is useful since it hints at the complexity of the exercise in which member economies may be engaged, as well as the ultimate point of reference for the economic integration process. However, it contains a serious flaw which Balassa himself has recently formulated as follows: "These definitions have been criticized on the grounds that they conform to the principles of classical economic doctrines but do not apply to present-day market economies, which are characterized by a considerable degree of state intervention."[8] Yet, a close look at the definitions only partially confirms this statement.[9] The first three stages, the free trade area (FTA), the customs union (CU) and the common market (CM), constitute forms of market-integration-from-above. The CU can be supposed to lead to product market integration and the CM to complete market integration, including factor market integration. Thus, the point of reference is the laissez-faire economy and the concepts of stages 2 and 3 conform to conventional distinctions in the theory of international trade. The market-integration-from-above is solely negative. On the other hand, Balassa's stages 4 and 5 constitute pure forms of positive economic integration. In the fourth stage he suggests that "some degree of harmonization of national economic policies" takes place, and the final stage should result in the "unification" of macro-economic policies.[10] The extreme

[6] Balassa's categories of economic integration are set forth in B. Balassa, The Theory of Economic Integration (London, Allen & Unwin, 1962).

[7] *Id.* at 2.

[8] Balassa, *Types of Economic Integration*, in Economic Integration: Worldwide, Regional, Sectoral 17 (F. Machlup ed., London, Macmillan, 1976).

[9] *See* Pelkmans, *Economic Theories of Integration Revisited*, 18 J.C.M. Stud. 333 (1980).

[10] *See* B. Balassa, *supra* note 6, at 2.

vagueness of these definitions makes them inadequate to sharpen our insights into the course of the process. Nevertheless, it must be concluded that Balassa has taken the mixed economic order of advanced countries into account.[11] Therefore, the critique on the Balassaïn sequence should not be mis-stated: it is not the *alleged conformity* to classical economies that is objectionable in his presentation, but the presumed *dichotomy of the economic integration process.*

This dichotomy is defined as *the separation of negative* and *positive economic-integration-from-above* and makes it appear as if the first three stages of economic integration take place in a classical economic universe whereas the following two stages reflect a world of government intervention. Given that, after World War II, Western European countries have developed mixed economies, the separation in analysis of positive and negative integration can never lead to a full understanding of the integration process and may grossly misrepresent the problems associated with any single stage. A fundamental defect of the dichotomy is that it requires positive integration to *follow* negative market-integration-from-above, whereas positive market-integration-from above is a *prerequisite* for negative market-integration-from-above to take place in a mixed economic order. If it were not, the emphasis on negative market-integration-from-above would signify a definite and significant shift in the sensitive balance between public and private economic decision-making. Furthermore, the analysis of the two elements is itself also unbalanced. The *clear-cut* definitions of market integration stages and the *loose* description of the positive integration stages do not seem to guarantee a similar rigor of analysis and a parallel in-depth development. Application of the dichotomized version of the process may not only lead to a misunderstanding of economic integration, but also to serious gaps and omissions in the theory. This is borne out by the available body of analysis; there is a vast amount of literature on the theory of market integration, in contrast to a small body of theory on positive economic integration.[12]

Finally, the conformity of stages 2 and 3 to conventional distinctions in trade theory has apparently been so convenient that the theory of market integration (dominated by the customs union theory) is strongly biased toward models which postulate, in line with the standard trade theory, undistorted and flexible economies focusing on product markets having perfect competition.[13]

[11] Observe that Balassa does not expect complete commodity or factor integration to result from a CU or a CM. *See id.* at 2 ff. This interpretation is supported by Balassa, *Towards a Theory of Economic Integration*, 14 KYKLOS 1, 8 ff (1961), in which state intervention and economic integration are discussed more extensively.

[12] *See, e.g.*, P. ROBSON, *supra* note 5. *See also, e.g.*, THE ECONOMICS OF THE EUROPEAN COMMUNITY, *supra* note 5, which contains a number of chapters on positive economic integration, none of which is theoretical, but all descriptive.

[13] *See, e.g.*, P. ROBSON, *supra* note 5; THE ECONOMICS OF INTEGRATION (M. Krauss ed., London, Allen & Unwin, 1973).

There are also traces of the dichotomy in international economic law – GATT provides an example – which can be attributed to long-standing traditions in commercial diplomacy.[14] Article 24 of GATT defines the FTA and the CU largely on the basis of a heritage from an era in which government intervention was much less pervasive. Confining consideration to the CU (as the FTA is less relevant for the European Community), GATT's definition corresponds essentially to Balassa's, in that it requires that the union should comprise "substantially all" trade and should cover trade regulations "other" than tariffs, and that the "general incidence" of the common external tariff should not exceed that of previous national tariffs.[15] The latter two specifications are most unfortunate. The infinite list of present and future non-tariff barriers requires a more elaborate treatment, and the "general incidence" clause antedates the economic theory of customs union, which disproves the implicit linkage between the tariff level and the incidence of protection.[16] The proper label for the CU, as defined in GATT, is a *tariff union*. The only proviso of that term is that quotas should first be converted into "tariff equivalents," which is always possible in principle. In today's mixed economies, a pure tariff union is of limited economic significance.

Other Balassain stages are not defined in international economic law. The common market is not defined in the EEC Treaty although some major elements can be inferred from the Treaty's text and structure. An economic union is loosely defined by Balassa and one might refer to the Benelux Treaty for further glosses. However, the recurrent debates on an "Economic and Monetary Union" or a "European Union" in the European Community have shown that an operational definition does not exist. The final stage is total economic integration and this may be taken to refer to federations such as the U.S., or to unitary states such as the Netherlands. Hence, *ex definitione*, the stages cannot be found in international economic law.

The conclusion is that, both for theoretical and practical reasons, the conventional view of the stages of economic integration needs to be revised and refined, with the properties of the mixed economy taken into account. When embarking upon such a task it would be desirable to dispose of criteria for the optimal *assignment* of public economic functions to the union level of government as well as the appropriate *sequence* for their possible transfer, especially for the lower and intermediate stages. One can then introduce consideration of the national political level and establish whether and to what extent it diverges from the optimal assignment distribution, presumably due to the behavior of national politicans in their mixed economies.

[14] *See generally* J. Viner, The Customs Union Issue (New York, Carnegie Endowment for International Peace, 1950).

[15] *See* B. Balassa, *supra* note 6, at 2; and GATT art. XXIV.

[16] In short, theory shows that intra-union trade can only increase to the extent that the common external tariff protects the "new" trade. Of course, lawyers have come to recognize the point. *See, e. g.*, K. Dam, The GATT, Law and Economic Organization (Chicago, U. Chi. P., 1970).

3. On the Assignment of Economic Powers to the Union Level[17]

a) Timing and Emphasis

No compelling logic exists to support a particular sequence or timing for the member economies to limit national economic powers (negative integration) or transfer economic powers to the union level (positive integration). The member states face the formidable problem of whether to reproduce the existing national private/public economic relationships at the union level right from the beginning, or to emphasize (more) positive integration, or to rely primarily on negative integration. The primacy of negative integration is to be presumed, however. Not only is a controlled reliance on "thou-shalt-not" rules easier for politicians to accept (as adjustment costs can be lessened by the remaining domestic policy instruments while "sovereignty" is not formally touched), but also market processes in Western Europe are, of course, the prime movers of the economy, and liberalization measures would amount to a recognition of this fact. To give precedence to positive integration of economic rules and policies would be very ambitious, however, since it would require detailed agreement on many of the allocative and possibly redistributive and stabilizing functions of government in the economy. In turn, it presupposes either both an initial and a lasting convergence of numerous institutional aspects of the mixed economic order in the participating countries, or such an overriding integration loyalty that convergence can be negotiated and transformed into an effective and lasting common policy structure.

An inital reliance on negative integration will nevertheless engender feedbacks since, by itself, it *tends to alter* the private/public "mix" in the participating economies. As the national preferences for government intervention in the economy result from a long history of conflict and compromise, it may reasonably be assumed that they are deep-rooted and relatively rigid over fairly long time-spans. Therefore, the consequence of negative integration is likely to be a stronger utilization of the economic competences that are still assigned to the national, rather than the union, public agents.

Here we meet a thorny problem in integrating mixed economies: the private adjustment processes and public policy constraints engendered by negative economic integration tend to accentuate the role of national public agents in economic functions still assigned to the country level. In turn, this tends to generate resistance to further negative integration and, also, particularly to attempts of positive integration. The initial choice between a balanced reproduction of the economic order at a "higher" tier of government and negative integration is therefore one of degree. The fundamental problem of the desirable economic order for the integrating group cannot be avoided by opting for a start in "thou-shalt-not" rules unless one assumes that integration represents a higher value than the (national) economic orders.

[17] The following draws from Pelkmans, *supra* note 3.

b) Application of the Economic Theory of Federalism

The assignment problem can be studied in light of the economic theory of federalism.[18] It should be realized that this exercise is fruitful only for very advanced stages of economic integration because the economic theory of federalism is constructed as a decentralization issue for mature federations. The question presented is "the determination of the appropriate degree of decentralization for a particular government sector.... [The] answer ... requires matching public functions, including the provision of each public service, with appropriate levels of decision-making."[19] The basic point of this theory is that it is a mistake to presume that the ultimate stage of economic integration will necessarily or preferably consist of the complete centralization of all public economic functions at the union tier of government. The major conclusions of the federal economic theory ignore completely the thorny dynamics of negative and positive integration over time, which result from politicians being accountable nationally. In brief, they include that stabilization functions must be assigned to the union level, that the bulk of redistribution policies should be centralized (while emphasizing that residual local policies are severely circumscribed) and that, given free trade and factor movements over union territory, the allocation function – especially the provision of locally differentiatable public goods – can be assigned to both tiers of government.[20]

Certain underlying assumptions of the theory are unhelpful for acquiring insights into the lower and intermediate stages of economic integration, which are applicable to the European Community. Indeed, two of the theory's assignment premises ignore what are precisely the central problems of *immature* economic integration *over time*: the first premise is that currency exchange rates are irrevocably fixed; the other is that negative integration-from-above with respect to product and factor markets is complete. These assumptions are not surprising given that this theory was first developed in the U.S. and aims to find the appropriate degree of decentralization of a given federal country (such as the U.S.). In contrast, the initial and intermediate configurations in integration processes among mixed economies have complex distributions of economic competences – in product markets, services, labor, financial capital – and also distinguish several types of interventions with varying assignments. Negative integration is usually far from complete and exchange rates are not (irrevocably) fixed. The question about what economic functions ought to be assigned to the union level can be addressed only if, first, a much finer disaggregation of public economic functions is applied than the Musgravian triptych (especially in the "allocation" branch) and, second, a number of constraints are built into the model (such as variable exchange rates).

[18] For further discussion of the economic theory of federalism *see infra* text accompanying note 20; and *see supra* § II (by Thomas Heller).

[19] W. Oates, Fiscal Federalism 19 (Boston, Little Brown, 1972).

[20] For readers unfamiliar with the "triptych of public economic functions" (allocation, stabilization, distribution), *see* R. Musgrave & P. Musgrave, Public Finance, Theory and Practice (3d ed., New York, McGraw-Hill, 1980).

A number of criteria for the assignment of economic powers to the union level can be derived from the economic theory of federalism. Most well known are the externalities (also called "spill-overs") and the identified "economies of scale" (which are due to "indivisibilities" or the fixed costs of supply) of economic functions. Other criteria include political homogeneity, competition in public performance and democratic controls.[21] As shown in a working paper in the *MacDougall Report*,[22] assignment exercises with respect to a highly disaggregated set of public economic functions are possible. But a serious problem in such exercises is that the criteria, in themselves already elusive, become less operational the higher the degree of disaggregation of economic functions.

Yet, even accepting the drawbacks of this approach, we are still left without a political economy of the assignments. The economic theory of federalism makes no attempt to explain why the theoretical assignment structure differs from reality. One could say that, in adapting the assignment structure for application to integration, one might fall into the trap of extreme functionalism. Integrating mixed economies with representative governments is a political process where functionalist behavior is only rarely decisive. Functional pressures for economic assignments to a common tier of public action may in fact result in less-obliging cooperative ventures, temporary project collaboration or different types of cooperation with varying (country) membership. The outcome may well be a large fringe of weaker or stronger forms of economic cooperation, with varying degrees of effectiveness and stability and characterized by relatively mild politicization. Where political sensitivity is higher, exceptions and "opting out" will be more frequent. But the actual choice between integration and cooperation cannot be explained by making the economic case for union assignment.

Finally, the application of the economic theory of federalism to the EC is hampered also by the profound cultural and linguistic diversity in Europe. In federations not only is factor mobility not restricted in theory, but the assumed mobility of voters among the member economies introduces a competition for packages of public goods and legal obligations which severely constrains the component polities in their redistribution instruments or in a number of al-

[21] Useful references relevant to the EC include Forte, *Principles for the Assignment of Public Economic Functions in a Setting of Multi-Layer Government*, in 2 REPORT OF THE STUDY GROUP ON THE ROLE OF PUBLIC FINANCE IN EUROPEAN INTEGRATION 319 (D. MacDougall *et al.*, Brussels/Luxembourg, EC Commission, Office for Official Pubs. of the EC, 1977) [hereinafter cited as MACDOUGALL REPORT]; Oates, *Fiscal Federalism in Theory and Practice: Application to the European Community*, in 2 *id.* at 279; Dosser, *Economic Integration and Its Realization in the Public Sector*, in THE COLLABORATION OF NATIONS: A STUDY OF EUROPEAN ECONOMIC POLICY 26 (D. Dosser, D. Gowland & K. Hartley eds., Oxford, Robertson, 1982).

[22] *Working Paper: Perspectives for the Place of the European Community in the Sectoral Economic Functions of Government*, in 2 MACDOUGALL REPORT, *supra* note 21, at ch. 12.

locative interventions. By contrast, if languages and habits restrict potential factor mobility and countries successfully insulate their national labor markets by legal means, the spill-overs of divergent redistributive policies shrink virtually to zero except for indirect effects over the public budget and the overall competitiveness of the economy that work in the long run and can be cushioned by exchange rate depreciation. In Europe "voting with one's feet" will not be a serious option open to many. One implication is that, under such assumptions, the assignment of (most) redistributive policies remains at the national level. Another implication is that low potential factor mobility and the discretion to employ legal means of restricting cross-border labor-flows ties the national politician more strongly to national political solutions: it creates strong incentives to devise vote-maximizing strategies based on national redistributive instruments for a national electorate that is "trapped," as it were, in its country rather than in the union.

c) Political Conjectures

The economic theory of federalism must not merely be revised before it can be applied to (European) integration, it must be complemented by the explicit introduction of the political nature of the economic assignment. Indeed, recognizing that public economic functions have become politicized, it seems fruitful to search among the determinants of the behavior of *politicians* for a further explanation. A few conjectures will be offered.

A fundamental political reason exists for the empirically observable preference for beginning economic integration predominantly with liberalization in product markets. National politicians implicitly tend to discriminate between *"electoral politics"* and *"constituency politics"* according to their relative attractiveness. Constituency politics relate to the strategy of maximizing the number of votes by means of economic policy decisions that favor or satisfy particular pressure (interest) groups. Constituency politics are a classic determinant of policies in micro-economic spheres such as industrial, competition, agricultural, regional and trade policy. However, due to the discrete and time-consuming nature of constituency politics and the increasing complexity of persistent favoritism, the marginal political benefits of constituency politics fall rapidly. This holds true especially for government cabinets or political leaders which, unlike many *individual* members of parliament, tend to conceive of electorates as broad aggregates or, at most, as segmented in large classes or groups. The strategy of *electoral politics* is to use a few simple major issues or a recognizable program to keep or to get into power. Although these aims may sometimes imply broad reforms of allocative or distributive rules in the economy, this strategy is especially likely to attach to macro-economic policy issues such as employment, inflation and growth.

When the fundamental decision of whether to join an economic integration process is faced, the gesture of limiting the national possibilities for "constituency politics" is made much more easily than the transfer of the very means on which the possible implementation of broad programs of "electoral politics" depends. Moreover, where negative integration is achieved, the ingenuity in-

volved in finding new domestic substitutes for "forbidden" instruments of implementation should not be underestimated. However, where a particular sector is heavily regulated, the regulatory regime must be transplanted to the union level or remain essentially on the national level. If the reasons for regulation are primarily for income redistribution, the *union* regime would have to be such that *national* politicians could find sufficient room for their domestic constituency politics vis-à-vis the regulated sector. Indeed, for the union regime to be stable, national politicians must not be unduly hurt by noisy protests from the sectoral constituency. More likely than not this condition is prohibitive, and where it is to be met these sectoral constituencies will have to be "bought off," more or less permanently, by the union regulators.

Political resistance, with respect to economic policy domains susceptible to transference to the union level, may be ranked both in structural and process terms. At any given moment in time, the political loyalty to integration is not homogeneous but will differ greatly in different domains. But the resistance is subject also to change over time. The accentuation of residual policy instruments in early stages of negative integration, and the vital stake national politicians have in remaining recognizably "autonomous" militates against the naive assumption that there will be a constant political will to integrate further. It is particularly unclear whether and when politicians, in mixed economies, would be prepared to transfer macro-economic instruments to the union level as this transfer would largely destroy the (national) basis for electoral politics. With the capacity to pursue (national) constituency politics already greatly diminished, macro-economic integration would amount to a statesman-like act of self-denial. Few politicians have the courage *and* the authority to bring this off.

The assignment problem in integration processes for a group of mixed economies is, therefore, not comparable to that in mature federations. It is also different from the perspective of conventional trade theory as numerous domestic distortions, indeed entire regulated sectors, will call for early endeavors in positive policy integration. In consequence, if participants proclaim only moderate aims in economic integration, it is not clear a priori, how such an intermediate stage is to be defined; although there is a presumption of expecting at least some liberalization in product markets, the extent of the constraining commitments and the degree of complementary positive integration are largely a function of political processes.

4. The Stages of Economic Integration - A Classification

The "Musgravian triptych" of economic functions of the public sector must be further refined before the probable range of integrative ambitions – which economic functions will be allocated to the union level – can be established. A detailed classification of the stages of market integration is presented in this section for this purpose. Section 4.c examines more closely the mechanics and political implications of macro-economic integration, with special attention to irrevocable currency unification.

Table 1
Stages of Market-Integration-from-Above

stage of integration	*negative integration*		*positive integration*		
				union assignment	*function*
1. ***Pure Tariff-Union*** tariff-free intra-union trade	N. 1. N. 2.	abolition of tariffs, quotas on intra-union trade freedom of payments for intra-union trade, except financial safeguard clauses	P. 1.	common external tariff schedule	allocative
2. ***Tariff-Union-Plus*** security of customs clearance within the union	N. 3. N. 4.	abolition of autonomous customs rules limitation of safeguard, and abolition of escape, clauses for intra-union trade	P. 2. P. 3. P. 4.	common customs code common surveillance adjustment assistance	allocative allocative allocative, redistributive
3. ***Pseudo Customs Union*** free intra-union movement of products and services, except in the financial/ fiscal sphere, or free physical market access	N. 5. N. 6. N. 7. N. 8.	abolition of national non-tariff trade policy to third countries abolition of transport discrimination limitation or abolition of non-fiscal border interventions (measures with equivalent effects to tariffs or quotas; health, safety standards; technical specifications; import prohibitions due to state distributions monopolies, etc.) abolition of restrictions on private services, except banking	P. 5. P. 6. P. 7. P. 8.	common trade policy harmonization of technical (etc.) obstacles to intra-union trade parallel union instrument: union norms harmonization of laws on insurance, product liability, etc.	allocative allocative allocative allocative
4. ***Pure Customs Union*** intra-union trade without customs	N. 9.	abolition of exchange controls, etc.; minimization of financial safeguard clauses on commercial payments	P. 9. P. 10. P. 11. P. 12. P. 13.	harmonization of indirect tax systems equalization or harmonization of tax base for indirect taxation (and excises) approximation, & where appropriate, equalization of indirect tax rates (and excise duties) common surveillance common borrowing facilities, swaps	allocative allocative allocative (also redistributive) allocative, stabilization stabilization
5. ***Undistorted Product Market Integration*** approximation of customs union as in theory; requires uniformity of public influences on competitive conditions	N. 10. N. 11. N. 12. N. 13. N. 14. N. 15. N. 16.	abolition of autonomous sector regulations limitation of autonomous sector funds limitation of state distribution monopolies limitation of autonomous aid to industry limitation of autonomous regional policy abolition of discrimination in public procurement abolition of automatic deficit financing of public firms (except public utilities)	P. 14. P. 15. P. 16. P. 17. P. 18. P. 19. P. 20.	common policies for regulated sectors common sector funds common policy for public aid to industry harmonization of regional policy instruments common regional fund harmonization of public tendering procedures common competition policy toward firms	allocative, redistributive redistributive allocative, redistributive, stabilization allocative redistributive, allocative allocative allocative

Continued

Table 1 (continued)

stage of integration	*negative integration*		*positive integration*		
			union assignment		*function*
6. *Customs-Union-Plus*	N. 17.	abolition of restrictions on intra-union direct investment			
7. *Pseudo Common Market* free intra-union movement of all non-financial factors of production	N. 18.	abolition of restrictions on labor mobility; free professions; right of establishment (including abolition of discrimination in local social security eligibility)			
			P. 21.	harmonization of merger laws, bankruptcy, etc.	allocative
			P. 22.	parallel union instrument: legal incorporation as "union" firm under union statute	allocative
			P. 23.	parallel union instrument: union public firm	allocative
8. *Pure Common Market* free intra-union movement of all factors of production	N. 19.	abolition of discrimination/restrictions in banking laws	P. 24.	harmonization of banking laws	allocative, stabilization
	N. 20.	abolition of discrimination/restrictions in law on security markets (stocks, bonds, mortgages, etc.)	P. 25.	common surveillance over security markets	stabilization, allocative

a) Methodology of the Classification

Before the classification of the stages of market integration is presented this section sets forth the methodology used for deriving the classification and the assumptions which govern it.

Table 1 shows eight highly stylized stages of market integration, the lowest one being the arrangement that article 24(8) of the GATT defines as a customs union (the free trade area option is ignored but could be viewed as a stage preceding stage 1 in the Table). The analysis is focused solely on the negative and positive integration of *public* economic policy/rules with respect to market behavior, *i.e., market-integration-from-above.* It is not concerned with private barriers to market integration: for simplicity, the assumption is made that union-wide transactions of private economic agents are only inhibited or distorted by public rules or interventions.[23] Abiding by our definition of integration,[24] the Table presents a sequential removal of public economic frontiers in the union markets. Stage 8, called the pure common market, provides for a union economy in which all products markets (including services) and all financial and factor markets are free of any public obstacles along national lines, where public intervention in markets is made on the union level and where regional differentiation in public policy can arise only by common agreement. Of course, such an agreement might even take the form of a "federal" constitution, whereby powers to states are assigned for local public goods under the constraint that intra-union trade and factor mobility will not (or at least not to an appreciable extent) be influenced.[25]

The Table ignores the four main instruments of macro-economic policy, that is, monetary policy, fiscal policy, public expenditure policy and exchange rate policy. It is assumed that national governments retain these powers, but, for consistency, the governments are thought to be constrained by the requirements of negative and positive market-integration in the various stages. For example, a deficit in a national government budget is possible and can be financed by money creation, borrowing or taxes. But in the Table, additions to the money supply cannot be insulated by exchange controls (at least not past stage 4 at N. 9), borrowing cannot be accompanied by insulation of security markets (but this is only the case in stage 8) and indirect tax or excise rates cannot be raised, except pursuant to special rules or in the event of common authorization (stage 4). It is assumed, also, that there is no union tax on personal income – a true stabilization and redistribution assignment to the union level being excluded here – and that national income taxes are not distortive.[26]

[23] In other words, market-integration-from-below will be complete as soon as all public economic frontiers are removed within the union.

[24] *See supra* § A.2.

[25] In Heller's concluding section, it would represent box No. 4 assuming that the choices in Heller's matrix do not refer to macro-economic policy but only to matters of "allocation." *See infra* § IV (Table 1).

[26] It is assumed that corporate tax rates are equalized in the tax unions (stage 4).

The stages are, of course, not meant to describe a compelling sequence of integrative steps, nor should the various elements in every stage be seen as imperative. The purpose of the Table is strictly analytical: it is hoped to disentangle the intricacies of joint negative and positive market-integration for mixed economies while, at the same time, minimizing classification. This imposes stylized abstraction. The presentation serves three aims:

- In the first place, it disaggregates the conventional concepts of customs union (CU) and common market (CM) into finer classifications, making explicit the operational implications of (various degrees of) freedom of product and factor mobility. An optimal degree of disaggregation is hard to formulate as no mixed economy has a unitary and consistent policy structure. Therefore, an element of arbitrariness is unavoidable; for example, should the aggregate "industrial policy" also comprise public procurement policy, or should the latter be separately listed?
- Second, the Table serves as an aid in identifying the numerous political constraints to negative and positive market-integration among mixed economies. For any intermediate stage these constraints lead to gaps and omissions. In turn, inconsistencies or odd exceptions arise and cause inefficiencies which generate political tensions which may or may not persist. Great problems for consistent judicial review in matters of free movement of goods and distortions of competitive conditions are also caused. The importance of the political constraints cannot be over-estimated. It is here especially that the origins of the profound differences between Europe and federal economies such as Germany, Australia, the U.S. or Canada should be sought. Among mixed economies, a nicely dressed-up customs union (*à la* GATT) is only a shadow of full-fledged product market integration, while formal permission for factors to move over the union area does not equal a "common market" when a series of other conditions have not been fulfilled.
- Third, Table 1 is useful as a yardstick for analyzing the extent of negative and positive market integration in the European Community. The conventional approach, distinguishing merely a CU, a CM and "some degree of harmonization of national economic policies" is not really operational, even ignoring the dichotomy problem.

The stages have been classified from the least ambitious to complete market integration. The sequence is based on the following assumptions:

(a) It is (politically) easier to integrate product markets than factor markets;

(b) In product markets, it is (politically) easier to dismantle tariffs than non-tariff distortions (except quotas, where GATT rules already mandate removal, if not based on old safeguard clauses);

Note further that general (as opposed to sectoral) price controls are considered a matter of stabilization policy and are ignored.

(c) Among non-tariff distortions, it is (politically) easier to align non-fiscal barriers than to align indirect taxes; and
(d) In factor markets, it is (politically) easier to liberalize irrevocably real factor movements than those of money and financial assets.

These assumptions, although plausible, are not compelling as they inevitably rely on subjective judgments about national politicians' attachment to instruments. At every stage the major *additional* negative and positive integration decisions required are listed on the assumption that the previous stage is completed. This is to aid the clarity of exposition. However, in actual practice elements of "higher" stages may be tackled by the integrating group without necessarily having exhausted all requirements of the previous stages. Indeed, it would be most extraordinary if the stages were meticulously followed. The virtue of Table 1 is precisely to bring out the underlying political constraints by identifying gaps and omissions.

b) The Classification

i) Pure tariff-union

The lowest stage is a pure tariff-union, defined in article 24(8) of the GATT as a "customs union." However, if a customs union is understood to be a union where intra-union-trade does not encounter customs, the GATT requirements are grossly insufficient. If a "customs union" is to approximate the undistorted integration of product markets behind a common external tariff – as conventional customs union *theory* has it – the GATT requirements amount to just a small step. A tariff-union aims merely at *tariff-free-intra-union* trade without touching any of the many remaining obstacles or distortions (except quotas that have to be abolished as well). It goes without saying that ordinary payments for intra-union commerce have to be liberalized as well.

ii) Tariff-union-plus

Stage 2, a "tariff-union-plus," seeks to provide a *minimum security of customs clearance* for intra-union product movements by prescribing common customs procedures (such as customs valuation) and a minimization of controls (transit clearance, etc.), while limiting recourse to safeguard clauses by providing common surveillance and adjustment assistance for cases of injury due to the establishment of tariff-free trade. It is worth observing that the unambitious stages, one and two, already contain a common machinery with four elements; a common external tariff schedule, customs code, surveillance over safeguard clauses and an adjustment assistance fund.

iii) Pseudo customs union

Stage 3 takes tariff-free trade one step further to *free physical market access* in the "pseudo customs union." The major obstacles to tackle are the non-fiscal border interventions, such as health, safety or technical standards, measures (or charges) having equivalent effects to quotas (or tariffs), etc. (Table 1 at N. 7 and P. 6 and P. 7). It is important to appreciate two institutional issues for this category. One is the difference in stringency between cooperation and in-

tegration in obviating non-fiscal border interventions. The cooperative approach in GATT or OECD would typically consist in drafting "codes," to which adherence would be optional, which would contain loopholes and for which surveillance would be weak and non-mandatory. While the cooperation approach is an important form of conflict management in trade policies, it does not yield free physical market access, required under stage 3. A second point to notice is that, even under a stringent requirement alternative ways of arriving at the same result exist. Unification of standards is a drastic method but is not always attractive since it might unnecessarily suppress the desire for differentiated local public goods. Harmonization of (minimum) norms, or parallel union norms are much more satisfactory in this respect. Finally, it is important to dispose of authoritative judicial review in these technical matters, both before time-consuming harmonization is completed and after, when reinforcement of a common interpretation is essential.

Other big hurdles in stage 3 include negative integration in transport policy – a logical complement of free physical access, but cumbersome in practice, being a regulated sector – and a common trade policy. Remnants of the old quota toward third countries or the failure to unionize "voluntary export restraints" concluded on a national basis would leave hard-core pockets of national protection that compel the country in question to check the relevant *intra*-union trade on country origin to avoid trade deflection. Hence, an incomplete common trade policy can be expected to frustrate free physical access within the union.

Finally, the freedom to supply (private) services over union territory also belongs to the "pseudo customs union." Again, this liberalization presupposes extensive efforts of harmonization as many service sectors tend to be subject to stringent national rules and continuous surveillance of semi-public bodies that have substantial administrative power.

iv) Pure customs union

It is only at stage 4 that *customs become superfluous* and can be dismantled. For that purpose the pseudo customs union has to be supplemented with a tax union for products and services and with the abolition of exchange restrictions. A(n) (indirect) tax union is quite an achievement. A first step consists in the harmonization of indirect tax *systems* such as cascade, value-added and sales taxes into one type of system with comparable calculation. Its administrative and unspectacular character notwithstanding, indirect tax harmonization is a major concession for all union members and leads to much simpler border fiscal procedures, thereby reducing uncertainty about price and diminishing queuing time. A further step is the equalization or harmonization of the tax *base*, so that there is identity of exceptions, exemptions and categorization of goods subject to excise taxes, etc. Also, this step will not easily be taken because it tends to constrain national fiscal authorities in the method of raising indirect taxes. This can be of practical political importance because politicians will often prefer to employ hikes on excise duties as substitutes for an increase in income taxes since the latter can be evaded more easily. Excise duties are

typically levied on goods with inelastic demand (like petrol, cigarettes, or spirits), so that demand does not fall and the tax cannot easily be evaded. However, a union definition of the tax base would greatly limit this substitutive freedom for national tax authorities. The final step is the convergence of the national tax *rate* structures. On occasion, this could imply equalization of the rates but this is not necessary for the customs to disappear. Once the tax system and bases are comparable, the differences in tax rates on close substitutes in neighboring countries is already constrained irrespective of customs; buyers would turn in mass to the low tax country when differences become profitable. At the same time, it should be said, this is very much a "federal" perspective. In a *process* of economic integration, customs may stubbornly remain in existence *precisely* for the purpose of protecting higher indirect or excise taxes – again an accentuation of domestic economic instruments left over when other instruments have been transferred.

The attraction for reinstalling customs is very great especially since abolishing commercial and financial customs need not touch upon the duties of "frontier police" charged with matters of law and order and drug control. Therefore, only the undertaking of stringent commitments such as explicit prohibition of customs functions, can bring a "pure customs union" into existence. An interim solution is, perhaps, to install union, rather than national customs, and to "subcontract" intra-union controls to them. At any rate, the political will to set up a pure customs union has to be manifest. The Benelux example has shown that the "frontier nuisance" can be reduced to such an extent that there is no need to stop at the border.

v) Undistorted product market integration

Stage 5 aims at *"undistorted product market integration."* It is this stage which is usually – implicity – in the minds of academic economists when analyzing a customs union. In today's "mixed" economies, however, "laissez-faire" is out of the question. Hence, stage 5 has to be interpreted as an *approximate uniformity of public influences on competitive conditions.*[27] It implies that all major elements of national public policy influencing the intensity and structure of the movement of goods and services have to be constrained or abolished and replaced, supervised or complemented by union public policy. Depending on a country's political task for public economic intervention, the domain for negative and positive policy integration can become immense. Table 1 disaggregates the required negative and positive integration into seven distinct elements. The most drastic is likely to be sectoral policy integration. Sectoral policy integration is bound to be controversial and cumbersome since the traditional national sheltering of the sectors has to be abolished – causing adjustments where they are not easily accepted – while the union substitute is likely to reflect redistributive politics more than least-cost effectiveness. Regulation

[27] But this is under the constraints that there is no macro-economic integration and there are no results with respect to P. 21 through P. 25 in Table 1.

and daily policy decisions have to be common in some sense while common sector funds may be complementary to national funds.

Coordination and/or harmonization of industrial and regional policies is also necessary. If this is to be done effectively, complementary union funds will be required. To the extent that public agents directly intervene – by selling through state monopolies, by public procurement and via public firms – the intra-union discriminations which result must be eliminated. It is obvious that this can be very demanding for countries having large parts of production under public ownership. In certain cases, ideology can cause this issue to be one for electoral politics thereby precluding integration. An important element consists in the harmonization of tendering procedures (public, well-publicized and timely announcement) for public procurement. A consistent but ambitious obligation of public firms is to finance new investment and losses through the capital market, or internationally, and without public money, except for common authorization.

Finally, a common competition policy toward firms is needed to prevent the union product market from being segregated by monopolies and restrictive private business practices, or by inner circuits among national public firms.

It follows that an undistorted integration of product markets in a group of "mixed" economies is highly ambitious and will not be easily accomplished. It is also anything but purely "economic." Various adjustment processes will give rise to a number of redistributive wrangles in the transition period, while fundamental ideological disputes among parties and among countries may arise even after the transition to stage 5. Both will profoundly politicize the process of negative and positive integration involved. Domestic politicians could find it attractive to jump on the bandwagon of spreading unwillingness since completion of stage 5 will make it much more difficult for them to accentuate their individual "profile." After all, many interventionist measures or discrete and piecemeal forms of aid are no longer under national control.

vi) Customs-union-plus

Stage 6, the "customs-union-plus," incorporates unhampered intra-union direct investments. In today's world economy, where direct investments penetrate virtually every country, although not always unhampered, this is but a marginal achievement if "undistorted product market integration" were first achieved. But if distortions remain important under trade integration, direct investment may substitute, in part, for trade that cannot now take place. Direct investment can also be a complement – rather than a substitute – of trade, when proximity to customers demands local presence or in case it is profitable to allocate the respective intermediate fabrication stages up to the final product in different countries of the union. Such integrated production within (multinational) firms necessarily implies a first set of direct investment flows, and a later multiplication of trade flows in the union. The presumption is that intra-firm unionwide integration of production is facilitated, the more the elements of stages 3, 4 and 5 are dealt with by the union. Conversely, widespread intra-union direct investment might well tend to constrain disintegrative ten-

dencies on the public policy level and might even generate pressures to complete previous stages in the very long-run.

vii) Pseudo common market

Stage 7 is the "pseudo common market," aiming at the *free movement of all non-financial factors of production.* This would imply the abolition of mobility restrictions on labor – in turn, implying negotiations on diploma recognition – and of members of free professions (which are often nationally cartellized, with public authorization) and abolition of restrictions on the right of establishment. If this is done in a substantive rather than a purely formal way, a union labor market can be expected to arise and competition among retailers and among distributors may increase. But there are at least two provisos that undermine these expectations: the degree of xenophobia must be negligible and there should be no language barrier(s). Under recessionary circumstances, a third caveat must be added: unemployment registration (hence, the eligibility for vacancies) and unemployment allowances should not discriminate between nationals so that *unemployed* workers as well can be mobile throughout the union. A union labor market can only arise if these three conditions are fulfilled and the liberalization is not purely formal. The third condition, free movement of unemployed labor, has redistributive and stabilizational aspects. Without some major advancement in macro-economic integration the prospect of it being fulfilled are dim. In the absence of supporting macro-economic integration, non-discrimination will only relate to *paid* labor and will merely assure equal local treatment with respect to social security.

A further element of the pseudo common market is the creation of minimum conditions for business integration, *i. e.*, business links, such as mergers, across frontiers among initially independent firms. This will require harmonization of business laws, including the intricacies of liquidation. Parallel union legislation might include provisions regarding the incorporation of firms under a union statute and union public firms.

Under stage 7 a "common market," in the economic sense, will not materialize and there is every possibility that the exercise will remain stuck in shallow legality. The "liberalization" would probably have to cut deep in the social laws of every country. Material barriers to the development of the "pure common market" would be the "closed shop" required by national labor unions, "nationally recognized" diplomas or other local educational certifications, or particularized requirements for local apprenticeships. Other barriers may relate to pension laws, housing policies (a serious bottleneck in several European countries) or labor contracts. The simultaneous fulfillment of the three conditions, described above, for the establishment of a pseudo common market cannot be assumed a priori. Moreover, conditions for entrepreneurs to achieve access to financial capital and credit will not be uniform and exchange rates will not be fixed. Thus psychological and other barriers relating to risk which affect the mobility of wage earners and small business may be overcome only if wage differentials are excessively large relative to present income.

viii) Pure common market

Stage 8 is the "pure common market," that is, product market integration plus *free movement of all factors of production.* Assuming that the possibilities under the pseudo common market are exhausted, the two major additions would be harmonization of banking laws, enabling union banking in some form with a union-wide interbank money and loan market, as well as the liberalization of securities markets (stocks, bonds, Treasury bills, mortgages, etc.), engendering a union capital market. The pure CM is a union without public economic frontiers (except for macro-economic policy that is now severely constrained).

Although the pure common market may be theoretically envisaged, it would constrain the operation of domestic stabilization and redistribution policies so much that its realization seems to be entirely dependent on developments in macro-economic integration.

This is not to say that there are no important issues pertaining to the allocation function of union public agents. Union banking requires harmonized (if not uniform) norms for bank solvency, protection of clients' deposits and water-tight rules for "lender of the last resort" functions by the union. In addition, if the union market for banking services is to be undistorted, even the monetary supervision (on banks' liquidity, etc.) would have to be harmonized (or uniform?). The latter would greatly limit the autonomous implementation of national monetary and (especially) credit policy.

Also, at earlier stages, considerations of stabilization policy are of some importance already for the abolition of exchange controls and the minimization of safeguard clauses to reintroduce them (stage 4, pure customs union), as well as for a common industrial policy, giving the invariably great weight of employment issues involved (stage 5, undistorted product market integration).

But the implications of a pure CM for stabilization policy are of an entirely different character. Autonomous money supply or interest rate policies would be impossible as money and short-term financial assets would flow in or out as soon as the interest differential with neighboring economies became smaller or larger than the risk premium for expected exchange rate changes. If exchange rates are assumed (by private economic agents) to be stable over a given period intra-union nominal interest rates could hardly differ. Autonomous budgetary deficits are possible but will lead immediately (perhaps even anticipatorily, after the announcement of budget outlines) to exchange rate or interest rate reactions, more or less neutralizing the desired expansionary effects. If the deficits are financed by money creation, this is likely to be offset by financial capital outflows, set in motion by a fear for later exchange rate losses. If the deficits are financed by public borrowing in the (union) capital market this will cause a rise in the (chain of interdependent) interest rates, making it more difficult for domestic firms to borrow *and* making borrowing more costly in other union countries (both for public and private purposes).

Exchange rate policy becomes next to impossible. If it is attempted via interest rate policies, it might temporarily succeed but at the risk of great volatili-

ty of the exchange rate whenever short term capital moves out again, for whatever reason. If it is attempted by interventions on the foreign exchange market, they would be swamped if underlying conditions would not justify the initial rate.

The conclusion is that, although macro-economic "harmony" is possible temporarily and by chance, stage 8 could only be full-fledged *and permanent* if commitments with respect to stabilization were firm and, to be credible, embedded in extensive and in part mandatory coordination as well as (irrevocable) unification of some instruments. Since direct taxation and social security contributions constitute a central element in these matters, certain major taxes will have to be on uniform footing (including progression). Hence, countries will also be severely constrained in autonomous methods of "invisible" redistribution through taxes and social security payments. Some typically local redistribution may still be possible (perhaps via property taxes) but even there mobility of private agents may impose constraints.[28]

c) Inhibitions About Macro-Economic Integration – The Case for Currency Unification

Table 1 suggests that the political economy of integration-from-above sustains quite well a separation of integration of allocative policies from that of stabilization policies, up to and inclusive of the customs-union-plus (stage 6). One exception is the abolition of exchange controls and minimization of financial safeguards (N. 9), but that need not be serious as exchange rates are still adjustable. Another is common public aid to industry (P. 16). In this case the redistributive effects are likely to swamp both allocative and stabilization aspects, which is another way of saying that it is really constituency politics on the union level (with package deals or log-rolling) rather than electoral politics that is at stake.

Beyond stage 6 there is a definite qualitative jump. If it is appropriate to assume that the political resistance to a transfer of stabilization and aggregate redistributive policies is significantly greater than that to a transfer of allocative policies, it is doubtful whether stage 7 will be completed or achieved other than in a formal way, while stage 8 cannot exist by itself. If stage 8 were indeed ever to be reached, it would be unstable, with one of two courses likely: either there would be a return to a partial implementation of stage 7, with, at the same time, prior achievements (such as N. 9, for example) being reversed; or, stage 8 would be tied to accomplishments in macro-economic integration. In fact, completion of stage 7 is already likely to be tied to a certain progress in macro-economic integration. An example would be a *union* surtax for a union Unemployment Fund as a condition for a truly free union labor market.

[28] The reader is reminded once again that the additive presentation of stages is an analytical device. The stylized sequence should not lead one to think that even stage 6 would be achieved normally without gaps and omissions. This is an empirical political question, although it is one, of course, with important economic consequences.

But there is a more general reason for the connection between ever increasing market-integration-from-above and the question of whether or not to assign macro-economic competences to the union. The more public economic frontiers in the union are abolished, the more it becomes increasingly artificial to believe that the exchange rate regime would be of no concern to economic agents. Discrete adjustments of exchange rates can have disruptive effects on trade and factor flows. If repeated exchange rate changes prove hard to anticipate, they will exercise a deterrent effect on intra-union trade and factor flows. Furthermore, a number of border interventions, such as tariffs, quota and exchange controls, amount, in effect, to partial and disguised exchange rate changes via price distortions or rationing. There is little credibility to engaging in far-reaching negative integration of such border interventions if their aggregate substitute is not touched upon. The absence of currency unification permanently endangers the accomplishments in market integration.

It is, therefore, of great importance to investigate whether there is a case for currency unification, or perhaps one against national autonomy in exchange rate policy for countries committed to market integration. The literature on this question is enormous and a survey is outside the scope of this essay.[29]

One conclusion is that currency integration has to be placed rather late in the economic integration process. Put differently, the time profile of benefits and costs seems to require a strong political-will assumption, perhaps in the form of hegemony or otherwise, in order to achieve stages as advanced as 7 or even 8 that would tend to reduce adjustment costs over time. With stages 7 or 8 firmly in place, the transition to currency unification would entail a more favorable cost/benefit ratio.

National politicians, however, may perceive a certain rise in unemployment as the "cost" of currency unification, since they might be forced to embark upon austerity policies, causing unemployment, rather than resort to devaluation. The higher inflation is and the better established inflationary expectations are in the minds of economic agents, the less interesting this argument becomes. It is by now widely accepted that the more perfectly inflation is anticipated, the less likely it is that exchange rate changes have any permanent effect upon employment though they may uphold or help increase inflation. Hence, the employment-costs argument against currency integration vanishes. Moreover attempts to peg exchange rates in the high inflation countries may be positively welcomed as one means to reduce inflationary expectations.

Nevertheless, one should not jump to the conclusion that this amounts to a case for currency unification. What it boils down to is a case for exchange rate *stability*, in other words, avoidance of vicious circles of (more) inflation and (larger) depreciations. Some flexibility of exchange rates over time might still be welcomed, especially if domestic politicians in member states have to

[29] *See, e.g.*, P. Allen & P. Kenen, Asset Markets, Exchange Rates and Economic Integration (Cambridge, C. U. P., 1980) (and the many references cited therein); P. Robson, *supra* note 5 (and the references cited therein).

respond to very different types of socio-economic pressures. It may then be politically rational to search for limited currency commitments at the union level – constraining domestic inflationary pressures – while enjoying some policy discretion in the national economy, that suffices to sharpen a cabinet's profile in the eyes of voters. The further jump from currency stability to currency unification seems politically unattractive and economically trivial.

The trouble is that this leads to a circular argument about the *transition* to currency integration. If national politicians (and central bankers) wish to safeguard domestic macro-economic policy autonomy – given electoral politics and the domestic characteristics of socio-political pressures – negative integration will not, indeed *cannot*, extend to the highest stages of market integration. At the same time, however, this is likely to imply differential inflation over time, and divergent mixtures of fiscal and monetary policy, worsening the cost/benefit ratio for currency integration later. This fundamental contradiction is the mirror-image of the instability of the pure common market noted before. In general, one cannot expect to pursue negative integration up to the pure common market, separate from major steps in macro-economic integration. The genuine dilemma is between a customs-union-plus (with perhaps something of a pseudo common market) and a *viable* currency union.

The option of a viable currency union cannot be understood without discussing in detail its ramifications both in market integration and in macro-economic integration. Although the EC does not have any of the relevant competences, a brief digression on the intricacies of macro-economic integration is useful for understanding the qualitative jump involved in shifting from a customs-union-plus to a viable currency union. The elements of the triad that cannot but abstractly persist in isolation are the following:

(i) *Currency unification*: permanent and irrevocable fixity of exchange rates, supplemented by unlimited credit arrangements, common rules for intervention in exchange markets (or central intervention by a common agency) and pooled exchange reserves. Legally, this could be done by declaring currencies of all member states legal tender in every member country *at a given rate*, guaranteed by the central banks.

(ii) *Money and capital market integration*: complete liberalization (negative integration), harmonization of domestic laws for credit and banking and centralization of the "lender of the last resort" function vis-à-vis private union banks.

(iii) *Macro-economic policy integration*: a shift of the power to create money to union institutions, mandatory forms of coordination about the *way* of financing national budget deficits (both among countries, and between countries and the central institution, that could also engage in fiscal/budgetary policy) and centralization of the determination of the *size* of the union's public borrowing requirement and its *composition* country-wise; this is likely to imply direct union taxes and (at least a basic) union social security system.

The question of sub-optimality of any single arrangement will in reality trans-

late into *instability*, with possibly great damage to integration loyalty, so great that a second attempt might have to overcome a much higher threshold of political resistance.

It is fair to say that the *transition* to a *viable* monetary union is still poorly understood. Controversies about the alleged effects of monetary versus fiscal policies, and about those of exchange rate policies have played a more important role than the possible views on the transition stages. There are also *different routes* to the commonly agreed final stage. Thus, it makes a great difference whether one believes in the gradual tightening of coordination of macro-economic policies; in the commitment to forego *unilateral* exchange rate changes; in a parallel role of union monetary or spending powers at an early stage; in a parallel role of a union currency for intervention; in a parallel role of union debt instruments and taxes. In addition, it is exceedingly difficult to prescribe theoretically what the nature of the union's capital market ought to be. Should banks be the main suppliers for long-run capital (debt financing) or should the "open" market be preferred (equity financing, or bonds)? Should there be future markets in financial assets?

5. Encapsulation and Stability

The preceding discussion suggests important differences in the domestic political resistances to negative and/or positive integration in the various economic domains. On the basis of a scale of increasing resistance, one may characterize the extent of economic integration by its political ambition.

Least ambitious is likely to be the ordinary free trade area, with the classic customs union (in fact, a "tariff union") being only marginally more ambitious. In non-financial factor market integration, the full liberalization of direct investments would also be considered a marginal step toward integration.

Ambition increases whenever other border interventions are systematically tackled. Not only do border interventions entail greater involvement, but they also may lead to substantial changes in domestic laws and specifications and be politically sensitive to certain constituencies. This holds even more true when domestic interventions come under a common regime or under a system of concurrent competences. Given the central place which rules and policies on domestic interventions occupy in the post-War domestic politics of every Western European country, it is highly improbable that an approximate uniformity of public influences on competitive conditions (even if only in non-financial markets) can be accomplished. This does not imply that no harmonization would take place, that a court would not be able to speak out on certain excesses or that certain common funds would not be instrumental in establishing concurrent competences at the two tiers. Only under exteme "integrationist" assumptions can it be expected, however, that the domestic politicians would permit the core of the mixed economy to be organized outside their electoral reach. In many other configurations that can be envisaged, the constraints accepted or the transfers agreed to will be meticulously circumscribed so as to leave sufficient discretion or substitutive instruments for domestic in-

terventions – whether by rule-making, financial aid or procurement – to retain their electoral or constituency politics role.

Labor market integration, that is likely to be resisted or conducted only formally, is another area where sensitivity can be expected to be profound.

In financial markets progress will not come easily from "above." In fact, for practical purposes it is indistinguishable from macro-economic integration. There are political and economic reasons for favoring a structural emphasis on exchange rate stability, although the short-term politics of weak cabinets may occasionally overwhelm them. The latter possibility constitutes an incentive to "organize" exchange rate stability through *cooperation* without, of course, imposing too many constraints on electoral politics.

The range of integrative ambition in a group of mixed economies is therefore likely to be circumscribed. The combination of substantial (negative) integration of border interventions, modest advances in matters of domestic distortions and free intra-union direct investment is the expected picture. This implies that integration processes of mixed economies are likely to become "encapsulated." There is a high probability that a "capsule" consisting of elements of the first six stages of Table 1 can be defined in an initial "*loi cadre.*" Thus, economic integration-from-above is likely to remain encapsulated in a *customs-union-plus with adjustable exchange rates.* Whether a domain will be subject to *integration* within the capsule or to mere *cooperation* outside the capsule depends primarily on domestic political resistance (which itself is likely to be a positive function of the intensity of economic integration over time). Beyond this "capsule" progress is not to be expected unless extreme integration loyalty exists. Within the "capsule," of course, there is ample scope for marginal progress and refinements.

The stability of the integration capsule depends on three institutional responses to domestic forces that, driven by the politics of the mixed economy, could undermine the achieved degree of economic integration. The first is a response to the suddenly greater exposure to the union economy during the transition period. The initial willingness to accept profound structural changes hinges upon firm commitments that access to the union market will be guaranteed. Investments in the export sectors and an inter-sectoral shift of factors are greatly facilitated by business confidence in legal security. Ordinary international economic cooperation fails to provide such legal security. For the politician in one country, the more far-reaching the exposure to the union economy, the firmer other countries' commitments are required to be. This is especially so since, in comparison with worldwide economic cooperation, the weight of bilateral economic intercourse per capita is likely to be much larger within the union than without. Hence, the mutual interest is also much greater in the union and approaches something of an unpayable ransom that justifies strict rules for all participants. In other words, for the integration of mixed economies to be stable, the initial commitments must be credibly firm with few loopholes or escape clauses and must contain common, mandatory supervision as well as strict time-sequential prescriptions for the transition period, since the then structural economic change may fuel political resistance.

The second condition for stability is an appropriate response to the dangers of reversibility. Even after the transition period the achieved exposure to the union economy causes *continuous* pressure for structural economic change, *inter alia* among various export sectors and for import competing sectors. A possibly effective response is an authoritative court that has extensive powers of judicial review. There are a number of legal techniques that tend to increase the firmness of commitments (such as union laws that have direct effect on all legal persons, bypassing the national legislatures) and which in turn strengthen the authority of a common court so that it can issue verdicts with respect to cases under such laws. Judicial review will largely de-politicize disputes over integrative achievements. Such de-politicization is very important where a group of mixed economies seeks to form one economy. A stronger court could play a role in the interpretation of safeguard clauses and their supervision, and could help also to de-politicize the common supervision of these sensitive matters. An effective court, working within a union legal order and one that is well-entrenched in the national legal orders, can be a powerful stabilizer of economic integration.

The substitution of political discretion by judical review over economic integration establishes important principles of the rule of law over the rule of politics or the rule of bureaucracy. Over time, a court will attempt to realize a coherent case law which is likely to remove inconsistencies while providing interpretations of vague clauses in the light of preceding judgments. In doing so, the court not only helps in "filling" the capsule but it also helps in hardening its shell; political discretion in those matters of economic integration where the court feels competent and is given the chance to speak, will decrease.

The curious combination of integration and cooperation by which mixed economies are attracted is the third condition of stability. The notion that there is an inescapable "logic" to complete economic integration is overly simplistic as it ignores the fact that politicians will often attempt to collaborate on functional grounds without giving up – and certainly not giving up "irrevocably" – the very instruments that they need for keeping (and making) electoral promises. The point is related to the economic order. Among more classic, least-interventionist economies, cooperative arrangements can be stable and credible as there is only a minimal probability that economic stabilization or a sectoral decline would lead to large-scale political intervention. But among mixed economies the same functional outcome, resulting from mere cooperation in a classic world, requires extensive organization through rules and institutions before the venture is credible. Because the political "logic" of domestic discretion imposes a presumption of *cooperation*, it will be exceptionally difficult to push for *integration* in each and every domain where spillovers from achieved economic integration can be felt.

The integration "capsule," while hardening its shell over time, will be surrounded by a large fringe of cooperative ventures with varying degrees of intensity and of legal or financial commitment. Rather than considering this a failure, endangering integration, the option of economic cooperation, complementing a "capsule" of economic integration, can be seen as a powerful stabil-

izing device. It supports the achieved integration without constraining unwilling domestic political forces so much that ruptures occur, endangering both new and old achievements. Enlarging the cooperative fringe around the "capsule" can, therefore, be welcomed as the avoidance of unnecessary tensions precisely in domains where, apparently, political sensitivity is too high, while at the same time constituting a recognition by all participants that domestic economic autonomy has become circumscribed. It is only if the growth in the cooperative fringe is a result of the *integrative* commitments being watered down to cooperative ones – a shrinkage of the "capsule" – that this device would cease to act as a stabilizer. The other two stability conditions should be instrumental in preventing this from happening.

The conclusion is that economic integration activity is likely to remain "encapsulated" in a stable but limited range of economic assignments to the union level: a customs-union-plus with adjustable exchange rates. It is also probable that the union assignments for the customs-union-plus will remain incomplete.

C. Economic Assignment to the European Community

The analytical framework for studying the integration of mixed economies developed in the last section will now be applied to the European Community. A comprehensive view of the distribution of economic assignments between the Member State and Community tiers of government pursuant to the EEC Treaty and later developments of Community law should be derived. In addition, this section will shed some light on the scope for progress in economic integration-from-above and on the possible erosion of Community achievements. A further reason for studying economic assignments in some detail consists in the stability properties of rules and policies of the Community system. For market participants it is important to know what elements of the new environment are relatively stable and, hence, can impart a legitimate sense of security to intra-union economic transactions, and what elements are transient, or essentially cooperative and unenforceable, or indeed merely consultative.

1. The Foundations of the EEC Treaty

a) Objectives

The European Community pursues a series of objectives. Article 2 of the EEC Treaty mentions the following five:[30]

[30] Vague aims, rather than explicit objectives, can be inferred from the preamble to the EEC Treaty, in which the Member States are "desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade" and display good intentions for development cooperation. These statements were meant to abate the fears that an "inward looking" economic bloc would develop.

Observe that the objective of a "reasonable" income distribution in the factoral or personal sense is entirely neglected in EEC Treaty art. 2, although for farmers it is implicit in art. 39(1)(b).

(i) harmonious development of economic activities
(ii) continuous and balanced expansion
(iii) increase in stability
(iv) accelerated raising of the standard of living
(v) closer relations between the States belonging to it.

The fifth objective is a political objective, expressing integration loyalty. For analytical purposes it frequently may be sufficient to assume a steadfast political will to integrate, and merely deduce the costs and benefits. This has been the traditional approach in customs union theory. In the case of the EC, however, one might perceive a functional link between economic integration and political will, at least in the constitutional phase, expecting the political will to integrate to increase in response to pressures arising from the achieved degree of integration.[31] A fundamental flaw in this (neo-)functionalist view is the assumption that the political imperatives of *national* systems of representative government can be ignored or minimized at best. This is correct neither for foreign policy nor defense, nor for certain economic rules or policies.

The other four are economic objectives although their wording leaves much to be desired. For example, there is little difference between continuous expansion (of production, presumably) and an accelerated raising of the standard of living, except when the possibility to concentrate output growth in the investment goods sector for a long period of time exists or where there are externalities. The first objective should be interpreted as harmonious in the *inter-regional* sense[32] despite the fact that dissonances may also be perceived in the *international* sense – especially under pegged exchange rates – and in a *functional* sense (with trade-offs among pairs of objectives in overall economic policy). Given the regional interpretation, the Treaty provisions on regional policy coordination seem grossly insufficient and weak. Even the Preamble acknowledges regional economic disparities. The increase in stability (objective three) has to be read in the usual macro-economic sense. But this is only clear when one takes article 104 into consideration, explicitly pointing to the (obligatory) policies for external balance, a high level of employment and price stability. It is remarkable, to say the least, that article 2 was not formulated more explicitly with regard to the core objectives of economic policy. One might be tempted to conclude that what are really set out in article 2 are the four objectives of the "magic square": full employment, external balance, price stability and economic growth. The problem with this interpretation is,

[31] The idea that economic integration should be seen as a vehicle for (further) political integration is, of course, clear from the *Schuman Declaration*, laying the foundation for the ECSC Treaty (DECLARATION OF MAY 9, 1950 of FRENCH FOREIGN MINISTER ROBERT SCHUMAN (Brussels, EC Commission, 1970)), and the *Spaak Report* of 1956 laying the foundation for the EEC Treaty (*see infra* note 109).

[32] *See* P. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES AFTER THE ACCESSION OF THE NEW MEMBER STATES 50 (London, Sweet & Maxwell, 1973).

as will be shown, that the instruments for such an overall macro-economic policy have been only marginally transferred to the Community level.

The five objectives are to be achieved by two very general means: "by establishing a common market and progressively approximating the economic policies of Member States" (article 2). These two general means are specified into eleven instruments (in article 3), some of which lump together a series of measures with a distinct economic nature. For instance, article 3(c) covers "the abolition ... of obstacles to freedom of movement for persons, services and capital." All instruments are then developed into legal rules in articles scattered throughout the Treaty.

b) Two Peculiar Institutional Properties of the EC and Their Economic Effects

Before discussing the material economic assignments inherent in the Treaty, two institutional properties have to be briefly emphasized because they are distinct from those in unitary or federal states as well as from those in ordinary international economic relations.

i) The Community as a "legal order"

The first characteristic relates to the existence of Community law *as a legal order* in its own right: Community law is independent and a source separate from international or national law. The Community order is also of unlimited duration.[33] These properties accord well with those required for the analytical distinction between integration and cooperation, which were developed above.[34] They serve to stabilize the realized economic-integration-from-above, the so-called "*acquis Communautaire.*" In turn this should be expected to exert a positive influence on market integration-from-below. The fundamental *economic* significance of the Community's legal order is that it greatly reduces risk and uncertainty with respect to intra-Community economic transactions in so far as Community law applies to them. The inhibitions on Member States not to interfere with the application of Community law are likely to be high indeed, since they know that such interference would touch upon the basic principle of a Community legal order.[35] All things being equal,

[33] In contrast to the EEC and Euratom Treaties, the ECSC is limited to 50 years duration. *See* ECSC Treaty art. 97. There seems to be fairly general agreement among lawyers that no right of unilateral withdrawal can be implied in any of the Treaties. *See* J. Weiler, Supranational Law and the Supranational System: Legal Structure and Political Process in the European Community 173 ff (Ph. D. thesis, Florence, EUI, 1982) for a juxtaposition of the political and legal arguments about withdrawal. Although Weiler does not deny the existence of a political option of withdrawal – since there is no EC federal police force or army – he argues that there is a de facto constraint against doing so which stems from economic, legal and political reasons.

[34] *See supra* § B.1.

[35] For example, art. 5 states that Member States "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty," while art. 7 prohibits discrimination on grounds of nationality. These provisions would be meaningless if national law were to have precedence over Community law.

the Community's legal order creates a stable, low risk environment for intra-Community economic intercourse. This would seem to be of special relevance to international (intra-EC) direct investment and the resulting international production, to trading agencies, to professional workers and wage-earners who work in other Member States, as well as to certain services. Even more important, intra-EC trade compares favorably with trade falling under GATT arrangements. GATT has a weak complaint procedure, which is heavily politicized because it lacks an independent court. Although collective sanctions are possible in principle,[36] such retaliation merely serves as an ultimate weapon in case of flagrant violations of the GATT.

In contrast, the EC has a Court of Justice and any legal or natural person,[37] the EC Council or Commission[38] or any Member State[39] can bring matters before the Court in a great number of cases. It is also important to note that the Commission – an independent, non-national body – is under the duty to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied," a prerogative that is never given to secretariats of international organizations under international law.[40] The objective of this unique right (supplemented by the procedure to bring matters before the Court of Justice, *ex* article 169) is explicitly that of fostering market integration, or, in Treaty language, "to ensure the proper functioning and development of the common market."[41] A further crucial point to notice is that although the Community has only persuasive legal means to enforce compliance this does not mean that the system is powerless and without authority. The Community's system of judicial review is enmeshed in national systems of judicial review with all their means of enforcement, authority and national legitimacy.[42]

A serious weakness, especially relevant to market integration-from-below, is the practical inappropriateness of article 169 for relatively "small" violations of Community law, particularly insofar as they relate to individual firms or persons. In case legal obligations are not of direct and individual concern or do not produce a "direct effect," individuals have no legal recourse to the Community's Court of Justice. The frequently used "directive" (where Member State rules with respect to a commonly defined, legal objective will differ) is a major cause of numerous small divergences in national laws pertaining to market integration-from-above, rendering market integration-from-below

[36] *See* GATT art. XXIII.

[37] EEC Treaty art. 173, para. 2. *See also* EEC Treaty art. 177. *See generally* Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *infra* this vol., Bk. 2.

[38] EEC Treaty arts. 169, 173 (Commission); art. 173 (Council).

[39] EEC Treaty arts. 170, 173.

[40] EEC Treaty art. 155.

[41] *Id.*

[42] *See generally* H. Schermers, Judicial Protection in the European Communities (2d ed., Deventer, Kluwer, 1979); J. Weiler, *supra* note 33, at 4.

more difficult. Since directives generally have no direct effect (with some rare exceptions), the *extent* of the hindrance to market integration-from-below is not easily made subject to Community judicial review. This is not only a matter of inadequate "access-to-justice," it is a basic economic issue of integration processes. Of course it is true that, where public goods are differentiatable along national lines, the imposition of Community uniformity entails "welfare" costs. But the search for differentiation should not be a pretext for disguised national protection, a condition that calls for effective judicial review based on easy complaint procedures for individuals. The EC system goes some way in providing this via the national courts, with provision for a preliminary ruling by the European Court of Justice pursuant to article 177, but a number of inadequacies remain.[43]

Recently, non-compliance with EEC directives and other secondary legislation has emerged as an increasingly important issue in Community law. This can hardly be surprising given the subtle checks and balances in the Community system of judicial (and sometimes political) review, the relatively large number of national legal systems that have to be linked in some sense and the different interests that inevitably are touched upon. For our purposes, taking a more global view, it is still justifiable to state that the legal authority of the Court has been challenged only occasionally and in exceptional circumstances.[44]

ii) Strategic behavior – The "unanimity" requirement for "vital national interests"

The second important characteristic of the EC system relevant in this context is the subjection of the *procedure* of decision-making in the Council of Ministers on all *major* issues to a requirement of unanimity. This practice constitutes a violation of the Treaty, which prescribes qualified majority voting in a number of explicitly mentioned cases after the transitional period (that is, after 1969). Since the Luxembourg Accords of 1966 – ending a conflict between France and the EC, during which France practised an "empty chair" policy – every Member State may declare that a particular issue touches upon a "vital national interest" and hence impose unanimity. Of course, it is politically naïve to believe that a voluntarist process of economic integration could imply decisions by majority voting that impose changes going against the *vital* national interests of a Member State. In this sense the Luxembourg compromise is undoubtedly shared by all countries of the Community. Indeed, the Treaty imposes unanimity in several instances of major importance, including Treaty

[43] *See* Cappelletti & Golay, *supra* note 37, at nn.208–11 and 255–77; and Gaja, Hay & Rotunda, *Instruments for Legal Integration in the European Community - A Review, infra* this vol., Bk. 2, at nn.46–58. *Also see generally* Jacobs & Karst, *The "Federal" Legal Order: The USA and Europe Compared - A Juridical Perspective, supra* this book.

[44] *See* J. Weiler, *supra* note 33, at ch. 10. Weiler includes an interesting legal and statistical analysis in this chapter.

revision. What is problematic since 1966, is that signatories of the Treaty have, in effect, regained the discretion to determine whether an issue is politically (too) sensitive for all cases where the Treaty legally prescribes submission to majority voting.

Among mixed economies with representative government this retrogression represents a significant obstacle for change in the Community. Assuming that vested interests will frequently be able to present the issue as a *vital* national interest in some political sense, the economic costs of such an extremely cumbersome procedure can be very high. It also creates a presumption in favor of a low redistributive capacity of visible transfers as this would easily invite a veto from a net-paying Member State. Inefficiencies may also be created or sustained because "package deals" – used to "buy off" the anxieties of the unwilling Member States – contain political "sweeteners" that may prove hard to undo later.

The limits of the Luxembourg compromise are not entirely clear. Declaring that a certain issue is vital is an accepted practice in the EC for every Member State. The purpose is rarely to block decision-making entirely, but rather to achieve better "package deals" or less disadvantageous redistributive effects. Permanent obstruction by one Member State only is not easily accepted for matters falling under accepted Community competence. The landmark-case is the one-time return to majority voting with respect to the agricultural intervention prices for 1982. On 18 May 1982, British obstruction to those prices – for reasons having to do with the EC budget, not with the agricultural prices per se – was overridden by seven Member States with two abstaining. The British defeat shows that every Member State's stake in economic integration within the EC sets a limit to adventurous politicization of decisions that unduly increase uncertainty in market integration. It does not, however, do away with the Luxembourg compromise; it merely constrains it to a faithful interpretation of a vital national interest at issue.[45]

c) Encapsulated Assignments: A Sketch

It is far from easy to obtain a reading of the assignment of public economic functions and competences from the Treaty itself. The objectives are ill-defined and the relation between the instruments in article 3 and the objectives is anything but clear. Certainly the EC is not a unitary state where lower-tier economic functions are merely delegated from higher-tier economic functions. Neither is it a federation. On the other hand, the transfer of national jurisdiction in specific economic domains to the Community level renders the EC distinct from ordinary international economic organizations such as the GATT, the OECD or the IMF. The Community is in some sense *pre-federal* – as a bird's eye view readily shows.

The Treaty does not assign economic *stabilization* functions to the Community level. None of the instruments and institutions required for Community

[45] *See, e.g.*, Editorial Comment, *The Vote on the Agricultural Prices: A New Departure?*, 19 C.M.L. Rev. 371 (1982).

stabilization policy are foreseen in the Treaty, whether it be a single currency, one central bank or a Community taxing power. The Treaty assigns virtually no *redistribution* function to the Community level, although the actual process of economic integration has generated moderate redistributive effects via Funds that were foreseen in the Treaty (*e.g.*, the Agricultural Fund, especially the Guarantee Section or the Social Fund). In addition, the Regional Development Fund was established, entailing a (very) limited redistributive impact. However, these visible transfers underline precisely the pre-federal nature of the Community. Federations and unitary states rely heavily on invisible and automatic transfers both between persons and between regions through the central tax system and the central social security system, acting as a powerful mitigation of income and activity differentials. Finally, the Treaty assigns economic *allocation* functions to both tiers. The assignment of Community competences is far-reaching, compared to any other international economic organization. Nevertheless, it is surely not equivalent to the allocative assignment in mature federations.[46]

This roughly sketched, "pre-federal" distribution of economic assignments between the two tiers of governments accords well with the assignment hypothesis developed earlier. On theoretical grounds one expects a qualitative jump from the custom-union-plus to macro-economic integration. Beyond the customs-union-plus no, or mere symbolic, market-integration-from-above is expected, while macro-economic integration would not be expected at all. The economic assignments to the Community reflect these expectations, since economic functions at the EC level have remained firmly encapsulated within the realm of integration of non-financial markets (the pseudo common market). As will be shown later, the liberalization of (non-financial) factor movements has only a marginal economic significance, so that, in fact, the relevant capsule is the customs-union-plus. Within that range of ambition the accomplishments are nonetheless impressive, comprising elements of negative and/or positive market-integration-from-above from every one of the first six stages, defined in Table 1, including some ambitious instances of unification as well as some symbolic achievements from the stages 7 and 8. Of course, it ought to be realized that this does *not* amount to a *completed* customs-union-plus due to important omissions.

2. Product Market Integration – An Assessment

The Treaty provisions and ECJ case law on product market integration are complex and a full treatment is, of course, not possible here. To reduce the risk of arbitrary incompleteness in this brief survey, Table 1 will be used as a point of reference.

a) Removing Classic Border Interventions

There is no doubt that the EC has completed stage 1, the pure tariff-union. It

[46] *See infra* § A.3.b.

enjoys tariff- and quota-free intra-union trade, it has set up a common external tariff[47] and there is freedom of payment for intra-union trade.[48] But it must be emphasized that this assessment deals only with industrial goods; agricultural products fall under the common agricultural policy, and services often have restrictions other than tariffs. One should also realize that raw materials hardly ever encounter trade barriers in developed countries anyway. The transitional period for the removal of the restrictions was short, lasting only ten and a half years – from 1 January 1958 to 1 July 1968 – the most important reason for this being that in the early 1960's acceleration of the tariff breakdown was deemed desirable. In the two-centuries history of industrial capitalism it would be difficult to find another example of such a successful and durable effort of trade liberalization.[49]

A common external tariff entered into force on 1 July 1968. The stand-still agreement (EEC Treaty article 12) made it possible to overcome the immense problems involved in harmonizing over 20,000 tariff items into some 3,000 common provisions and calculating the future rates. This meant that the common external tariff was already negotiable in the Dillon Round (1961–1962) and the Kennedy Round (1963–1967) of GATT before it was formally installed.

A greater security of customs clearance is achieved in stage 2. Here, the Treaty and Community practices diverge, and neither fully complies with the requirements of stage 2. While common surveillance of safeguard clauses with respect to intra-union trade is reasonably secured (though article 115 continues to cause problems) and adjustment assistance is allowed for by a Social Fund (*ex* article 123 – although its actual role during the transitional period was in fact very modest), the EC has not been able to agree upon a Common Customs Code. It is not surprising given the casual stipulation in article 27: "Before the end of the first stage [1962!], Member States shall, in so far as may be necessary, take steps to approximate their provisions laid down by law, regulation or administrative action in respect of customs matters. To this end, the Commission shall make all appropriate recommendations to Member States." How "necessary" steps can be dealt with by non-binding recommendations seems puzzling.

[47] *See* EEC Treaty arts. 9–37. *See generally* Kommers & Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience, infra* this vol., Bk. 3.

[48] EEC Treaty art. 106.

[49] The German *Zollverein*, set up through a cumulation of small customs unions over a 50 year period, comes to mind as the other major example. The analogy is surely fascinating but at least two important distinctions ought to be considered. First, the *Zollverein* was largely engineered under the hegemony of Prussia whereas the EC did not, and does not, have a clearly dominant Member State. Second, the politicization of socio-economic issues in today's mixed economies is, of course, very different from elitist decision-making in early capitalism. For further discussion of the German experiment with customs unions, *see* Frowein, *Integration and the Federal Experience in Germany and Switzerland, infra* this book.

Even in the early 1980's the approximation of customs legislation is far from being completed and the logical means to relieve the "frontier nuisance" – a Community Customs Code – is unlikely to be achieved soon.[50] A fundamental problem underlying the harmonization of customs legislation is that the customs union in the EC halts between the modest concept of a pure tariff-union and the ambitious one of customs-less trade (stage 4). The pre-federal character is institutionally expressed in the reliance on coordination of operating procedures, rather than uniformity through delegation. In administrative customs matters – which constitute the lion's share of the frontier nuisance – the Treaty merely talks about "methods of administrative cooperation" for goods in free circulation in the union.[51] In 1967 the Member States concluded an *inter-governmental* Convention for Mutual Assistance Between Customs Administrations,[52] which excludes the Commission despite its being entrusted with the implementation of what the Treaty calls "the customs union." Furthermore, it should be realized that there are economic effects arising from frontiers in non-customs matters (such as taxation, criminal law, monetary questions) that are *not* subject to integration. The upshot is that the circulation of goods is not entirely free.

b) Free Physical Market Access

Free physical market access for goods is achieved on the completion of stage 3. It is here that the true problems of the Community's product market integration begin.

The abolition of transport discrimination has remained incomplete while positive integration in transport policy – a necessity in a sector with so many restrictions and distortions – has hardly taken off from the ground.[53] Nor has the abolition of restrictions on non-banking services gone faster than at a snail's pace; for example, accountancy and insurance services do not enjoy a Community-wide market.

The principle of physical market access is also undermined by divergences in national product regulations that frequently result in de facto import prohibitions, on the basis of the physical properties of a product. In addition, gaps in the common trade policy vis-à-vis third countries may lead to intra-union controls of product origin, possibly thwarting access to markets of (some) Member States. Both complications warrant a brief digression.

[50] For a listing of the deficiencies of the proposed Community Customs Code, *see* Aubree, *Community Customs Rules: The Need for Their Completion*, in COMMISSION OF THE EC, THE CUSTOMS UNION – TODAY AND TOMORROW 57 (Luxembourg, Office for Official Pubs. of the EC, 1978).

[51] EEC Treaty art. 10(2).

[52] Convention between Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands, signed at Rome on 7 Sept. 1967, for mutual assistance between their respective customs administrations, BII ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW, EUROPEAN COMMUNITY TREATIES B11–032 (Looseleaf, London, Sweet & Maxwell, 1973).

[53] *See infra* § C.2.f.iii for further discussion of transport policy.

i) National product regulation and intra-union trade

Free movements of goods "within" the Community's product market can be compromised by national fiscal and product regulation, thereby thwarting possible competitive pressures from other Member States. Harmonization, *ex* article 100, proved to be extremely time-consuming while the agreed outcome rarely satisfied consumers and traders. However, the Court has gradually taken a more stringent attitude, removing, over a period of two decades, a host of subtle barriers and hindrances. This daring judicial policy has frequently implied deep inroads into old regulatory practices and vested pockets of protection in Member States. Initially, for example, the Court considered a pecuniary charge to have an effect equivalent to a tariff only if it had a protective effect, but changed later to the criterion that any pecuniary barrier to the free movement of goods should be abolished.

In the modern mixed economy, however, spatial mobility of goods is more frequently hampered by quantitative restrictions, or as article 30 puts it by "measures having equivalent effect" to quotas, than by tariffs. It is here especially that the European Community has developed an economic regime for spatial mobility of goods that begins to resemble that of a true federal state. The Court has defined "measures having equivalent effect" to quantitative restrictions as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[54] This interpretation goes far in dealing effectively with the ingenuity of national bureaucrats in inventing new non-tariff barriers while blocking harmonization of existing ones. For instance, the French restriction imposed on the advertising of whisky and gin (but not applying to cognac) found no grace in 1980. "If a given measure makes... the import of goods from other Member States more difficult or costly than the disposal of domestic production it falls under the Court's definition" except "if they are justified by an overriding consideration of general interest," such as those specified in article 36.[55] Article 36 justifies derogations from article 30 "on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants... 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." The article raises a fundamental question of political choice: in a non-unitary polity having free "Community-wide" movement of goods, when should the economic principles of non-discrimination be subservient to the maintenance of local public goods? Even in the Australian federation where section 92 of the Constitution Act 1900 provides that economic "inter-

[54] Case 8/74, Procureur du Roi v. Dassonville, [1974] ECR 837, *discussed* in D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 92 (London, Sweet & Maxwell, 1980). *See also* Kommers & Waelbroeck, *supra* note 47, at § III.B.

[55] Note that art. 36 may lead to derogations from art. 30 (and art. 34 on export quotas) but not from art. 9 (on tariffs), nor art. 16. This reduces further the scope for border interventions.

course among the States... shall be absolutely free," the position that the division of political powers in a constitutional system could demand priority over the logic of economic union has occasionally been taken.[56] The Community Court would seem ill-advised always to declare contrary to Community law measures which flow from national powers for which the EC authorities *cannot* substitute.

Thus, in matters of public health, Member States have to demonstrate a risk but, given such a risk, have a certain discretion in deciding at what level they wish to place the protection (as in the case of additives to food products). However, the Court balances the necessity for the measure against the risk and then determines whether a less restrictive measure could be employed. How crucial this elaborate judicial review can be for the maintenance of competition is demonstrated by the *de Peijper* case.[57] In the Netherlands, parallel imports of pharmaceutical products are, of course, permitted but, presumably for health reasons, the importer is required to submit certain documents relating to the content and methods of production which can obviously only be obtained from the manufacturer of the product. This leads to the curious position that the sole distributor or agent could refuse such documents as the accommodation of the parallel importer would probably damage his market share or profits. The Court decided that in such cases the Member States have a positive *duty* to collaborate among themselves in order to minimize the burden on intra-EC trade, rather than imposing measures having restrictive effects.

Many such problems can be prevented by adequate harmonization of national laws on these matters (article 100; or, in theory, articles 101 or 102). One important consequence is that if directives *ex* article 30 have been adopted (following article 100), recourse to article 36 is no longer justified.

Article 30 has also led to some rather spectacular results in matters justified as "consumer protection," notably the *Cassis de Dijon* case.[58] Its likely importance is much greater, however. The present criterion is a more rigorous application of the one mentioned above, that is, making the import of goods from other Member States more difficult or costly than the disposal of domestic production.

Yet, if disparities of rules on consumer protection are allowed to develop along separate lines, it is clear that local industry will find subtle formulations – equally applicable to goods of domestic or foreign origin, surely – that in fact create pockets of protection and frustrate intra-EC competition. In the *Cassis de Dijon* case the Court decided that derogations *ex* article 36 can be justified by overriding considerations of general interest, such as consumer

[56] *See* Rowe, *Aspects of Australian Federalism and the European Communities Compared*, *infra* this book, at nn.235–83. *See also* D. Wyatt & A. Dashwood, *supra* note 54, at 101–02.

[57] Case 104/75, *Re* de Peijper, [1976] ECR 613.

[58] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] ECR 649 [hereinafter cited as *Cassis de Dijon*]. For a discussion of the case, *see* Kommers & Waelbroeck, *supra* note 47, at nn.188–97.

protection or "public policy," but the burden of justification is on the Member States. Discharging this burden is, however, made much more difficult by the Court's consideration that, in principle, justification for blocking imports from other EC countries on the grounds of a different national regulation is not valid when the products "have been lawfully produced and marketed in one of the Member States."[59]

The potential importance of this judgment can only be appreciated when one realizes, first, how difficult harmonization of technical barriers is, and second, how easily national regulations can frustrate or complicate intra-EC trade. If a product, being lawfully produced and marketed in one of the Member States, cannot justifiably be blocked in a Member State with a different regulatory standard, the tedious and slow harmonization process would become superfluous for many of the goods *and*, at the same time, intra-EC trade would be freed from many bureaucratic hindrances. In the wake of the *Cassis de Dijon* judgment, a legal debate has developed, fueled, *inter alia*, by a letter of the EC Commission[60] and a series of other cases dealt with by the Court. It has become clear that no "sweeping" victory for negative market integration through judicial review is to be envisaged, although the import-blocking effect of national product regulations will have to be justified more in response to private or public litigation. Since this judicial review is, by nature, highly discretionary, it does not match the legal certainty in truly unified product markets.

The present position of the Court with respect to national product regulations which have the effect of restricting the flow of intra-EC trade appears to be as follows:[61]

(1) Member States may promulgate product regulations only when there are no EC harmonization rules (*ex* article 100) on the same subject;
(2) The national regulation cannot discriminate between domestic and imported (from other Member States) goods;
(3) The national regulation must pass muster under a two-prong general-interest/purpose test:
   (*a*) The existence of an *overriding* public interest is determined by reference to the Court's past case law on article 36. If articles 36 or 100 are not applicable then a "rule of reason" will be applied to determine the reasonableness of the public interest of the national regulation; and,

[59] Case 120/78, *Cassis de Dijon*, [1979] ECR 649, 659.

[60] *See* Communication from the Commission concerning the Consequences of the judgment given by the Court of Justice on 20 Feb. 1979 in Case 120/78 ("Cassis de Dijon"), OJ No. C 256, 3 Oct. 1980, p. 2, emphasizing the principle of free physical access to markets once a product is lawfully produced and marketed in one of the Member States.

[61] This synopsis of the Court's present position is derived from Timmermans, *Nogmaals: de brief van de Commissie n.a.v. het arrest "Cassis de Dijon,"* 29 SEW 381 (1981).

(*b*) the national regulation is "compared" to the product regulation of other Member States. The justifiability of the national regulation blocking the importation of the product is judged on this basis;

(4) If the national regulation does not pass this two-prong test then the Court looks to see if the products have been indeed "lawfully produced and marketed" in their country of origin.

It appears that the Court is the only institution which has competence to apply the test set forth above since the comparability test the Court mandates necessitates the careful examination of product regulations of the several Member States which often pertain to complex products. There is, therefore, little reason to expect a "factual deregulation" down to the lowest levels of consumer protection in the EC through the automatic application of this test at national borders. All in all, the economic effects of the additional trade liberalization, engendered by this judicial policy could be substantial despite the legal complexity and the discretionary nature of the matter.

ii) National product regulation and international trade – The search for a common policy

Finally, intra-EC (non-financial and non-fiscal) restrictions also persist because the Common Commercial Policy is not always completely common. The EC's commercial policy is truly common in tariffs but not always in quantitative restrictions. In practice this is usually related to imports from Eastern Europe, Japan, Newly Industrializing Countries and, in textiles and clothing under the Multi-Fibre Agreement (MFA), under bilateral agreements between the EC and approximately thirty industrializing countries – agreements that are partitioned into *intra*-EC quotas! The logical complement of this partial trade policy autonomy of Member States is a provision in article 115, which aims at preventing trade deflection: authorized by the Commission the Member State may "take the necessary protective measures," including controls on the origin of the product and selective import prohibitions or quotas. It is evident that the implications of the omissions in the Common Commercial Policy destroy the very advantages of a customs union above those of a free trade area. If this loophole were applied frequently, the EC would degenerate into a situation prior even to stage 1 of Table 1.

The risk is not entirely to be dismissed as fantasy. First, article 115 also mentions "economic difficulties" attributable to omissions in the Common Commercial Policy as a legitimate ground for authorization. Second, the EC Commission is under great pressure to authorize national border measures, *ex* article 115, precisely because they concern the most sensitive and resistant remnants of national protection, and frequently are related to severe regional or sectoral difficulties. The national desire for autonomy – however narrow the product category – tends to be strong. In fact, it took the Commission eight years to replace a decision of 1971 empowering Member States to take interim protective measures, *ex* article 115, even though the decision delegated to the Member States discretionary powers of appreciation concerning the granting of authorizations, thus undermining the legal certainty of the trader offering

the goods.[62] Even the improved later decision[63] provided for the application of article 115 to the textile and clothing sector, where in fact the Common Commercial Policy has no lacunae and which hence cannot qualify for national protection.

In no sector is the conflict between the union border protection and national sectoral policies so great as in the textile and clothing sector: national adjustments through the market and by means of policies differ greatly, national views on border protection vary and the replacement of (union) border protection by aid and restructuring at the union level is not accepted. The escape is to succumb to disintegration of the core of market integration in the EC, namely the free movement of goods throughout the customs union. The EC has felt it necessary to impose quotas *per Member State* in view of the different speeds (and willingness) to adjust to textiles and clothing import competition.

A possible set of national quotas can, of course, be a guideline for negotiations among the Ten within the MFA. However it is legally incorrect to use them as a justification for national origin controls at the border.[64] Since overall quotas (and their annual growth rate) are first negotiated between the EC and (some thirty) individual exporters of the Third World and Southern Europe the upshot is a list of internal quotas per year per product per exporting country. With 126 product groups under the EC interpretation of the MFA, (say) thirty suppliers and eight internal quotas (Benelux counting for one), the maximum number of quotas is more than 30,000 per year. Since many product groups are not in the highest class of sensitivity, no internal (or sometimes not even external) quotas are established, although there are strict monitoring schemes in case they show too high an import growth rate. Nonetheless, at present the EC has several thousand (!) textile and clothing quotas, rendering the internal "free customs union" in this sector ridiculous, while penalizing the industrial achievements of LDC's.

Japan also has been subjected to selective but increasing quantitative protection measures. Most of this protection is still imposed by the individual EC Member States. A common commercial volume policy vis-à-vis Japan is only slowly coming into existence, starting with the first Multi-Fibre Arrangement (1973) and the common "monitoring" of EC imports of cars, tools and TV sets decided in 1981. It was precisely in (certain) textiles and (all) clothing,

[62] Commission Decision (EEC) No. 202/71 of 12 May 1971, empowering Member States to take interim protective measures with regard to the importation of certain products originating in third countries and put into free circulation in other Member States, JO No. L 121, 3 June 1971, p. 26 ([1971] OJ (spec. Eng. ed.) at p. 343).

[63] Commission Decision (EEC) No. 47/80 of 20 Dec. 1979, on surveillance and protective measures which Member States may be authorized to take in respect of imports of certain products originating in third countries and put into free circulation in another Member State, OJ No. L 16, 22 Jan. 1980, p. 14.

[64] *See* Timmermans, *Common Commercial Policy on Textiles: A Legal Imbroglio,* in PROTECTIONISM AND THE EUROPEAN COMMUNITY (L. Volker ed., Deventer, Kluwer, 1983).

however, that Japan turned from being a net exporter to being a net importer in the course of the 1970's. The Community has subsequently liberalized the import of Japanese textiles and clothing. On 12 February 1983 Japan agreed to restrict the export of video-recorders and large TV tubes to negotiated volumes while accepting unspecified restraints for ten other products, including cars, certain robots and TV sets. This further step to a joint commercial policy vis-à-vis Japan appeared only possible in a protectionist context.

In several industrial products, "voluntary export restraints" have been negotiated, whether between a Member State and Japan, among a Member State's group of firms and Japanese exporters, or among the four "parties" with various mixtures of (legal) government involvement on either side.[65] According to Bronckers in his example on cars,[66] Italy appears to have a minuscule quota of 2,200 Japanese cars per year (under "automatic" approval of the EC); France has made it known by extremely informal methods that it would never accept a Japanese share of French car consumption of more than 3 % (and has applied ingenious "waiting" procedures at the French harbors); Great Britain has an unpublished "voluntary restraint" agreement between the British Society of Motor Manufacturers and the Japanese Automobile Manufacturers Association that is widely said to contain an 11 % market-share ceiling; while Germany and the Benelux have obtained (different) voluntary export restraints, with an ill-defined role respectively for the German Government, and for the Benelux Governments in unison; finally, Greece, Ireland and Denmark have no car volume protection. Given such divergent policies, and the important interests behind them, virtually any conceivable *common* policy of car volume protection vis-à-vis Japan would entail substantial (consumer or producer and where necessary labor) adjustment costs for several Member States. Hence, a common policy is a remote possibility and could only be realized in a heavy-weight package-deal, if at all.

In turn, divergences (in cars, or other products) imply that the internal market of the EC will be disrupted because trade deflection through more liberal Member States has to be prevented for the national volume protection to be effective. As discussed above, the Commission will usually grant this permission *ex* article 115, despite the dubious legal nature of such approvals and the fact that it may lead to a dangerous erosion of the core of the Community's achievements, *i. e.*, of free access of all products, circulating in the EC *within* the union borders, to all domestic markets of Member States.

[65] These "mixtures" can have important consequences for the questions of whether the "agreement" falls under an EC or Member State "competence," and whether competition is not distorted (especially pursuant to arts. 85 and 90). These issues would take us too far in the present context but are discussed further in, *e. g.*, Aarts, *Mededingingspolitiek en economische crisis*, 28 SEW 16 (1980).

[66] *See* Bronckers, *Een juridische analyse van beschermende maatregelen tegen Japanse importen in de Europese Gemeenschap*, 30 SEW 670 (1982).

c) A Union Without Internal Customs

More ambitious yet is stage 4, product market integration without customs. In fact, this stage combines free physical access with free financial and fiscal access: that is, with absence of exchange controls and abolition of fiscal frontiers for indirect taxes. Obviously, product market integration can be heavily distorted, indeed prevented, if the level and structure of imports can be determined by exchange controls. In the EC this is still possible[67] and it is also possible to re-install controls when certain difficulties arise.[68]

The Community has harmonized the respective indirect tax systems into the value added tax system, thereby greatly facilitating the (comparison of) calculations of the tax burden in consumer prices as well as reducing the "frontier nuisance."[69] It has also eliminated a source of allocative distortions due to the old "cascade" systems of indirect taxation.[70]

Two other requirements for indirect taxation have been met by the EC. The first one is a technical set of questions of harmonization (or equalization) of the tax base (*i. e.*, duties on the same goods with the same exceptions), of the techniques of collection and of tax clearing with wholesalers. One could argue that the distortions flowing from the lack of progress are not of great importance although they do cause numerous irritating incidences. The sheer bureaucratic haggling involved in removing them seems only worth the trouble when there is an overriding political commitment. With determination, one can eliminate fiscal frontiers for private consumers and harmonize collection for traders, so as to leave a simple check of common forms at the frontiers *without* moving to a federal system, as the Benelux has shown.

The second requirement is the approximation, or occasionally unification, of indirect tax rates. It is a mistake to believe that the rates ought to be equalized in a tax union; so long as they do not differ greatly – and they will not if there are no fiscal frontiers for consumers – Member States can differentiate for purposes of revenue, discouragement of use or other reasons. Nonetheless, unification of indirect tax rates would imply comprehensive harmonization of many important duties and excises, ranging from the rates on petrol or cars to those on spirits, road use or cigarettes. Although harmonization would not formally touch upon the national prerogative of taxing power, it would

[67] For example, exchange controls were in force in the U.K. until 1979.

[68] *See* EEC Treaty arts. 73, 108 & 109. Italy represents a recent example.

[69] The basis was EEC Treaty art. 99.

[70] A cascade tax system taxes products at every stage of production with individual tax rates, irrespective of the cumulative tax on the product. In countries with a cascade system, it would be fiscally profitable to avoid entering the market at intermediate productive stages – the tax would not be neutral. Vertically integrated firms would be attractive fiscally relative to the ordinary chain of productive stages with many producers at every stage. Therefore, a cascade system would constitute a distortion of competition. Moreover, a tendency to integrate vertically could thwart the incentives for horizontal specialization, with the expected cost reduction due to larger scale production that market enlargement is supposed to provide.

greatly limit fiscal policy, not only for revenue purposes, but also for objectives in the sphere of health policy, energy conservation and local constituency protection.

d) Common Competition Policy Toward Private Firms

Product market integration will be thwarted if producers or sellers – whenever not so numerous as to be powerless with respect to price, quality or delivery conditions – can affect competitive conditions differently in different parts of the union product market. This paper cannot deal with the intricacies of the Community's Competition Policy vis-à-vis private firms, but a few observations on the EC assignment, and its enforcement ought to be made.

By far the most important acknowledgement is the very fact of the existence and relatively firm implementation of a Common Competition Policy. Of the six founding Member States, only the Federal Republic of Germany had an emerging legal infrastructure for "anti-trust" policy; the other five had weaker structures, ranging from administrative committees that advised a Ministry with large discretionary power under a loosely formulated law, to nothing but general laws of commerce. It is probably justifiable to say that the EC Competition Policy has, therefore, caused a remarkable shift of emphasis toward the enforcement of competitive firm behavior in a number of EC Member States. This point should not be exaggerated, as compensating drifts, via public interventions, as well as practical problems of enforcement (for the EC Commission) have enfeebled the final result.

I shall very briefly summarize the four main areas of interest: cartels and concerted practices, abuse of dominant position, mergers and the question of intangible assets.

i) Cartels and concerted practices – Article 85

Article 85 prohibits, and explicitly declares automatically void, and incompatible with the common market "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Examples, such as price-fixing, quantitative restrictions on production, investment or research and development (R & D), market-sharing and tying of supplementary conditions to sales, are given in the article. The operation of article 85 can be "declared inapplicable" (so-called exemptions) if four conditions are fulfilled simultaneously:

(1) The activities contribute to improving production or distribution, or promote technical or "economic" progress;
(2) consumers are allowed a fair share of the benefits;
(3) the activities are indispensable for the attainment of the first two conditions;
(4) the possibility that competition will be eliminated in respect of a substantial part of the products in question is avoided.

For exemptions from the operation of article 85 to be granted the Commission must be notified of the impending agreement and be allowed to examine the substance of the agreement.[71]

Reading article 85 one tends at first to think of cartels and concerted practices. In a way the two are interchangeable and, under certain restrictive assumptions, even perfect substitutes. But the generation of circumstantial evidence in the case of concerted practices is obviously very much more difficult than in the case of formal cartels. In the celebrated *Dyestuffs* cases,[72] involving both concerted action on prices and on market sharing, the Court held that a concerted practice may exist where there is a "form of coordination between undertakings, which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risk of competition."[73] But in the absence of evidence of telexes, letters or registered telephone calls (all difficult to obtain), one is compelled to study the market structures over time and, if possible, the actual behavior of the colluding firms.[74]

On market-sharing (rather than price) collusion the Court has held that the analysis of market structure and behavior serves as sufficient proof only if there is no other possible explanation but that the undertakings concerted their actions.[75] Since this is very difficult, the Commission is forced to produce circumstantial evidence or else simply hope that the arrangements are temporary and unstable (which is frequently the case). The legal practice of dealing with concerted practices is therefore not really living up to the verbal "promises" of article 85.

[71] But agreements which have not been submitted for clearance need not necessarily be void. On block exemptions, negative clearances, etc., *see* A. JACQUEMIN & H. DE JONG, EUROPEAN INDUSTRIAL ORGANIZATION (London, MacMillan, 1977); D. SWANN, *supra* note 5; D. WYATT & A. DASHWOOD, *supra* note 54.

[72] Case 48/69, ICI v. Commission, [1972] ECR 619; Case 54/69, Francolor v. Commission, [1972] ECR 851; Case 55/69, Cassella Farbwerke Mainkur AG v. Commission, [1972] ECR 887; Case 56/69, Hoechst v. Commission, [1972] ECR 927; Case 57/69, ACNA v. Commission, [1972] ECR 933.

[73] Case 48/69, ICI v. Commission, [1972] ECR 619, 655. *See* D. WYATT & A. DASHWOOD, *supra* note 54, at 255.

[74] An idea of the complexity of such studies can be derived from EC COMMISSION, NINTH REPORT ON COMPETITION POLICY 158–63 (Brussels/Luxembourg, Office for Official Pubs. of the EC, 1980) where sixteen indicators of "anomalies" of competition are used to study the EC market for soft drinks, classical records and electrical appliances. Before a court even greater precision would be required.

The Commission, in its large-scale study program on concentration in the EC, has found evidence that *oligopolistic structures* are very widespread. *See* EC COMMISSION, EIGHTH REPORT ON COMPETITION POLICY 186 ff (Brussels/Luxembourg, Office for Official Pubs. of the EC, 1979) for a survey of 43 industries and 150 product markets. Monitoring actual competitive behavior on a continuous basis, although laborious, is becoming imperative.

[75] *See, e.g.*, Joined Cases 40–48, 50, 54–56, 111, 113 and 114/73, Coöperatieve vereniging "Suiker Unie" UA and Others v. Commission, [1975] ECR 1663.

Cartels (horizontal agreements) may take many forms, ranging from price-fixing or outright export bans, to fixing deliveries, imports or exports (hence separating markets) and joint sales agencies (so-called syndicates). A useful survey by Jacquemin and de Jong[76] shows a preponderance of price restrictions, although many cartels have used other means in addition to price-fixing. As a rule, cartels will not be exempted by the Commission unless the cartel has a small market-share.

Besides cartels and concerted practices, two other important categories related to article 85 are vertical agreements between firms in consecutive stages of production or distribution, and agreements based on industrial property rights. Again, there are many types of vertical agreements and the limited space here only permits us to deal briefly with the most important phenomenon – exclusive dealerships, or selective distribution systems. If an exclusive dealership is coupled with territorial protection via clauses that forbid exports in the contracts of dealers in other countries, markets are effectively separated and price discrimination is likely to occur. The remedy is either to forbid exclusive dealerships (even though they are frequently beneficial for consumers, when quality control, spare parts and after-sales service are desired and they may also promote competition by giving an incentive to a certain firm to penetrate the market); or to allow parallel imports (which, by their mere availability, tend to render price discrimination unprofitable).[77]

ii) Abuse of dominant position in the market – Article 86

At the same time *dependent* commercial agents do not come under article 85(1). Does this mean that a multi-agent firm can practice price discrimination by ordering a different price behavior in different regions within the EC, simply because it is effectively not more than one firm? The answer is simple: although such practices fall outside the scope of article 85, they are covered by article 86 as constituting an abuse of a dominant position. The same would apply to multinational enterprises irrespective of whether the parent firm is based in the Community.[78]

[76] *See* A. JACQUEMIN & H. DE JONG, *supra* note 71, at 215–16.

[77] This proposition, however, does not do justice to the intricate economics involved. For an in-depth analysis of the case law on selective distribution systems, with a critical view of the Commission's position, *see* Chard, *The Economics of the Application of Article 85 to Selective Distribution Systems*, 7 EUR. L. REV. 83 (1982).

[78] In EC case law the firm is seen as an "economic unit" if appropriate for the behavior at issue. In the words of the Court, the fact that a "subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company." Further, the fact that the latter "does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the applicability of Community law." Case 6/72, Europemballage Corp. & Continental Can Co. Inc. v. Commission, [1973] ECR 215, 242. *See also* Case 27/76, United Brands Co. v. Commission, [1978] ECR 207; and Case 85/76, Hoffmann-La Roche & Co. AG v. Commission, [1979] ECR 461. For a full treatment of this subject, *see* J. BARACK, APPLICATION OF COMPETITION RULES (Deventer, Kluwer, 1981).

Article 86 is not, on a literal reading, aimed at a dominant position in a market per se but against the abuse of this position. It is important to see that this seemingly more lenient position (when compared to article 85 on agreements among independent firms) is ambiguous both from an economic and a legal practice point of view. In addition it should be observed that article 86 has no exemption clause, so that the conflict between competition and productive or innovative efficiency is apparently assumed not to arise.

Article 86 reads: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." Four examples are mentioned. What article 86 suggests is that it is not market structure but, rather, the firm's conduct that is relevant in assessing whether competition is touched upon. Dominance is, therefore, not to be derived solely from the existence of prices higher than competitors' when market shares are relatively large. If various non-price strategies (comprising investment, product and process R & D and uncertainty) are introduced, a more relevant and practical notion of dominance can be derived.

Once this richer view of dominant conduct is developed it is virtually impossible to separate it from abuse. The Court's full definition of a dominant position is taken from the *United Brands* case:[79] "The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[80] This definition combines structural and behavioral aspects and calls for a thorough analysis incorporating the major determinants of them as advanced in industrial economics, such as economies of scale, patent protection, product differentiation, market shares, growth of demand, potentially competing products and strategic firm behavior. *United Brands* has now become the leading case for the Commission[81] due to the Court's extensive economic argumentation with respect to the key concepts, "dominance" and "abusive behaviour." The Commission has developed a formula – the so-called "*Linda index*" – as a rough first-detector of possible dominance by measuring the disparity of market shares between the first and the second firm, the first two and the third, and the first three and the fourth.[82] It appears that single firm dominance – in the statistical sense – occurs in 9 % of the 150 product markets investigated. Most national markets are dominated – still in the *Linda* sense – by triopolies, often with a stable duopoly among the three.

[79] Case 27/76, *United Brands*, [1978] ECR 207, 277.

[80] Note that this definition is the result of an evolution of at least 25 years, and goes back to ECSC Treaty art. 66(7). For an analysis of the concept over this period *see* D. Wyatt & A. Dashwood, *supra* note 54, at 289–90.

[81] *See* Eighth Report on Competition Policy, *supra* note 74, at 24, 187 & 191.

[82] *Id.* at 194.

iii) Mergers

External rather than internal growth of firms creates the ominous loophole that dominance can be established in one stroke precisely by buying out competitors. In other words, the act of merger could be both anti-competitive ("abusive") and result in dominance. There is no explicit provision on mergers in the EEC Treaty,[83] but the famous *Continental Can* case[84] has provided the Court with an opportunity to clarify the meaning of article 86. The crucial point consists of the anti-competitive *effects* of a firm's behavior whether in day-to-day business conduct or in pursuing a merger or take-over. Such effects may in themselves form a basis for, or contribute to, the finding of an abuse of a dominant position, *ex* article 86. As Wyatt and Dashwood emphasize: "It would put the Common Market system in jeopardy if undertakings could avoid the prohibition in Article 85 by forming a closer combination virtually excluding any serious possibility of competition, without bringing themselves within the scope of Article 86."[85] The Court's view on mergers is, *inter alia*, derived from the understanding of the Community's competition regime as a whole, in particular as expressed in article 3(f).

The Court has held competition to be "so essential that without it numerous provisions of the Treaty would be pointless."[86] Therefore, the unity and cohesion of the competition regime can make up for this omission in the Treaty, but it can do so only very imperfectly. A complete "merger policy" could deal with mergers having less dramatic effects on competition – merely disadvantages – and it could be done prior to the merger's implementation. The Commission's Proposal for a Regulation on merger control[87] envisages precisely that but has not yet been accepted.

iv) Intangible assets – Article 222

Intangible assets have the effect of barriers-to-entry for potential competitors. When intangible assets are generated under a regime of legal protection they can serve as incentives for higher quality or quantity of their production, with presumably favorable effects for society at large. The most important intangible assets fall under "industrial and commercial property" (as mentioned explicitly in article 36) such as patents, industrial designs, trade marks or appellations of origin, and literary property such as copyright.

Elementary, but at the same time the nub, is article 222: "This Treaty shall in no way prejudice the rules in Member States governing the system of prop-

[83] ECSC Treaty art. 66 requires prior authorization by the Commission.

[84] Case 6/72, *Continental Can*, [1973] ECR 215.

[85] D. Wyatt & A. Dashwood, *supra* note 54, at 317.

[86] Case 6/72, *Continental Can*, [1973] ECR 215, 244.

[87] *See* Commission Proposal for a Regulation (EEC) of the Council on the control of concentrations between undertakings of 20 July 1973, OJ No. C 92, 31 Oct. 1973, p. 1; *see also* Schmitt, *Multinational Corporations and Merger Control in Community Antitrust Law*, in 1 European Merger Control – Legal and Economic Analysis on Multinational Enterprises 169 (K. Hopt ed., Berlin/New York, De Gruyter, 1982) for further discussion on the prospect of this proposition on mergers.

erty ownership." The implication is not only that the consequent co-existence of separate systems of protection for industrial property rights in the various Member States entails inequalities in the conditions of competition, but also that, given the independent legal existence of "national" rights (see the stringent text of article 222), product markets governed by such rights might become fully separated. A faithful implementation of competition policy is obviously undermined if firms may compartmentalize the Community market by relying on rights with respect to intangible assets, although market segmentation under article 85 would be effectively countered.

The most straightforward solution, compatible with article 222, would be the enactment of unified rules on intangible assets, but this route has not been followed. An interesting alternative approach is that of the Community Patent Convention (December 1975) which creates a parallel and optional EC patent.[88] The cumbersome and hitherto usual means of counteracting this situation has been to see whether the result is akin to a measure having equivalent effects to quotas,[89] or whether it is tied up with restrictive business practices of a kind falling under articles 85 or 86. In accordance with article 222, the *existence* of the right in an intangible asset is always accepted, but the *exercise* of the right is carefully controlled.

Without entering the intricacies of the subject further let us acknowledge the interest the Court has taken in preserving the free movement of goods, short of further political initiatives that have to consist in ratifying common rules:

[88] Convention for the European Patent for the Common Market (Community Patent Convention), OJ No. L 17, 26 Jan. 1976, p. 1. By mid-1982, the Community Patent Convention had not yet been ratified by all EC Member States. However, a European Patent Office, located in Munich, has opened officially, as of late 1977, pursuant to the terms of the European Patent Convention (EPC), signed in Munich on 5 Oct. 1973 by fourteen European Countries (European Patent Convention: Convention on the Grant of European Patents, TREATY SERIES No. 20 (London, HMSO, Cmnd No. 7090, 1978)). By mid-1982 seven of the Member States of the EC had ratified the EPC, but Greece, Ireland and Denmark have not yet signed the Convention, which came into force in 1977. The EPC creates a "European Patent" on the basis of a single procedure. Its wording is identical for all countries adhering to its terms, but the Convention is subject to national patent law in each country. The patent procedure has not been unified for all adherent countries. Therefore, legal enforcement of patents remains under national law. The Community Patent Convention, signed in Luxembourg in 1975, goes one step further in attributing to the European patent, issued in Munich, an EC-wide legal status. Legal enforcement of European patents is therefore Communitarian. However, since the European patent is optional, one is free to opt for a national or a European patent. It is the legal enforcement over the EC that awaits ratification.

[89] *See* EEC Treaty art. 36: "The provisions of Article 30 ... shall not preclude ... restrictions ... on grounds of ... the protection of industrial and commercial property. Such ... restriction shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

> in the present state of Community law ... the requirements of the free movement of goods and the safeguarding of industrial and commercial property rights must be so reconciled that protection is ensured for the legitimate use of the rights conferred by national laws, coming within the prohibitions on imports "justified" within the meaning of Article 36 of the Treaty, but denied on the other hand in respect of any improper exercise of the same rights of such a nature as to maintain or effect artifical partitions within the common market.[90]

e) Domestic Interventions

i) The economic order in the Treaty

In moving beyond stage 4, one faces the question of the kind and degree of public intervention in markets. As Table 1 shows, different degrees of domestic intervention need not stand in the way of the initial stages of economic integration. But it also suggests that different national preferences with respect to the economic order become less and less compatible the further the process of economic integration advances.

Stage 5 aims at uniform public influences on competitive conditions throughout the union. Basically there are two alternative routes toward that aim. One is the acceptance of the principle of minimal intervention, resulting in the virtual free play of market forces (in the non-financial sector) throughout the union. The institutional requirements are largely that of negative policy integration, with the notable exception of a common competition policy. While the logic of this alternative is unassailable, it necessarily implies a change in the economic order of the more interventionist Member States. Hence, one can expect, both in the constitutional phase and during the actual process of market-integration-from-above, that constraints will be built in, rendering the approach politically tolerable. Thus, one will compromise the principle by a small number of well-defined exceptions in specific sectors where there would be a call for positive sectoral integration. The second route is the acceptance of systematic intervention (in the non-financial sector). It calls for uniformity in the resulting conditions for private economic agents in as far as they purchase, sell and produce. The institutional requirements may range from harmonization, or policy coordination, to matching of Community and national funds under common rules and unification. Again, the domestic political implications of the second route are drastic. Once it is considered unacceptable to forego intervention, the subordination to rules and decisions at the union level would largely prevent the national politician from creating an "electoral profile." But intervention at the union level is also intrinsically more difficult, as shall be shown below. Of course, one can compromise on the principle of uniformity of national public influences on competitive conditions by allowing exceptions or differentiation where domestic situations differ sharply, say, for regions below a certain threshold of production per capita or of employment.

[90] Case 119/75, Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapferer & Co., [1976] ECR 1039, 1061–62. *See* D. Wyatt & A. Dashwood, *supra* note 54, at 357.

The Treaty can be considered legally *neutral* with respect to the economic order.[91] There is agreement that the EEC Treaty conflicts with pure "laissez-faire" and with imperative planning, but would not necessarily prevent either of the two routes just mentioned. The discussion about the economic order concentrates on the second means of article 2, *i. e.*, "progressively approximating the economic policies of Member States." Although article 3 does *not* assign instruments to either one of the two means of article 2, the *maximum* which the approximation of economic policies could encompass is:

(1) a Common Trade Policy vis-à-vis third countries;
(2) common transport and agricultural policies;
(3) a Common Competition Policy;
(4) the coordination of economic policies; and,
(5) the establishment of a Social Fund and a European Investment Bank.

Ignoring for the moment the first three common policies mentioned and assuming that the Common Competition Policy sets appreciable limits on intervention (given the wording of articles 85 and 92 in particular), the real issue is the coordination of economic policy (being an obligation for Member States *ex* article 6(1), and a competence of the Council *ex* article 145) and two (marginal) Funds. There is no general competence for "*Wirtschaftslenkung*" (steering the economy by means of interventions) except in the case of the first three common policies. On the other hand, the EEC Treaty does not exclude explicitly measures of *Wirtschaftslenkung*, unlike the ECSC Treaty (article 5) which imposes "a limited measure of intervention... with a minimum of administrative machinery."

The following spectrum unfolds itself. At one end, one defines the concept of coordination broadly and, *ex* article 235, assigns "the necessary powers" to attain "one of the objectives of the Community," hence leading to potentially extensive intervention. At the other end, one minimizes coordination (and points to the procedural deficiencies of article 145(1)) in order to conclude that the Treaty is relatively non-interventionist, except in the three common policies where powers are explicit.

The *practice* so far has evidently been closer to the latter interpretation, but a political change of direction seems compatible with Community law. The probability of a series of interventionist assignments to the EC is, however, very low due to national political resistance.

It should be emphasized that the national public agents are extremely reluc-

[91] *See, e.g.*, VerLoren van Themaat, *Competition and Planning in the EEC and Member States*, 7 C.M.L. Rev. 311 (1970); P. VerLoren van Themaat, Economic Law of the Member States of the European Communities in an Economic and Monetary Union (Competition: Approximation of Legislation Series – No. 20; Brussels/ Luxembourg, EC Commission, Office for Offical Pubs. of the EC, 1973); Constantinesco, *La Constitution économique de la CEE*, 13 R.T.D.E. 244 (1977); Mathijsen, *Structuurbeleid van de Gemeenschap versus structuurbeleid van de Lid-Staten*, 27 SEW 547 (1970).

tant to subject themselves to union coordination of domestic interventions even if they agree on the desirability of the interventions themselves. The institutional expression of this political fact is what we might call the "rule of Mathijsen"[92] with respect to coordination, *ex* article 145: "the more important the decision, the more informal the act." Rather than assigning explicit competences to the EC level, coordination is pursued by "Representatives of the Member States," instead of the competent organ (the Council), and operationalized by "resolutions" of the Council or other circumventive constructions. The "rule of Mathijsen" brings out quite forcefully that the process of economic integration over time has to cope with strong resistance to the assignment of interventionist economic powers to the union tier of government. Among those mixed economies in which intra-union border interventions have largely been dismantled, such resistance can be explained by reference to the fear which national politicians have of losing the core of their residual set of instruments for conducting electoral and constituency politics. This is the more important to them since recourse to the residual policy options will also be pressed for as a substitute for the options lost through previous integration.

From this general perspective the state of affairs with respect to stage 5 can be better understood. Comparing Table 1 with the present situation in the EC, one is struck by the unevenness of the measures, whether negative or positive, taken to achieve uniformity of public influences on competitive conditions. Practice has roughly followed the prescriptions of the Treaty wherever it is explicit: negative sector measures[93] have advanced greatly while positive sector measures[94] have also gone far in agriculture, yet have hardly progressed in transport. The limitation of state distribution monopolies (article 37) has been implemented and a common competition policy toward private undertakings is firmly in place.

However, in other fields progress is much more limited. Negative integration in public procurement is formal and has proved to be impossible to enforce. The harmonization of public tendering procedures has yielded a shallow legality, leaving far too much discretion to national public agents. A common industrial aid policy is not in sight and the prospects for Community competences in this field are at best dim. A common regional fund exists but its functioning hardly goes beyond inter-Member States' distributional politics.[95]

Two domains of great importance to the typical European mixed economy require some further attention: public aid to industry and public firms' behavior.

[92] *See* Mathijsen, *supra* note 91, at 556.
[93] *See* Table 1, at N. 10 & N. 11.
[94] *See* Table 1, at P. 14 & P. 15.
[95] *See* Mény, *Should the Community Regional Policy be Scrapped?*, 19 C.M.L. Rev. 373 (1982).

ii) Community surveillance and national aids to industry

The negative surveillance of national aid applies to general, regional and sectoral aid programs. General aid programs are not specifically mentioned[96] as *possible* exceptions to the general rule[97] of incompatibility with the EEC Treaty. But it is not a priori clear that they would always distort competition in such a way as to be "incompatible with the common market," as the language of article 92(1) provides. This implies that the Commission has to exercise discretionary power, which is far from easy in this politically sensitive domain. The Commission's position, which has been endorsed by the Court in the *Philip Morris* case, legitimizing EC rejection of a number of national aid schemes is as follows:

> State aids are in principle incompatible with the common market. The discretionary power of the Commission should only be exercised when the aids proposed by Member States contribute to the achievement of the Community objectives and interest set out in Article 92(3) EEC. The national interests of a Member State or the benefits obtained by the recipient of aid in contributing to the national interest do not *by themselves* justify the positive exercise of the Commission's discretionary powers.[98]

As to national regional aids, the competences of the Commission do not allow interference with the precise sectoral distribution of aid once a regional program has been agreed to in Brussels. Given the frequent overlap between sectoral and regional problems this amounts to a serious limitation.

For sectoral aid, guidance and surveillance has been farthest developed during the 1970's. Sectoral aid has to be selective, temporary and regressive over time. Purely conserving aid, propping up firms without reference to restructuring or reconversion programs has to be abolished. In sectors with adjustment problems, aid ought not to have capacity increasing effects (of course, this does not apply to dynamic, innovative sectors). Also, aid ought not to hinder structural industrial change.[99]

Thus *on paper* aid surveillance in the EC appears to aim at facilitating rationalization processes in industry. Aid is strictly conceived so as to strengthen the adaptive capacity of firms and to lower the tangible and intangible social costs of transition. Therefore the problem of a possible distortion of competition, both for non-assisted firms in the country and those in the rest of the EC, would seem to be bearable. But the practical implementation over the 1970's has proved to be quite different.

First, in three sectors – shipbuilding, synthetic fibers and steel – serious

[96] *See* EEC Treaty art. 93.

[97] *See* EEC Treaty art. 92(1).

[98] *See* Case 730/79, Philip Morris Holland BV v. Commission, [1980] ECR 2671. *Quoted from* EC COMMISSION, TENTH REPORT ON COMPETITION POLICY 151 (Brussels/Luxembourg, Office for Official Pubs. of the EC, 1981) (emphasis added).

[99] *See* EC COMMISSION, FIRST REPORT ON COMPETITION POLICY 112–16 (Brussels/Luxembourg, Office for Official Pubs. of the EC, 1972).

structural over-capacities have led to a policy of easing and weathering crises, rather than facilitating rationalization. In some measure it is accepted, for instance, that current operation costs of firms in these crisis sectors are reduced by aid. Even in steel – an especially favorable case given that far-reaching competences have been gradually applied – it was half a decade before, in 1981, a first attempt to reduce over-capacities was undertaken. In 1980, the German Government had to agree to recognize the "manifest crisis," *ex* ECSC article 58, in order to compel other Member States to start negotiating capacity reduction and its distribution among Member States.

It follows that it is quite difficult in socio-political practice to implement negative surveillance for sectors in genuine trouble. The upshot has been that "crisis aid" has taken on a life of its own, largely exempt from the ordinary surveillance criteria mentioned above, and this has been occurring for a considerable time now. It has led to permanent distortions and to tendencies of "aid matching" among countries, restricting the expansion of the more efficient firms.

Of course the Commission is well aware of the problem. For instance, in 1982 it warned against an emerging "aid mentality," that leads firms, when they get into difficulties, to turn immediately to the State for assistance rather than rely on their own resources and efforts to overcome their difficulties. "This aid mentality is nurtured particularly in cases where they see their competitors receiving aids in other Member States and consequently feel that they have a right and a need to receive aid themselves."[100] The Commission also claims it has developed three guidelines for aid in (industrial) *crisis* sectors:

(1) national aid must not lead to the export of unemployment to the rest of the EC;
(2) aids must bring about the restoration of the health of the firm(s) within a "reasonable" period of time;
(3) aids should be "transparent," so that they can be controlled.[101]

The first two guidelines, if faithfully applied, must inevitably lead to capacity reduction in crisis sectors.

A second problem with aid surveillance is the weak political legitimacy of the Commission when it opposes aid. Although it has the ultimate "stick" of recourse to the Court of Justice, it has no "carrot" in the form of less distortive Community aid or significant EC procurement, and it suffers from a lack of political authority in requiring timely and accurate notification enabling complete and *ex ante* evaluation. All too frequently notification is late and all too rarely is it sufficiently detailed and accurate. One has the impression, especially after the mid-1970's, that Member States have done this on purpose so as to postpone the actual adjustment to Community criteria as long as possible.[102]

[100] *See* EC Commission, Eleventh Report on Competition Policy 111 (Brussels/Luxembourg, Office for Official Pubs. of the EC, 1982).
[101] *See id.* at 114.
[102] *See* Chard & MacMillen, *Sectoral Aids and Community Competition Policy: The*

iii) Surveillance of public firms' behavior

Article 222 of the EEC Treaty specifies that Member States are free to regulate their systems of property. However, this does not mean that public firms can be made to *behave* any differently from private firms except when explicitly provided for. This is clear from article 90(1): "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force *any* measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94" (emphasis added).

Since every EC Member State has a number of public enterprises, which are outside the public utilities sector, as an expression of the "mixed economy" philosophy in Western Europe, a major issue of negative surveillance arises for the Commission. Sometimes the roots of public ownership are solely historical, and juridical forms are chosen that ensure the company will behave as any ordinary private firm (examples are *Volkswagen* and *Dutch State Mines* (DSM) which is now a chemical firm). Nonetheless, there is a societal presumption that in the case of public firms, even including those which are normally fully independent, rescue operations would be less easily refused than in the case of private firms. In certain countries, independent legal status could still imply informal patterns of influence through nominations, political arm-twisting or clientelism. More serious is the sometimes intimate relation between public credit institutions and public firms, resulting in discriminatory access to financial funds. However, by far the most worrying aspect of the matter is the possible or indeed automatic underwriting of losses made by public firms, particularly in Italy and Great Britain, but (in steel) also in France and Belgium and lately even in Germany. Further complications arise if public firms operate in regulated sectors (*e.g.*, railways, air transport) or have to comply with special rules, not applying to the private sector (such as the Italian regulations requiring public firms to locate the majority of new investments in the Mezzogiorno).

It is no surprise that where Member States have taken upon themselves entrepreneurial activity or direct control of such activity, due to ideological or sectoral pressures, political sensitivity is such as to prevent the Community from taking any countervailing action at all for a long time. It was only in 1980 that the Commission issued a directive on the "transparency of financial relations between Member States and public undertakings."[103] In a strictly le-

Case of Textiles, 13 J. World Trade L. 132 (1979). In 1980 the EC Commission went so far as to issue a Communication to the Member States' Governments, stating that: "Cases of non-notification or late notification . . . have ceased to be isolated. Indeed, the extent of the tendency . . . would appear in some cases to indicate the possible existence of a general decision not to respect the provision in question." OJ No. C 252, 30 Sept. 1980, at p. 2.

[103] Commission Directive (EEC) No. 80/723 of 25 June 1980, on the transparency of financial relations between Member States and public undertakings, OJ No. L 195, 29 July 1980, p. 35.

galistic sense the directive is superfluous since the Court of Justice had ruled in 1977 that:

> state aids to public undertakings, as well as to private undertakings, is subject to the prohibition contained in Article 92, para. 1 and that such prohibition covers, save for the exceptions contained in Article 90, para. 2, all aid granted by a Member State or through State resources without it being necessary to make a distinction between whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid.[104]

In practice, as noted above,[105] the mandatory notification of State aids to the Commission is frequently evaded. With respect to public firms, it has remained unclear for a long time whether legally and politically, the Commission could demand disclosure of the relation between public firms and state institutions on the grounds of possible state aids being involved. The basic economics of it are, of course, very simple: easy access to capital, hidden subsidies or the underwriting of losses increase the competitiveness of the public firm artificially, and prevent the rewards for superior efficency – a crucial incentive for markets to function properly – from being reaped by firms not aided. The firms not aided can include firms located in the same country but will usually include firms from other Member States (perhaps even non-aided public firms in other Member States).

France, Italy and the United Kingdom have requested the Court to declare null and void the 1980 Directive on financial transparency of public firms, but the Court has rejected their appeals.[106] This stance by the Court provides the much needed legitimacy for the Commission to pose the question of the role of Member State intervention in what is likely to be a most sensitive domain.

Not only is this area legally complex and unclear without further case law,[107] but the Commission also faces a Community in which France is embracing the ideal of public industrial and banking activity as a priority in its search for societal reforms, while the UK is pursuing a vigorous policy of privatization of public firms. Until the late 1970's the public entrepreneurial sector was regularly increasing in Europe[108] and it would be illusory to believe that the market behavior of these firms can be made "compatible with the common market" by the mere negative surveillance of the Commission. This would require major political decisions in several countries about a more restrained position of the state in the mixed economy.

[104] Brothwood, *The Commission Directive on Transparency of Financial Relations Between Member States and Public Undertakings*, 18 C.M.L. Rev. 207, 211 (1981), referring to Case 78/76, Firma Steinike und Weinlig v. Federal Republic of Germany, [1977] ECR 595.

[105] *See supra* note 102 and accompanying text.

[106] Joined Cases 188 to 190/80, France and Others v. Commission, [1982] ECR 2545.

[107] *See* Page, *Member States, Public Undertakings, and Article 90*, 7 Eur. L. Rev. 19 (1982).

[108] *See* Shepherd, *Public Enterprise in Western Europe and the United States*, in The Structure of European Industry 289 (H. de Jong ed., The Hague, Nijhoff, 1981).

f) Sectoral Integration - The Examples of the CAP and Transport Policy

i) Political and economic implications of sectoral integration

Despite the initial emphasis on sectoral integration in the ECSC, it should be realized that its significance in overall economic integration in the Community is very limited. It is the highly politicized nature of decision-making in sectors like steel and agriculture that tends to lead to the excessive press coverage of structurally shrinking employment shares in the overall EC employment. Sectoral integration is also something of an exception in the market-oriented implementation of the EEC Treaty.

The willingness to engage in positive sectoral integration, where protection and sheltering are most prevalent, can be explained by the strong political interests involved. Without concentrated emphasis on the French agricultural interests and the Dutch transport interests, both the *Spaak Report*[109] and the Treaty might not even have contained positive policy integration in sectors. We might have witnessed nothing more than weak industrial market integration, since the fragile and traditionally protected French industry would not have permitted product market integration with stringent provisions and an accurate time-table such as the one in the Treaty. But the French Government could exploit the German eagerness to enhance their exports structurally. After all, the division of the previous *Third Reich* into the "Federal" and the "Democratic" Republics, and the near-autarky of the Eastern European economy, had deprived the West Germans of their traditional hinterland. Having overcome its vast problems of reconstruction, the Federal Republic of Germany gave dramatic evidence of its determination to participate vigorously in international trade by unilaterally implementing tariff reductions in 1956 – the year of the *Spaak Report* – in response to a stubborn trade surplus. The Dutch interests in a common transport policy were less well secured, as could have been expected from the smaller Dutch weight in the negotiations.

But even in the two common sector policies it would be a misconception to expect a well-organized market with virtually no disparities as between countries. In commonly regulated sectors, theory would suggest the terms of exchange of goods, services and factors to be determined primarily by positive integration from which liberalization would follow. Hence, the basic economic freedoms would formally be the same as in the industrial "common market," yet materially constrained. But the constraints would be uniform over the entire Community so that there would be no difference between regulated domestic trade and regulated cross-frontier intra-union trade.

The theoretical view is utopian, however. Intervention is a political response either to redistributive constituent pressures or to more fundamental, "electoral" views on market failures and the desirable economic organization of so-

[109] Comité Intergouvernemental créé par la Conférence de Messine, Rapport des Chefs de délégation aux Ministères des affaires étrangères (P. H. Spaak *et al.*, Brussels, Secrétariat du Comité, 1956 (the *Spaak Report).* (A summarized translation of Part I of the *Spaak Report* – "The Common Market" – was published in Political & Economic Planning, Broadsheet No. 405 17 Dec. 1956).)

ciety. It is political processes, and bureaucratic implementation, that will determine the effective outcome of the intervention. Although efficient management of intervention is already difficult enough on the national level, it is appreciably *more* problematic on the Community level. It is probably fair to say that domestic and Community action, for a given interventionist policy, are imperfect substitutes. The reason is that for any common policy the more interventionist the method chosen, the more *centralist* the policy will have to be. To achieve the requisite uniformity in the face of divergent economic circumstances, a process of perpetual bargaining evolves wherein every element of the common regime will be translated into redistributive issues, that can be played out both at the Community level – especially under the veto system – and at the national level, as a proof of "good" constituency politics. This system can nonetheless function if all participants agree that the intra-union interdependence is too great to fall back on national interventions of a similar kind.

ii) Common Agricultural Policy – An assessment

The point is illustrated in the case of the Common Agricultural Policy. The price-support policy uses variable common levies plus Community intervention both based upon common prices set by the Council.[110] The visible revenue (levies) and expenditure (intervention plus export subsidies) of the policy are strictly Community matters. But this centralist set-up can only achieve its objectives of intra-EC free agricultural trade and improved productivity through specialization if exchange rates are fixed, *i. e.*, if macro-economic integration is equally far advanced. In the absence of the latter, the common price policy will imply recurrent shocks to farmer incomes, sharply diverging as to Member States. Since it is the level of farmer income that is the basic reason for agricultural intervention – anywhere in Europe – and not intra-EC free trade, these shocks will be cushioned by giving up the latter, at least temporarily. The curious result is, then, that to safeguard the centralist solution in the long-run, intra-EC trade will repeatedly be hampered in the short-run. Had one chosen a less *interventionist* solution – for example, degressive deficiency income payments per unit of land – a less *centralist* solution could have safeguarded intra-EC trade irrespective of exchange rate fluctuations. That this does not happen should be explained by the fundamental difference between pre-federal distributive politics *among* Member States and the smoother distributive politics *within* Member States. The political economy of immature, pre-federal integration cannot normally muster the excessive centralism that is required if a great deal of interventionism is deemed desirable.

Of course, the present essay cannot deal adequately with the Common Agricultural Policy (CAP). What follows highlights certain basic points of interest.

Article 38 of the EEC Treaty is explicit about combining positive and negative integration in agriculture. While article 38(1) says that the "common

[110] Of EC agricultural production, 70% is subject to both; another 25% only to variable common levies.

market shall extend to agriculture and trade in agricultural products," article 38(4) acknowledges that the "common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States."

The objectives of the CAP are defined in article 39(1):

(1) to increase agricultural efficiency ("to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour");
(2) a fair standard of living for farmers ("a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture");
(3) "to stabilise [agricultural] markets;"
(4) "to assure the availability of supplies;" and
(5) "to ensure that supplies reach consumers at reasonable prices."

The practice of the CAP has clearly shown that the objectives of an appropriate level and stability of income are paramount among the five objectives. The sensitivity with respect to these objectives extends to the instruments used to achieve them and this causes negative side-effects vis-à-vis other CAP objectives and the overall objective of integration itself.

There are also constraints in pursuing the CAP. One constraint to the policy formulation is that the five objectives must be pursued under *free trade within the customs union* (called the "common market" in article 38(1)). One may also relate the constraint to the optimum utilization of factors (objective 1), implying regional specialization in the customs union. Another constraint has undoubtedly been neglected. Article 18, on the common external tariff of the CU, explicitly mentions the Member States' "readiness to contribute to the development of international trade and the lowering of barriers to trade."[111] In the CAP the declared readiness is simply absent. It is no exaggeration to say that there is a readiness to frustrate international agricultural trade (by export subsidies) and to maintain very high barriers.

Once one realizes the full significance of objectives and constraints, it becomes evident that the CAP had to be constructed in some compromise form. The constraint of (external) trade liberalization has literally been given up. However, that by itself conflicts with objective 5 on reasonable consumer prices, and may occasionally conflict with objective 4 on supply security.

Three sets of policies are instrumental to the above objectives:

(1) the so-called "price support system";
(2) structural agricultural policy (via grants); and,
(3) structural policies with important side-effects on the agricultural sector (via the Social & Regional Development Funds or the European Investment Bank).

[111] Similar wording can be found in the Preamble and arts. 29(a) & 110.

The price-support system is based on the notion that farmers should be provided with a reasonable level and security of income by guaranteeing minimum prices for their products in advance. Hence, it is an instrument geared to objectives 2 and 3. However, supporting income through prices may well be incompatible with prices that are "reasonable" to the consumers (objective 5) and, by warding off competitive imports, with a liberal international trade policy to third countries. It is also difficult to see how prices that should equilibrate demand and supply can be manipulated for income purposes without affecting the structural volume of supply. When sufficiently high prices are guaranteed, it is attractive to increase supply by means of physical capital investment so as to raise income in a riskless way. Once this is done, the fixed-cost component in the sales price becomes higher, making adjustment more difficult and price-concession more costly. Maintaining the price, however, is costly to society at large which will have to pay for the emerging surpluses. Trying to achieve two objectives – the level of income and equilibrium in the market in the longer run – with one (price) instrument is not a good policy. Either supply has to be constrained, or additional instruments are needed to induce the desirable labor mobility. If both are not possible for one reason or another, a different (set of) instrument(s) ought to be chosen.

Has the CAP resulted in Community-wide agricultural market integration? Negative agricultural market-integration-from-above had been largely achieved toward the end of the 1960's (with quotas eliminated and only some veterinarian and phytosanitarian barriers left) while positive market-integration-from-above seemed to be virtually complete in terms of price and income policies, and hence also the outer protection. Relative to the late 1960's, however, the 1970's brought disintegration with barriers to intra-union market access (due to monetary compensatory amounts – MCA's) and with irregular attempts to use domestic aid policy as an agricultural income policy (as in France in April 1981 for plainly electoral purpose). Although the level of the respective MCAs has come down in the early 1980's, the fact of their mere existence and repeated recreation in the European Monetary System (with every realignment of the exchange rates) makes the Community's agricultural market reminiscent of a free trade area rather than a true CU. The verdict for this class of issues is a simple one: when macro-economic developments (hence, incomes) in the EC countries remain structurally divergent, one cannot expect to bring the national absolute incomes of farmers into line. The solution is to let national farm incomes diverge roughly in accordance with domestic macro-economic performance without employing instruments that hamper intra-union agricultural trade.

iii) Transport policy – An assessment

Whereas the CAP is firmly established in the Treaty, the Common Transport Policy is in a less firm position. The ambiguity of the *Spaak Report* is adopted in pursuing the "freedom to provide services in the field of transport,"[112] while

[112] EEC Treaty art. 61(1) on services.

simultaneously imposing that the transport objectives "shall... be pursued by Member States within the framework of a common transport policy."[113] Whereas the CAP has aimed at common market regulation, with liberalization subordinated to such regulation, the common transport policy has suffered from the conflict between the objective of competitiveness and efficiency, on the one hand,[114] and the objective of cheap and accessible public or publicly controlled transport services[115] on the other hand. The public service approach, in turn, is instrumental to higher policy objectives, such as personal income distribution, or regional development. Finally, the implementation of the CAP provisions has been economically costly but politically successful, whereas the Common Transport Policy has been implemented at a much slower pace and has remained painfully incomplete. The lack of progress can be attributed in part to the inherent conflicts of objectives in the Treaty.

Where the Community's transport policy is successful, it is almost entirely of the negative variety, that is, the elimination of discrimination on the grounds of nationality, unjustifiable state aids, etc.[116] Due to extensive domestic interventions and bilateral Member State agreements on licenses for international road haulage, the free movement of transport services has not been achieved within the Community.[117] It should be kept in mind that different economic philosophies and strategies in national transport policies remain the true obstacle behind a veil of techniques: Germany's and France's traditional protectionist views on freight movement by road – not unrelated to losses on freight by rail – contrast markedly with the Dutch concept of a free market for road haulage. Transport policy is a typical area where the competences of the Community and Member State government tiers are concurrent but with ambiguous specification on the distribution of such powers and the priorities of a common regime. In such a configuration, and given the vested national interests, the decision-making procedures in the Council make it extremely hard to achieve more than negative integration. Since, in a sector such as transport, negative integration is a necessary but insufficient condition for market integration, the conclusion is that Community law is not stringent enough to achieve the efficiency in transport services one might have expected in stage 5.

[113] EEC Treaty art. 74.

[114] EEC Treaty art. 78.

[115] EEC Treaty art. 77.

[116] *See* Gwilliam, *The Transport Policy*, in THE ECONOMICS OF THE EUROPEAN COMMUNITY, *supra* note 5, at 159.

[117] For example, the bilateral agreements do not permit the right of a foreign haulier to undertake purely national carriage within other countries ("cabotage"). On the other hand, there are now a limited number of multilateral "Community" licenses. Note also that it is road haulage in particular that is important: in 1977 road haulage accounted for 84% of all goods (by weight) transported over the surface in the EC. *See* THE EUROPEAN COMMUNITY'S TRANSPORT POLICY (European Documentation Series, 2/1981; Luxembourg, Office for Official Pubs. of the EC, 1981).

3. Toward a Pseudo Common Market?

a) Beyond Product Market Integration

In moving beyond stage 5, the Community has liberalized intra-union international direct investments and therefore complied with stage 6. However, international direct investment (and the foreign production flowing therefrom) has become such an ordinary phenomenon in the world economy that its liberalization should not be taken as a significant addition to product market integration. Of course, the commitment is irreversible here but whether this has effectively ended xenophobic interventions (*e. g.*, de Gaulle vetoing Fiat's takeover of Citroën) is not clear.

Article 52 mentions the "progressive abolition... [of] restrictions on the setting up of agencies, branches or subsidiaries." However, this provision cannot be abused for tax reasons, since, according to a later directive, a registered office must show an effective and permanent link with the economy of one Member State before the right of direct investment can be invoked.[118]

The main economic significance of the freedom of intra-EC direct investments is the mitigation of the effects of economic distortions resulting from the gaps in stages 3, 4 and 5, especially where direct investment is a substitute for trade. The impact of direct investment upon market-integration-from-below, however, results primarily from the freedom of *intra-union trade*. This attracts substantial direct investments from outside the union, while exerting an influence on intra-union investments in later periods.

The real issues, however, of moving beyond product market integration center around the notion of the "common market," in other words stages 7 and 8. In reading the Treaty one gets the impression that at least some elements of stage 7, the pseudo common market, are to be realized, in particular the free movement of labor and the freedom of establishment. The free movement of labor is provided for in article 48 of the Treaty. By 1 July 1968, the legal freedom of movement of (Community) workers was secured together with the achievement of tariff- and quota-free trade.[119] The practical value of this principle is debatable, however. First, there are two exceptions: employment in public service[120] and "limitations" justified on grounds of public policy, public security or public health.[121] At the same time, it should be added that "public service" has been interpreted narrowly, so as to enable nationalized industries or local governments to employ foreign manual workers. Second, social secu-

[118] *See* EC Council, General Programme for the Abolition of Restrictions on Freedom of Establishment, [1962] JO No. 2, 15 Jan. 1962, p. 36 (IX OJ (spec. Eng. ed., 2nd Series) p. 7) (Title I: Beneficiaries – "companies and firms... provided that... their activity shows a real and continuous link with the economy of a Member State..."). *See generally* D. Wyatt & A. Dashwood, *supra* note 54, at 195 ff.

[119] *See generally* Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State, infra* this vol., Bk. 3.

[120] EEC Treaty art. 48(4).

[121] EEC Treaty art. 48(3).

rity systems have not been unified or harmonized anywhere near to the extent necessary for neutrality. Article 51, and some subsequent regulations, have only laid down the principle of equal treatment of a local worker and the obligation that previous social insurance periods, associated with work in another Member State, shall be added to the ones relevant for current work elsewhere in the Community.[122] Although these provisions are a sufficient condition for legal non-discrimination, they are totally insufficient for eliminating the economically distortive nature of social security differences. Third, there are a host of other public and private barriers to labor migration – ranging from the incomparability of national pension schemes, or discrimination against diplomas from other educational systems, low-cost housing difficulties ("grandfather" protection to tenants under rent control legislation in particular generates excessive immobilities), to social habits, food and – most important of all – language. Therefore, it is false to expect labor migration over frontiers to lead to convergence of labor productivity. Indeed, it is no surprise to observe that intra-Community labor migration has remained an uninterestingly marginal affair. The only important labor migration has come from *outside* the EC, in the movement of non-skilled Mediterranean labor – despite the priority that Community workers have over non-EC workers.

The freedom to exercise a trade or a profession anywhere in the Community, that is, the freedom of establishment, is covered by articles 52 and 53. Articles 59 to 66 cover the closely associated freedom to supply services. Since services can be supplied from a distance or by setting up a "trade or profession" locally, the two freedoms are imperfect substitutes, analogous to the relation between product trade and direct investment. In addition, one might argue that the non-discrimination provision of article 7 also supports the right of establishment for all natural persons in the EC. However, in a great many instances the practical fulfillment of a legally non-discriminatory requirement (for example, knowledge of language, national commercial knowledge or the possession of a professional diploma obtained following an examination) may act as a similar obstacle. Harmonization of national administrative provisions in this respect[123] is, therefore, of great importance, but at the same time extremely difficult as national professional associations may militate against too liberal standards. The (national) specificity and distinct quality of the professional service enable professionals to enjoy economic rents that could be brought down by a foreign inflow of similar professionals not subject to the same standards.[124]

The freedom of movement of labor and of establishment are not of great economic significance in the EC. It is difficult to establish the extent to which this can be attributed to private barriers (*e.g.*, linguistic barriers and social at-

[122] *See* Garth, *supra* note 119, at nn. 42–47, and references cited therin.

[123] *See* EEC Treaty art. 57(2).

[124] After long negotiations, agreement was reached in the late 1970's for architects, medical doctors, lawyers, soccer players, nurses and veterinarians. Even these few agreements do not really deliver "freedom" in the sense of equality of opportunity.

tachments) rather than to public obstacles. There is little doubt that, with respect to the first two factors, Europeans are less mobile than U.S. citizens within their country. Nonetheless, it is also important to stress the limitations of the principle of non-discrimination (on the grounds of nationality *ex* article 7) in realizing the free movement of non-financial factors of production, *i.e.*, stage 7. The fundamental deficiency of the non-discrimination principle is that, in and by itself, it does nothing to remove the differences in national laws governing the activities of the factors of production. Thus, even a pseudo common market, as defined in Table 1, cannot be expected to come into being on the basis of specifications of the non-discrimination principle, as is done in the Treaty.

Finally, the Community is only slowly developing a legal framework to facilitate European business. This is a cumbersome and comprehensive exercise dating back from the mid-1960's and – due to long transition periods in some instances – extending into the 1990's. This set of "minimum contents" directives includes references to national legislation covering taxation, corporate reporting, financial disclosure, auditing, mergers and separations, employee consultation and parent-subsidiary liability.[125] However, the pace is slow. Moreover, politicization has frequently watered down the stringency of commitments in the directives already accepted. Therefore, the Commission has proposed a common statute of a Community company – the Societas Europa, S.E. – operating alongside companies constituted under national company laws, but the proposal has not yet been accepted. Given the legal difficulties in cross-frontier mergers in the EC, the refusal to adopt a common statute makes direct investment the single possible route for European business integration. It leaves the pseudo common market in the Community with symbolic, rather than economic significance.

b) The Thorny Issue of the Common Market

No elements of stage 8, the pure common market, have been realized, or indeed seriously pursued, by the Community. Negative integration in banking has not gone very far since article 61(2) says that the "liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital." The accompanying harmonization has concentrated on solvency supervision and protection of clients' deposits, that is, on allocative rather than stabilization issues.

This is in line with the expected encapsulation of non-financial market integration, excluding macro-economic integration. The test case is therefore the liberalization of financial capital movements.

[125] Sometimes complex legal constructions for quasi-mergers are used. On integration of company law, *see generally* R. Buxbaum & K. Hopt, Legal Harmonization and the Business Enterprise: Corporate Law and Capital Market Harmonization Policy in Europe and the U.S.A. (IV Integration Through Law Series, forthcoming).

Article 67(1) reads: "to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital." The reservation "to the extent necessary" leads to serious interpretative difficulties. A common market has been defined as product market integration plus free movement of all factors of production.[126] Another way of saying the same thing is to say that a common market is a group of countries wherein all private economic agents are *free* to trade, to invest, to offer services, to work and to pay *wherever they prefer*; all the freedoms, normally enjoyed in a national market, extend to the total area of the group. On the basis of this definition, the reservation in article 67(1) is superfluous: the complete liberalization of all capital movements is a *conditio sine qua non.*

Does economic theory have something to say on the "proper functioning" of a market? There are a number of caveats with respect to the economic theory of market behavior under the collective label of "market failures." Capital or direct investments may not always move to areas where such resources are scarce due to spatial or other diseconomies. Conversely, factor movements may also be attracted by private pecuniary benefits to certain agglomerations without immediate reflection on the social costs of spatial concentration (and of impoverishment elsewhere). Moreover, firms, especially large and/or multinational ones, usually attempt to create a continuous flow of firm-specific advantages over time by "internalizing markets" within the corporation. Consequently, a significant share of trade in intermediate products and of international factor flows – particularly knowledge and management – only indirectly contributes to "common market" behavior. In the short- and medium-run, the upshot is closer to market segmentation *over frontiers but between firms and products.* It follows that, for a "common market" to approximate maximum efficiency and social welfare, stringent and ambitious regional and competition policies are required, and possibly even R & D policies.

However, it is most improbable that *this* is the reason for the reservation, "to the extent necessary to ensure the proper functioning of the common market." Some of the theoretical problems apply equally well to national markets and others have to do with the intricacies of international direct investments, which belong to a lower stage of market integration (customs-union-plus) and have already fully been liberalized by the Community.

The reservation can only be justified by adopting a definition of "common market" that artificially ignores the capital movements that have primarily stabilization effects, or are tied in with redistribution at the macro-level, while singling out those that have primarily allocative effects. This hypothesis cannot be derived from the basic articles of the Treaty on means and instruments. It only becomes clear when studying the provisions on financial capital movements and those on macro-economic integration.

[126] The definition is widely accepted and is congruent with the one developed in B. BALASSA, *supra* note 6.

Article 2 merely speaks about "establishing a common market and progressively approximating the economic policies of Member States." No definition is provided. The eleven instruments in article 3 are *not* assigned to either one of the two means of article 2. Although this generality is appropriate, in principle, for mixed economies – as negative and positive integration will apply to both means – it causes serious interpretative problems whenever "the proper functioning" of an undefined phenomenon is the condition for negative or positive integration.[127] As Pescatore writes: "*j'estime que ce serait de la peine perdue que d'essayer de lui donner (à la notion de Marché commun) un sens précis et rationnel. En réalité, il s'agit d'une formule passe-partout qui permet, à volonté, de désigner n'importe laquelle des formes d'intégration que nous venons de définir.*"[128]

Applying the economic definition of a common market to the integration of mixed economies there is *no* reason to exclude *a priori any* of the first ten instruments of article 3.[129] Quite to the contrary, the theoretical analysis above[130] strongly suggests that both far-reaching forms of positive integration in the allocative sphere[131] *and* in the stabilization sphere[132] are required to realize a pure and, some extent, even a pseudo common market in a group of mixed economies. Since article 3 has provisions on both, the encapsulation can not be directly deduced, although it is foreshadowed in the rather unbalanced specification of the two elements and the imprecise wording of article 3(g).

But, that the reservations of article 67(1) point to a split vision of capital movements is immediately apparent from the wording of Part II, Title III, chapter 4 of the Treaty. For example, in article 71 the standstill provision has been kept so weak as to be of little value: "Member States shall endeavour to avoid introducing within the Community any new exchange restrictions on the movement of capital. They declare their readiness to go beyond the degree of liberalisation of capital movements provided for in the preceding Articles in so far as their economic situation, in particular the situation of their balance of payments, so permits." This weak provision based on the "endeavours" of the Member States and the conditional "readiness" to liberalize suggests that

[127] One example, besides art. 67(1), is art. 3(h), which calls for "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." A second example is art. 100 which provides for harmonization in case national measures "directly affect the establishment or functioning of the common market."

[128] *Quoted in* Constantinesco, *supra* note 91, at 247 n. 5. Thus Constantinesco states that "the" common market in the Treaty consists of the instruments in art. 3(a), (b), (c), (d) & (e), (*id.* at 263), whereas Kapteyn and VerLoren van Themaat (*supra* note 32, at 56–57) agree on art. 3(a), (b) & (c), but exclude (d) (the CAP) and (e) (common transport policy) while including 3(f) (common competition policy) and 3(h) (on the approximation of laws, not of policies).

[129] Art. 3(k) concerns overseas territories and is clearly ad hoc.

[130] *See supra* § B.

[131] *See* art. 3(b), (d), (e), (f) & (h) as well as 3(i) and (j).

[132] *See* art. 3(g).

financial capital movements will only be liberalized, *ex* article 67, in the context of prior decisions about macro-economic integration.[133] In addition, it should be noted that safeguard and escape clauses have been added in articles 73(1) and 73(2) and that the link with exchange rate policy coordination is weak.[134] Finally, public budget financing through the capital market of another Member State is *explicitly excluded* from the Community sphere[135] by prohibiting it unless there is bilateral agreement between the demanding and supplying Member States. The latter prohibition must imply segregation, rather than integration, of national capital markets.

Considering also the conditions on financial services, and the partial and mostly formal implementation of the pseudo common market, one is inevitably led to the view that *there is no such thing as a common market in the European Community.* The most faithful characterization of the EC is a *customs-union-plus.* Furthermore, the *legal* concept of the "common market" as it should be understood in Community law is unclear at best. There is little dispute over the elements in stages 3, 4 and 5 of Table 1, which all relate to product market integration and to payments accompanying trade. Hence a large number of articles in the Treaty may be functional and legally operational when referring to *"the"* common market, since what is meant in such cases is the common *products* market. Whether this is still true for the addition to the customs-union-plus of the elements that are the distinguishing features of a common market can be called into question.

4. Macro-Economic Integration

a) Stabilization Policies in the Treaty

The under-development of macro-economic integration is apparent even from the most cursory look at the EEC Treaty. One is immediately struck by the non-compulsory nature of "progressively approximating the economic policies of Member States"[136] via the "application of procedures by which the

[133] This interpretation accords fully with that of the ECJ in Case 203/80, Criminal Proceedings Against Guerrino Casati, [1982] ECR 2595. In particular the Court held that the limitation in article 67(1) "depends on an assessment of the requirement of the Common Market and on an appraisal of both the advantages and risks which liberalization might entail for the latter, having regard to the stage it has reached and, in particular, to the level of integration attained in matters in respect of which capital movements are particularly significant." Since capital movements "are also closely connected with the economic and monetary policy of the Member States," the Court maintains that "at present, it cannot be denied that complete freedom of movement of capital may undermine the economic policy of one of the Member States or create an imbalance in its balance of payments, thereby *impairing* the proper functioning of the Common Market." *Id.* at 2614. *See* Petersen, *Capital Movements and Payments Under the EEC Treaty After* Casati, 7 EUR. L. REV. 167, 172–73 (1982).

[134] *See* art. 70; *see also infra* § C.4.a.

[135] EEC Treaty art. 68(3).

[136] EEC Treaty art. 2.

economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied."[137] Virtually without any further detail one encounters distinctly weak provisions[138] and a series of concepts without clear definition.[139] In the case of balance of payments crises, the Council and/or Commission may grant or alter authorizations,[140] but this is typically a safeguard clause for (temporary) retrogressive measures. Only article 103 has the potential for imposing commonly decided policy measures "appropriate to the situation."[141]

How this can be reconciled with the obligation of the Member States to, "in close cooperation with the institutions of the Community, coordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty,"[142] and with the power of the Council to "ensure coordination of the general economic policies of the Member States"[143] is not clear. As has been noted before, the power of the Council of Ministers to coordinate is a peculiar one since no decision-making procedure is provided for in article 145. This means that the Community has to be endowed with explicit competences, *ex* article 235, for the coordination powers of article 145 to be practically applicable.

In the case of *macro-economic* "coordination," rather than that of "general economic policies," specification is hardly better.[144] A distinction is made between "conjunctural" policy (this is equivalent to the terms "cyclical" or short-run "stabilization" policy) and balance of payments policy. The value of this distinction is most doubtful. For relatively open economies, as all Western European economies in different degrees are, the objective of an external balance acts as an important constraint of individual expansionary policy. Only coordinated expansion can do away with a significant part of the potential deficit, for otherwise the currency will depreciate. This is recognized in article 105 which calls for coordination with a view to the stabilization objectives of articles 104 (external balance, "full" employment and price stability). Yet,

[137] EEC Treaty art. 3(g).

[138] Arts. 103 & 106(4) call for consultations, arts. 105(1), 108(1) & 109(2) provide for recommendations.

[139] *See, e.g.*, arts. 105 (coordination); 105(5) (cooperation); 103 ("a matter of common concern"); arts. 103 & 107(1) ("a concerted approach"); and art. 108(2).

[140] Pursuant to arts. 108 and 109.

[141] For example, Kapteyn and VerLoren van Themaat claim that directives *ex* art. 103 could oblige Member States to establish national cyclical stabilization funds. A common Stabilization Fund is also assumed to be possible. Furthermore, they state that the Council could issue regulations for a complementary common cyclical policy. Other lawyers, however, wonder whether, given the lack of appropriate institutional provision, art. 103 is not *alien* to the Treaty. *See* P. KAPTEYN & P. VERLOREN VAN THEMAAT, INLEIDING TOT HET RECHT VAN DE EUROPESE GEMEENSCHAPPEN 359 (2nd ed., Deventer, Kluwer, 1980).

[142] EEC Treaty art. 6(1).

[143] EEC Treaty art. 145.

[144] EEC Treaty arts. 103–09.

both articles fall under the heading "Balance of Payments"! On conjunctural policies little more is said than that they are "a matter of common concern" and that the Council "may . . . decide upon the measures appropriate to the situation."[145]

The Treaty is based on the implicit assumption that pegged, but adjustable, exchange rates are the normal and indeed the proper state of affairs. Every Member State is expected to "pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency."[146] This is also something of a constraint on the other Member States. Article 107(1) provides: "Each Member State shall treat its policy with regard to rates of exchange as a matter of common concern." Moreover, the entire fabric of the agricultural price support policy is built upon that assumption. Therefore, a balance of payments crisis in one of the Member States is viewed as a potential threat to all. But at the same time it should be said that the highly inadequate provisions for economic policy coordination are likely to be responsible for payment deficits exceeding the crisis norms.

Safeguard clauses with respect to external balance, but with a possible impact on the entire "common market," are found in articles 108 and 109. Article 108 deals with procedures concerning special measures when a Member State has balance of payments difficulties. Article 109 is, so to speak, an escape clause for article 108, which comes into play in case of a "sudden crisis in the balance of payments" that requires a more urgent response than that which the complex procedures of article 108 could perhaps provide.

Article 108 has three procedural stages. The first comprises recommendations by the Commission after a detailed investigation; the second one provides measures of assistance including limited credits (by the Council); and the third comprises an authorization by the Commission upon a failure of the Council of Ministers to provide sufficient assistance. The Commission used the power under the third stage for the first time, in the case of France in mid-1968 (the "May-revolt"). Article 109 permits the necessary protective measures to be taken by the Member State itself "as a precaution," but the Council has the power for partial or full correction afterwards.

However, when emergencies arise, political pressures are heavy and uncertainties abound. Thus, in the French case, an application was made for the authorization of the Commission, yet, immediately followed by unilateral action under article 109. Ironically, France had to devalue one year later despite all emergency action.

Applying the six criteria to distinguish integration from cooperation,[147] not a single condition for integration holds. There is no transfer of any function of stabilization policy nor is there a more than marginal transfer of redistribu-

[145] EEC Treaty art. 103.

[146] EEC Treaty art. 104.

[147] *See supra* § D.1. The seventh criterion concerns judicial review and can be applied to macro-economic integration only, if at all, with respect to negative integration in stage 8, as one of the elements thereof.

tion functions (and even that is in the realm of "visible" transfers); there are no constraints on policy instruments other than voluntary ones; but there are ample escape and safeguard clauses without mandatory, or even negotiated, supervision. In the absence of commitments, the additional conditions about "opting out," unlimited duration and precision in sequence and time-table of stages do not even apply.

The leeway in safeguard clauses is mirrored in the Community regime on capital movements (where, as shown before, obligations are very weak anyway). The clauses relating to external imbalances[148] are indeed matched by a double safeguard clause with respect to capital market integration.[149] The language used is very vague: "If movements of capital lead to disturbances in the functioning of the capital market in any Member State the Commission shall... authorise that State to take protective measures in the field of capital movements, the conditions and details of which the Commission shall determine."[150] However, if a Member State is "in difficulties," which is even vaguer but could obviously relate to external imbalances, it may also "on grounds of secrecy or urgency, take the measures... on its own initiative" even though the Commission may require the State to amend or abolish such measures.[151]

The economic implication of all these provisions comprises neither capital market integration nor substantive macro-economic integration, but a *customs-union-plus with adjustable exchange rates.* This is exactly what one would expect on the basis of an integration theory for mixed economies. It also reflects the practice of the EC: during most of the 1960's exchange rates were relatively stable but adjustable, while during most of the 1970's a curious hybrid of flexible and adjustable rates was applied without coordination via the Community, drifting back to a more cooperative system by the end of the decade, explicitly set up under the aegis of the Community.

b) The European Monetary System

The European Monetary System (EMS) effectively started on 13 March 1979, and aims to achieve a "zone of monetary stability" in Europe. Monetary stability has two components: an internal one – price stability, or the stability of the domestic purchasing power of one unit of the currency; and an external one, namely exchange rate stability. The emphasis is clearly on the latter, although the institutional machinery and intensity of consultation about both aspects of monetary stability may be considered as an improvement over the casual arrangements based upon articles 103 and 105. The EMS has given article 107 material significance: "Each Member State shall treat its policy with regard to rates of exchange as a matter of common concern." It has even for the first time been explicitly stated that "adjustments for central rates will be sub-

[148] EEC Treaty arts. 108–09.
[149] Not counting art. 70 which is also relevant.
[150] EEC Treaty art. 73(1).
[151] EEC Treaty art. 73(2).

ject to mutual agreement by a common procedure,"[152] but this undertaking was made only in a Resolution of the European Council (of 5 December 1978) and has never been transposed into a legally binding form. It should be acknowledged, however, that – binding or not – the mutual agreement clause has been respected during the first five years of the EMS. In the same Resolution the European Council was "firmly resolved to consolidate, not later than two years after the start of the scheme, into a final system the provisions and procedures thus created based on adequate legislation at the Community as well as the national level,"[153] but this firmness has since eroded and no action had been taken as late as 1984.

A full-fledged discussion of the EMS is neither necessary nor desirable for our purpose.[154] In brief the EMS can be said to comprise the following four elements:

(1) The exchange rate arrangement: the core is an agreement between the central banks of the Member States, setting central rates in European Currency Units (ECU, *see* below) and laying down intervention rules; it also includes the option to de- or re-value subject to mutual agreement. The arrangement has proved to be operational on a daily basis. The legal nature of the intervention rules is somewhat unclear but has not (yet) been a practical problem. However, countries can withdraw or refuse to participate, as the U. K. and Greece are currently doing.

(2) Credit facilities: (automatic) very short-term facilities (up to 45 days) take the form of renewable swaps between central banks; short-term (9 month) facilities, originating from the early 1970's, are non-conditional and between central banks; medium-term credits are conditional and subject to a Council decision as they supposedly constitute an instrument to enforce coordination of economic policies so as to yield more "economic convergence" – such medium-term credits have never been used *precisely because* they are conditional.

(3) Depositing of 20% of gold and exchange reserves in the European Fund for Monetary Cooperation, against ECUs: although a Regulation has been used to empower the Fund to issue ECU and receive monetary reserves, the move of "depositing" is an entirely symbolic one as deposits are temporary and are (for the time being, automatically) renewed every three months; thus, reserves are not yet "pooled." This is why the U. K. could participate in this gesture. All these measures serve as the preliminaries for an eventual European Monetary Fund (EMF) with its *own* (common) reserves.

[152] Resolution of the European Council of 5 Dec. 1978, on the establishment of the European Monetary System (EMS) and related matters, BULL. EC 12–1978, p. 11, at point 3.2. In 1964, a mutual consultation preceding any change in exchange rates had been agreed upon as the procedure.

[153] *Id.* at p. 10, point 1.4.

[154] For detailed discussion of the EMS, *see, e. g., The European Monetary System*, 3 EUROPEAN ECONOMY 63 (1979); and 12 EUROPEAN ECONOMY *passim* (1982).

(4) The European Currency Unit: also introduced by a Regulation, the ECU is the present unit of account of the Community and a means of payments (within limits, and *only* between central banks) and serves as the basis for the "divergence indicator" for the purpose of compelling Member States with a too weak or too strong one-sided shift in actual exchange rates to consult; a signal from the "divergence indicator" creates a "presumption" for that country "to act," or else to consult to explain why it does not.

Without entering into the details of the system, the weaknesses are apparent and show that while the EMS is some improvement, with respect to exchange rate policies, on the highly unstable period of the mid-1970's, it has *not* led to a substantial improvement in the weak, essentially cooperative provisions of the EEC Treaty. Although the intervention *cum* (very) short-term-finance system is elaborate and its operation intensive, there is hardly anything that makes it "integrationist" rather than "cooperative." There would be few problems in letting non-EC Members take part. The one major improvement is a de- or re-valuation decision: all realignments have indeed been commonly decided. Britain's non-participation as "a matter of course" is, however, telling.

One may take different views on whether economic policy "convergence" has been seriously pursued during the first five years of the EMS. Despite upheavals in the world (and EC) economy, such as the second "oil shock," a deep recession and a widespread debt rescheduling, the EMS partners have been willing to introduce disinflationary policies (*e.g.*, higher interest rates and budget cutting) with the aim of having rates of inflation converge at a lower common level. However, these policies were not entirely successful in, for instance, Italy and Ireland. It is also doubtful whether, and to what extent, convergence of inflation rates really was a product of the EMS machinery or of a generally felt necessity to fight inflation.

Moreover, (agreed) mutual interventions in EC currencies hardly take place (dollars are typically employed), the "divergence indicator" is not functioning properly and the more ambitious plans for the future have been shelved. In other words, the EMS has not broken through the capsule of the customs-union-plus.

D. The European Community: From Pre-Federal to Federal?

Hitherto progress in European economic integration has been inhibited by the qualitative jump from the customs-union-plus, or, at best, non-financial market integration, to macro-economic integration. Thus, *advances are "encapsulated" within the realm of the customs-union-plus*, and even there a definite preference for allocative over redistributive measures of any significance can be discerned. The European Community does not really engage in macro-economic integration; any such provisions are of the cooperative kind. None of the criteria of transfer of competences, binding arrangements (whether

negative or positive integration), common supervision, a precise and mandatory prescription of the transition period, unlimited duration, unilateral impotence to opt out and a minimization of safeguard and escape clauses, that distinguish integration from cooperation, are fulfilled. Even the common agreement required to alter exchange rates in the EMS is at best a border case, as it rests on shaky legal grounds and does not include all Member States.

Though legally and economically the "encapsulated" possibilities to advance on issues of product market integration are far from being exhausted, the political benefits seem too meager, both at the Community and the national tier, to raise great expectations about exceptionally complex bureaucratic processes. But breaking out of the "capsule" of the customs-union-plus in order to move to more full-fledged economic integration-from-above is, though not unthinkable, even more demanding. Financial and fiscal negative integration will be conditional upon decisive progress in macro-economic-integration. Tinkering with these ideas has never really stopped in Europe. It has led to two experiments that acknowledge the strong resistance to macro-economic integration. Both generated an impressive machinery of what Corden has aptly called "integration through talk,"[155] yet failed to make progress in transcending cooperation and engaging in integration. The actual reasons for failing to jump from cooperation to integration are legal, political and economic and a full analysis is beyond the scope of this study. But even a brief look is instructive.

In a Resolution of 22 March 1971, the Council confirmed its desire to achieve an "Economic and Monetary Union," implying that "the main economic policy decision will be taken at the Community level, and therefore that the necessary powers will be transferred from the national to the Community level."[156] The Resolution goes on, mentioning the following list of policies that will be subject to these principles: (domestic) monetary and credit policy, external monetary policy, policies with respect to the capital market and capital movements, public expenditure and fiscal policy (with unspecified links to growth and stabilization policies), and structural and regional policy. The ambition makes one gasp, especially given the explicit recognition that, for competences in macro-economic policy to shift to the Community, the Treaty will have to be changed. At any rate, the attempt utterly failed, both because the

[155] Corden, *The Adjustment Problem*, in EUROPEAN MONETARY UNIFICATION AND ITS MEANING FOR THE UNITED STATES 161 (L. Krause & W. Salant eds., Washington D.C., Brookings Inst., 1973).

[156] Resolution of the Council and of the Representatives of the Governments of the Member States of 22 March 1971, BULL. EC 4–1971, at p. 20. (For the official (French) text, JO No. C 28, 27 March 1971, p. 1). *See generally, From Customs Union to Economic and Monetary Union*, BULL. EC 4–1971, at pp. 11 ff & 74 ff; and BULL. EC 5–1971, at p. 47. *See also* P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 32, at 286–87; and *id.*, *supra* note 141, at 366. For examples of measures adopted pursuant to the Resolution, *see* Council Decisions (EEC) Nos. 141/71, 142/71, 143/71, JO No. L 73, 27 Mar. 1971, pp. 12–16 ([1971] OJ (spec. Eng. ed.) at pp. 174–77).

ambition was set much too high and because external monetary disturbances and the first oil shock led private economic agents to discriminate among EC currencies, while inducing public agents to diverge in domestic policies precisely when faced with a severe test.[157]

The present EMS – the second experiment – has been constructed with more care and flexibility. Although there are references to "a second stage" to come, this would seem to amount to little more than legal confirmation that "opting out" would henceforth be foreclosed. This would imply that ECUs would become permanent as a means of payment, rather than being renewed every three months against temporarily pooled reserves; that (partial) reserve pooling would become permanent – making the Community in one stroke possess more reserves than virtually all non-Arab countries except the U.S. and Germany; that exchange rate changes could be blocked by other countries *as of right* (this would require domestic legislation as well); and it would probably also mean an improvement in the divergence indicator, the common dollar policy of the EMS (implying cooperation with the U.S.) and a material role for the then European Monetary Fund (EMF). There is no reference to a Monetary Union in the EMS plan. All the fairly technical points just mentioned do not go very far, despite their politically sensitive nature and domestic legal, indeed constitutional, consequences. One might argue that *if* the German Constitution is to be changed at all for the sake of macro-economic integration, it will surely not occur for such a small step as is implied in the EMS documents. It has to be assumed that a second possible stage of the EMS will be more ambitious, or else it will not be at all.

There are essentially two approaches to a "federalization" of the EMS, a market approach and a policy approach. The market approach will attempt to boost the public, but also and especially the (now independently emerging) private role of the ECU. At present the ECU can be no more than a unit of account in capital markets, and even in this respect it is distinctly less attractive than the Special Drawing Right (SDR) (containing only five currencies). Nonetheless, the growth of private ECU transactions has been quite spectacular in 1982 and 1983, especially in EC countries with a relatively weak currency. However, as yet, the private ECU is *not* protected by EC decisions, but has spontaneously arisen in the banking world. The private contracts imitate the official ECU. The long run prospects of this market will only brighten if exchange and capital controls in some EC countries will disappear. Second, the EC should be given the right to issue bonds in ECUs, whatever the costs in interest (to compete with SDRs) and the costs with respect to the exchange-rate guarantee implicit in such issues.

Further steps depend on the way in which the ECU will be created in the

[157] As Kapteyn and VerLoren van Themaat point out, a number of objectives *of the first stage* of the road to the Economic and Monetary Union have gradually been realized during the 1970's. P. Kapteyn & P. VerLoren van Themaat. *supra* note 141, at 367 nn. 23–24. The economic significance of all these attempts is barely more than that of well-organized and intensive consultation.

future.[158] Will it be created by swaps, that is, will it remain a suggestive cooperation gimmick as at present? Will it truly be created via capital contributions into the EMF (and how much additional liquidity of this "Community money supply" ought to be created?) or via reserve pooling, including gold (the price of which is highly volatile)? If so, and if the EC could pay non-EC central banks in ECUs, then the ECU itself could take on the role of a reserve currency.

Any further steps would depend on the "constitution" of the EMF: of course, it would administer the three forms of financial assistance but whether it could make decisions on the medium-term finance is doubtful. The latter is conditional upon a domestic program of broad economic policy measures, under the political responsibility of cabinets, not of the central bankers who are governing the Fund. To mix up the two is definitely against the German conception of independent monetary authorities (also reflected in the Dutch Bank Law of 1948) and will not be acceptable. The EMF should also conduct the interventions in the major foreign exchange markets of Europe, but this is again rather unspectacular if it is not done in ECUs. Yet for that purpose the EMF would have to be given the competence of money creation *for private use* and this is the step carefully avoided in every EMS discussion. It might perhaps be possible to avoid Treaty revision by implementing simply a modest second stage of the EMS, say to enable some reserve pooling – although this might be jeopardized if it would imply constitutional revisions in Member States – but to introduce privately usable money creation would definitely shift the macro-economic competences to the EC level. This would require strict rules for deficit financing and for the expansion of domestic money creation (if indeed national and Community monies can co-exist in private markets although this is not to be expected). It would also require a Community capital market to which non-inflationary deficit financing rules can be geared. And, of course, it would shift major decisions about public subsidies and credits, paid via previously independent budgets, to the Community level. In turn this seems hardly feasible unless the Community were to have a "federal" budget that, unlike at present, would not have to be balanced. This EC budget could then assume significant stabilization and redistributive functions.

Not surprisingly, this would have further implications for the political institutions, such as the Commission and the European Parliament. It would also require built-in guarantees that no Member State could disrupt this ambitious fabric, either by sudden restrictions or by a refusal to pay or to be subject to "federal" economic policy. The social (trade union) and political consequences seem too drastic to make the picture credible. Yet, this is precisely what a "federalization" of the EC implies – breaking out of the capsule of the customs-union-plus with endeavors at macro-economic integration has pro-

[158] *See generally* Padoa-Schioppa, *The EMF: Topics for Discussion*, 33 BANCA NAZIONALE DEL LAVORO, QUARTERLY REVIEW 317 (1980).

found political, institutional and economic consequences, following from a seemingly technical set of measures of economic policy coordination or unification. It makes the present capsule of EC economic assignments appear a robust one.

The Community's macro-economic arrangements have been carefully construed as cooperative, remaining outside the capsule, and this has deep-rooted national-political reasons. This cooperation has, of course, various possible degrees of stringency, without engaging in integrationist and irreversible commitments. As the late Harry Johnson observed about the Community's tinkering with the idea of monetary union: "one can flirt interminably with the idea of marriage, without ever actually sacrificing one's technical virginity."[159] If anything, this is the principle of pre-federalism.

[159] *See* Johnson, *Problems of European Monetary Union*, in THE ECONOMICS OF INTEGRATION, *supra* note 13, at 196.

IV. Concluding Postscript (*by* Thomas Heller)

As the end of the twentieth century draws near, it becomes increasingly clear that its history has been marked by the tension between two of its principal accomplishments – the formation of an open global economy and the institutionalization of the modern regulatory nation-state. This tension has been particularly apparent in the recent development of the European Community. Differences in national regulatory, monetary and macro-economic policies have economic consequences which affect the competitive position of the Member States so long as their borders remain relatively open to flows of goods and productive factors. Without the capacity to impose uniform interventionary policies in a centralized fashion across partially integrated economic systems, there arise pressures to isolate the national polity in order to preserve the regulatory solutions that were so long in being brought into existence.

In such circumstances, it is natural to consider the history of the U.S. which has seemed to have rather painlessly overcome these obstacles and to have stabilized a highly integrated political economy. There are, however, a variety of difficulties in using the American experience as a model case for dealing with the tension between integration and regulation. As we have argued above, the evolution of an American economy with both relatively full exchange of labor, capital, goods and technology and a largely centralized positive state is the consequence of a very specific and complex local history that is unlikely to be replicated.

It is also no longer apparent that the U.S. will be able to maintain the institutional solutions it has worked out. There is mounting evidence that the competitive forces within the more integrated global economy the U.S. helped create after World War II will disrupt the seemingly stable employment, redistributional, environmental and other regulatory policies developed in the first half of the century. It might be said that the U.S. faces the problem of replicating on a global scale the strategies it once achieved on a domestic level if it is to preserve both the benefits of exchange and the virtues of regulation. In this latter sense, the questions of federalism or multi-level government have not been put aside, but rather displaced from national or regional locations to the level of the world economic system. Both the U.S. and the EC must reciprocally reevaluate the political histories of their local economies in terms of this shifting environment.

A. The American Domestic Experience

The emergence of increasing centralization of government in the twentieth century U.S. should be understood with reference to: (1) the development of the theory of the liberal state; and (2) the contradictions within the liberal theory of the state that produce uncertainty about the optimal configuration of public and private institutions. The dominant narrative of American political

order assumes the cooperative activity of autonomous individuals.[1] Because individual action precedes and constitutes the state, liberalism establishes a utopian image of social institutions which are private and local. The history of the modern expansion of a centralized, public power goes against the basic thrust of American political theory to limit the intrusion of collective agencies on private choice and to localize those intrusions which are deemed to be necessary.

The American central state is, ideologically, an exceptional or residual solution. Legal economic theory explains the emergence of broad governmental units as a phenomenon appropriate only in that subset of cases where private markets or the local institutions that correct markets by collective action are incapable of adequately performing the functions set out for them. In this sense, the form of the historical chronicle of the American central state parallels the form of the fundamental American account of collective organization. Just as the public interventions follow the failure of private bargains in the constitutional narrative of social contract, so the centralized state theoretically follows upon the inadequacy of decentralized politics in the logic of the economic history of federalism. The normative legitimation of the national state demands it be seen as a produced or subsequent object, rather than a producing or primary agent.

The extraordinary process by which a wide range of public controls became centralized in Washington has been analyzed principally as an ongoing economic problem related to the construction of a positive federalized system. Emerging from an earlier period of mercantilist controls exercised by the separate state economies, the U.S. in the nineteenth century gradually brought into being a system of full exchange of goods and factors of production prescribed by liberal trade theory. While the first half of the century was marked by both the protectionism and infant industry subsidization characteristic of a developmental economy, there was an increasing institutionalization of a mature liberal state with a role ideally restricted to insuring that open and competitive national (federal) markets did operate. The legal history of nineteenth century federalism is characterized by the doctrinal ratification of the negative integration of private markets. This doctrinal development coalesced with a more comprehensive ideological thrust in the law that sought to restrict the general scope of governmental intervention at both the local and federal levels.

In the late nineteenth century, as neo-liberal economic theory that called for the public correction of market outcomes was accepted, the enactment of varied decentralized (state) programs to reallocate resources and redistribute wealth raised, for the first time, serious questions of how multiple positive regulatory policies could coexist. It gradually became evident that there was an incompatibility between differential levels of some types of intervention in markets by various sub-national governments and a continuing legal commitment to interstate borders open to trade and factor movements. In these cir-

[1] *See* Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 172–81 (1984).

cumstances, the growth of a centralized government represented a historically contingent solution to the difficulties occasioned by regional economic imbalances between advanced and peripheral sectors of the U.S. The coexistence of non-uniform positive economic policies produced a threat to the industrial and financial bases of a group of states desiring to more comprehensively regulate their local economies and led to a substantial concentration of institutional power at the national (federal) level.

Centralization was the mechanism by which the politically dominant Northern states equalized competition by imposing generalized productive conditions upon the markets of the less interventionist South and West. The shift of power within the federal system is interpreted as a response to the modern structural dilemma set up by a simultaneous commitment to decentralized government, positive market correction, and open economic borders. However, the dominant national regulatory state that constitutes the American solution to the problem of federalism only emerged in the early twentieth century within the configuration of political and economic conditions specific to the American domestic and international situation. Correctly or not, it was asserted that positive intervention in markets raised costs of production relative to unregulated productive technologies. These cost increases were treated as marginally important so that regulation did not simply reduce economic rents. Moreover, due to the mobility of capital and other factors, it was assumed that productive facilities would migrate to the lowest cost area and export goods back into higher cost regions. The result of this combination of events was to raise the menace of a progressive impoverishment of pro-regulatory or redistributive jurisdictions.

To core Northern states, such impoverishment was not an acceptable indirect transfer of development aid to the periphery. Northern states insisted their interventions in local markets constituted belated recognitions of fundamental individual rights concerned with humane conditions of labor, safety, environment and security of income. The pro-regulatory states, fearing competitive losses to regions producing under less costly conditions and rejecting development aid, still had several choices. They could abandon effective regulation and be forced into a "race to the bottom" – the level of intervention desired by the least interventionary effective competitive region. Alternatively, they could have pressed hard with innovative legal doctrine against the continuing constitutional commitment to an open borders doctrine. By reversing the negative integration achieved by nineteenth century law, border controls or their functional equivalents could have protected higher cost local production against unregulated competition or interstate mobility of persons and capital.

Centralization – the substitution of effective uniform positive economic policy for local market control – obviated the need for advanced regions to either deregulate or disintegrate. Nevertheless, it should be stressed that the political power utilized by pro-regulatory states to enact national programs was a consequence of the military defeat of the largest peripheral region in the Civil War. This conquest discredited the southern argument for a disintegrationist or secessionist institutional solution. The war created at the same time

the political coalition which supported a central government that served as a surrogate for progressively oriented, decentralized (state) intervention. The breakdown of a national constitution which demanded consensus – the form of federalism represented by the doctrine of nullification – was itself a coercive action. The national positive state was the outcome of America's federalist history because of an asymmetrical political imposition of an integrative and regulatory solution. It did not grow naturally out of a functionalist imperative associated with free trade and open borders. Moreover, the positive central policies which were stabilized by mid-century in such key areas as industrial relations, transfer policy, or health and safety in the workplace were insulated from foreign competitive pressures by both the high tariff levels erected in the 1930's and the relatively low volume of international trade and factor movement. Legal doctrine ratified the existence of a centralized, interventionist government theoretically justified by neo-liberal economic theory, supported by the political control of an advanced core region, and autarchically operating within a disintegrated global system.

Finally, we may note that the role of the law in the history of American federalism has been confused by judicial analyses which frequently intertwined in a single fabric of doctrine the responses to two separate constitutional questions. The predominant issue to be constitutionally resolved was the delimitation of the relative spheres of private and public activity. Only where this controversy was settled in a way which permitted the establishment of an important state sector did the issue of federalism, or the level of political institutions at which control was to be located, arise. Courts wrestled sequentially with, and eventually acceded to, both the legitimation of an expansive collective power and its national exercise. However, the importance of the American judiciary in producing federal integration stems from its peculiar institutional competence as the authoritative interpreter of the scope of the constitutionally permissible size of the public sector. It was with reference to the problem of restraining illegitimate legislative encroachment upon the private sector that courts became central actors in the development of the form of the American state. In this sense, it may be argued that the principal contribution of the twentieth century judiciary to the development of centralized power was simply to remove the doctrinal barriers to the operations of the positive state at any level which had been constructed by courts in the latter half of the nineteenth century.

B. Implications for the European Community

If there is merit in reconsidering the history of American federalism in these terms, we must be cautious in extending the analysis to European integration. One serious limitation concerns the extension of categories of political and legal discourse dominant in the U.S. to the interpretation of events in Europe. In general, there is great danger of misrepresentation of the European account of the centralized state when it is blithely transfigured into the terms of Ameri-

can liberalism. In the U.S. constitutional analysis begins in the autonomous experience of the individual subject. It imagines the centralized regulatory state only as a late and residual measure to be employed after others have failed to produce satisfactory solutions. European political discourse has never been subjectivist to nearly the same degree. There has always been an ambiguity in European thought about the ingenuousness with which Americans have embraced ideologies of individual choice, such as liberalism.[2] Far more than in the U.S. comtemporary European discourse commences with an account of the collective or the state and examines social organization, including individual subjects, as the artifacts it has produced.[3]

[2] This ambiguity is evidenced strongly in the continuing vitality in Europe of both socialist and organic conservative political traditions which make use of more determinist discourses centered upon economic class or historical culture. Foucault has argued that the Western (European) state is a "disciplinary" organization which creates the illusion of autonomy in the subjects it defines. *See* M. FOUCAULT, DISCIPLINE AND PUNISH (New York, Vantage P., 1979). Within this objectivist representation of the social order, it is the collective, represented in contemporary terms by the state, which is the origin of political and legal order. For a more general discussion of the dichotomy between liberal and anti-subjectivist discourses in law, *see* Heller, *supra* note 1.

[3] It is clearly not the case that the theory of law and politics in Europe presents an uncompromisingly totalitarian picture of the state's aims or efficiency. In particular, liberal discourse has been expressed within European legal thought in the last century. The civil codes have been centrally concerned with subjectivist categories like intention in structuring their jurisprudence. Moreover, the formation of the EC itself may be interpreted as a thrust toward deemphasizing the traditional rooting of European identity in national culture. Many proponents of the foundation of the EC after World War II hoped to create a denationalized individual or a universal subject as the basis for a refounded social order. Nevertheless, the ambiguity which attends the attempt to institutionalize subjectivist discourse has, arguably, plagued the subsequent history of the EC. There exists an ideological unease and a political resistance to European integration in part because there remain in place fundamental images of social organization which are not purely individualist. Continental politics is more than subjectivist economics because its basic categories have so long been cultural, national and statist.

If there is not a complete disparity of theory which separates Europe from America, still less can this be true of legal practice which is invariably complex and contradictory with respect to any theory. Nevertheless, rather sharp differences in the theory of ideology or the imagery of the state have been commented upon by modern European analysts of the regulatory state (which correspond to our assertion):

> But I am also surprised by the American discussion. The fascination with which American scholars and politicians alike talk about regulation seems to indicate that regulation is looked upon as being something extraordinary, a factor still to be explained: something both hopeful and worrisome, a social panacea or a social disease, a drug you are addicted to and you hate at the same time.... [In the European experience] there has never really been a dichotomy consisting of an autonomous market system and mechanisms of regulation imposed on it. Economy and state on the continent have been intertwined, notwith-

When political analysis begins with the priority of the state, the relationship between regulation and market is transformed. Regulation or the centralized production of social outcomes will be the expected, rather than the exceptional, state of affairs. The market can no longer be the paradigmatic and primary expression of social organization as it is in the U.S. On the contrary, there will be residual resort to the market only where it proves to be the most effective institution for carrying forward the project of the state. In this context, the importation of the American dichotomy of negative and positive state would distort European experience. Both terms make reference to an American political utopia which has usually seemed to incorporate too naïve and too apolitical a view of life to attract a similarly fervent European commitment.[4]

standing Adam Smith's appeal to the invisible hand of free competition. The visible hand of government interference and cartelization went for a long time unchallenged in European economic, political, and legal thinking.

Reich, *The Regulatory Crisis: American Approaches in the Light of European Experiences*, 1983 A.B.F. Research J. 693, 694–95.

[4] To analyze the EC solely as an institution intended to maximize the well-being of European individuals would miss essential aspects of its history. However, in many cases, European adherents of the Community have done just this. As in the U.S. there are various, competing accounts of the history of European federalism. The most important of these rhetorics corresponds to the progressive account of American federalism in that it views the decentralized level of EC government – the nation-state – as an anachronistic or outmoded form of social organization which transnationalism is intended to overcome. *See* Greilsammer, *Theorizing European Integration in Its Four Periods*, 2 Jerusalem J. Int'l Rel. 129, 130–41 (1976); Elazar & Greilsammer, *The Federal Democracy: The U.S.A. and Europe Compared – A Political Science Perspective*, *supra* this book, at § II.A.3.b. Naturally, in terms of this universalist ideal, the EC's subsequent history will be seen as in substantial part a failure in need of explanation. But as it is too limited to understand American federalism only in progressivist terms, so it is important to avoid this interpretation in Europe. In the United States progressivism is, at least, consistent with the dominant constitutional discourse. In Europe it ignores the ideological ambiguity produced by an ongoing tradition of collectivism as the basis of political organization.

Functionalist social analysis reflects the categories of a subjectivist discourse and, therefore, may be associated with the progressivist account of integration in Europe and America. The basic dynamic of social evolution in functionalist theory is the passage from segmented societies where the social position of an individual is defined by an ascribed (objective) status to a contemporary society organized around a functionally integrated series of roles which individuals choose to assume. It was the past history of Europe as a social order established on a nationalist or culturally segmented division, rather than a functional division, which European progressives hoped the EC would overcome. Because it clearly reflects the collectivist discourse in European politics, it may be as useful to analyze the development of EC institutions in relation to the theoretical construction of segmented societies as it is to view it with reference to a thorough going, functionalist individualism. Such fundamental features of Community institutions as government by coalition, proportionality of staffing, and negative minority voting are consistent with a non-functionalist characterization of EC

Nevertheless, comparison between the American and European federal experiences may profitably proceed on a basis which recognizes the persistence of partially dissimilar representations of social organization. For example, we might assume that the nation-state will endure in Europe as the institutional manifestation of a non-liberal or objectivist discourse that recognizes an ongoing cultural differentiation among peoples. Comparative analysis would still usefully focus on the structural question of the stability of an integrated system of contemporary interventionist polities having dissimilar regulatory goals and treaty obligations to open economic borders. In this manner, we can ignore the normative constitution or domestic legitimation of national policy formation. Internal politics may be either corporatist, socialist or liberal without upsetting the logic of comparison. A purely positive analysis may consider the history of the EC as a confrontation between integration and decentralized (sub-transnational or Member State) regulatory economic policy. Although this confrontation occasioned the growth of centralization in the U.S., it is apparent that the chronological order of political events was altogether different in Europe.

In the light of the divergent levels of economic development between the members of the EC, it would be tempting to replay a variant of the regional conflict scenario that characterized the American case. Using an explanation that emphasizes the potential instability of an economic union of interventionary governments which retain diverse regulatory policies, one need not envision the effort to centralize greater power in Brussels solely in terms of an ideologically motivated post-War project to eliminate national governments as culturally reactionary. Rather, centralization could be the instrument by which a positively integrated and regulated market could be created. The twist in the history of the EC came in the increasing prominence of the Member States in Community institutions after 1965. The acquiescence in a decision process based on the consensus of all members and the emergence of an executive organization (COREPER) closely linked to the separate national bureaucracies have diminished the thrust toward an effectively centralized politics.[5] This result, in retrospect, is not wholly surprising. While in the U.S. national integration of a single economic unit preceded the institutionalization of decentralized interventionary controls, the reverse timing took place in Europe. Member State bureaucracies in the EC established entrenched positions in macro-economic, industrial and welfare policy during periods of relatively limited international markets. At the close of World War II, the existing system of regulatory politics was recognized as accepted practice of advanced industrial economies and also, in part, discredited by the political events that attended

history. For an extensive treatment of the forms of segmented organization, *see* A. LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 25–47 (New Haven, Yale U.P., 1977).

[5] A. Mangas Martin, El Comite de Representantes Permanentes (unpublished doctoral thesis, Madrid, Universidad Complutense de Madrid, Facultad de Derecho, 1978) (copy also on file at EUI, Florence).

the depression. The founding of the EC looked toward integration and a system of full economic exchange to alleviate the political dangers of autarchic behavior, but never disrupted the national institutions that had administered positive economic controls. Nor was there a dispositive event, like the American Civil War, in EC annals to concentrate the political power needed to reduce the tension between integration and regulation by eliminating the serious threat of withdrawal of those polities anxious to preserve their decentralized economic autonomy.

These conditions substantially reduce the chances of resolving Community structural instability by an American style centralization in which those Member States with competition enhancing economic policies could be constitutionally coerced into uniform intervention. Nor is it likely that the core Northern European Governments will be willing to tolerate, in the long-term, a stable pro-peripheral situation. The relatively low level of inter-regional transfers in the EC works against the hypothesis that core Member States will unilaterally maintain as a form of development aid effective domestic market controls that result in competitive losses.[6] At the same time, a solution which suggests effective deregulation of important areas of the control of production to that level imposed by the least regulatory Member State competitor would seem equally disequilibrating given the long-established tradition of state regulation, planning of production, and redistribution of returns throughout Northern Europe. In the absence in the more wealthy Member States of a commitment to regional transfers, a willingness to deescalate domestic intervention, or a political capacity to force uniform regulation of EC markets, the stresses caused by differences in economic goals among Member States may produce a type of feedback within the EC system that contradicts functionalist predictions of increasing integration and pushes toward the occurrence of continual disintegrative crises within the Community.

Several important factors militate against the likelihood that disintegration will be brought about by center-periphery conflicts. First, there is often not a wide disparity between many domestic regulatory policies adopted in the Member States of the EC. For several reasons domestic Member State programs are more uniform than was previously the case within the U.S. Although there have been persistent regional differentials in economic development within Europe, in the EC Member States it is frequently true that the interests of the poorer regions have not been well reflected in centralized domestic policies. In the most publicized case – that of the Mezzogiorno in Italy – it has long been alleged that domestic legislation produced in Rome has represented the demands of a coalition composed of the industrial North and the traditionalist land-owning class in the South.[7] To the extent that sub-EC intervention-

[6] *See generally* G. Podbielski, Twenty-Five Years of Special Action for the Development of Southern Italy (Milan, Giuffrè, 1978).

[7] *See generally* J. Schneider & P. Schneider, Culture and Political Economy in Western Sicily (Studs. in Soc. Discontinuity Series, New York, Academic P., 1976).

ary policies express the will of the most advanced internal sectors in each Member State, the level of international disharmony may be reduced.

This coalescence of positive Member State policies, produced by what has been described as a form of internal colonialism, would seem threatened by the admission of new, relatively poorer, EC members without politically dominant advanced sectors. Even this conclusion might be hasty given shifts in the substance of economic development strategies advocated by organized progressive interests within those nations. For example, it was the Italian Left which pushed for the equalization of wage scales in Southern and Northern Italy. Where the general wage contours or levels of social transfer programs that constitute effective political demands in the periphery are modeled directly on those of the center, the centripetal forces of potentially wide variations of positive Member State regulation are weakened.

The second factor which mitigates the pressure toward a political destabilization of the EC is the degree of effective disintegration of Community markets that is permitted under Community law and continues under Member State policies. The existence of a set of partial legal restrictions on market integration would not be able by itself to protect distinct Member State policies from being undermined by intra-Community competition. However, since there are economic conditions which impose additional barriers to a more complete integration, domestic interventionary programs in the core Member States do receive a measure of insulation against potentially lower-cost, uncontrolled production. To illustrate this type of argument, consider the integration of labor and capital markets in the EC. Migration of workers within the Community is not as free as it is in the U.S. Rather, legal permission to reside in another Member State for a substantial period is basically conditioned on the receipt of a work permit available only to those with an offer of a job.[8] The number of job openings and the manner in which they are distributed can be closely controlled by viable Member State legislation on work security and collective bargaining. Low cost labor from Southern Europe may have thus only a limited impact on the primary or skilled sectors of Northern European labor markets that remain protected within a tradition of extensive regulation. Competitive pressure toward the integration of primary labor markets is reduced without the need for centralized Community legislation. Moreover, by conditioning residence on work, Member State social protection or welfare programs may be protected from the cross-border migration of those seeking to profit from higher levels of transfers in another Member State.

The disintegration of central policies in the labor and welfare sectors could not endure if capital and goods markets were to be fully economically and legally unified. Capital could emigrate to low cost production regions, avoid Member States with high tax loads dedicated to non-business social goals, and

[8] *See* D. Wyatt & A. Dashwood, The Substantive Law of the EEC, ch. 5 (London, Sweet & Maxwell, 1980); Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State, infra* this vol., Bk. 3.

re-export goods back to their former national jurisdictions. Again, this process seems to be limited in the EC by formal and substantive factors. Legally, a reasonably wide range of restrictions on many types of capital movement still remain in place even under the EEC Treaty.[9] More importantly, a number of economic factors restrict the relocation of production. Statistical studies have pointed to the persistent, though arguably diminishing, existence of economic rents in the more advanced EC nations.[10] Regulations that imposed higher production costs could tax these rents away without provoking capital flight. Given the strong sense of national identity which persists within the EC, it is apparently difficult to induce highly skilled labor and management, which are relatively scarce on the periphery, to relocate in foreign and more backward jurisdictions. This is especially true for smaller enterprises. In addition, where capital is mobile, it is increasingly unlikely that the periphery of the EC can compete with Third World sites. Even with protective barriers against external trade, cost differences between the semi-peripheral areas of the Community and still less developed nations may be determinative of a more distant production location. These differences are exacerbated by the political tendencies in relatively poorer EC regions to mimic the social and labor legislation of the core with regard to their advanced industrial sectors. The result of this conjuncture is both a limited intra-Community mobility which supports autarchic Member State regulation within the EC and a potential for economic recession in the entire EC as worldwide market integration grows.

The problem of the instability of decentralized, positive policies within an integrated market was resolved in the U.S. by the capacity of relatively wealthy states to impose centralized regulation upon less advanced regions. While this solution has not been available in the EC, the instability has been reduced by a convergence of many types of Member State policy and an interestingly high level of persisting legal and economic disintegration of important markets. However, if core/periphery conflicts do not pose an immediate threat to EC economic integration, other Member State splits centered on the ideology of regulation may do so. Recent variations in monetary and distributional policies within the Community core of France and Germany have led to differing inflation rates and trade imbalances. While these can be resolved through periodic adjustments in rates of exchange, such shifts in money values must eventually affect the politics of what is considered fair trade within an integrated economic unit. Since there has been little EC success in coordinating Member States' national macro-economic policies, differential inflationary or deflationary strategies generate political pressures to protect national goods markets by border restrictions on trade and have become a cause for growing concern. This suggests that the structural problem set up by the attempt to

[9] *See* E. Stein, P. Hay & M. Waelbroeck, European Community Law and Institutions in Perspective 717–37 (Indianapolis, Bobbs-Merrill, 1976).

[10] *See* U. Hiemenz & K. Schatz, Transfer of Employment Opportunities as an Alternative to the International Migration of Workers 10–44 (Migration for Employment Project, ILO, Geneva, 1976).

combine positive, decentralized government with the integration of markets produced by open borders may still be manifested in the EC. However, the tension between regulation and integration within Europe may be less likely to appear as a developmental or North/South struggle than as an ideological conflict about the appropriate political management of the contemporary economic order. It is on a global scale that regional developmental disparities will pose the more severe challenge to the established regulatory institutions of Europe at all levels of government.

As a final point of comparison, we may consider the relative roles of Member State courts in furthering economic integration. Because of the activist role of the judiciary in shaping the American federalist state and because of the observed reduction in the power of the EC executive, it is sometimes hoped that some of the lost drive toward centralization in Europe may be restored through appeals in the courts. In spite of an assertive record of support for integrationist measures evidenced in European transnational jurisprudence, there is reason to suspect whether those courts will be willing or able to resolve the particular instabilities caused by the structural problem of decentralized positive regulation.

The most notable development of the tradition of judicial activism in the U.S. centered upon the legitimate scope of private versus public institutions. The event which established the central role of the judiciary in the creation of American contemporary institutions was the recognition earlier in this century of the constitutionality of the positive state. However, this acknowledgment can be seen as no more than a reversal of the Court's previous doctrines which favored private market solutions. Moreover, American courts have never elaborated a serious theory of exclusive competences for different levels of government so much as they have allowed positive government, once legitimated, to function on a coordinate state and federal basis. Judicial activism in the U.S. has had less to do with directly constituting the centralization of positive policy than with belatedly ratifying the action of the national state after some form of market regulation was legally allowed. The expectations for the integrationist capacities of European courts should not ignore the limited character of that which the American courts have produced with regard to the centralization of interventionary power.

Just as there are important differences about the understanding of the nature of the relations between state and society on the two shores of the Atlantic, there are also separate histories of constitutional relations and competences within European and American politics. It is commonly asserted that as much as Americans have distrusted and sought to restrict executive and parliamentary power, Europeans have distrusted and sought to restrict judicial power.[11] While American courts have legitimated their activity by assuming the task of describing the explicit and implicit constitutional limits of an always suspect public power, European courts since the *Ancien Régime* have had to re-

[11] *See* J. H. Merryman, The Civil Law Tradition 35–39 (Stanford, Stanford U.P., 1969).

legitimate judicial intervention by reference to the enacted pronouncements of more popular government institutions. Positivist theories of law sought to cleanse judicial power of its pre-liberal associations by treating courts, not as the guardians of government power, but as the instruments of its implementation. Consequently, there is relatively less constitutional precedent in Europe than in America to be used to repudiate the actions of Member State legislatures and executives. What has been developed in the European positivist tradition are doctrines of supremacy and limitations on administrative behavior which detail the hierarchy of a unitary, less fettered government power.

It is principally this form of positivist doctrine that has been actively elaborated by the European Court of Justice as it struck down Member State regulatory legislation contradicting the free trade or negative integration clauses of the Treaty of Rome. The ECJ has ruled often and forcefully to open borders and prevent direct trade subsidies between Community Members. This process and the degree of its success are discussed elsewhere in these chapters. However, in carrying out the process of negative integration, the Court did not have to abandon a positivist conception of its proper role. It interpreted the EEC Treaty as a transnational compact which established a hierarchical relation between levels of public jurisdiction. The Court did not challenge the authority of the Member States to intervene legitimately in private markets. It simply concentrated on the compatibility of what were generally pre-existing Member State regulatory or tax/subsidy practices with the positively superior and chronologically subsequent Treaty provisions. Since the largest substantive part of the Rome Treaty concerns the removal of barriers to free trade and free movement of factors of production, the ECJ did not have to strike out on an unorthodox and contentious path of judicial behavior in order to perform considerable service to the cause of market integration in the Community. If the failure to integrate positive policy and equalize competitive conditions in the EC persists over time, it is likely that disadvantaged Member States will be increasingly tempted to discover more innovative and subtle instruments of protectionism. The early labor of the ECJ in pursuing an open borders doctrine is then likely to continue to preoccupy the tribunal's attention precisely because the Court has been relatively successful in enforcing it.[12]

It is not possible to extrapolate from the past activism of the ECJ the con-

[12] A second area of judicial assertiveness has been in the area of human rights. It is interesting to note that in the U.S., as confusion arose over whether state market intervention represented the legitimate public interest or the illegitimate special interest, courts have tended to make human rights questions more the center of liberal constitutional jurisprudence. The core ideological reproduction of the symbols of constitutional order shifted from the public-private sphere issues of due process to the human rights issues of equal protection. The major actions of European courts which are not directly grounded in a Treaty instrument so much as in general constitutional or legal principles have similarly been transferred into the human rights field. *See* Drzemczewski, *Domestic Application of the European Human Rights Convention as European Community Law*, 30 I.C.L.Q. 118 (1981).

clusion that it can directly contribute to the integration of *positive* public policy among the Community Member States. It seems unlikely that the Treaty of Rome would be interpreted to permit a court to order EC authorities to supersede a political impasse or to require the judicial imposition of centralized controls where such authorities have failed to act. The content of the Treaty provisions detailing the macro-economic, developmental, fiscal and social policy functions of the Community are generally of an enabling character. They empower positive legislative and administrative action and counsel harmonization of Member State programs. The Treaty does not impose any requirement for the unification of governmental policy.[13] The imperative language of the free trade and mobility clauses, which allowed a positivist court to use the Treaty to foster negative integration, is exchanged for exhortation with regard to centralized regulation.[14] We have no intent to diminish how important an integrationist role the ECJ or cooperative Member State courts have played. What must be understood is the nature and limits of that action. In a sense, the results of the judicial role may be somewhat perverse. It is because the courts have been forceful in the quest for negative integration that the structural problem posed by the juxtaposition of decentralized economic controls and open borders arises. The Community's extraction from that dilemma, however, will have to be resolved elsewhere.

[13] Among the range of positive interventionary policies which the Treaty enables are those which are open to assertive judicial enforcement in the areas of antitrust and agricultural regulation. Both are arguably special cases which do not upset the more general hypothesis. Antitrust as intervention aims to restructure non-competitive markets to eliminate the need for further public action. It is an odd type of *anti*-regulation discovered early by liberal theorists interested in perfecting the private sphere and negative market intervention. On the other hand, the exceptional politics of the agriculture sector in the U.S. and Europe have long been corporatist, even during generally free market epochs. The special treatment of this sector in the EC, difficult though it has been, represents no more than the continuation of the pre-existing political allocation of farm production.

[14] The principal exception which could be cited to refute the proposition about judicial behavior would be Case 43/75, Defrenne v. SABENA, [1976] ECR 160. In this instance the ECJ interpreted art. 119 to mean that all Member States should bring domestic legislation into conformity with Community equal pay standards. The case was argued as a regulation issue on the grounds that those Member States which had not enacted legislation had a competitive advantage, or conversely, would suffer economic losses if forced into compliance. However, the tone of the opinion is overwhelmingly one of human rights set in a factual context where all Member States had agreed to common standards before the ECJ wrote its opinion. In addition, the period following *Defrenne* has not been marked by a continuing series of interventions to substitute positive judicial power for a failed politics of centralization.

C. The Instability of the American Solution

The institutionalization in the U.S. of an internal economy with both full economic exchange of goods, factors and technology and a centralized interventionary apparatus was stabilized in the first half of the twentieth century. The principal features of an advanced industrial economy were in place by the beginning of World War II. These included an industrial organization regime by which national unions and corporate management accepted a cooperative administration of core productive enterprises; a monetary/banking system pursuing a Keynesian employment policy formulated in Washington; a structure of low income, disability and old age transfers that was capable of incorporating the mass of the population; a tax/budgetary apparatus which acted to alter micro-economic allocations through public intervention in relative prices; and the incipient network of agencies charged with regulating the production environment with regard to such matters as occupational health, safety and pollution. The rise of a national regulatory economy, relatively autarchic of more global influence, occurred in historical circumstances which proved anomalous within a remarkably short time. It is even arguable that the efforts of the centralized state to preserve the character of its domestic institutions led to policies that have destabilized this resolution of the tension between integration and regulation that is recounted in the narrative of American federalism.

In the period that followed World War II proponents of regularized economic intervention faced a substantial dilemma. While employment and other regulatory policies had been institutionalized within relatively closed national systems, the political consequences of excessive autarchy were unacceptable. In the U.S. in particular Keynesian planners were concerned over the ability of the American economy to produce a sufficient level of aggregate demand to reabsorb the manpower returning from the armed forces. Since employment policy was a cornerstone of both the industrial relations and transfer payments systems, the stability of the centralized regulatory order depended on resolving this problem. The principal strategy to insure adequate demand came to focus on securing the openness of foreign markets to American products and fostering sufficient development of the global economy to assure purchasing power would be available.[15] American macro-planners worked to institutionalize expanded global exchange through the establishment of the GATT, the Bretton Woods monetary system, the World Bank, and the rebuilding of war-torn economies. American overseas investment was encouraged by a favorable tax regime and a lack of control on offshore capital flows. At the same time the pre-War national regulatory policy was reaffirmed in the Employment Act of 1946 and the Taft-Hartley Act of 1947 which ratified earlier anti-depression and industrial peace legislation.[16] While this broad strategy for the growth and

[15] *See generally* F. Block, The Origins of International Economic Disorder: A Study of United States Monetary Policy from World War II to the Present (Berkeley, U. Cal. P., 1977).

[16] *See* D. Gordon, R. Edwards & M. Reich, Segmented Work, Divided Workers 165–70 (Cambridge, C.U.P., 1982).

integration of a global economy was overwhelmingly successful, it should be noted that it was not initally the antithesis of American domestic regulation, but its outgrowth. America's external turn was not an abandonment of national industrial policy so much as an effort to protect it in the short-term. Because of the enormous production advantages in the U.S. an international economy of relatively free exchange did not immediately threaten American macrogoals in spite of cheaper factor costs abroad. For some time an integrated world economy became an instrument of American regulation.

The breakdown in the 1970's of the economic conditions that underlay the institutions resulting from this temporary harmony between regulation and integration has been discussed extensively.[17] The flow of American capital and technology overseas, the growth of productive capacity in the Third World, the recovery of Western Europe and Japan, and the increase in energy costs all have reduced the comparative production advantages in the primary sector of the American economy that supported the costs imposed by domestic regulatory solutions. Increased unemployment in core industrial sectors has in turn imposed stress on the labor and transfer systems, raised political demands for protectionist legislation, and fortified the drive toward deregulation. In effect, the long-term difficulties always latent in the strategy of preserving the American domestic regulatory state by global integration have become manifest as the institutions which structured the world economy to accord with U.S. national policy no longer are capable of assuring this coincidence. The tension between locally regulated industrial economies and wider integration of markets that was overcome by centralization in the domestic history of federalism has reemerged in the U.S. with the passage of time. Schematically, the problem that confronts both the U.S. and the EC might be represented as shown in Table 1.

Table 1: The Interaction of Market Regulation and Economic Integration

	Relatively Integrated Global Economy	Relatively Autarchic National Economies
Regulatory intervention of markets	U.S. regulatory economy preserved by foreign demand 1946–1973 3	U.S. stabilized regulatory solution before World War II 2
Deregulation or unregulated market behavior	4 Global economy with low transport costs and equalized factor costs/goods prices	1 U.S. economy in later nineteenth century

[17] *See, e.g.*, R. REICH, THE NEXT AMERICAN FRONTIER 117–39 (New York, Penguin, 1983).

The second part of this chapter chronicled the post-mercantilist history of the U.S. in its passage from box No. 1 to box No. 2. Recent events have exposed the instability of box No. 3 as a global solution in the face of the shifts within the fundamental division of worldwide production. Current political demands push alternatively for two disparate strategies to deal with this dilemma. Deregulation of the domestic economy combined with the preservation of a full international exchange system would sacrifice much of what was won in the 1930's for global integration. Protectionist sentiment would effectively return to box No. 2 by dismantling the institutions of free trade and factor mobility to preserve domestic legislation.

However, it is unlikely that either autarchy or unrestricted free trade is any longer realistic. The worldwide division of production has proceeded to such a degree that the reestablishment of locally insulated economies would be economically depressive and politically reactionary. It is equally unlikely that economic boundaries between deeply integrated states could administratively be closed any longer.[18] At the same time, nationalized ownership and state subsidization of production, as well as manipulation of macro-economic and financial policy, have destroyed our ability to determine what is a competitive price toward which free or fair trade should be oriented. If neither box No. 2 nor box No. 4 presents a viable option, it would be logical to consider the reworking of the politics of global regulation suggested by box No. 3 toward a new multinational system that does more than extend U.S. regulation into a wider sphere. Whether the domestic history of the U.S. or the more problematic experience of the EC more illuminates the prospects for this project is open to question.

[18] Consider, for example, the reciprocal inabilities of the U.S. to close its borders to Mexican labor and Mexico to insulate its capital markets from the effects of U.S. monetary policy.

Part III

The Federal Experience of Some Nation States: Selected Topics

Aspects of Australian Federalism and the European Communities Compared

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I. Introduction

This study concerns the federal character of Australian politics, government and law.[1] It does not purport, however, to be an exhaustive analysis of federalism in Australia, but merely seeks to provide an outline of the Australian system, focussing on certain topics and issues in the Australian experience which may prove relevant or interesting for comparison with the European integration experience. The study will firstly give a general description of the structure of federal government in Australia, examining the federal governmental institutions and the constitutional arrangements for the separation and allocation of powers, including the particular problems of integrating structures and conventions based on the Westminster Parliamentary model with a North-American style written federal constitution. This investigation includes not only a detailed examination of the constitutional division of competences between the federal and the state levels of government, but also a consideration of the law- and decision-making processes, both formal and informal, and of the interaction between the levels of government. Within this framework, particular attention will be given to the institutional role of the High Court of Australia and to its function and style as a federal constitutional court. The powers and limitations of the states will also be examined, including their *inter se* relations and their international position since the "mature reflection which is

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[1] The governmental units of Australia are: the Government of the Commonwealth of Australia; the Governments of the states of New South Wales, Victoria, Queensland, Tasmania, South Australia, and, Western Australia. In addition to these primary units there are: the Legislative Assemblies of the Australian Capital Territory (wherein is located the national capital, Canberra), and of the Northern Territory (the eighth "government"). All of the states have a roughly similar system of local government; there are also certain other dependent administrations in such places as the Cocos Keeling Islands, Lord Howe Island, Norfolk Island and the Australian Antarctic Territory.

now possible on the Australian problem of the relationship between international law and federal constitutional law permits insights into the classical problem of sovereignty, the States and international responsibility that unitary societies rarely offer."[2]

Having described the federal structure, institutions and relationships, the study will then attempt to analyse the implications of the federal system as an exercise in governmental organisation and power sharing, illustrating the dynamics of governmental interaction and attempting to evaluate its efficiency by concentrating on the issue of human rights protection, using an actual case (concerning aboriginal land rights)[3] to demonstrate the impact of federalism on government in Australia, and its advantages and disadvantages.

At the outset, some general reflections on a societal commitment to the federal principle are in order. The choice between a federal and a unitary system of government is essentially a decision about who decides. In that respect it is no different from many of the constitutional aspects of public choice,[4] for example, the establishment of a system of separated competences within a unitary government and the specification of the subject matter to be dealt with by each branch. The evaluation of these constitutional decisions must be in terms of the same criteria by which post-constitutional decisions are evaluated although at a different level of generality and uncertainty.

These criteria are, despite differences in terminology depending on the discipline through which one approaches the evaluative exercise, essentially concerned with allocation and distribution: can the structural decision be predicted to maximise total social welfare subject to constraints (exogenous to the structure) and can it be predicted to achieve equitable (just) distributional results. By way of example, certain constitutional decisions (not specifically federal) which generate rules such as "equal protection clauses" can be seen to be concerned primarily with distributional questions.[5]

In a federal context, equity considerations are given expression not only, or even principally, on an individual basis, but rather on a geographical basis.[6] So, for example, in the Australian Constitution the prohibition on taxation which discriminates between the states[7] seems primarily concerned with equity considerations at a highly aggregated level. (In passing, one might question the value of such a rule on at least two bases: first, whether equity considerations

[2] O'Connell, *The Evolution of Australia's International Personality*, in INTERNATIONAL LAW IN AUSTRALIA 33 (D.P. O'Connell ed., Sydney, Stevens, Law Book Co., 1965).

[3] Koowarta v. Bjelke-Petersen, Queensland v. Australia, 39 A.L.R. 417 (High Ct. 1982).

[4] For a survey of the literature on public choice theory *see* D.C. MUELLER, PUBLIC CHOICE (Cambridge, C.U.P., 1979).

[5] Such decisions are often criticised as having been concerned with only formal and not substantive equity.

[6] Leaving aside any specific bill of rights or similar protection which might also be part of a federal constitution as much as of a unitary one.

[7] AUSTL. CONST. § 51(ii).

at such a high level of aggregation are at all meaningful; second, whether the formal requirement of non-discriminatory taxation might not, given, for example, certain geographical disparities of welfare, be contrary to substantive equity.) Other constitutional decisions of a federal kind might be seen to generate rules concerned primarily with efficiency questions, particulary with the efficiency of the provision of public goods. So, for example, the centralising of defence and external affairs powers,[8] or of prohibitions on separate coinage for each state,[9] which one finds in the Australian Constitution, might be examples of this. Yet again other decisions formulating the constitutional framework generate rules which seem ostensibly to mix both equity and efficiency concerns. Such provisions as section 92 of the Australian Constitution – the "common market rule" of the Australian context – seem, at least as interpreted and applied, to combine both a geographical non-discrimination element ("equity," subject to the query mentioned earlier) and an unregulated market element ("efficiency," resting on certain unambiguously out-dated and erroneous assumptions about the role of government intervention).

Looked at in this way, the basic structural question of who should decide on particular policies and subject to what legal and institutional constraints is answered by that structure which will maximise welfare and effect a just distribution. Any existing structure can be examined in terms of how it will achieve these ends.[10] It is difficult to make a precise estimation of whether there has been such an achievement, but one can only ignore the need to arrive at measures of welfare gains and losses, if one takes the view (in my opinion wrong) that federation, or cooperation or integration, is valuable in itself.[11] In terms of governmental structure there are two broad levels on which one can make these assessments. On one level one can look merely at the broad alternatives which are available in terms of structures: in Australia these are, presumably, non-federated states, a federation much as we now know it, or a unitary system for the whole continent. One might then attempt to assess which is preferable. On the other level one can assume, say, a federation, but engage in an assessment of the particular distribution of decision-making power which exists within it. In general the latter approach is the one which has been preferred throughout this paper, leaving a more general, but limited, evaluation of the federal system as such until the conclusion.

[8] AUSTL. CONST. § 51(vi) and (xxix).

[9] AUSTL. CONST. § 115.

[10] The "ends" should not be understood too narrowly. It may be, for example, that the rhetoric or self-perception of unity which is associated with a federation or an economic community is associated with a system which is efficient overall (that is, total social output is maximal) and equitable even though specific inefficiencies and inequities exist (the equity-efficiency trade-off is not likely to be absent at the constitutional level any more than it is elsewhere). Such gains might be achieved if, for example, war between federating parties is avoided.

[11] A recent brief discussion of this in the context of the EC is found in van Esch, *How Relevant are Economic Integration Effects?*, in ESSAYS IN EUROPEAN LAW AND INTEGRATION 73 (D. O'Keeffe & H.G. Schermers eds., Deventer, Kluwer, 1982).

II. The Federal Structure and Relationship

The central political and legal structures of Australia derive as part of its colonial heritage principally from those of the English system of government, although the federal character of Australian government introduces an element radically at variance with that English model. Within that "radical," federal structure, English influence finds repeated expression in each of the eight governments of the federation through the presence of the Westminster model of Parliamentary and Cabinet political institutions, statutory style (and often, by outright duplication, in content), and legal arrangements including court hierarchy, process, technique and influence, and the substance of many legal rules.

A. The Federal Constituent Document

The federal character of the Commonwealth of Australia is established by its Constitution. This Constitution was created as a part of a section of an Act of the Parliament of the United Kingdom,[12] but its form (which relied on the United States and Canadian models in many respects)[13] was established by a series of Constitutional conventions held in Australia in the 1890's, at which representatives of the then Australian Colonies met to determine the form of constitution which would be put to the Government of the United Kingdom for passage into law.[14]

The Colonies were not, however, entirely free in their choice of constitutional form, since the United Kingdom did not consider itself merely a legislative tool at the service of the Colonies. Thus, for example, although the Colonies had sought in their proposal to establish the High Court of Australia as the ultimate court of appeal on all questions arising in any Australian court, the United Kingdom insisted that the Judicial Committee of the Privy Council be retained as the ultimate court of appeal, above the High Court, with a small (but significant) compromise on some questions of constitutional interpretation.[15] This lack of independence of the Colonies to establish a constitutional form entirely as they wished contrasts sharply with the freedom of the six founding Members of the European Communities in establishing the form of their interaction. Needless to say, in the case of the formation of both the Australian Constitution and the European Community Treaties, the resulting governmental (or perhaps for Europe, "inter-governmental") form is the prod-

[12] Commonwealth of Australia Constitution Act, 1900, sec. 9, 63 & 64 Vict., ch. 12 (U.K.).

[13] *See* G. Sawer, Australian Federalism in the Courts 76 (Carlton, Melb. U.P., 1967).

[14] *See* B.R. Wise, The Making of the Australian Commonwealth 1890–1900 (London, Longmans, Green & Co., 1913).

[15] Austl. Const. § 74.

uct of compromises among the constituent members; the Australian case, however, involved an overriding power to control that form by a Government not about to become a member – truly a curious and striking contrast.[16]

B. The Structure of the Federal Government

In structure, the Australian Federal Government[17] adopts the Westminster model in most respects, except for the place of the Constitution itself and the (at least implicit) overriding power of the High Court as a constitutional court. Thus the legislative power of the Federal Government is vested in the Parliament of the Commonwealth.[18] This Parliament is bicameral,[19] with a House of Representatives and a Senate; the Members of the House of Representatives are elected on the basis of roughly uniform electorates,[20] while the Senators come in equal numbers from each state,[21] supposedly to make the Senate a states' House.[22]

Established independently of the Parliament and of one another, are the Executive and the Judiciary. With some qualifications,[23] the independence of the

[16] Canada offers another example of such a contrast with Europe. *See, e.g.*, Soberman, *The Canadian Federal Experience - Selected Issues, infra* this book.

[17] The expression "Commonwealth" or "Commonwealth of Australia," the language of the Constitution, is open to an ambiguity, in popular speech if not in legal language. Strictly it refers to the central governmental element of the Federation, but occasionally it is also used to refer to the Federation as a whole. Sometimes, therefore, in this paper, and particularly where there is a risk of ambiguity, I will refer to that central element as the Australian Federal Government.

[18] AUSTL. CONST. § 1.

[19] AUSTL. CONST. § 1. Note that in strict terms the legislative unit, the Federal Parliament, includes the Queen as well as the two Houses. In the case of a continuing deadlock between the Upper and Lower Houses, § 57 makes provision, under specified conditions, for both Houses to be dissolved simultaneously, with members of both facing re-election at the same time (normally Senators are elected for 6 years, elections following vacancies which occur on a rotational basis). If this procedure fails to resolve the disagreement, a joint sitting of both Houses may be convened with authority to legislate on the subject of the conflict. *See* G. SAWER, AUSTRALIAN GOVERNMENT TODAY ch. 8 (12th ed., Carlton, Melb. U.P., 1977) for a brief discussion of this.

[20] AUSTL. CONST. § 24; *see* Attorney-General for Australia (*ex rel.* McKinlay) v. Commonwealth, 7 A.L.R. 593 (High Ct. 1975). The duration of the House of Representatives is fixed at 3 years but may be dissolved sooner by the Governor-General (§ 28).

[21] AUSTL. CONST. §§ 7, 9.

[22] For consideration of the pratical nature of the Senate, *see, e.g.*, G. SAWER, FEDERATION UNDER STRAIN: AUSTRALIA, 1972–1975, at 128 (Carlton, Melb. U.P., 1977) where the allegiance of Senators more to parties than to states is discussed.

[23] For example, the advice proferred by the Chief Justice to the Governor-General in November 1975 as to whether the Government of the day should be dismissed from office, not having such a majority in the Senate as could guarantee the passing

Judiciary, demanded by the Constitution and insisted on by the High Court,[24] is realised. The Executive's independence, however, is another matter. Formally the Executive power vests in the Governor-General, as the representative of the British Crown;[25] in reality the Executive is the Prime Minister and Ministers of State, who are all both heads of departments of the federal bureaucracy and members of one or other House of the Federal Parliament.[26] Clearly, in this respect, little reliance was placed on the United States' model, and the formal position of the Executive assumes the adherence to conventions of the Government at Westminster.[27]

Plainly, the placing of legislative power solely in the (popularly elected) Parliament distinguishes the Australian Federal Government from the decision-making organs of the European Community. Indeed, in terms of Western democratic philosophies one might reasonably suggest that the lack of a *legislatively powerful*, and popularly-elected assembly (or at least of a legislature which derives its power in some way "directly" from its subjects, even if only by main force) makes it difficult even to draw an analogy between a federal *government* and the European Community organs. While on some criteria some hints of "federalism" might be discernible in the Community system such a legislature might be thought of as a *sine qua non* of any democratic form of "government" whether federal or not.

The purpose of this study is not to provide conclusive answers to such questions, and indeed perhaps the matter is only one of labels. It is sufficient here to observe that the combination of the relatively limited powers of the European Parliament with the extensive powers of the Council and the Commission, all suggest a considerable distance from the governmental form of Australia.[28] But is this difference more apparent than real? It has already been ob-

of appropriations bills; or, the nature of appointments to the High Court and other courts, where former members of Parliament have become judges; there is a more general point that courts are law-*makers* as much as the legislature (and, for that matter, the executive) so that the notion of separation is a rather artifical one.

[24] AUSTL. CONST. Ch. III. *See, e.g.*, New South Wales v. Commonwealth (The Wheat Case), 20 C.L.R. 54 (High Ct. 1915); *In re* Judiciary and Navigation Acts, 29 C.L.R. 257 (High Ct. 1921); Attorney-General (Cwlth.) v. R. (The Boilermakers Case), 95 C.L.R. 529 (High Ct. 1957); *cf.* Lane, *The Decline of the Boilermakers Separation of Powers Doctrine*, 55 A.L.J. 6 (1981).

[25] Although, for the most part, the Governor-General's role is formal, occasionally real power is assumed, as on 11 November 1975 when the then Governor-General, Sir John Kerr, dismissed the then Prime Minister, Mr Gough Whitlam and his Ministry; *see* L.J.M. COORAY, CONVENTIONS, THE AUSTRALIA CONSTITUTION AND THE FUTURE (Sydney, Legal Books, 1979). *See generally* G. WINTERTON, PARLIAMENT, THE EXECUTIVE AND THE GOVERNOR-GENERAL (Carlton, Melb. U.P., 1983).

[26] The Prime Minister is always a member of the House of Representatives.

[27] *See, e.g.*, G. SAWER, AUSTRALIAN GOVERNMENT TODAY ch. 12 (Carlton, Melb. U.P., 1973); W.I. JENNINGS, THE BRITISH CONSTITUTION chs. 3, 7 (5th ed., Cambridge, C.U.P., 1966).

[28] Noting Palmer's caution about making such comparisons: M. PALMER, THE EUROPEAN PARLIAMENT 29–30 (Oxford, Pergamon Press, 1981).

served that the distinction between the Executive and Parliament in the Australian federal context is formal but not substantial. Avoiding a lengthy treatment of this topic, let me say (with other commentators)[29] that the interaction of party solidarity (in both Houses) and Prime Ministerial dominance does lead to a condition of "government by Executive." If that is so, perhaps the *real* differences between the Australian and the European Community approaches to the separation of powers are not so great.

Yet in a federal – as distinct from a purely governmental – perspective, some differences can be seen to emerge. Even if the Federal Parliament *is* dominated by the Executive, it is nevertheless the *Federal* (central) Executive. In the Community organs the Executive which dominates can be seen, at least partly, as de-centralised. There is, of course, a permanent, Euro-centric bureaucracy in the Commission, and for much non-controversial legislation and enforcement this reflects government by a *federal* (central) executive. But for many matters, often those most important politically, the key organs are the Council and COREPER, which generally might be regarded as a de-centralised executive. Whether Australia possesses any organs analogous to these will be considered in the next section dealing with relations between the seven Governments.[30]

How might one sum up these similarities and differences? In both the Australian Federal Government and the organs of the European Community there is a dominance of the Executive. There are however two important differences between these Executives. First, in Australia the Federal Executive is quite independent of the state governments whereas in Europe, for many significant matters, the Executive is of a representative kind, pendent from the Member States. Second, in Europe the central Executive has a wide measure of legislative freedom, both formal and substantive, from direct democratic control, whereas in Australia the Executive has a formal obligation to work through Parliament. This formal obligation does on some occasions lead to substantive control.

A detailed consideration of the third branch of government – the judicary – and of the institutional position of the High Court, together with a comparison with the European institutions, will come later in this part and will not be included here. However, a few words should be said about the important "fourth" element in federal government, namely the administration. In contrast to Europe, Australia has not only a national army and tax system but also a well-developed federal administration, with, for example, federal revenue and customs and excise services and federal immigration agencies, and federal responsibility for communications networks (posts, telegraphs, telephone and broadcasts). Equally important, there exist federally organised and coordinated policing agencies, and the recognition and enforcement of both state and federal judicial orders is controlled by federal legislation. This is a significant

[29] *See, e.g.*, G. SAWER, *supra* note 27, at 39–40.

[30] That is, the Federal Government and the six State Governments. Strictly, one should perhaps refer to eight, or nine, Governments, including the Assemblies of the Northern Territory and the Australian Capital Territory.

contrast, with far-reaching practical implications, to the position in Europe, where in general Community law is administered and enforced by Member State agencies.[31]

C. The Constitutional Allocation of Powers and Federal-State Relations

Justice Dixon,[32] of the High Court of Australia, described Australia as having a "Federal system by which two governments of the Crown are established within the same territory, neither superior to the other."[33] The consequences of this duality are perhaps nowhere more clearly demonstrated than in the field of international relations, where, as we shall see, a certain ambiguity exists as to the relative capacities of the federal and state governments, but it also has extensive repercussions in other fields. The Constitution provides specifically for a clear division of powers in order to achieve this two-fold governmental structural balance, but the conceptual clarity is only dimly reflected in the practice, where the exigencies of daily politics call for a far greater interplay of the two levels of government, both in policy-making and in implementation. Ultimately it is the Federal Supreme Court — the High Court of Australia — which is responsible for ensuring that the constitutional federal balance is respected; but, as we shall see, for historical and doctrinal reasons the High Court has played a far less explicitly politically oriented role than, say, its American counterpart, or indeed than the European Court of Justice.

1. The Constitutional Allocation of Powers

Under the Constitution certain specific matters fall within the sole legislative power of the Commonwealth (for example, customs, defence, federal territories);[34] others within the concurrent legislative power of the Commonwealth

[31] *See, e.g.*, AUSTL. CONST. §§ 51(vi), 68, 114 (centralisation of defence forces); 69 (transfer of some state administrations to federal control on Federation); 51(ii), 54, 55, 56, 81–83 (federal revenue raising and administration). *See generally* G. CAIDEN, THE COMMONWEALTH BUREAUCRACY (Carlton, Melb. U.P., 1967); GOVERNMENT ADMINISTRATION IN AUSTRALIA (R. Spann ed., Sydney, Allen & Unwin, 1979).

[32] Later to become Chief Justice.

[33] Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd. (Farley's Case), 63 C.L.R. 278, 312 (High Ct. 1940).

[34] Howard observes there are three bases on which the Commonwealth obtains exclusive powers: (1) *expressly* (*see* AUSTL. CONST. §§ 51(xxxi), Commonwealth places; 52(i), Commonwealth places and seat of government; 52(ii) public service transferred from a state; 51(iii) and 90, customs, excises and bounties; 111, 122, federal territories); (2) *impliedly* (*e.g.*, the power to borrow on behalf of the Commonwealth, § 51(iv); the defence power, § 51(vi) read in conjunction with other provisions such as §§ 68, 69, 114 and 119; the power regarding federal jurisdiction of courts, being about matters which could not be dealt with by the states unless expressly given to them, § 77); and (3) *inherently* (*e.g.*, the power, not mentioned in the Constitution, to control its own public service). *See* C. HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW 10 (2nd ed., Sydney, Law Book Co., 1972).

and the states (for example, taxation,[35] corporations, trade and commerce, divorce[36]);[37] and, with some qualifications, the residue is within the legislative competence of the states alone (for example, local government, education).[38]

Where the matter is one exclusively within the legislative competence either of the Commonwealth on the one hand or of the states on the other, any conflict which may arise is to be resolved merely by deciding whether a purported exercise of power is supported by the Constitution. Where, however, there is a joint legislative power of the Commonwealth and the states, the Federal Constitution provides the rule to resolve any conflicts which may arise:

> Sec. 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency be invalid.

It is not possible here to canvass the detailed jurisprudence of this provision. As one might expect, a central problem has been to decide when a provision of an otherwise valid state law is inconsistent with a (valid) federal law.[39] The

[35] It should be noted that although the taxing power is in formal terms concurrent the Federal Government has used a number of Constitutional provisions (particularly §§ 51(ii), 96 and 109) to give it in effect an exclusive power. *See* South Australia v. Commonwealth, 65 C.L.R. 373 (High Ct. 1942).

[36] Although § 51(xxii) makes the power to legislate with respect to "divorce and matrimonial causes" concurrent, it must be noted here that the exercise by the Commonwealth of its legislative power in this area, in combination with § 109 (the supremacy clause), effectively means that this power has become one exclusive to the Commonwealth. This is so of many areas; the general nature of § 109 is discussed in the following paragraph in the text.

[37] Refer to AUSTL. CONST. §§ 7–10, 14, 22, 27, 29–31, 34, 39, 46–50, 51 (but not all parts: *see supra* note 34), 52, 65, 67, 71, 73, 74, 76–79. Some other provisions probably give concurrent powers, but not so clearly: refer to §§ 81, 85, 87, 93, 94, 96, 97, 102, 105, 105A, 111, 121, 123, 128.

[38] AUSTL. CONST. § 107 provides:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

As Howard says, "[T]he States do not have a given legislative power unless, first, they had it at federation and, secondly, the Constitution does not take it away from them." C. HOWARD, *supra* note 34, at 11. Note, however, that in respect of both examples mentioned in the text the Commonwealth's financial power plays an important role.

[39] Among leading decisions of the High Court on this provision are: Clyde Eng'g Co. v. Cowburn, 37 C.L.R. 466, 489 (High Ct. 1926) (Isaacs, J.) (being the first detailed exposition of this test for inconsistency under § 109); *Ex parte* McLean, 43 C.L.R. 472 (High Ct. 1930); Wren v. Attorney-General (Vict.), 77 C.L.R. 84 (High Ct. 1948). For general discussion, *see* C. HOWARD, *supra* note 34, at 27–45; Murray-Jones, *The Tests for Inconsistency under Section 109 of the Constitution*, 10 FED. L. REV. 25 (1979); Rumble, *The Nature of Inconsistency under Section 109 of the Consti-*

resolution of this problem is for the High Court of Australia in its role as a constitutional court, and in exercising this function the Court has interpreted section 109 in such a way as to allow for a general pre-emptive effect to be given to federal legislation, which may impose implied limitations on the states. Thus section 109 allows the Court not only to rule on specific incompatibilities (where a state statute or section thereof is clearly inconsistent with a federal statute and, therefore, invalid to the extent of the inconsistency), but also to examine whether the federal law was intended to be exhaustive in a particular field ("a complete statement of the law for Australia" in a specified area), so that any state law, even if only supplementary to and not contradictory of a federal law, will be excluded. Whether the existence of a federal law will have the effect of excluding any and all state laws on the same topic depends on the intention of the federal law, an intention which need not be express but which can be deduced by the Court.[40]

As to each state's own legislative competences and the mutual recognition of state law, irrespective of what matters are left to the states under the Federal Constitution, this is determined by general constitutional principles, by the (usually minimal) written constitutions of the several states (which, among other things, affect the extra-territorial legislative competence of the Australian states),[41] by the Colonial Laws Validity Act, 1865 (U.K.),[42] by the rules of international law, and by certain specific provisions of the Federal Constitution.[43]

2. Federal-State Relations

a) The Extent of the Federal Government's Power to Control State Action and Law

An important issue for inter-govermental relations in Australia is whether federal laws are binding on the states or vice versa.[44] In general, federal laws are binding upon the states themselves[45] (as well as upon the citizens of the states

tution, 11 FED. L. REV. 40 (1980). For further discussion with respect to state discrimination laws, *see infra* notes 340–44 and accompanying text.

[40] *See also infra* notes 332 and 480–90 and accompanying text. Of course, the Commonwealth law may itself provide that state law in the area if not inconsistent is allowed: *see infra* note 484.

[41] *See infra* notes 111–16 and accompanying text.

[42] *See* R.D. LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES 89–115 (4th ed., St. Lucia, U. Queens. P., 1977).

[43] For example, AUSTL. CONST. § 92 which requires that inter-state trade be "absolutely free"; § 118, a "full faith and credit" clause; § 117, which prohibits laws discriminating against residents of other states. These examples and others are discussed *infra* notes 93–127 and accompanying text, and § III.A.

[44] Constitutional provisions relevant here are §§ 51(xiii), (xiv), (xxxi); 52; 77(iii); 98; 100; 105A; 114.

[45] *See, e.g.*, Australian Rys. Union v. Victorian Ry. Comm'rs, 44 C.L.R. 319, 390 (High Ct. 1930) (Dixon J.); Victoria v. Commonwealth, 45 A.L.J.R. 251 (High Ct.

who are, of course, also citizens of the Commonwealth) although this proposition has not always been accepted[46] and is not unqualified. The Commonwealth, of course, cannot purport to bind the states with a law which is simply beyond its legislative competence. But beyond this, it also seems that the states are not bound by a law which discriminates against the states.[47] This last principle means that a state would not be bound by a Commonwealth law which in its operation singles out the state in question or the states as a group from other legal subjects.[48] Therefore, the effect would seem to be that a state government cannot be obliged positively to enact laws, since the normal legal subject – that is one that is not a state – is incapable of so doing. This contrasts with the power of the Community Council to issue directives to the Member States of the Community obliging them to make laws of certain kinds.[49]

There is, however, another basis on which a state may find itself directed or controlled by the Commonwealth. The Australian Constitution gives a power to the Commonwealth Parliament to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit" (section 96). The Federal Parliament seems to have power to use this provision in an extremely broad way, and, for example, can use it to provide financial incentives to influence state action. It can even discriminate between states in providing grants under this power – although it would not be entitled to discriminate in imposing taxation – but it may not use the section 96 power simply so as to avoid the rule as to non-discriminatory taxation.[50] Even further, it has been said:

> If the Commonwealth Parliament, [having imposed on all taxes[51] rates so high as practically to exclude State taxation and make it dependent on the Commonwealth], in a Grants Act, simply provided for the payment of moneys to States, without attaching any conditions whatever, none of the legislation could be challenged.... The amount of the grants could be determined in fact by the satisfaction of the Commonwealth with the policies, legislative or other, of the respective States... all State powers would be controlled by the Commonwealth – a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision.[52]

One example of the use of section 96, although not perhaps of the extreme lengths to which it might be used, is in the provision of funds for local govern-

1971) (which held that the states are liable to pay non-discriminatory Commonwealth taxation).

[46] *See, e.g.*, Federated Amalgamated Gov't Ry. & Tramway Serv. Ass'n v. New South Wales Ry. Traffic Employees Ass'n, 4 C.L.R. 488 (High Ct. 1906).

[47] Melbourne Corp. v. Commonwealth (The State Banking Case), 74 C.L.R. 31 (High Ct. 1947).

[48] This seems to derive at least from the opinion of Dixon, J., in *The State Banking Case.*

[49] EEC Treaty arts. 189–192.

[50] W.R. Moran Pty. v. Deputy Comm'r of Taxation, 63 C.L.R. 338 (P.C., 1940).

[51] Under AUSTL. CONST. § 51(ii).

[52] South Australia v. Commonwealth, 65 C.L.R. 373 (High Ct. 1942); to similar effect *see* the opinions in Victoria v. Commonwealth, 99 C.L.R. 575 (High Ct. 1957).

ment in all states. Here, the Federal Government grants a fixed percentage of income taxation receipts to the states on condition that the funds are passed on to local governments.[53] This is a clear example of by-passing constitutional prohibitions, since the Commonwealth has no power to grant money directly to local governments.[54] In 1974 the Government sought a Constitutional amendment[55] to allow such direct grants to be made, but the proposal was defeated by voters at a referendum. The conditional grants power (section 96) is therefore used instead to make indirect grants to local government.

b) The Extent of State Powers

Can state law bind the Commonwealth? The simple answer is no,[56] but only with respect to the Commonwealth in its exercise of constitutional functions; Commonwealth action strictly beyond these functions (even though validly engaged in), or actions of its individual servants or instrumentalities on its behalf, will not be immune from state laws.[57] What amounts to acting beyond a strictly constitutional function is extremely difficult to determine. Even an act such as entering into a contract, which is part of the ordinary administration of government, seems to fall within this general exception,[58] so the boundary is far from clear.[59] It is clear, however, that even in areas where the Commonwealth is not immune, state laws cannot bind if they discriminate against the Commonwealth or its servants.[60]

c) Joint Action

Inter-governmental relations in Australia do not rely wholly (or even primarily) on the discovery of a binding power in one or other level of government. Much is achieved by consensus at a ministerial or bureaucratic level. For example, federal and state Ministers with responsibilities for environmental protection have met regularly over recent years to attempt to develop a common policy on lead levels in petrol; and senior officials of the respective state worker's compensation authorities meet annually as part of a process to

[53] Under the Local Government (Personal Income Tax Sharing) Act, 1976 (Cwlth.).

[54] *See* AUSTL. CONST. § 81 and Attorney-General (Vict.) (*ex rel.* Dale) v. Commonwealth (The Pharmaceutical Benefits Case), 71 C.L.R. 237 (High Ct. 1945); *cf.* The A.A.P. Case, 50 A.L.J.R. 157 (High Ct. 1975), where the principle seems to have been relaxed. *See also* Gerard, *A Reply to the A.A.P. Case*, 2 U.N.S.W.L.J. 105 (1977).

[55] Under AUSTL. CONST. § 128 which, most importantly, provides that there must be a majority of electors voting in a majority of states for a Constitutional amendment to be effected.

[56] Commonwealth v. Cigamatic Pty. (in liquidation), 108 C.L.R. 372, 376–78 (High Ct. 1962) (Dixon, J.); Commonwealth v. Bogle, 89 C.L.R. 229, 259–60 (High Ct. 1953) (Fullager, J.).

[57] *Farley's Case*, 63 C.L.R. 278, 308 (High Ct. 1940); Pirrie v. McFarlane, 36 C.L.R. 1970 (High Ct. 1925).

[58] *Farley's Case*, 63 C.L.R. 278 (1940).

[59] *See* the discussion in C. HOWARD, *supra* note 34, at 108–23.

[60] West v. Commissioner of Taxation (N.S.W.), 56 C.L.R. 657 (High Ct. 1937).

achieve, *inter alia*, consistent standards in terms of process delays, level of benefits and eligibility. Examples of the success of multi-governmental interactions include the achievement of uniform legislation governing corporations (formation and regulation) in all Australian jurisdictions,[61] or the work of the Loans Council, which annually decides on the total national and international borrowings for government instrumentalities and the sharing of these borrowings so that government agencies will not be competing with one another in the finance markets. Another notable success was a result of the 1982 Premiers' Conference[62] where agreement was reached for, *inter alia*, the termination of rights of appeal from state supreme courts to the Judicial Committee of the Privy Council.[63] The detailed achievement of this policy will largely depend on another inter-governmental body, the Standing Committee of Attorneys-General.[64] As a further example of such inter-governmental relations, one could also refer to the states' role in international affairs.[65]

[61] It should be observed that the Federal Government probably had the power to enact uniform legislation under AUSTL. CONST. § 51(xx): Strickland v. Rocla Concrete Pipes, 124 C.L.R. 468 (High Ct. 1971). Instead it chose in 1976 to seek a cooperative solution, probably for reasons similar to those mentioned when discussing federal control of Queensland with respect to the Aboriginal people: *see infra* text accompanying notes 427–28. For a discussion of the process of achieving this cooperatively-based legislation *see* Saunders & Wiltshire, *Fraser's New Federalism 1975–1980: An Evaluation*, 26 AUSTL. J. POL. & HIST. 355, 361–63 (1981); R. BAXT, H. FORD, G. SAMUEL & C. MAXWELL, AN INTRODUCTION TO THE SECURITIES INDUSTRIES CODES chs. 2–3 (2nd ed., Sydney, Butterworths, 1982). The inter-governmental arrangements for implementing the new legislation consist of a Ministerial Council, and a National Companies and Securities Commission.

[62] This annual meeting of the Heads of the seven Governments is primarily concerned with the allocation of tax revenues, collected by the Federal Government, between all the Governments. In this activity the Federal Government has considerably more power than the states and consequently the Conferences are often regarded as an empty ritual performed to let the state leaders take certain electorally appropriate postures. These postures are usually captured by the notion that each Premier bargained hard for his or her state and to the extent that this was unsuccessful, this must be blamed on the rapacious and/or miserly Federal Government. It would seem that the Council of the EC does not have a similar image, perhaps because there is no one member of the Council which stands in the same position as the Australian Federal Government.

[63] This would be achieved by reliance on AUSTL. CONST. § 51 (xxxviii) and a joint request for legislation to be passed by the U.K. Parliament. This provision gives the Federal Parliament power to make laws with respect to:

> The exercise within the Commonwealth at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

[64] Attorney-General (Cwlth.), Press Release: Abolition of Residual Constitutional Links with Britain other than the Crown (25 June 1982).

[65] *See infra* text accompanying notes 84–91, discussing federal-state cooperation with respect to international matters.

In effect, the type of negotiation which occurs in these inter-governmental meetings would be reminiscent of the negotiations which take place in the EC Council of Ministers, although the legal outcome differs greatly, since, unlike the Council, such bodies in Australia have no official legislative or decision-making powers. These inter-governmental arrangements in Australia could perhaps be compared and contrasted with the role of COREPER in the European Community. Both COREPER and the Australian consultative bodies consist of representatives of discrete, elected governmental units. Because of constraints imposed upon them by their delegating authorities, the representatives probably come with a more rigid agenda of available policy positions than if they were directly elected, although this is perhaps less so in the case of the Australian Premiers' Conference where each of the "representatives" is the head of his or her respective Government. However, COREPER is a multi-purpose and continuously functioning body, whereas the Australian organs tend to be *ad hoc* and intermittent. Perhaps the closest analogy is the European Council – the institutionalised periodic meetings (outside the formal Community framework) of the Member State Heads of State and Government, whose agenda and functions vary with changing political exigencies.[66]

The existence of or potential for informal structures of negotiation, cooperation and power-sharing is always, no doubt, important to the functioning of a federal system. In the Australian context it seems that important questions about such structures are not often asked. In choosing between a formal and an informal structure of decision-making the test to be applied is essentially the same as that regarding all alternative public choice mechanisms, about which one needs to ask: What are the substantive results which are achieved from it? What costs are associated with it? Applying this test to the informal constitutional structures in Australia which have just been discussed one might observe that, even if the results have been benefical, they seem to have come at the cost of wasteful delays in many cases, and only after the expenditure of considerable resources in trying to achieve agreement. The delays in the achievement of a uniform nationwide companies law, and in the abolition of appeal rights to the Privy Council, are both examples of this.[67] In terms of constitutional power, the latter could not perhaps have been avoided since no alternative formal mechanism was available, but the former probably could have been expedited by a somewhat stronger attitude on the part of the Federal Government.[68]

[66] For further discussion of the European Council, *see* Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, *infra* this vol., Bk. 3, at § III.B.

[67] Cranston makes the same claim with regard to consumer credit law: Cranston, *From Co-Operative to Coercive Federalism and Back?*, 10 FED. L. REV. 121 (1979) (this paper provides a survey of the history of informal interaction and of the legal status of inter-governmental agreements and canvasses the arguments for and against different modes of federal interaction).

[68] *See supra* note 61.

3. The Position of the States: International Personality and Inter-State Relations

a) External Affairs

Although the Australian federal structure is based, if we may return to the Dixon formula,[69] on the principle of two equal levels of government, it is the Union, and not the constitutent states, whether jointly or severally, which represents the nation. The Australian states and Territories, like the American states, have in fact never enjoyed the status of independent nation states, a sharp contrast to the European Communities which attempt to unite several highly independent nation-states. Thus, in general, in Australia the Commonwealth is taken as representing the nation in foreign affairs, whilst the individual states have no independent international capacity. Again, in general, the responsible unit for the purposes of international law, and its breach, is the Federal Government and not the states.[70]

Where treaties are concerned the applicable principles are somewhat less clear. Obligations or rules arising under international agreements are not capable of becoming part of municipal law without some legislative intervention.[71] In a federal system there is, of course, the problem of deciding which level of government has the legislative power to *implement* a treaty, but even before this question arises there is the problem of deciding whether the states have any powers *to enter into* treaties. Although there is no provision in the Australian Constitution expressly forbidding the states to enter into a treaty,[72] in general the usual view has been that, nevertheless, the states do not have this power, which is considered to be within the exclusive capacity of the Federal Executive.[73]

The capacity of the Federal Executive to enter into a treaty seems to be completely unfettered.[74] Nevertheless, the legislative power of the Federal

[69] *See supra* text accompanying note 33.

[70] *See* O'Connell, *supra* note 2, at 29–31.

[71] *Cf.* the position of international law generally which is part of Australian municipal law, although it can be overridden (violated) by specific municipal legislation: Polites v. Commonwealth, 70 C.L.R. 60 (High Ct. 1945). Although treaties do not become part of Australian municipal law without specific legislative acts (the so-called "dualist" position) it seems they may nevertheless be influential: *see, e.g.*, Municipal Officers (Queens.) Consol. Award, 1975, [1978] INDUS. ARB. SERV. – CURRENT REV. 145 (Conciliation and Arb. Comm'n, 1978).

[72] *Cf.* U.S. CONST. art. I, § 10, prohibiting the states to enter into treaties, alliances or confederations.

[73] *See* Thompson, *A United States Guide to Constitutional Limitations upon Treaties as a Source of Australian Municipal Law*, 13 U.W.A.L. REV. 110, 113 (1977–78). But this view has been challenged. *See, e.g.*, the discussion in Burmester, *The Australian States and Participation in the Foreign Policy Process*, 9 FED. L. REV. 257, 262 (1978). Burmester himself takes the view that the exclusive competence of the Federal Executive should as a matter of policy be retained. *Id.* at 270.

[74] Sawer, however, observes that "it is at least possible that the position of the Australian executive is dependent on or derives from the legislative position, instead of

Parliament (needed to implement a treaty) is certainly controlled. For this reason it has been argued that the states do have some international capacity in areas reserved to the states, and do at least have the right to some say in international policy formulation. The Australian Constitution grants to the Federal Parliament a legislative power with respect to "external affairs,"[75] but the precise scope of this expression is by no means clear. In broad terms the possible interpretations are, either that the existence of a treaty, without more, entitles the Federal Parliament to legislate to implement it, or that an independent assessment of the external nature of the subject matter of the treaty must be undertaken before federal legislative action can be based upon that power.

This debate is far from being merely moot in Australia and the issue of the scope of this power and the general question of the external affairs capacity of the several states was recently raised before the High Court in the *Koowarta* and *Tasmanian Dam* cases.[76] In *Koowarta* several different views were expressed in the opinions. The most restrictive view was that of Justice Murphy:

> The Australian States have no international personality; unlike the Commonwealth, they are not nation-states. Any purported treaty or agreement [concluded by a State] . . . is a nullity. . . .[T]he Constitution envisages no division of external affairs power between the [Federal] Parliament and the State Parliament.[77]

But in general the majority concluded (to varying degrees) that Australian international obligations can, in part at least, be satisfied by laws of the states, although they did not actually state a precise view on the international personality of the state.[78] It seems quite clear, however, that any purported international agreements made by the states with foreign countries on, for example, immigration would not be effective, or, if they were, that any laws purportedly made by the state in implementation thereof would not be valid. The latter proposition holds, not because the states are forbidden to make laws with respect to immigration – section 51(xxvii) in giving a power to make such laws to the Commonwealth Parliament does not give that power exclusively – but because the Commonwealth has exercised its power under section 51(xxvii),

having an independent historical and formal base." Sawer, *Australian Constitutional Law in Relation to International Relations and International Law*, in INTERNATIONAL LAW IN AUSTRALIA, *supra* note 2, at 40. Since the legislative position of the Federal Parliament is limited in some way by the Constitution, it may be that the executive power is limited in the same way.

[75] AUSTL. CONST. § 51(xxix).

[76] *See* Koowarta v. Bjelke-Petersen, 39 A.L.R. 417 (High Ct. 1982); Australia v. Tasmania, 46 A.L.R. 625 (High Ct. 1983). *See* discussion of these *infra* notes 460–79 and accompanying text.

[77] 39 A.L.R. 417, 469 and 473 (*per* Murphy, J., Mason, J. concurring at 462–63). Despite the fact that these two Justices were in the ultimate majority, on this point they seemed to be in the minority – except that none of the other Justices addressed the identical issue.

[78] For an examination of the differences of view *see* Rowe, *Commonwealth Powers with Respect to Racial Discrimination*, [1982] AUSTL. CURRENT L. AT30–34.

and under section 109 of the Constitution the federal law[79] would probably be held to cover the field.

In *Koowarta* the Justices were all very conscious of reading the "external affairs" provision in the context of a federal Constitution, a federal system, and a growing internationalism in states' affairs. So, the limit of the Commonwealth's power had to include implicit limits deriving from the federal nature of the Constitution, such as the preservation of the "structural integrity of the State components of the federal framework"[80] and "the existence of the States."[81] Chief Justice Gibbs considered the federal nature of the Constitution as crucial, seeing a wide view of the Commonwealth's external affairs power as allowing the possible destruction of the federal balance.[82] Justice Stephen added another contextual perception, in linking the fact that the *national* Government is entrusted with the responsibility to conduct public business as it "relates to other nations or other things or circumstances outside Australia," with the necessity, in the context of the modern world, of a national government accepting that responsibility (saying very effectively, "[e]ven a nation occupying an entire island continent cannot be 'an Island entire of itself' ").[83]

In view of the fact that treaties concluded by the Federal Government may affect areas within the control of the states, the Premiers' Conference in 1977 decided to involve the states in the process of international agreements, and there was agreement that states would be consulted where a treaty might be adopted which might affect a traditionally state-legislative area, that state representatives would be included in delegations to international conferences, and that the Federal Government would, where appropriate, seek to insert a federal clause in particular treaties.[84] The Federal Government did in fact insert a "federal" reservation in its ratification of the International Covenant on Civil and Political Rights, although such a reservation clause seems fundamentally inconsistent with article 50 of that Convention which provides that "The provisions of the present Covenant shall extend to all parts of federal States without any limitation or exceptions."[85] It would seem that unless there is effective *state* implementation of the Covenant then the Commonwealth's deference to the states would be "an example of abrogation of power by the Commonwealth rather than its devolution to a more appropriate level of government."[86]

Even apart from an attempted inclusion of a federal reservation in a ratifi-

[79] Migration Act, 1958 (Cwlth.).
[80] 39 A.L.R. 417, 452 (Stephen, J.); 459–60 (Mason, J., to same effect).
[81] 39 A.L.R. 417, 472 (Murphy, J.); 459–60 (Mason, J., to same effect).
[82] 39 A.L.R. 417, 439 (Gibbs, C.J.); 481–82 (Wilson, J., to same effect).
[83] 39 A.L.R. 417, 449 (Stephen, J.).
[84] Saunders & Wiltshire, *supra* note 61, at 367; *see also* Burmester, *supra* note 73, at 280–82.
[85] *See* G. Nettheim, Victims of the Law 149–50 (Sydney, Allen & Unwin, 1981).
[86] Saunders & Wiltshire, *supra* note 61, at 369.

cation, the failure of the Commonwealth to adopt at least a potentially independent attitude to the formation of treaties may be unsound. This is not to under-value cooperative efforts in a federal system; but it is not hard to see that the inclusion of the states in delegations concerned with treaty negotiations could make the already difficult business of international negotiation more protracted and cumbersome.[87] In *Koowarta*[88] it was only by a slender majority that the High Court managed to avoid *imposing* such a burden on Australian international activity: although Justices Mason and Murphy took the view that Australia could not be allowed to be an "international cripple"[89] and that, therefore, the Commonwealth must be held to have sufficient power to avoid this, Chief Justice Gibbs and Justice Wilson maintained that the cripple status could be avoided by cooperation between the seven governments and by state representation at international conferences.[90] Justice Wilson also seems to approve of the specifically federal reservations to treaties.[91]

The position of the Member States of the European Community contrasts considerably with that of the Australian states. In Europe not only is there no question as to Member States' having power to conclude international agreements in their own right, subject to any express or implied provisions of the Treaty conferring such competence on the Community, but also there is no *general* grant of power to the Community to conclude all agreements, so the exclusive treaty-making power of the Community is thus restricted to a limited number of enumerated fields (express or implied).[92]

b) Inter-State Relations

The relationship between the Australian states is partly regulated by the Australian Constitution, and partly from other sources. Under the Constitution the most significant elements are the following. First the Constitution requires full faith and credit be accorded to each state's laws, public Acts and records, and judicial proceedings throughout the Commonwealth.[93] In order to achieve the practical realisation of this requirement the Constitution gives the Federal Parliament certain non-exclusive legislative powers with respect to service and execution of process and judgments[94] and recognition of judicial proceedings.[95] Those federal legislative powers have been exercised by the Federal Parliament.[96] In all of this there is a considerable similarity with the United

[87] *See* Burmester, *supra* note 73, at 270–75.
[88] 39 A.L.R. 417 (1982).
[89] *Id.* at 473.
[90] *Id.* at 434–35 (Gibbs C.J.); 479–80 (Wilson, J.). *See also* Burmester, *supra* note 73, at 270–72.
[91] 39 A.L.R. 417, 479–80.
[92] *See generally* Stein, *supra* note 66, at § III.A.3.b.
[93] AUSTL. CONST. § 118.
[94] AUSTL. CONST. § 51(xxiv).
[95] AUSTL. CONST. § 51(xxv).
[96] State and Territorial Laws and Records Recognition Act, 1901 (Cwlth.); Service and Execution of Process Act, 1901 (Cwlth.).

States position.[97] What the full faith and credit provisions achieve in Australia beyond what would be achieved by the normal application of private international law rules is not completely clear, particularly since historically there seems not to have been any reluctance to recognise and enforce laws and judgments between the states.[98] It may be that these provisions have only the evidentiary effect of requiring courts in one state to take judicial notice of the laws of another state, rather than imposing a substantive requirement to give effect to the laws or judgments of the other state.[99] If it is the latter it is problematic to decide when and by what rules (other than those of private international law) this substantive effect is to be achieved.[100] In any case, in the area of Common Law, the ultimate appellate position of the High Court would minimise differences between the states. It should also be observed that in some areas, but not many, the states have at various times agreed on uniform legislation,[101] but the uniformity thus achieved has sometimes been eroded over time due to non-cooperative amendments to one or other of the separate laws passed by each state. In an attempt to overcome that type of problem, recently enacted uniform companies and securities legislation is based on a formal agreement, between the Commonwealth and all the states and Territories, which establishes a Ministerial Council responsible for controlling amendments to the several state statutes which implemented the scheme.

Second, and somewhat related to the preceding point, the High Court of Australia is given certain jurisdiction which touches upon inter-state relations. The Court is given original jurisdiction in matters "[b]etween States, or between residents of different States, or between a State and a resident of another State."[102] Also, the Federal Parliament may make laws conferring original jurisdiction on the Court in any matter "[r]elating to the same subject-matter claimed under the laws of different States."[103] The latter provision, however, has been of little effect, since the Federal Parliament has passed no laws pursuant to it and its meaning is obscure.[104] With regard to the former, over which the jurisdiction of the High Court is exclusive,[105] there are two principal ele-

[97] *See* M. Pryles & P. Hanks, Federal Conflict of Laws 57–60 (Sydney, Butterworths, 1974).

[98] *Id.* at 67.

[99] R.D. Lumb & K.W. Ryan, The Constitution of the Commonwealth of Australia Annotated 386–88 (3rd ed., Sydney, Butterworths, 1981). For a somewhat more complex analysis of possible interpretations of the full faith and credit requirement *see* O'Brien, *The Role of Full Faith and Credit in Federal Jurisdiction*, 7 Fed. L. Rev. 169, 177 ff (1976).

[100] *See* the suggestions in M. Pryles & P. Hanks, *supra* note 97, at 84–85, 90–94.

[101] *E.g.*, in 1964–67 uniform legislation on the adoption of children was passed; in 1961–62 Uniform Companies Acts were passed.

[102] Austl. Const. § 75(iv).

[103] Austl. Const. § 76(iv).

[104] *See, e.g.*, R.D. Lumb & K.W. Ryan, *supra* note 99, at 295.

[105] Judiciary Act, 1903 (Cwlth.) §§ 38, 39(1). In a rather cumbersome scheme state courts are re-invested with *federal* diversity jurisdiction: Judiciary Act, 1903 (Cwlth.) §§ 39(2), 39A.

ments: disputes between states, and the so-called diversity jurisdiction, relating to matters between residents of different states. The first type of dispute is of such significance that High Court jurisdiction is no doubt appropriate,[106] but the diversity jurisdiction usually involves only trivial matters, and even though it involves some problems of choice of law, it is surely not appropriate for the High Court.[107] The law to be applied in cases of both kinds seems to be of four types: Imperial legislation,[108] Commonwealth law,[109] the common law (including conflict-of-laws rules) and legislation of the states in which the Court sits,[110] and general Common Law (perhaps specifically adapted in intergovernmental cases[111]). An important unresolved issue is whether the federal nature of diversity jurisdiction allows the Commonwealth Parliament to legislate as to the law to be applied, other than on matters where that Parliament has a Constitutional grant of power. No doubt the Commonwealth's power[112] to give effect to the full faith and credit clause[113] would allow an affirmative answer to this.[114]

Third, the Constitution controls the alteration of the boundaries of a state or the formation of a new state by the union of two or more states or parts of them.[115] No more need be said of this here.

Fourth, under the Constitution the states are bound in various ways not to discriminate against one another or against the citizens of one another. The Constitution provides "trade, commerce and intercourse between the States shall be absoultely free";[116] that the Federal Parliament may legislate to forbid preference or discriminations by one state against another with respect to rail-

[106] J. Crawford, Australian Courts of Law 144 (Melbourne, O.U.P., 1982).

[107] *Id. See also* C. Howard, *supra* note 34, at 229; M. Pryles & P. Hanks, *supra* note 97, at 104–19, 144–46.

[108] United Kingdom legislation passed before Australia's complete independence, the primary example of which is the Commonwealth of Australia Constitution Act, 1900.

[109] Including particularly the Judiciary Act, 1903 (Cwlth.) which provides which law is to be applied by courts exercising federal jurisdiction.

[110] *See* M. Pryles & P. Hanks, *supra* note 97, at 159–69.

[111] *See* Renard, *Australian Inter-State Common Law*, 4 Fed. L. Rev. 87, 100 (1970); *see also* O'Brien, *The Law Applicable in Federal Jurisdiction* (pt. 2), 2 U.N.S.W.L.J. 46 (1977).

[112] Austl. Const. § 51(xxv).

[113] Austl. Const. § 118.

[114] M. Pryles & P. Hanks, *supra* note 97, at 173–74; O'Brien, *supra* note 99, at 200–01; O'Brien, *The Law Applicable in Federal Jurisdiction*, 1 U.N.S.W.L.J. 327, 335 (1976).

[115] Austl. Const. §§ 123, 124.

[116] Austl. Const. § 92. This is a most significant provision, and one important by way of comparison with the European Community. As will be seen in the more extended discussion *infra* at § III.A.2, it has been applied to cover more than non-discrimination between the states, and to control Federal Government action of various kinds.

ways;[117] and that residents of one state may not be subject in another state to a disability or discrimination not applicable to residents of that other state.[118] Related to these are Constitutional provisions which specifically allow states to levy inspection charges on goods passing into or out of the state,[119] and to impose regulatory rules on any alcohol passing into the state.[120]

Apart from the specific provisions of the Australian Constitution, relations between one state and another are governed by other rules, mainly derived from the state constitutions, Imperial law[121] or international law. Under the various state Constitutions[122] the wording of the grants of legislative power to the state legislatures[123] are such that "the legislation must be in some way associated with persons, things or events ... within the territory of the States."[124] This is generally expressed as the "extra-territorial legislative incompetence" of the Australian States.[125] Lumb observes that the original purpose of this principle was to protect the interests of the Imperial Parliament,[126] but that it now serves the purpose of imposing needed "restriction on the legislative power of one State vis-à-vis another State in the Commonwealth, for otherwise there would be overlapping of State legislative jurisdictions."[127] Other rules under private and public international law are applicable to interstate relations, but these will not be canvassed here.

D. The Federal Court System and the Role of the High Court of Australia

I do not propose here to deal in detail with all aspects of the federal judicial system, but will concentrate primarily on certain areas of the High Court's activity. The federal judicial system is established by Chapter III of the Australi-

[117] AUSTL. CONST. § 102.

[118] AUSTL. CONST. § 117. This will be discussed in more detail *infra* at § III.A.1.

[119] AUSTL. CONST. § 112, but note that such charges are then to be paid to the Commonwealth.

[120] AUSTL. CONST. § 113.

[121] In particular, *see, e.g.*, the Colonial Laws Validity Act, 1865, 28 & 29 Vict., ch. 63, and the Australian States Constitution Act, 1907, 7 Edw. VII, ch. 7.

[122] The present principal state constitutional documents are: Constitution Act, 1902 (N.S.W.); Constitution Act, 1975 (Vict.); Constitution Act, 1934 (Tas.); Constitution Act, 1934 (S.A.); Constitution Act, 1890 (W.A.) and Constitution Acts Amendment Act, 1899 (W.A.); Constitution Act, 1867 (Queens.).

[123] In the case of Tasmania and Western Australia the grant of legislative power is partially based on an Imperial enactment, the Australian Constitutions Act, 1850, § 14, 13 & 14 Vict., ch. 59.

[124] R.D. LUMB, *supra* note 42, at 82.

[125] *See, e.g.*, O'Connell, *The Doctrine of Colonial Extra-Territorial Incompetence*, 75 L.Q.R. 318 (1959); Trindade, *The Australian States and the Doctrine of Extra-Territorial Legislative Incompetence*, 45 A.L.J. 233 (1971).

[126] R.D. LUMB, *supra* note 42, at 88.

[127] *Id.*

an Constitution, section 71 of which provides that the judicial power of the Commonwealth shall be vested in "a Federal Supreme Court, to be called the High Court of Australia,"[128] which is given certain original[129] and appellate[130] jurisdiction, both of which are subject to modification within limits by the Federal Parliament.[131] At the same time the Federal Parliament is vested with authority either to create "other federal courts" or to invest "other courts" with federal jurisdiction. In fact, the Parliament has not (yet) used this power to establish a general network of federal courts throughout the states – as in America – although it has created some specialised federal courts (*e.g.*, the national family court, industrial court, bankruptcy court or the Federal Administrative Review Tribunal) and recently has set up a more general (central) Federal Court of Australia, with original jurisdiction in bankruptcy, trade practices, industrial matters and judicial review of administrative action. Thus the state courts vested with federal jurisdiction by the Federal Parliament are a general source of federal judicial power in the states, below the High Court.[132] It is interesting to note also that the appellate jurisdiction of the High Court from the state supreme courts is not limited to questions of federal law, but is a general appellate jurisdiction, so that apart from a few remaining rights of appeal directly from the supreme courts of the states to the Judicial Committee of the Privy Council,[133] the High Court is the ultimate court of appeal on *all* questions arising under both statute and common law, whether federal or state, in Australia.

Before proceeding to discussion of the federal and constitutional role of the High Court, it is appropriate to sketch briefly the nature of the Australian court hierarchy so that the position of the High Court can be better understood. Each Australian state has its own hierarchy of courts, and there is also a federal hierarchy. The state courts generally conform to a tri-partite structure, the highest level being occupied by the respective Supreme Courts, within which there is a division between the original and appellate jurisdiction of single judges and the appellate jurisdiction of the Full Courts. Below the Supreme Courts are usually found the District Courts or similarly named bodies with certain original jurisdiction in indictable offences and civil matters of high monetary value, and appellate jurisdiction from the lowest level, usually called Magistrates' Courts or Courts of Petty Sessions. These last have origi-

[128] AUSTL. CONST. § 71: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. . . ."

[129] AUSTL. CONST. §§ 75, 76.

[130] AUSTL. CONST. § 73.

[131] AUSTL. CONST. §§ 73, 77.

[132] On the federal courts in Australia, including state courts vested with federal jurisdiction, *see generally* Z. COWEN & L. ZINES, FEDERAL JURISDICTION IN AUSTRALIA (2nd ed., Melbourne, O.U.P., 1979).

[133] AUSTL. CONST. § 73(ii). *See* the brief discussion of the role of the Privy Council *infra* notes 137–38 and accompanying text.

nal jurisdiction regarding summary offences, committal proceedings and less valuable civil litigation. The states also have certain specialised courts (such as, in New South Wales, the Land and Environment Court, and the Industrial Commission). The supreme courts of the states have jurisdiction, of course, under state law; but in addition they are also invested with certain jurisdiction under federal law.[134]

In the federal hierarchy there are essentially two primary levels of courts. At the highest level is the High Court of Australia, which has certain original jurisdiction both in single Justices and in the Full Court, and general jurisidiction in appeals from state and territory supreme courts (both from the full courts and single judges of those courts), from the Federal Court of Australia, and from certain specialised federal courts, such as the Family Court of Australia. The Court, which sits in the Federal Capital, Canberra, is currently composed of seven justices,[135] each of whom may deliver a separate opinion when the Court is sitting in plenary session. Procedurally it follows the Common Law adversary model.

The second level of the federal court hierarchy consists of the Federal Court of Australia, which was created by federal statute in 1976.[136] It comprises twenty-five judges and sits in each of the state capitals and in Canberra. The court is divided into a General Division and an Industrial Division, with both Full Court and single judges sitting in each division, and has a number of specialised jurisdictions. These consist of: the original jurisdiction of single judges in the General Division in respect of bankruptcy, trade practices, administrative law (in respect of judicial review of administrative action), and some civil and criminal matters and, in the Industrial Division, of industrial matters; the original jurisdiction of the Full Court in certain industrial matters; the appellate jurisdiction of the Full Court in appeals from single judges of the Federal Court, in appeals from state courts (other than the full supreme courts) exercising certain federal jurisdiction, in appeals from state courts in criminal matters, and in appeals from the Federal Administrative Review Tribunal and other miscellaneous tribunals (formally this is original jurisdiction).

At a level strictly above the High Court lies the Judicial Committee of the Privy Council – a remnant of English colonial arrangements. The role of this body, however, is now very limited, being restricted to an appellate jurisdiction in matters of state jurisdiction from the supreme courts of the states, and to an extremely limited (and perhaps even non-existent[137]) appellate jurisdiction

[134] *See*, particularly, Judiciary Act, 1903 (Cwlth.) § 39(2).

[135] AUSTL. CONST. § 71: "[T]he High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

[136] Federal Court of Australia Act, 1976 (Cwlth.).

[137] Rights of appeal to the Privy Council have, under AUSTL. CONST. § 74, been abolished by the Federal Parliament by two Acts: Privy Council (Limitation of Appeals) Act, 1968, and Privy Council (Appeals from the High Court) Act, 1975; *see also* Viro v. R., 18 A.L.R. 257 (High Ct. 1980). It may be, however, that appeals by certificate of the High Court in *inter se* matters have not been statutorily abolished: *see* J. CRAWFORD, *supra* note 106, at 172 n. 20.

under the Australian Constitution in relation to "the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States"[138] if the High Court grants a certificate allowing the appeal. As to the latter, since the High Court has granted such certificate only once, in 1914, and has refused it ever since, it seems unlikely that it would ever do so again. As to the former, the Attorneys-General of the states and the Commonwealth have agreed to act jointly to abolish all rights of appeal to the Privy Council under state law; ironically, such a move might be achieved by legislation of the United Kingdom Parliament, requested by the states, although it could also be achieved by legislation of the Commonwealth Parliament requested by the states.

The role of the High Court as a constitutional court, the only question I will address in detail, does not rest on any explicit grant of power in the Constitution, and yet, as a matter of practice, is not doubted.

The notion of a court with power to declare Parliamentary legislation invalid is at odds with an English-based legal tradition, in which the fundamental doctrine is sovereignty of Parliament. An obvious difficulty is introduced where there is more than one Parliament (or supposedly supreme law-maker) but the necessity for some arbiter (or at least some rule about arbitration) can easily arise even in a system with only one governmental level: there may be, for example, a problem of the separation of powers, or the presence of some declared overriding standard (for example, a bill of rights). The presence of more than one legislative or governmental unit is, however, the hallmark of a *federal* system and the role of a constitutional court in such a context is a special one. In such case the court would seem to have four, perhaps five, primary functions: (1) specifying the extent of central government power (a role which may involve declaring central legislation invalid); (2) specifying the extent of constituent state powers (which may involve the invalidity of state laws); (3) providing an independent forum for actions against the central government; (4) settling disputes between constituent states (perhaps only, as a conceptual necessity, with respect to specifically federal questions in which case this role overlaps with (2)); and, (5) *perhaps*, establishing or developing a shared system of law.

Some aspects of the High Court jurisdiction with regard to such *federal* functions are specified in the Constitution, particularly a function in matters between the states[139] and, implicitly, certain other functions such as the provision of a forum wherein actions by or against the Commonwealth may be heard formally and substantially independent of state courts.[140] However, the

[138] AUSTL. CONST. § 74. The expression "matters *inter se*" refers to "the mutual relation of powers of the Commonwealth and the states: matters such as the extent of one's immunity from legislation of the other, or the ambit of Commonwealth concurrent legislative powers" and "the extent of Commonwealth *exclusive* power": J. CRAWFORD, *supra* note 106, at 171.

[139] AUSTL. CONST. § 75(iv).

[140] AUSTL. CONST. § 75(iii) and (v).

broad function of the High Court in determining the extent of Commonwealth and state powers, with the seemingly necessary concomitant of the capacity to assert overriding constitutional rules and legislative invalidity, is not *expressly* provided for. The existence of the character of constitutional court in a superior court is not the only way to deal with these matters, but it is a commonly accepted method. The High Court, however, is not like many other constitutional courts, for its role arguably goes beyond the purely *federal* role which functions (1)–(4) seem to derive from or suggest, to include the fifth function of being an appellate court for all matters.[141] This perhaps goes beyond a specifically federal function to an almost unitary one, given the effect it produces of harmonisation or indeed uniformity of laws (at least with respect to the Common Law) and of the interpretation of similar statutory provisions. The High Court's character as an appellate court for all matters, and its wide original jurisdiction, distinguish it from the specialised *Corte Costituzionale* or *Bundesverfassungsgericht*. Certainly it is rather different from the European Court of Justice.

1. The Legal Basis of the Judicial Review Power of the High Court

Although the Constitution contains no provision explicitly conferring a power on the High Court (or any court) to review the validity of legislation (whether state or federal) for non-compliance with the Constitution, the High Court has, in fact, assumed such a power to exist.[142] In doing so it echoes the United States Supreme Court in *Marbury v. Madison*[143] and *Fletcher v. Peck*,[144] although because of the implicit sources of power as a constitutional court expressed in the Australian Constitution the High Court perhaps has not assumed quite as much as the U.S. Supreme Court.[145] In general, the justification for such an

[141] AUSTL. CONST. § 73.

[142] Federated Amalgamated Gov't Ry. and Tramway Serv. Ass'n v. New South Wales Ry. Traffic Employees Ass'n, 4 C.L.R. 488, 534 (High Ct. 1906); Baxter v. Commissioner of Taxation (N.S.W.), 4 C.L.R. 1087, 1111–13, 1125 (High Ct. 1907); Australian Communist Party v. Commonwealth, 83 C.L.R. 1, 262 (High Ct. 1951).

[143] 5 U.S. (1 Cranch) 137 (1803). In *Australian Communist Party* (83 C.L.R. 1, 262 (1951)) the High Court said "in our system the principle of *Marbury v. Madison* is axiomatic." For further discussion of the *Marbury* doctrine, also incorporating European comparison, *see* Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *infra* this vol., Bk. 2, *esp.* at § III.

[144] 10 U.S. (6 Cranch) 87 (1810).

[145] For a detailed comparison *see* Kadish, *Judicial Review in the High Court and the United States Supreme Court*, 2 MELB. U. L. REV. 4, 127 (1959). Sawer does not think the assumption is a very great one: G. SAWER, *supra* note 13, at 76. Galligan justifies it, very persuasively, by detailed analysis of the intention of the Framers of the Constitution: Galligan, *Judicial Review in the Australian Federal System: Its Origin and Function*, 10 FED. L. REV. 367 (1979). But Lane seems somewhat affronted by the Court's presumption: Lane, *Judicial Review or Government by the High Court*, 5 SYDNEY L. REV. 205–08 (1966).

assumption of power relies on the nature of a federal system and the necessity for some arbiter as to the exercise of powers by the respective units of that system. Both the High Court and the Privy Council have referred to this necessity.[146] Implicit support of such a role can be found in sections 74 and 76(i) of the Constitution.[147] Section 74 refers to certain constitutional questions (*inter se* matters) which are not to be appealable from the High Court to the Privy Council (except under a specified condition), and so implicitly assumes that the High Court is to have the power to determine such questions. Section 76(i) says: "The Parliament may make laws conferring original jurisdiction on the High Court in any matter (i) Arising under this Constitution, or involving its interpretation."

There are clearly weaknesses in reliance on these provisions.[148] One is that *inter se* matters are not the only class of constitutional issue which the High Court decides. Secondly, it was never clear who would make decisions on the constitutional validity of laws if the Parliament did not make laws under section 76(i), and even assuming such laws, whether state courts could also exercise constitutional functions. It was not until 1903 that the Federal Parliament did make a law under section 76(i) – the Judiciary Act, 1903 (Commonwealth) – which in section 30 gave the High Court original jurisdiction in exactly the terms of the constitutional provision. Prior to that the state supreme courts had dealt with matters of constitutional interpretation and even after 1903 the state courts still had that jurisdiction, and have retained it (subject to some specific rules which for some time conferred exclusive jurisdiction on the High Court).[149]

Even if the Federal Parliament had not acted under section 76(i) to give the High Court *original* jurisdiction on matters of constitutional interpretation or, indeed, if it repealed the 1903 Act, arguably the High Court would still have a role as a constitutional court: constitutional questions would have arisen in the state courts which could have attempted to resolve them; because of the all-embracing appellate jurisdiction of the High Court,[150] including appeals from state courts, constitutional questions would have come to it, as they would have come to the Privy Council, on appeal from the state courts. The assumption by these courts of the capacity to invalidate legislative acts of the

[146] *See* cases cited *supra* note 127; and James v. Commonwealth, 55 C.L.R. 1, 43 (P.C., 1936).

[147] Professor Sawer maintains that the Constitution has many provisions which are "unintelligible unless such a power was intended": G. SAWER, *supra* note 13, at 76. Professor Lane considers §§ 74 & 76(i) as unsatisfactory sources: Lane, *supra* note 145, at 203; he also views clause 5 of the Commonwealth of Australia Constitution Act, 1900 (U.K.) as a possible implicit source of power, but considers it equally unsatisfactory.

[148] *See* Lane, *supra* note 145, for discussion.

[149] Judiciary Act, 1903 (Cwlth.), prior to amendment in 1976, conferred exclusive jurisdiction on the High Court in *inter se* matters: Judiciary Act, 1903 (Cwlth.) § 38A.

[150] AUSTL. CONST. § 73(ii).

Commonwealth or the states, without express constitutional permission, seems therefore to have been inevitable.

In order to make a brief comparison with the European Court of Justice it is appropriate to recall what were suggested above as the central roles of a *federal* constitutional court. These were:[151] (1) to answer questions concerning the validity of laws and administrative actions of the central governments, in other words to determine the scope of the powers of that unit within the federal framework; (2) to decide similar questions, and questions of conformity to valid central laws, with respect to constituent states; (3) to provide an independent forum for actions brought against the central government (apart from actions concerning legislative validity); (4) to provide for settlement of disputes between one state and another, at least where conflicts relate specifically to the federal structure (as distinct from those which might arise generally in the international arena); (5) less obviously federal and arguably of a more unitary character, the establishment or development of common legal principles or rules.

(1) With regard to ruling on the powers of the Council and Commission (that is, on the validity of Community acts and of certain implementation actions) the European Court has clear jurisdiction.[152] Statistics show the practical importance of this jurisdiction: between 1953 and 1981, excluding staff cases, just under half of all cases brought to the Court were direct actions[153] and over 80% of these were actions brought against the Commission or Council or both.[154] The Court may also in appropriate cases rule that the Communi-

[151] It should be emphasised that these suggested categories are not necessarily exclusive. For example, as between (2) and (4), the question of the validity of state acts may be the subject of the very *federal* dispute between states which a federal constitutional court might appropriately resolve.

[152] EEC Treaty arts. 173, 175, 177, 184, with regard to validity of legislation; 172 with respect to implementation action by way of imposition of penalties.

[153] The cases were brought *by*: Member States (59 cases), the Commission (173), or natural persons (709); *against*: Member States (171), or the Commission and/or the Council (766), under the EEC, Euratom and ECSC Treaties. The remaining cases were for preliminary rulings (949) and interim measures (142). (Statistics taken from L. Brown & F. Jacobs, The Court of Justice of the European Communities 186–87 (2nd ed., London, Sweet & Maxwell, 1983).)

[154] Total of cases (excluding staff cases) was 2032; direct actions numbered 941 and those against Commission/Council 776. (Statistics taken from *id.* at 186–87). In the case of the EEC Treaty, direct actions against Commission/Council would be based on arts. 173, 175, 184 which allow Community acts to be annulled or ruled inapplicable (*see id.* at 91–117 for further discussion). (Note that some of these cases would according to our 5-fold classification fall under the "independent forum" characterisation of the court's role, discussed *infra* text accompanying note 164.) Such actions may be brought by a Member State, the Council (against the Commission), the Commission (against the Council), by individuals (in limited circumstances specified in art. 173) and, under art. 175, by the Parliament. The grounds are specified in the Treaty (art. 173): "on grounds of lack of competence, infringement of an essential

ty has failed to act where it should have done;[155] this provision can be directly compared with the explicit original jurisdiction of the High Court of Australia to grant an order of *mandamus* against an officer of the Commonwealth,[156] although it should be noted that the Community procedure will result at most only in a declaratory judgment. Supervision of the Council and the Commission may arise also through indirect actions, by way of references to the Court from the courts of Member States,[157] but this supervision occurs only if the litigation from which the reference arises requires a ruling on the validity of Community acts and the national court makes a reference; indirect actions may, however, raise quite other questions, as will be seen.

Judicial control over or restraining of the Federal Government by the High Court is suggested by the grant of original jurisdiction to the High Court in all matters in which the Commonwealth is a party.[158] The important formal differences are, however, that the Australian Constitution does not specifically grant a right to bring actions to annul federal legislation; nor does it, unlike EEC Treaty article 173, specify grounds on which, in an action against the Commonwealth, the High Court might find against the Commonwealth by the assertion of overriding constitutional rules. As has been pointed out, the High Court has assumed this right.

(2) The Member States of the European Community can be controlled through the Court by direct actions brought against them,[159] although the general lack of an effective sanction limits the effectiveness of this procedure. Such actions may be brought by the Commission or by Member States. Only one action of the latter type has yet proceeded to judgment,[160] but a significant number of the former type has been brought.[161] Member States can also be indirectly controlled through reliance on the direct effect of Community law in actions or defences taken by private individuals in national courts, since if such an action gives rise to a reference for a preliminary ruling the European Court will have an indirect supervisory jurisdiction.[162] At this point it can be recalled that there is no express constitutional grant to the High Court of Australia of a supervisory jurisdiction over the states' actions within the federal framework so the states cannot be directly censured for non-compliance with federal law other than in the way any other non-state subject can be censured,

procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."

155 EEC Treaty art. 175.

156 AUSTL. CONST. § 75(v).

157 EEC Treaty art. 177.

158 AUSTL. CONST. § 75(iii).

159 Under EEC Treaty arts. 169, 170.

160 Case 141/78, France v. United Kingdom, [1979] ECR 2923.

161 *See supra* note 153. *See also* L. BROWN & F. JACOBS, *supra* note 153, at 186–87 & 192 (actions brought alleging failure of Member State to fulfill an obligation numbered 166); T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 316–17 (Oxford, Clarendon Press, 1981).

162 *See* T.C. HARTLEY, *supra* note 161, at 283–84.

but in any case the Court's general constitutional[163] and appellate jurisdiction allow a highly effective indirect control.

(3) The European Court also provides an independent forum in actions brought against the Community institutions[164] (even apart from those cases strictly on the validity of Community legislation discussed above),[165] but it should be noted that this is essentially limited to tortious liability; contractual liability is determined in the courts of the Member States.[166] As indicated above, the High Court of Australia is granted an original jurisdiction in all matters brought against the Commonwealth[167] although this jurisdiction is not exclusive.

(4) With regard to the settlement of disputes between Member States (other than those under (2)), the European Court has jurisdiction as far as the dispute relates to the subject matter of the Treaty, but only if the parties agree to submit to the Court.[168] However, because the Treaty also provides that Member States must settle such disputes as relate to the Treaty by methods provided in the Treaty,[169] the Court's jurisdiction is wider than at first appears. Even so, there is a clear distinction between this and the express original jurisdiction of the High Court of Australia with respect to all matters "[b]etween States."[170]

(5) One may regard the ability of a central court to establish legal principles common to all the units of a federation as at least a *federal* if not a unitary role for such an institution. Whether or not this is so, for the most part the European Court of Justice does not have such a role. Unlike the High Court of Australia, which has an all-embracing appellate jurisdiction, the European Court strictly has no appellate jurisdiction,[171] but, as Pescatore observes, there has been substantial progress

> towards a greater domestic effectiveness of Community law and towards unifying national conceptions, which at the start were very disparate. The decisive breakthrough in this direction is, however, due less to the diffusion and reception of certain abstract legal ideas than to the implementation of the direct cooperation set up between the Courts of the Communities and national courts through the preliminary rulings provided for by Article 177 of the EEC Treaty.[172]

The power of the European Court under article 177 is clearly of extreme importance both in principle and in effect. Of the four, or possibly five, functions

[163] *See supra* text accompanying note 139.
[164] EEC Treaty art. 178.
[165] This distinction is not an easy one, since sometimes the liability of the Community under EEC Treaty art. 178 will relate to legislative validity: *see* L. Brown & F. Jacobs, *supra* note 153, at 126–28.
[166] EEC Treaty arts. 183, 215(1).
[167] Austl. Const. § 75(iii) & (v).
[168] EEC Treaty art. 182.
[169] EEC Treaty art. 215.
[170] Austl. Const. § 75(iv).
[171] *See* G. Bebr, Development of Judicial Control of the European Communities 7 (The Hague, Nijhoff, 1981).
[172] P. Pescatore, The Law of Integration 91 (Leiden, Sijthoff 1974).

which might seem appropriate to a *federal* court, article 177 is relevant (but not exclusively) to three of them ((1), (2) and (5)). More particularly it is extremely important to the determination of the powers of, and the validity of the actions of, the central and constituent elements of the Community, particularly in cases brought by, or against, private individuals. The method by which this supervision is achieved – references by national courts – assists in the development of common principles, and in obtaining political acceptance of this central control. Pescatore sees the cooperative process between the European Court and national courts (a process which relies in many cases on the willingness of national courts to make a reference) as having successfully initiated a "European judicial power"[173] and he sees the acceptance of the case law of the Court by the national courts as the basis of a *common law*. The investing of federal jurisdiction in the state courts and the appellate jurisdiction of the High Court in Australia may be seen as offering a parallel to the article 177 process. One can contrast the United States where the federal courts are, for the most part, the only courts which exercise federal jurisdiction.[174]

To conclude these comparative reflections on the Community and Australian systems, reference should be made to another element in the judicial machinery which is of vital importance, namely the enforcement and implementation mechanisms. The powers of the European Court under articles 169 to 176 are in general declaratory in effect, and under the article 177 procedure the Court has power only to give preliminary rulings and does not decide the particular case, which is left to the national court. In general, therefore, with the exception of competition law, compliance with the Court's decisions under article 169 is voluntary, the result of political pressure, whereas under article 177 enforcement will take place not through the medium of Community enforcement agencies, applying Community procedures, but through national agencies, applying national procedures on the basis of orders received from national courts and tribunals. This is an important distinction from the Australian position, where the High Court has a number of remedies at its disposal, where federal statutes may impose penalties and provide a variety of remedies for breach, where recognition and enforcement of judgments (both state and federal) is subject to regulation by federal law, and where compliance is ultimately ensured by federal enforcement agencies.[175]

[173] *Id.* at 100.

[174] *See generally* P.M. Bator, P.J. Mishkin, D.L. Shapiro & H. Wechsler, Hart and Wechsler's the Federal Courts and the Federal System (2d. ed., Mineola, Foundation Press, 1973). Note, however, that the U.S. Supreme Court has a state appellate court function regarding federal law. *See generally* Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared, supra* this book, *esp.* at nn. 195–99 and accompanying text.

[175] *See* Z. Cowen & L. Zines, *supra* note 132.

2. The Approach of the High Court to Its Constitutional Role

Although the High Court has shown a measure of boldness and creativity in holding (or assuming) that it has a constitutional judicial review function, in general it adopts a much more restrictive approach to constitutional construction. Its usual approach is characterised by a reluctance to look beyond the actual text before it, and thus, for example, very rarely does one find the High Court making a close examination of the proceedings of the Constitutional Conventions of the 1890's and other contemporary sources. Illustrative of the High Court's general method of constitutional interpretation is the fact that even when construing the Constitution to imply a judicial review function the Court did not place any significant reliance on the supporting, copious historical evidence that the framers of the Constitution intended it to have this role.[176]

It is not the case, however, that the High Court never alludes to the intention of the Constitution's framers or to the circumstances surrounding the adoption of the provisions. Thus, for example, in a leading case on Aboriginal land rights, *Koowarta*,[177] some reference is made to the originally racist basis for the constitutional provision allowing the Commonwealth to make special laws for the people of any race,[178] and in the same case, one opinion makes a cursory reference to what the framers might have foreseen by way of the expansion of international cooperation with reference to the interpretation of the Commonwealth's "external affairs" power.[179] Such intention, however, is arrived at by a teleological interpretation of the text before the Court, not by reference to extraneous evidence.

Characteristic of the High Court's style is a tendency towards a seemingly precise literalism and legalism, as applied to both the Constitution and other legislation. In *Koowarta*, for instance, Chief Justice Gibbs and Justice Stephen turned to a dictionary for the meaning of the expression "foreign affairs";[180] and considerable attention is given to drawing fine distinctions between "external affairs," "indisputably international" elements[181] and "international or

[176] *See* this evidence marshalled in Galligan, *supra* note 145. In avoiding the use of antecedent historical evidence the High Court's method does not substantially differ from the method used by the European Court in interpretation of the EEC Treaty, although the similarity may be attributable to different causes: for the European Court the *travaux préparatoires* of the Treaty are not available; for the High Court, of the Australian Constitution, they are available in large quantity. Brown and Jacobs observe some difference between the European Court and the Advocate-General, the latter making more use of what *travaux préparatoires* are available, such as debates on the EC Treaties in the national parliaments at the time of ratification: L. Brown & F. Jacobs, *supra* note 153, at 246.

[177] Koowarta v. Bjelke-Petersen, 39 A.L.R. 417 (High Ct. 1982); this case will be discussed extensively in § IV *infra*.

[178] Austl. Const. § 51(xxvi). *See* observation of Gibbs, C.J., in *Koowarta*, 39 A.L.R. 417, 428–29.

[179] 39 A.L.R. 417, 462 (Mason, J.).

[180] *Id.* at 430 (Gibbs, C.J.); 449 (Stephen, J.).

[181] *Id.* at 485 (Brennan, J.).

domestic affairs."[182] The following quotation from Chief Justice Gibbs, while in itself hardly capable of proving the general style of the court, nevertheless does capture the flavour of at least part of the usual method. In reference to an earlier authority[183] he said in *Koowarta*:

> The words used by Starke J. are not free from ambiguity. If only by "international significance" he meant simply "international concern" there would be little practical difference between his approach and that of Evatt and McTiernan JJ., since under modern conditions there are few matters which are not regarded as fit subjects for international agreement. It is, I think, more likely that Starke J. was speaking of the character of the subject matter of the agreement, and that he meant to refer to the international character of the matter to which the agreement referred.[184]

One Justice of the High Court has taken the literalist position so far as to say that the literal interpretation of a statute was to be followed even if the result be thought to be "inconvenient or impolitic or improbable."[185] The literalist or legalist approach has important consequences, particularly if pursued to that extent. Clearly it leaves little scope for a purposive[186] or intention-based interpretation of a provision (ignoring whether intention is arrived at by an historical method, as discussed above, or by a creative reading of the provision in question). Indeed, the pattern of High Court decisions interpreting taxation laws in the 1960's and 1970's was so much to contradict the (some would say, plain) intention of the Parliament that in 1981 the Federal Parliament amended the Acts Interpretation Act 1901 (Commonwealth) to require the courts to adopt that construction of an act which would promote its object or purpose.

A further consequence of a legalist and literalist method is that it denies a creative and "principled" approach to law-making, so that the Court may prefer blindly to adhere to precedent, rather than to consider each issue on its merits in the light of changed social attitudes and circumstances and, indeed, of new knowledge. For an example, one can refer to two cases decided in the 1970's concerning Aboriginal land rights,[187] in which the question arose whether English or native law applied in Australia on settlement. The answer depended on whether the continent at the time of settlement was uninhabited land (in which case English law applied), or whether it had been settled by conquest or cession from a native people (then native law would apply). In both cases, the High Court simply relied on the plainly wrong finding in *Cooper v.*

[182] *Id.* at 440 (Gibbs, C.J.).
[183] R. v. Burgess, *ex parte* Henry, 55 C.L.R. 608, 658 (High Ct. 1936).
[184] 39 A.L.R. 417 (Gibbs, C.J.).
[185] Amalgamated Soc'y of Eng'rs v. Adelaide S.S. Co. (The Engineers Case), 28 C.L.R. 129, 162 (High Ct. 1920) (Higgins, J.).
[186] *See, e.g.*, Nonet, *The Legitimation of Purposive Decisions*, 68 CALIF. L. REV. 263 (1980).
[187] Millirrpum v. Nabalco Pty., 17 F.L.R. 141 (N. Terr., Sup. Ct. 1971); Coe v. Australia, 53 A.L.J.R. 403 (High Ct. 1979).

Stuart[188] – a case decided by the Privy Council ninety years prior – that the continent was uninhabited at the time of settlement, rather than addressing the central issues of those cases: the relative political powerlessness of Aboriginal Australians, their oppressed economic position, and the history of white Australia's treatment of them. The majority in *Coe* seems to rely on the legal, technical propriety of the Aboriginal position, without any acknowledgement of the substantial justice questions which press themselves on anyone even slightly familiar with the matter. For the most part, among the High Court Justices, only Justice Murphy has broken away from the literalist mould which makes questions of principle irrelevant.[189]

Perhaps the greatest criticism of the literalist approach is that it can lead to a misperception of what the Court is about. So, it is sometimes maintained that the court is – or should be – neutral in its law-making, or perhaps even that it is not actually *making* law at all. Some authors attempt to justify the High Court's method on this ground,[190] but it seems more easily criticised for what of its real behaviour it obscures:

> The High Court's leading decisions against the Chifley government typify its constitutional work. They present a consistent pattern of enormous judicial power being discretely and effectively exercised. The Court was active, even aggressive, in making crucial political decisions. It did so without acknowledging that its decisions were political; in fact it insisted repeatedly that they were not.[191]

These characteristics – literalist, legalist, non-purposive, non-creative – can hardly be said to be shared by the Court of Justice of the European Communities. Judge Pescatore seems to revel in the possibilities for judicial creativity which are given to the European Court:

> [T]he first time that . . . the judge has been allowed to play his part without having to submit to limitations arising either from the inadequacy of the substantive law, or from procedural deficiencies, or from political factors bringing into play the

[188] 14 App. Cas. 286 (P.C., 1889). In the light of the 300,000 original inhabitants and the history of their subsequent massacre by Europeans such a finding is patently absurd. In another case asserting Aboriginal land rights (Coe. v. Australia, 53 A.L.J.R. 403 (High Ct. 1979)) the High Court was invited to find that *Cooper v. Stuart* was wrong. It declined to do so. Justice Gibbs, in maintaining the view held in *Cooper v. Stuart*, said that Australia belonged to the class of colonies "acquired by settlement in a territory which, *by European standards*, had no civilized inhabitants or settled law." 53 A.L.J.R. 403, 408 (emphasis added). This is in sharp contrast with Justice Murphy (dissenting) who showed considerable awareness of the history of the Aboriginal people and of the current politico-legal nature of their land claims. 53 A.L.J.R. 403, 412.

[189] *See, e.g.*, Dugan v. Mirror Newspapers Ltd., 22 A.L.R. 439, 459 (High Ct. 1978); Coe v. Australia, 53 A.L.J.R. 403, 412 (High Ct. 1979); Federal Comm'r of Taxation v. Westraders Pty., 30 A.L.R. 353, 372 (High Ct. 1980).

[190] *See* Lane, *Neutral Principles on the High Court*, 55 A.L.J. 737 (1981).

[191] Galligan, *Legitimating Judicial Review: the Politics of Legalism*, 8 J. AUSTL. STUD. 33 (1981).

> national interests of states. This state of affairs has been highly beneficial to the development of the judicial element in the Community system.[192]

The European Court, in its purposive or intention-based method, is clearly distinguished from most English or Common Law based courts (with the important exception of the United States). Lord Denning has referred to the European way of looking "to the purpose and intent" and said that one must "divine the spirit of the Treaty and gain inspiration from it."[193] This is not a method which is easily consistent with literalism.

There are some aspects of method which the two Courts share somewhat more closely. One is a concern with the context in which a particular provision is to be read; the other is a concern with comparisons with other jurisdictions. In both cases there are still differences of degree. A good example of the High Court's contextual approach to constitutional interpretation, can be found in the *Koowarta* case, where, as we have already seen,[194] all the opinions show an awareness of the need to read the "external affairs" provision in the context of a federal Constitution, a federal system and an increasing internationalism in state matters. Such a contextual reading is not, however, habitual in the High Court: the taxation law cases, for example, often display an absolute refusal to read a provision in context.[195] By contrast, it would seem that contextual reading of one Treaty provision in the context of the whole is the standard mode of the European Court.[196]

The European Court also emphasises the use of comparative law in the interpretation of Community law.[197] Once again, there are differences between that Court and the High Court of Australia, but while the High Court does not rely on comparative material to the same degree as the European Court it is not entirely banished. Sawer observes that

> many High Court justices have made extensive use of [U.S.] Supreme Court decisions and individual justices, notably Isaacs and Dixon, always followed with intense interest the development of U.S. doctrine. It is essential for Australian constitutional counsel to be able to cite, and to discuss intelligently, any relevant U.S. decisions, though whether the High Court will use the material is always difficult to predict.[198]

The reason for High Court attention (at least sometimes) to United States constitutional law relates to the degree to which the Australian Constitution is modelled on that of the United States. In *Koowarta*, Chief Justice Gibbs made reference to Canadian constitutional law regarding the external affairs

[192] P. PESCATORE, *supra* note 172, at 84–85.
[193] Bulmer Ltd. v. Bollinger S.A., [1974] Ch. 401, 425 (C.A., U.K.).
[194] *See* discussion *supra* notes 76–91 and accompanying text.
[195] *See, e.g.*, the majority opinions in Federal Comm'r of Taxation v. Westraders Pty., 30 A.L.R. 353 (High Ct. 1980).
[196] *See* L. BROWN & F. JACOBS, *supra* note 153, at 248–52, who cite numerous authorities to support this view.
[197] *Id.* at 252–54.
[198] G. SAWER, *supra* note 13, at 73.

power,[199] expressly because the question before the Court was essentially a *federal* one, and, similarly, the framers' use of the Canadian Constitution as a model for Australia would provide a further explanation. Other Justices in *Koowarta* make the more usual United States comparisons as well as Canadian ones.[200] Somewhat unusually Justice Wilson makes a passing comparative reference to the Federal Republic of Germany.[201]

The tendency of the High Court to choose narrowly its comparative material again reflects a mode of decision-making which is "formalist" rather than "principled." The wider comparative reference of the European Court does not itself suggest a fundamentally different mode of reasoning, since its composition and the nature of the laws which it applies are considerably derived from different legal systems; in its comparative references the European Court usually draws on the laws of the Member States.[202] This in itself is, obviously, an important distinction between Australia and Europe, but it does not explain at all fully what are, as suggested by the earlier discussion, in fact fundamental differences in judicial technique. To explain those differences I suspect one must look more deeply into the historical legal traditions of, on the one hand, the several European states apart from the United Kingdom and Eire, and of, on the other hand, England which was the foundation of Australian legal culture. To sum up the style of the High Court of Australia, Geoffrey Sawer's words are apt (although his conclusion is one I feel somewhat doubtful about):

> [The Justices] try to decide cases by formal inference from a limited set of premises, found in the Constitution and in the decisions of the Privy Council and the High Court, and in a high proportion of cases – increasingly with the volume of precedents – they succeed.[203]

III. The Australian Approach to Some Issues of Federal Government

Having described the structures and to some extent the relationship between the whole and the parts within the federal system we now turn to consider some of the functional aspects, and to examine the ways in which this federal system does, and does not, promote the welfare maximisation objectives of all forms of government (as discussed in the Introduction). This part of the study will focus on two somewhat connected aspects of the Australian federal structure. The first deals with "federal values," the notion that, beyond the welfare

[199] 39 A.L.R. 417, 434–35.

[200] *Id.* at 451 (Stephen, J.); 478–80 (Wilson, J.).

[201] *Id.* at 480.

[202] In some situations the Court is obliged to do so: *see* EEC Treaty art. 215(2). The European Court, however, does go beyond its Member States for comparative law purposes, although this is much more common in Advocate Generals' opinions: *see, e.g.*, Case 96/80, Jenkins v. Kingsgate Ltd., [1981] ECR 911.

[203] G. Sawer, *supra* note 13, at 75.

maximising activity for which all governments are theoretically accountable, the federal system itself specifies or requires certain of the welfare maximising criteria by which public choice mechanisms will be assessed. As was suggested earlier, one welfare aim specific to a federation may be the achievement, *inter alia*, of geographic equity. Some of the constitutional structures which deal with this both in terms of central government action and of states' actions as between one another are those relating to the subject of discrimination between states. It is possible to perceive these structures in another way also. Instead of their relating to a substantive welfare aim of federalism, one can see that, having chosen federalism for whatever welfare advantages it may offer, there may be a need for special rules, such as to achieve non-discrimination between the federating units, to avoid welfare losses which might otherwise arise. Whether such structure or rules inhere in the purposes of federalism (that is to say, perhaps, that without them federalism would not exist) or whether they arise because without them the federal system might lose its advantages, one might justifiably call them "federal" values and regard them as sufficiently important to be considered here.

This part of the study will then deal with a second aspect, namely the substantive issue of welfare maximisation through the intervention of the State in the protection of fundamental human or civil rights (values which do not seem specifically federal in nature) and it will consider how the Australian federal system compares with the European Community in this respect. Basic human or civil rights protection is something one might expect from all types of government. In a divided power system it has an additional importance, and questions may be raised as to which level of government has ultimate responsibility. Does the federal government have to respect state standards and vice versa? Does the federal level have a general mandate to protect and/or promote rights (under, for example, a Bill of Rights) which may allow it to make rights legislation?

If we turn to the Constitution of Australia to examine the answers it embodies on both these aspects we find that it offers no clear guidance. It contains no Bill of Rights, but several dispersed clauses do provide for the protection of certain underlying values – both of a broad, not specifically federal kind, and of a "federal" kind.[204] These can be roughly classified into two very general groups: the first reflects the traditional civil libertarian democratic values of the founders, subjecting the Commonwealth when acting in the areas of its competence to respect hallowed Common Law principles, such as no uncompensated taking of property,[205] religious freedom,[206] right to jury trial,[207] the right to vote.[208] The second, which will be discussed first, and which

[204] *Cf.* Mendelson, *infra* note 306.
[205] AUSTL. CONST. § 51(xxxi) (this constrains only the Commonwealth).
[206] AUSTL. CONST. § 116 (this constrains only the Commonwealth).
[207] AUSTL. CONST. § 80 (this is limited to federal offences).
[208] AUSTL. CONST. § 41 (this applies only to federal elections); note also AUSTL. CONST. § 25.

for the purposes of this Volume is perhaps the more interesting, reflects the suggested federalist values – the principles of free circulation[209] and non-discrimination on state grounds[210] – which are fundamental to the functioning of, or perhaps even definitive of, the political union.

A. Protection of Federal Values

1. Equality Between the States and Between the Citizens of Different States

This subject can generally be thought of in terms of discrimination. It is important to observe immediately that there are two types of discrimination with which one might be concerned: (1) discrimination by the Federal Government in its treatment of the several states; (2) discrimination by one state against another state, whether in comparison with itself or with a third state. The Federal Government is prohibited from discriminating between states or parts of states in making laws with respect to taxation,[211] in making laws with respect to bounties or production or export of goods,[212] or by giving preferences, or abridging certain rights to use rivers, in any law or regulation of trade, commerce, or revenue.[213] The states themselves are bound not to discriminate against one another, or one another's citizens, in certain respects: trade, commerce and intercourse among the states shall be absolutely free;[214] disabilities or "discriminations" imposed by any state may be applied only equally on residents both of that state and of any other state;[215] the Federal Parliament may forbid undue, unreasonable or unjust preferences or discrimination by any state to or against any other state with respect to railways.[216]

It has already been pointed out that the prohibition on state-discriminatory federal taxation has to be understood in the context of the federal power under the Constitution to make conditional grants to the states[217] and that this power is not restricted by a non-discrimination rule. As a matter of practical inter-governmental financial arrangements, the grants power is used in a highly discriminating way, or at least in a superficially non-equal way. Although

[209] AUSTL. CONST. §§ 51(ii), (iii), 88, 92, 99, 100, 102, 117.
[210] AUSTL. CONST. § 92.
[211] AUSTL. CONST. § 51(ii). *But see* the earlier discussion of § 96 which showed that discrimination in Commonwealth grants is permissible, *supra* text accompanying notes 50–55.
[212] AUSTL. CONST. § 51(iii) (note that there are significant differences of wording from § 51(ii)).
[213] AUSTL. CONST. §§ 99, 100. With respect to all constitutional provisions touching Commonwealth discrimination between the states, *see* Rose, *Discrimination, Uniformity and Preference – Some Aspects of the Express Constitutional Provisions*, in COMMENTARIES ON THE CONSTITUTION 191 (L. Zines ed., Sydney, Butterworths, 1977).
[214] AUSTL. CONST. § 92.
[215] AUSTL. CONST. § 117.
[216] AUSTL. CONST. § 102.
[217] AUSTL. CONST. § 96.

the Federal and State Governments have joint taxing powers, the Federal Government has effectively monopolised income taxation.[218] This has given rise to the need for continuous and substantial reimbursements to the states by way of grants, given the relatively small amount of taxation by the states themselves. This in turn has led to greater central power, compared with, say, Canada which does not have such a high degree of Provincial reliance on federal grants.[219]

Over the period of centralised, uniform taxation, the distribution of tax reimbursement grants came heavily to favour the less populous states, with Tasmania (the least populous State) in 1975–76 receiving per capita double what New South Wales and Victoria (the two most populous states) received.[220] However, this figure does not reflect the complete pattern of intergovernmental financial relations in Australia, as tax reimbursement grants are supplemented by special assistance grants, special purpose grants and various loans from the Commonwealth to the states. All this is subject to "the most comprehensive and systemative arrangements for horizontal and fiscal equalisation of any federal country, both at State and local government level... a surfeit of arrangements, many of which are incompatible with each other."[221] The Commonwealth Grants Commission, a body set up in 1933 to decide on levels of special financial assistance to states, has recently recommended a more unified method for deciding on fiscal equalisation.[222] Since the Commission's proposals involve, *inter alia*, something of a reversal of the historical distribution in favour of less populous states, serious problems could arise which go to the heart of the federal system. The other aspects of prohibitions on discrimination by the Federal Government between the states are relatively unimportant and will not be dealt with further here.

Discrimination by one state against another raises more substantial issues particularly under the Australian Constitution's "common market" provision.[223] This provision, at least as interpreted, goes far beyond mere inter-state discrimination, and deserves a separate somewhat extended treatment in the following sub-section.

Apart from this provision, which certainly does have a non-discrimination effect on inter-state interaction, section 117 (non-discrimination against residents of other states) seems on its face to be important in this regard also.

[218] *See supra* notes 35 and 50 and accompanying text.

[219] Robertson, *Intergovernmental Financial Relations in Canada and Australia*, in PUBLIC POLICIES IN TWO FEDERAL COUNTRIES: CANADA AND AUSTRALIA 186 (R.L. Mathews ed., Canberra, Austl. Nat'l U.P., 1982) [hereinafter cited as PUBLIC POLICIES].

[220] Mathews, *Intergovernmental Financial Arrangements and Taxation*, in PUBLIC POLICIES, *supra* note 219, at 155.

[221] *Id.* at 169. For a detailed discussion of the history and problems of equalisation formulae and process *see id.* at 157–60, 169–73.

[222] COMMONWEALTH GRANTS COMMISSION, REPORT ON STATE TAX SHARING ENTITLEMENTS 1981 (1981).

[223] AUSTL. CONST. § 92.

However, the High Court has given this provision a limited scope, so that, for example, a prior period of residence requirement for admission to the South Australian bar was held not to offend the provision.[224] Such a result plainly contrasts with article 52 of the EEC Treaty, and in particular with the Community Lawyers Directive issued under that article.[225]

2. Freedom of Inter-State Trade

Of all the inter-state non-discriminatory provisions the most important (at least interpretatively) is section 92, which requires absolute freedom of trade.[226] It is a provision which has been extremely troublesome and litigation-generating.[227]

The interpretation of this provision has gone beyond merely the context of discrimination by one state against another, as will be mentioned below. Based on a non-discrimination understanding, the *narrowest* reading of section 92 is that fiscal burdens on trade, commerce or intercourse at state borders are absolutely prohibited, but that nothing beyond this is proscribed by the section. This reading[228] would give it a content which perhaps has its nearest European parallel in EEC Treaty articles 9, and 12–17 (on the elimination of customs duties), with the notable qualification that section 92 would not be interpreted as prohibiting charges or measures "having equivalent effect" which, of course, do fall within the prohibitions of those EEC Treaty provisions.

In general, however, section 92 has in fact been given an extremely broad interpretation, although it has not received so broad a reading as to say that inter-state trade and commerce is to be free from *all* regulation of any kind.[229]

[224] Henry v. Boehm, 128 C.L.R. 482 (High Ct. 1973). For general discussion of the interpretation of AUSTL. CONST. § 117, *see* Rose, *supra* note 213.

[225] Council Directive (EEC) No. 249/77 of 22 March 1977, to facilitate the effective exercise by lawyers of freedom to provide services, OJ No. L 78, 26 Mar. 1977, p. 17. *See generally* Friedman & Teubner, *Legal Education and Legal Integration: European Hopes and American Experience, infra* this vol., Bk. 3, *esp.* at nn. 65–68.

[226] AUSTL. CONST. § 92 reads (omitting a transitional provision): "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

[227] Over 125 cases have been directed to this provision. In the context of this paper the attention which can be given to the complex jurisprudence of § 92 is scandalously short. The most comprehensive and recent treatment of the provision is M. COPER, FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION (Sydney, Butterworths, 1983). *See also* L. ZINES, THE HIGH COURT AND THE CONSTITUTION chs. 6–8 (Sydney, Butterworths, 1981); R.D. LUMB & K. RYAN, *supra* note 99, at 323–44.

[228] By Murphy J., of the present High Court Justices the only one to give it such a reading and one of the few in the provision's history: *see, e.g.*, Buck v. Bavone, 135 C.L.R. 110, 132–38 (High Ct. 1976). Note, however, that Justice Murphy finds implicit Constitutional support for a right of freedom of movement: *see infra* note 292. The probable reason for Justice Murphy's narrow reading relates to the extreme breadth which has been given the provision by others.

[229] Duncan v. Queensland, 82 C.L.R. 556 (High Ct. 1916).

A striking example of the possible breadth of the provision was that given in the *Bank Nationalisation* case,[230] where an attempt by the Federal Government to nationalise all of Australia's banks was held to infringe section 92. It has been suggested that

> one of the main uniting forces of the federal movement was a desire to create a common market and to (at least) do away with the border tariffs which impeded the free flow of goods from one colony to another, [and] . . . this was achieved by a number of provisions including s. 92.[231]

It can justifiably be argued that a reading such as that given in the *Bank Nationalisation* case goes far beyond the notion that the provision was intended to prevent non-discriminatory interaction between states in a "*common* market," and asserts instead the proposition that such non-discriminatory interaction must take place in a "common *market.*" Such a view of section 92 can thus be said (as it has often been said[232]) to enshrine a particular political economy which seems in many respects quite passé. This particular political economy goes by the jurisprudential description of the "individual right theory," the theory that section 92 protects the right of individuals to engage in inter-state trade. This is the freedom which, it is asserted, shall be "absolute."

Such a theory is, at least without qualification, opposed to any form of public regulation. Coper observes that section 92 has been "a substantial obstacle to organised marketing,"[233] a curious result perhaps when compared with the high degree of regulated trade and commerce that one finds in the European Common Market – where there is more emphasis on "*common*" than on "*market.*"

The general nature and application of section 92 can be understood by reference to some of the specific questions which have arisen under it and some of the typical situations in which it has been applied. The most significant questions which have arisen under the provision are these: does section 92 bind the Commonwealth or the states or both; does it control only legislation, or the administration of legislation as well; does it prevent only prohibitions on certain activities or does it invalidate any form of regulation of these activities; does it control governmental action only when it operates directly on certain activities, or also when it affects them indirectly and what activities are within

[230] Bank of N.S.W. v. Commonwealth, 76 C.L.R. 1 (High Ct. 1948).

[231] M. Coper, *supra* note 227, at 3–4.

[232] *See, e.g.*, Encel, *The Social Impact of the Australian Constitution*, in Legislation and Society in Australia 114, 117 (R. Tomasic ed., Sydney, Law Found, N.S.W. & Allen & Unwin, 1979); Crommelin, *Sections 90 and 92 of the Constitution: Problems and Solution*, in C. Saunders & M. Crommelin, Current Constitutional Problems in Australia 37, 43 (Canberra, Austl. Nat'l U.P., 1982); L. Zines, *supra* note 227, at 130.

[233] *See* Coper, *Constitutional Obstacles to Organised Marketing in Australia*, 46 Rev. Marketing & Agric. Econ. 71, 96 (1978). *See also*, Coper, *Constitutional Obstacles to Organized Marketing in Australia: A Postscript*, 46 Rev. Marketing & Agric. Econ. 355 (1978); North Eastern Dairy Co. v. Dairy Indus. Auth. (N.S.W.), 134 C.L.R. 559, 615 (High Ct. 1975) (Mason, J.).

the protection of section 92 – in particular what is the meaning of "inter-state," and what is "trade or commerce"?

The answers which have been given to these questions have varied over time, and have never been simple. Only the briefest indications of them can be given here. First, it is now the accepted view that section 92 binds both the Commonwealth and the states,[234] although for about the first thirty years of Federation it had been held that only the states were bound.[235] The second question, as to whether section 92 can invalidate administrative action as well as legislation, relates to the power of the Commonwealth or the states to confer administrative discretions which might be exercised in a way contrary to the Constitution and to the nature of the rules of administrative law which may allow the courts to control the exercise of those discretions.[236] It seems that, with regard to section 92, the High Court will not uphold a law which grants a discretion in terms which are too vague. But if the criteria for the exercise of the discretion are more particularly stated so that the Court might be in a position to review individual administrative acts,[237] the legislation itself could be valid, while the individual administrative acts taken pursuant to it may be judged invalid.[238]

Third, as a general rule while prohibition of inter-state trade is invalid under section 92, the regulation of it is in principle permissible. The difficulty here is to decide what is permissible "regulation." Rules based on consideration of public health and safety, or for the prevention of fraud or of restrictive or monopolistic trade practices,[239] or for consumer protection,[240] or concerned with

[234] R. v. Vizzard, *ex parte* Hill, 50 C.L.R. 30 (High Ct. 1933); O. Gilpin Ltd. v. Commissioner of Rd. Transp. & Tramways (N.S.W.), 52 C.L.R. 189 (High Ct. 1935); James v. Commonwealth, 52 C.L.R. 570 (High Ct. 1935); James v. Commonwealth, 55 C.L.R. (P.C., 1936).

[235] W.A. McArthur Ltd. v. Queensland, 28 C.L.R. 530 (High Ct. 1920).

[236] *See* L. ZINES, *supra* note 227, at 177–96.

[237] Hughes & Vale Pty. v. New South Wales [No. 2], 93 C.L.R. 127 (High Ct. 1955).

[238] Coper offers a suggested interpretation of AUSTL. CONST. § 92 which includes the following:

> If the legislation authorises what would amount to unconstitutional action, it should itself be regarded as unconstitutional (at least to that extent); it would be unusual, however, if it were not possible to treat even a superficially unfettered discretion as subject to an implied restraint that it be exercised in accordance with the Constitution. Thus, strictly speaking, the question will usually be whether a discretion was exercised for a proper purpose, and the answer will have consequences only for that exercise of discretion and not for the legislation itself. This should be so whether the legislation merely authorises administrative action or whether it imposes some burden and subjects it to discretionary relaxation, although the latter perhaps presents a greater practical problem.

M. COPER, *supra* note 227, at 303.

[239] *E.g.*, Mikasa (N.S.W.) Pty. v. Festival Stores, 127 C.L.R. 617 (High Ct. 1972).

[240] *E.g.*, Samuels v. Readers Digest Ass'n Pty., 120 C.L.R. 1 (High Ct. 1969).

reasonable charges for services and facilities[241] are all examples within the concept of permissible trade regulation. More problematic is whether marketing schemes are within the concept of the mere regulation of trade: on this issue the High Court is divided.[242]

The fourth question concerning the distinction between direct and indirect controls is closely related to the fifth, the meaning of "inter-state." The reason for this is that while a law ostensibly is directed at something which is not "inter-state" it may, indirectly, affect something which is "inter-state." The question is whether, in such a case, it should be struck down under section 92. Historically, one of the most important aspects of High Court jurisprudence on this provision was the so-called "Dixon doctrine," propositions developed by Chief Justice Dixon to the effect, *inter alia*, that unless the law challenged under section 92 operated *directly* on inter-state trade it would be valid; this was so even if the supposedly indirect laws had a significant practical effect on inter-state trade.[243] One immediately feels bound to contrast this jurisprudence with the express coverage of parts of the EEC Treaty of "measures having equivalent effect."[244] An important qualification to the broad sweep of the Dixon principle was that merely "circuitous means and concealed design"[245] could not avoid invalidity under section 92.

How could one discover when legislation *directly* affected inter-state trade? "[O]nly if it was imposed on something which was itself a part of interstate trade."[246] Such an answer still required deciding what constituted "inter-state." Typical problems have arisen with laws which have applied to manufacture or sales antecedent to movement of goods across state borders or to sales

[241] *E.g.*, Armstrong v. Victoria [No. 2], 99 C.L.R. 28 (High Ct. 1957).

[242] One side of the division was represented by recently retired Barwick C.J.:

> Barwick CJ's concept of regulation was to permit laws only which were necessary for the "mutual accommodation" of the rights of interstate traders, laws which were necessary to secure true freedom rather than mere "licence": the competing view, as it emerged towards the end of the 1970s, would circumscribe the freedom of interstate traders by reference to consideration of the "public interest".

M. Coper, *supra* note 227, at 6. *See also* Clark King & Co. Pty. v. Australian Wheat Bd., 140 C.L.R. 120 (High Ct. 1978); Uebergang v. Australian Wheat Bd., 32 A.L.R. 1 (High Ct. 1980). These cases will be discussed in more detail, with reference to the impact of § 92 on marketing schemes generally, *infra* notes 252–59 and accompanying text.

[243] Expression of the Dixon doctrine can be found in O. Gilpin Ltd. v. Commissioner of Rd. Transp. & Tramways (N.S.W.), 52 C.L.R. 189 (High Ct. 1935); Bank of N.S.W. v. Commonwealth, 76 C.L.R. 1 (High Ct. 1948); Hughes & Vale Pty. v. New South Wales [No. 1], 87 C.L.R. 49 (High Ct. 1953). The earlier expression of the doctrine, by way of dissent in *Gilpin* "was not precisely the same as the doctrine he espoused in the 1950s": M. Coper, *supra* note 227, at 176.

[244] EEC Treaty arts. 9(1), 13(2), 16.

[245] Grannall v. Marrickville Margarine Pty., 93 C.L.R. 55, 78 (High Ct. 1955).

[246] M. Coper, *supra* note 227, at 80.

after such movement. In general the answer to these questions, until the Barwick era (the 1960's and 1970's), took a narrow view of what was "interstate."[247]

During the time of Chief Justice Barwick the Dixon doctrine was effectively done away with, even though the Chief Justice was himself mostly in dissent in the section 92 cases of that period.[248] In the result the present status of the distinction between direct and indirect operation is that it has effectively been put aside. In *SOS (Mowbray) Pty. Ltd. v. Mead*, Justice Mason said, together with three others on the same Bench, "[t]o say consistently with section 92 it is permissible to enact laws whose practical effect is to burden inter-State trade is to reduce the constitutional prohibition to a legal formulation which may be readily circumvented."[249] In other words the Court seems to have moved from consideration of formal incidence to actual incidence or real impact, or "equivalent effect."

Finally, with respect to the basic questions which have arisen under section 92, there has been the problem of deciding what is, or is not, "trade." This seems to have been a more difficult question than it need have been because many of the Justices have assumed that there are mutually exclusive categories of activity. So, for example, in *Nelson*'s case,[250] some judges characterised a state law as being about trade (and therefore invalid) and some characterised it as being about health (and therefore valid) when, more correctly, the law was about both matters. In the *Bank Nationalisation* case[251] it was argued by the Commonwealth, seeking to support its nationalisation law, that banking was only a facility incidental to trade and commerce but was not part of trade and commerce itself. The High Court rejected this view.

Some consideration of the particular contexts in which the High Court has had to consider section 92 and the way it has been applied will provide some further understanding of the nature and application of the provision. The most prominent of these contexts have been state or Commonwealth – and sometimes joint – marketing schemes, state taxation, the regulation or control of transportation, production quotas, and price-fixing rules.

The current position of the High Court with respect to marketing schemes is represented by the decisions in the *Clark King*[252] and *Uebergang*[253] cases. Both present a confused image of present section 92 jurisprudence. They concerned a national wheat marketing scheme which operates so as to make all trading take place through the Australian Wheat Board and prevents all pri-

[247] *Id.* at 181–82.
[248] *Id.* at 191.
[249] 124 C.L.R. 529, 606–07 (High Ct. 1972). Barwick, C.J.; Stephen and Jacobs, JJ.
[250] *Ex parte* Nelson [No. 1], 42 C.L.R. 209 (High Ct. 1928).
[251] Bank of N.S.W. v. Commonwealth, 76 C.L.R. 1 (High Ct. 1948).
[252] Clark King & Co. Pty. v. Australian Wheat Bd., 140 C.L.R. 120 (High Ct. 1978).
[253] Uebergang v. Australian Wheat Bd., 32 A.L.R. 1 (High Ct. 1980).

vate trading. In the *Clark King* case two Justices[254] held that this prohibition was not mere "regulation" (as discussed above) and found the scheme invalid under section 92. Three others found the scheme valid: one (Justice Murphy) on the basis of his "fiscal burden" theory;[255] the others[256] because the scheme was the only reasonable and practical way of regulating the industry.

The same scheme came before the Court in *Uebergang*, but for complex procedural reasons no final decision on the validity of the scheme was offered, although Coper suggests that the thrust of the varied reasoning of the Justices should, if not reconsidered, lead to invalidity.[257] The reasoning of the Court presents almost a complete conspectus of possible interpretations of section 92, except perhaps for the lack of an orthodox Dixon doctrine. At one extreme one finds Justice Murphy's "fiscal burden" theory, in which the question of whether section 92 allows "regulation" is fundamentally irrelevant. At the other extreme Chief Justice Barwick asserted an individual right theory and saw the scheme as invalid because of the prohibition on individual participation in inter-state trade. In between were essentially two other positions, neither at all close to Justice Murphy's, nor very close to that of the Chief Justice. Justices Gibbs (as he then was), Aikin and Wilson were closest to Chief Justice Barwick, taking the view that the scheme could be valid as "regulation" if "the prohibition with a view to state monopoly was the only practical and reasonable manner of regulation and that inter-state trade commerce and intercourse thus prohibited and thus monopolised remained absolutely free."[258] This is a "most stringent test"[259] of validity; for procedural reason the factual proof or disproof of it was not available. Justices Stephen and Mason had a less stringent view, namely that the regulatory scheme would be valid if it were reasonably necessary, in the circumstances, on the basis of "public interest." It can be seen that the fate of collective marketing schemes vis-à-vis section 92 is, to say the least, inconclusive. The composition of the Court has changed considerably since *Uebergang*, most significantly with the departure of Chief Justice Barwick, the strongest proponent in the Court's history of the "individual right theory." This, plus the signs in *Clark King* and *Uebergang*, may suggest that a fundamental change of direction will occur, probably not sharply, within the next few years.

As one might expect, the general rule is that state taxation of inter-state trade fails under section 92.[260] The strength of this proposition can be shown

[254] Barwick, C.J., and Stephen, J.

[255] *See supra* note 228 and accompanying text.

[256] Mason and Jacobs, JJ.

[257] M. Coper, *supra* note 227, at 277.

[258] Commonwealth v. Bank of N.S.W., 79 C.L.R. 497, 639 (P.C. 1949) (this quotation was a reservation to the general doctrine of § 92 which, in the *Bank Nationalisation* case, both the High Court and the Privy Council applied to invalidate a Commonwealth nationalisation of all Australian banks).

[259] M. Coper, *supra* note 227, at 275.

[260] Hughes and Vale Pty. v. New South Wales [No. 2], 93 C.L.R. 127 (High Ct. 1955).

by the fact that even while the direct/indirect distinction held fairly general sway, such that control on first sales after import of goods into a state were not usually within the ambit of section 92,[261] tax on such first sales has been held invalid.[262] A clear exception to this status of taxes is where a charge is made for some service or facility, including a road tax which is related to usage of roads and their maintenance cost.[263]

The regulation of transportation has been another area where section 92 has been relied upon often. In cases in the 1930's the Court took the view that a refusal by Victoria of licences for vehicles carrying goods inter-state was valid because the refusal was based on the existence of a competing railway goods service.[264] Although the High Court later attempted to uphold this view,[265] the Privy Council took a different view,[266] invalidating legislation which conferred essentially unfettered discretions to licence or not licence motor vehicles. The High Court has since adhered to this view.[267]

Both price-fixing laws and production quotas illustrate the direct/indirect and the intra-state/inter-state distinctions which have played an important role in the application of section 92. Quotas on production touch on activity which is antecedent to inter-state trade but not itself inter-state trade.[268] Price-fixing by way of establishing a general price for a good sold within a particular state does not have a sufficiently direct effect on inter-state trade.[269]

As has been shown, particularly in some of the judgments in *Clark King* and *Uebergang*, the jurisprudence of the High Court since the *Bank Nationalisation* case (the central locus of the "individual right" theory) has not been unqualifiedly "*laissez-faire*" in its attitude to section 92. Crommelin suggests that the present Court may have moved to a less rigid view being prepared to "balance the rights of individuals engaged in inter-state trade against the interests of the community at large."[270] Recognising that even with this relaxation there are serious problems, he argues in favour of an interpretation which concerns itself with a state protectionism concept of free trade and discrimination:

> The task for the High Court in any case would be to decide whether the practical effect of a law was to provide a measure of protection to industries of a State against competition from interstate. Discrimination and legislative purpose would be relevant factors in this inquiry but would not themselves be decisive. Identification of the practical effect of a law would certainly not be straightforward in all

[261] SOS (Mowbray) Pty. v. Mead, 124 C.L.R. 529 (High Ct. 1972).
[262] Vacuum Oil Co. Pty. v. Queensland, 51 C.L.R. 108 (High Ct. 1934).
[263] Armstrong v. Victoria [No. 2], 99 C.L.R. 28 (High Ct. 1957).
[264] Riverina Transp. Pty. v. Victoria, 57 C.L.R. 327 (High Ct. 1937).
[265] McCarter v. Brodie, 80 C.L.R. 432 (High Ct. 1950); Hughes & Vale Pty. v. New South Wales [No. 1], 87 C.L.R. 49 (High Ct. 1953).
[266] Hughes & Vale Pty. v. New South Wales, [1955] A.C. 241 (P.C.).
[267] *See, e.g.*, Hughes & Vale Pty. v. New South Wales [No. 2], 93 C.L.R. 127 (High Ct. 1955).
[268] Grannall v. Marrickville Margarine Pty., 93 C.L.R. 55 (High Ct. 1955).
[269] Wragg v. New South Wales, 80 C.L.R. 353 (High Ct. 1953).
[270] Crommelin, *supra* note 232, at 39.

> cases, some of which would involve complex questions of fact, but the difficulties in this area would seem to be less than those presently confronting the Court.[271]

Coper also prefers a "free trade" (rather than "individual right" theory), observing that

> the implementation of a free trade interpretation does not in any event produce a result which makes a political choice in quite the same sense as the implementation of laissez-faire – it does not necessarily choose governmental control as the alternative to umhampered private enterprise, but rather leaves that choice to the legislature. In other words, the promotion of private enterprise is not precluded, but remains as a political option.[272]

The particular free trade theory which he supports is also tied to a discrimination basis. Rose seems to come to similar conclusions, although perhaps with a narrower view of what is discriminatory ("less favourable") than does Coper, based on the premise that section 92 is primarily motivated by a *federal* principle.[273] Rose's view, perhaps more than any other, seems to import to Australian federalism ideas which underlie the EEC.

B. Protection of Civil and Human Rights

It can be seen from the preceeding section that non-discrimination is a fundamental federal principle, but that the only area of discrimination which falls under this rubric and which received any significant attention from the drafters of the Australian Constitution, or from the courts subsequently, is that between states or persons as citizens or residents of states. In general, however, federalism apart, discrimination on this basis is by no means the major fundamental rights problem. Other areas of individual rights protection may give rise to far greater societal problems, and even if we limit the discussion to discrimination alone, we find at least three types of discrimination in Australia – those based on sex, race and national origin – which create problems which are equally difficult to resolve.[274] In this section we will turn to consider the

[271] *Id.* at. 47.

[272] M. Coper, *supra* note 227.

[273] Rose, *Federal Principles for the Interpretation of Section 92 of the Constitution*, 46 A.L.J. 371 (1972).

[274] Australia shares sex discrimination with virtually every country, and certainly with the European Community. Race discrimination, in the sense of discrimination against an aboriginal population, is not shared with Europe – unless one includes the problems of various ethno-linguistic minorities (*see, e.g.*, A. Pizzorusso, Le Minoranze nel diritto pubblico interno (Milan, Giuffrè, 1967)) – but is shared with the U.S. and Canada, with respect to the Indian people. Discrimination against the aboriginal population in Australia has some similarities also to discrimination in the U.S. with respect to the Negro population. National origin discrimination in Australia has many parallels in both Europe and the U.S., because of the extensive immigrations particularly from southern Europe, the eastern Mediterranean, and, more recently, Indo-China. Apart from sex, race and national origin discrimination, there

role of the Constitution and of the governments – federal and state – in protecting and promoting fundamental rights, focussing primarily on these issues of non-discrimination.

1. Common Law Protection of Human Rights

Neither the Australian Constitution nor the Constitution of any of the six states contains any general protection of fundamental human, civil or political

are also significant problems of discrimination on grounds of age, handicap and sexual preference.

"Discrimination" refers to differences of treatment, and, sometimes, to equality in treatment which brings about differences in effect, between one category of persons and others who do not belong to that category. The essence of that treatment, or of the effects, is that it is disadvantageous to the particular category when its members are compared with persons outside the category. In probably a minority of cases it is overt: the "discriminator" uses words in such a way as to indicate that the criteria being used to determine who enjoys a benefit or is given a burden are tied to membership of a particular category or not. Alternatively the discrimination is identifiable because the "discriminator" (without necessarily saying so, or intending to) consistently bestows the benefit or imposes the burden according to a particular pattern as between a category of persons and non-members of the category. When numerous decisions consistently repeat (consciously or not) the same pattern of disadvantage one can conclude that a problem of discrimination may exist. In general when institutional arrangements and patterns of socialisation unnecessarily or unjustifiably present, create or re-inforce patterns disadvantageous to particular groups of people one can assume, at least *prima facie*, that there is a discrimination problem. The more precise identification of the nature of the problem relies on the demonstration (by, for example, statistical evidence) of a consistent pattern of disadvantage against a particular group and the identification of the institutional structures and decisional criteria likely to be a cause of this.

In Australia, there is much statistical evidence to show the disadvantage suffered by women, Aboriginal people, non-Anglo-Saxon Australians, physically and intellectually handicapped people, homosexuals, and persons of certain ages (principally the young and the old) particularly in employment, education, accommodation, health care, provision of goods and services and the administration of criminal justice. *See, e.g.*, Review of New South Wales Government Administration, Report (1977) [*The Wilenski Report*]; K. Taperell, Sexism in Public Service (Discussion Paper No. 3, Royal Comm'n on Austl. Gov't. Admin., 1975); S. Encel, N. Mackenzie & M. Tebutt, Women and Society 119–21 (Melbourne, Cheshire, 1974); Davies, *Discrimination, Affirmative Action and Women Academics: A Case Study of the University of New England*, 25 Vestes 15, 17 (1982); 5 Royal Commission on Human Relationships, Final Report 96 (1977); J. Mackinolty & H. Radi, In Pursuit of Justice (Sydney, Hale & Iremonger, 1979); Council of Social Service of N.S.W., Unemployed Women – A Research Report 7–9 (Prepared for the Premier of N.S.W. 1978); Australian Schools Commission, Report – Girls, School and Society (1975); Australian Government Commission of Enquiry into Poverty, Migrants and the Legal System 24–29 (1975); W. Clifford, Aboriginal Criminological Research : A Workshop Report 28 (Canberra, Austl. Inst. of Criminology, 1981); House of Representatives Standing Committee on Aboriginal Affairs, Aboriginal Legal Aid 7 (1980).

rights. The lack of anything like a Bill of Rights represents a major departure from the model of the United States Constitution which, as mentioned, was influential on important aspects of Australian constitutional design. The Australian Constitution does, however, contain certain provisions which, on their face, may provide some specific rights protection. In this respect there is some similarity with the form of the Treaty of Rome which also lacks a Bill of Rights and yet contains some specific protections. By contrast, the Constitutions of the several Australian states[275] in lacking altogether any rights protection present no similarity to most of those of the Member States of the Community almost all of which contain general declarations of protected rights.[276]

Although there is in general no written rights protection of a constitutional kind in Australia it is important to say, immediately, that there is little reason to suggest that there is any, or significantly, less protection of human rights than there is in, say, the United States which has such written protections. It is a commonplace to say that, fundamentally, the level of protection of rights depends more on the nature of the civic culture than on whether there is a written guarantee. Plainly there are states which have written protections where the actual level of human rights protection is far lower than in Australia, which does not mean that rights protection in Australia is as extensive as it should be, particularly as regard certain sub-groups such as the Aboriginal people. It is the stable liberal democracy in Australia which ultimately assures the protection of such rights as are found. This is not to say, however, that there are no differences between written and unwritten sources of rights. In individual cases and for particular groups there may be important differences, even when on a general level, one can declare that differences in protection are minimal.

The legal protection of rights which in fact exists in Australia, both at state and federal levels, derives largely (but, as will be seen, not wholly) from Common Law. I cannot here treat the whole field of Common Law rights protection and examine the techniques of that protection in contrast with the alternatives.[277] At risk of gross over-simplification one might say that the key principles of Commom Law rights protection are: (a) that Parliament is always sovereign to the courts; (b) that a citizen has all possible rights other than those which Parliament has plainly taken away; and (c) that the courts will scrutinise legislation most carefully before it will find an intention to interfere with basic rights.[278] One is not at all able to say that adherence to these principles

[275] *See generally* R.D. Lumb, *supra* note 42.

[276] The U.K. is, of course, the obvious and notable exception, and the historical source of the Australian practice. On the European position and problems, *see generally* Cappelletti & Golay, *supra* note 143; Frowein, Schulhofer & Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration, infra* this vol., Bk. 3, *esp.* at § IV.

[277] For discussion of these, *see* E. Campbell & H. Whitmore, Freedom in Australia (Sydney, Syd. U.P., 1973); G. Flick, Civil Liberties in Australia (Sydney, Law Book Co., 1981).

[278] For illustrations of this, *see generally* G. Flick, *supra* note 277.

can always be demonstrated by the cases; and even assuming that the principles have been adhered to rigorously, there are obvious weaknesses in such an approach.

One weakness is that a Parliament (whether federal or state, for these principles apply to both) might perfectly plainly detract from certain existing rights, and to this there is no legal obstacle. That, in some cases, a political (electoral) obstacle may arise does not offer much to a minority which may be oppressed by a majority. A second weakness is that interferences with fundamental rights may arise from private, rather than public, action; here only the normal common law of tort or contract, and possibly some aspects of criminal law, offer limited protection.[279] The Common Law, as it is known, is unlikely to extend its protection against private abuses, and thus one can expect improvements only by legislative reforms, whether "constitutionally" (entrenched Bill of Rights at state or federal level, or both) or by normal legislation (possibly enacted to implement a constitutional precept). A third weakness is that the Common Law (judge-made law) may itself be contrary to fundamental rights. Of course, interpretation and application of constitutional guarantees can be restrictive or indeed, repulsive, but, at least in political terms, the documentary form of a Bill of Rights may itself be of some value.

An illustration of this third weakness of the Common Law approach is found in the case of *Dugan v. Mirror Newspapers Ltd.*,[280] in which a felon convicted under the law of New South Wales sought to sue a newspaper for defamation. The High Court of Australia held that the old English Common Law rule of attainder, received as the law of New South Wales in 1828 and not by the time of this case reformed in New South Wales, applied in the case before it.[281] Attainder is the condition of "civil death" which attaches to a convicted felon denying him or her the right to bring any civil suit, or to hold property, or even to act as a witness for any purpose of law, until the sentence has been served or a pardon given. The majority of the Court[282] principally addressed the question whether this rule of Common Law had been "received" into New South Wales, without discussing the modern relevance of the rule. Chief Justice Barwick expressly refused to consider whether the law, even if received, was an appropriate one for current conditions, saying "it is clearly a question for the legislature whether a change should be made in the law."[283] Justice Murphy, however, approached the subject in an entirely different way. He assumed that, because this was a rule of Common Law, he, a Common Law judge, could change it: "Judges have created the doctrine of civil death

[279] *See, e.g., id.* at 188–94.

[280] 22 A.L.R. 439 (High Ct. 1978).

[281] For discussion of the doctrine of "reception," *see* Castles, *Reception and Status of English Law in Australia*, 2 ADEL. L. REV. 1 (1963–6); Sawer, *The British Connection*, 47 A.L.J. 113 (1973). *See also* the earlier discussion of *Cooper v. Stuart*, *supra* notes 187–88 and accompanying text.

[282] Barwick, C.J.; Gibbs, Stephen, Jacobs, Aickin and Mason, JJ.

[283] 22 A.L.R. 439, 441 (Barwick, C.J.).

and judges can abolish it."[284] As to whether the law should change Justice Murphy made reference to the "universally accepted standard of human rights" as found in certain international instruments[285] and to *Golder v. United Kingdom*,[286] a decision of the European Court of Human Rights, which said that "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law."[287] Justice Murphy concluded that the rule should change.

The dissenting opinion of Justice Murphy in *Dugan* gives a clue to a possible, but realistically unlikely, development of the Common Law as a source of rights protection. Similarly, in the case of *Ansett v. Wardley*[288] the same judge (here in the majority) implicitly, but fleetingly, suggested that general principles might be relevant to the construing of Parliament's constitutional power to make law which might authorise arbitrary sex discrimination.[289] In the important Aboriginal land rights case *Koowarta*,[290] Justice Murphy referred to implicit constitutional constraints "associated with the implications of freedom of expression and other attributes of a free society,"[291] relying on certain of his own earlier opinions where he variously said "the right of persons to move freely across or within State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth,"[292] "subject to necessary regulation";[293] "[f]rom the nature of our society an implication arises prohibiting slavery or serfdom... an implication arises that the rule of law is to operate... an implication arises that there is to be freedom of movement and freedom of communication."[294] In justifying these implications Justice Murphy relies on earlier High Court opinions which allow for implication to be part of the process of constitutional interpretation.[295]

Some recent case authority, like Justice Murphy in *Dugan*,[296] finds the fun-

[284] *Id.* at 459 (Murphy, J.).

[285] These international instruments were: the International Bill of Human Rights (which includes the Universal Declaration of Human Rights); European Convention on Human Rights.

[286] European Court of Human Rights, Judgment of 21 Feb. 1975, Series A: vol. 18, p. 5 (Pubs. of Eur. Ct. H.R., 1975).

[287] *Cited* at 22 A.L.R. 439, 457 (Murphy, J.).

[288] Ansett Transp. Indus. (Operations) Pty. v. Wardley, 28 A.L.R. 449, 469 (High Ct. 1978) (Murphy, J.).

[289] *Id.* at 469 (Murphy, J.).

[290] *Koowarta*, 39 A.L.R. 417 (1982).

[291] *Id.* at 427 (Murphy, J.).

[292] Buck v. Bavone, 135 C.L.R. 110, 137 (High Ct. 1976) (Murphy, J.) (following the reasoning in certain U.S. Supreme Court opinions, *e.g.*, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[293] Ansett Transp. Indus. Pty. v. Australia, 52 A.L.J.R. 254, 267 (High Ct. 1978) (Murphy, J.).

[294] McGraw-Hinds (Austl.) Pty. v. Smith, 53 A.L.J.R. 423, 435 (High Ct. 1979) (Murphy, J.).

[295] *See* the authorities Murphy, J. relies upon, *id.* at 434–35.

[296] *Dugan*, 22 A.L.R. 439 (High Ct. 1978).

damental rights to be asserted given expression in international sources. In *Municipal Officers (Queensland) Award, 1975* the Australian Conciliation and Arbitration Commission filled a hiatus of industrial law by reference to International Labour Organisation Convention No. 111 (to which Australia is a party) in order to provide protection for a woman dismissed from employment on account of marriage.[297] In *Koowarta*, a federal law prohibiting race discrimination was held constitutionally valid partially on the basis of certain international conventions to which Australia was party.[298]

What conclusions might be drawn from these examples? Nothing sweeping is possible. Justice Murphy, who often relies on such principles and sources,[299] is frequently in the minority and is certainly not a guide to the general pattern of High Court jurisprudence. However, since even these examples show that he is not alone, one might infer that an *active* Common Law assertion of fundamental rights is a possibility.[300] But then comes the perhaps insurmountable barrier: the principle of the sovereignty of Parliament. Could one expect, and would one wish, that the courts would assert "fundamental rights" against even the plain words of Parliament in the absence of a written, agreed formulation of rights?

Although there may be some controversy in Australia over basic rights protection, this controversy has centered on separation of powers issues (involving the Parliamentary supremacy doctrine) and has not, with some exceptions such as Queensland's treatment of the Aboriginal people, so far resolved itself into a major federalism issue (raised by conflicts between federal and state standards). This is so because in Australia the supremacy question was relatively easy of solution, given the fairly specific division of powers between the Commonwealth and the states and, where there is a joint power and a conflict of laws, the existence of a provision (section 109) which gives precedence to the federal law. A clear result of this regime is that, if a state government attempted to make a law establishing and protecting fundamental rights such a law would be of *no* effect against a federal law for which the Commonwealth had exclusive constitutional power, or relative superiority under section 109. Furthermore, given Australia's legal heritage, in the absence of written laws – whether a federal or state Bill of Rights – problems of differing state and federal standards will rarely arise, since the Common Law protection is a genuinely "common" standard for all the states and at both levels of government. The

[297] [1978] INDUS. ARB. SERV. – CURRENT REV. 145.

[298] 39 A.L.R. 417 (High Ct. 1982) (discussed further *infra* notes 460–65 and accompanying text). *See also supra* notes 69–91 and accompanying text.

[299] This is not to say that other Justices never do so.

[300] In Canada one can observe an early and timid, but nevertheless clear step in that direction: *see Re* Drummond Wren, [1945] 4 D.L.R. 674; Noble and Wolf v. Alley, [1951] 1 D.L.R. 321. In the other direction, the decision of Lord Wilberforce in Blathwayt v. Baron Cawley, [1976] A.C. 397, 426, shows considerable reluctance to make use of principles arising from international agreements for the purpose of developing the Common Law. For discussion of these cases *see* G. FLICK, *supra* note 277, at 192–93.

achievement of just such a common standard of protection, under different circumstances and with different traditions, is what the European Court of Justice has attempted in its tentative steps towards the recognition of unwritten fundamental rights for the Community, in the series of cases from *Stauder*,[301] through *Internationale Handelsgesellschaft*,[302] *Nold v. Commission*,[303] *Rutili*[304] to, most recently, *Hauer*.[305] However, important differences must be kept in mind. In the first place the European Court's right to review judicially the acts of the Community institutions – even "legislative" acts – is expressly conferred by the Treaties, and thus the major obstacle of Parliamentary supremacy is non-existent at a Community level. For Europe the problems have arisen more in connection with the integration of distinct legal systems, with the difficulty of finding a common standard acceptable to all the constituent states, and of persuading the Member States to accept the principle that Community law need not respect individual state standards as such. Thus one of the leading Community cases on rights protection, *Internationale Handelsgesellschaft*, centrally concerns the question of the supremacy of Community law over the laws of the Member States (whether these laws be normal, constitutional, or indeed concerned with fundamental rights). The dominance of the European Court as a source of supreme law, however, particularly with respect to decisions touching on fundamental rights, is at best fluctuating – if it exists at all.[306] According to Bebr,[307] the European Court's dominance will, paradoxically, increase the more it is prepared to assert a wide-ranging and well-developed rights jurisprudence:

> The deep and well-justified concern of the Constitutional Courts[308] to protect fundamental rights is perfectly understandable. So also is their resolute stand against any restriction of their jurisdiction likely to weaken this protection... Steadily increasing requests for review of validity of Community acts for an alleged infringement of fundamental rights could provide the Court with a welcome opportunity to develop *Community* rights of individuals, foster them and alleviate thus considerably the suspicion and fear that an absolute supremacy of Community law is bound to lead to unconstitutionality, to deprivation of fundamental rights and to a negation of the rule of law.[309]

[301] Case 29/69, Stauder v. City of Ulm, [1969] ECR 419.
[302] Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125.
[303] Case 4/73, [1974] ECR 491.
[304] Case 36/75, Rutili v. Minister for the Interior, [1975] ECR 1219.
[305] Case 44/79, Hauer v. Land Rheinland-Pfalz, [1979] ECR 3727.
[306] *See* Mendelson, *The European Court of Justice and Human Rights*, 1 Y.B. Eur. L. 125 (1981).
[307] G. Bebr, *supra* note 171.
[308] He means specifically the *Bundesverfassungsgericht* and the *Corte Costituzionale*.
[309] G. Bebr, *supra* note 171, at 717–18. It is worth observing that the assertion of supremacy of Community law in *Internationale Handelsgesellschaft* was confirmed by the Court's decision in Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629. The basis upon which *Simmenthal* arose provides an

The Court has made some progress in the development of *Community* rights of individuals (a type of "European Common Law"), notably in the *Internationale Handelsgesellschaft* case, where it asserted that the "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice."[310] The Court has said that the sources of these fundamental rights are the national constitutions of the Member States,[311] and "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."[312] As has been seen the existence of treaties and international obligations generally was an important issue for the High Court of Australia in *Koowarta*, not for the development of fundamental rights by a Common Law method, but more narrowly to ground a Commonwealth exercise of legislative power. Only Justice Murphy and the Conciliation and Arbitration Commission[313] have been prepared to rely on international elements in the bold way that *Nold* does. *Rutili* also does so, in holding that certain constraints in the application of the "public policy" exception[314] to freedom of movement under EEC Treaty article 48 could be justified by reference to the European Convention of Human Rights,[315] even if contrary to national law. *Hauer*[316] continues the develop-

interesting (and somewhat ironic) parallel to a similar situation which presently exists in Australia. In *Simmenthal* a lower Italian court had to decide whether it should follow the precedents of the *Corte Costituzionale* or those of the European Court. The lower court referred the question to the European Court which, predictably, decided that Community law and precedents prevailed and made inapplicable any conflicting national rule. A similarity with Australia exists because, despite the High Court's final appellate status, there is a vestigial appellate jurisdiction of the Judicial Committee of the Privy Council. In 1978 the Supreme Court of N.S.W. (the "lower" court for the purposes of this comparison) was faced with the seemingly intractable problem of whether it should follow decisions of the High Court or those of the P.C. (where there were conflicting rules), appellants from its decisions in matters of state law having the option of appeal to either of those bodies (but, in the case of the High Court, no right of appeal therefrom to the P.C., as had earlier been the case). For distinctly policy reasons the Supreme Court decided that it would regard itself as bound only by the High Court's decisions. National Employers' Mut. Gen. Ass'n Ltd. v. Waind and Hill, [1978] 1 N.S.W.L.R. 372 (Sup. Ct.). The policy involved the acceptance of the almost indisputable fact that Australia has broken out of its English colonial fetters and is politically and legally independent. The political realism of the Supreme Court's decision in this case is undeniable. The political reality in the problem in *Simmenthal* is less easily stated, but the Italian lower court seems to have adopted an astutely pro-integration tactic in its referral of such a question to the European Court.

310 Case 11/70, [1979] ECR 1125, 1134.

311 *Id.*

312 Case 4/73, *Nold*, [1974] ECR 491, 507.

313 *See supra* text accompanying notes 296–98.

314 Discussed further *infra* text accompanying note 368.

315 Regarding the relevance of this in the Community, *see, e.g.*, Schermers, *The Communities Under the European Convention on Human Rights*, [1978] L.I.E.I. 1.

316 Case 44/79, [1979] ECR 3727.

ment of *Community* individual rights jurisprudence, still relying on Members States constitutions and international treaties for inspiration.

This approach of the European Court has, of course, some characteristics which distinguish it quite sharply from the active Common Law approach which I suggested as a mere possibility for Australia. Firstly, the European Court is adding to, or modifying, existing written rights guarantees of the Member States (with the exception of the United Kingdom, which is, however, a signatory of the Human Rights Convention). In Australia, the High Court (and any other court which chose to follow this course) would be stepping into a near vacuum. This would make it at once easier and harder in Australia: easier because, at least, there could be no claim (as there has been in, for example, Germany[317]) that the Court was substituting its "lowest common denominator" of rights for the stronger protections which already exist in some Member States; harder because in Europe, as in the United States, there is in all the national legal cultures except the British some "rights jurisprudence" which is almost completely lacking in Australia. Some Australian lawyers[318] indeed think the country is better off with this lack, a view this author does not share.

To conclude this aspect of the discussion, it might reasonably be hoped that within the Common Law proper and in the interpretation of statutes the Australian courts would increasingly broaden the principles, and sources of principles, on which decisions are based in order to give greater protection to fundamental rights. The constraints of the traditions of Anglo-Australian law are such, however, as to make it unreasonable to hope that the courts would assert unwritten fundamental rights against the legislature's plain words. Supra-legislative protection of rights must await the establishment of written constitutional guarantees, which may well be the preferable course. The European Court's steps in another direction are a useful experiment: if the High Court of Australia were accustomed to a broader use of comparative material in its jurisprudence,[319] it might find that there was something to learn from Europe.

2. Federal and State Legislative and Institutional Responses to Discrimination

Given the limits of the Constitution and the Common Law as sources for rights protection, recourse must be had to legislation. There has been legislation passed by the Federal Government and four states which addresses some as-

[317] BVerfG (D), Judgment of 29 May 1974, 37 BVerfGE 271 (1974), [1974] 2 C.M.L.R. 540.

[318] *See, e.g.*, Hutley, *The Legal Traditions of Australia as Contrasted with Those of the United States*, 55 A.L.J. 63 (1981). For discussion of whether, if some written guarantee of fundamental rights is provided, its enforcement or interpretation should be left to judges exercising a judicial review function (as discussed in the constitutional context, *supra* notes 142–50 and accompanying text), *see* Galligan, *Judicial Power and Democratic Principles: Two Theories*, 57 A.L.J. 69 (1983).

[319] *See supra* text accompanying notes 197–201.

pects of discrimination.[320] Important additions to these are likely in the near future.[321] As well as statutory measures, special agencies, such as the National and State Committees on Discrimination in Employment and Occupation, have been established.[322] In form, the most comprehensive measures are the two statutes of the Commonwealth, the Racial Discrimination Act, 1975 and the Human Rights Commission Act, 1981. Both of these statutes give a very wide scope to the rights which they purport to protect, relying for the definition of such rights on certain international conventions. The Sex Discrimination Act, 1984 (Commonwealth) also refers in its objects (section 3) to a broad international convention but its substantive protections (or, more precisely, prohibitions of discrimination) are not so correspondingly broad.[323] The reliance on these conventions immediately suggests one constitutional justification for federal legislation or other action in this area: if there are international instruments to which Australia is a party, or international obligations which are binding on Australia, it is at least arguable that this gives rise to an occasion for the exercise of the "external affairs" legislative power of the Australian Constitution.[324] Another constitutional justification, so far as race discrimination is concerned, is provided expressly by the Australian Constitution,[325] and there are other heads of power which would seem to validate federal intervention in particular areas to achieve non-discrimination in those areas.[326]

These are all, however, rather narrow, technical justifications for federal activity of this kind. Perhaps more substantial support for federal anti-discrimination laws and arrangements can be derived from an assumption that the

[320] These statutes are: Racial Discrimination Act, 1975 (Cwlth.); Human Rights Commission Act, 1981 (Cwlth.); Sex Discrimination Act, 1984 (Cwlth.); Equal Opportunity Act, 1984 (S.A.); Anti-Discrimination Act, 1977 (N.S.W.); Equal Opportunity Act, 1984 (Vict.); Equal Opportunity Act, 1984 (W.A.).

[321] The establishment of a general employment affirmative action programme by the Commonwealth Government seems reasonably likely, in respect of sex discrimination.

[322] These were established bureaucratically in 1973 by the Commonwealth Government, purportedly in implementation of its obligations under International Labour Organization Convention No. 111 – Discrimination (Employment and Occupation).

[323] International Convention on the Elimination of All Forms of Racial Discrimination (in the case of the Racial Discrimination Act); the International Covenant on Civil and Political Rights and the United Nations Declarations of the Rights of the Child, of Mentally Retarded Persons, and of Disabled Persons (in the case of the Human Rights Commission Act); the Convention on the Elimination of All Forms of Discrimination Against Women (in the case of the Sex Discrimination Act).

[324] AUSTL. CONST. § 51(xxix). Reliance on an international convention was, in the case of the Racial Discrimination Act, 1975 (Cwlth.), upheld as allowing the Act to be within the legislative power of the Commonwealth, in *Koowarta*, 39 A.L.R. 417 (High Ct. 1982). *See infra* notes 460–65 and accompanying text.

[325] AUSTL. CONST. § 57(xxvi).

[326] *E.g.*, employment in the Commonwealth Public Service; or under the "corporations power," AUSTL. CONST. § 51(i).

achievement of non-discrimination is of fundamental importance and that common standards should be satisfied throughout the whole federation: federal legislative action, where there is no federal bill of rights, can be thus viewed as a means of achieving that uniformity of basic rights which a bill of rights might establish or aim to accomplish. It might plausibly be argued that significant disparities in the rights enjoyed by different groups in different parts of the nation may, of themselves, give rise to tensions within, or threats to, the federal structure.[327] Thus it has been suggested that the equal pay provision of the EEC Treaty[328] was included at the request of France because, at the time of the establishment of the Treaty, France was the only prospective Member State with equal pay policies and laws and, therefore, France feared adverse intra-Community economic competition from Member States where aggregate labour costs were lower due to the absence of such laws.[329] This example illustrates how intra-federation tensions might support federal non-discrimination laws without there being any significant concern with the individual equity aspects of discrimination. Here we have an example of geographic equity considerations of the kind referred to earlier as peculiar to federal systems. One can also imagine such tensions being generated by a denial of rights in one part of a federation when that denial offends against the basic principles of the bulk of citizens of the federation as a whole.

The federal constitutional position of state non-discrimination laws can be simply stated: no matter what possible bases there are for federal legislation in this area none of them seems to give exclusive power to the Federal Parliament. The states would, therefore, be free to make laws of their own on these matters, subject to an important qualification: this qualification derives from the supremacy clause[330] which makes state law invalid when it is inconsistent with (valid) federal law. The High Court has recently declared certain discrimination laws of New South Wales invalid under the supremacy clause.[331] It did so on the basis that the Racial Discrimination Act, 1975 (Commonwealth) covered the field of racial discrimination and that, therefore, the race provisions of the Anti-Discrimination Act, 1977 (N.S.W.) were inconsistent. The finding of inconsistency did not rest on a view that the two statutes had contradictory aims or even substantive provisions, but rather that since the Commonwealth law had dealt with the matter there was no room for the state law to operate. Within two weeks of the High Court's decision the Commonwealth Parliament had legislated to save the operation of the state law by declaring that the federal law was, in effect, not meant to cover the field. This does not, howev-

[327] On a highly simplified view, the American Civil War might be seen partly as a function of this.

[328] Article 119.

[329] Sullerot, *Equality of Remuneration for Men and Women in the Member States of the EEC*, in WOMEN WORKERS AND SOCIETY: INTERNATIONAL PERSPECTIVES 104 (Geneva, ILO, 1976).

[330] AUSTL. CONST. § 109. *See supra* notes 39–40 and accompanying text.

[331] Viskauskus v. Niland, 57 A.L.J.R. 414 (High Ct. 1983).

er, conclude the matter, for the High Court in any future challenge need not interpret the provisions as being effective for this purpose and may still find inconsistency between the two laws, although present indications are that the Court will support the dual-effectiveness of state and federal laws under these provisions.[332]

Even apart from the operation of the supremacy clause, federal law operates within the states and on the states themselves.[333] But could state non-discrimination legislation bind the Commonwealth or its officers acting within the states? For example, can the Commonwealth Department of Foreign Affairs be obliged under the Anti-Discrimination Act, 1977 (N.S.W.) to hire Aboriginal employees? The matter has not yet been tested, but the answer would seem to be no, not at least if the state law attempted to operate on the Commonwealth when strictly constitutional functions are being undertaken.[334] Since the Commonwealth is a major employer this is a significant gap in the coverage of these laws. The Racial Discrimination Act, 1975 (Commonwealth) and the Sex Discrimination Act, 1984 (Commonwealth) do bind the Crown in the right of the Commonwealth so, in the example just given, an Aboriginal person would have an avenue for obtaining redress, as would a woman discriminated against by a Commonwealth instrumentality. However, in the light of the weakness of the Human Rights Commission Act, 1981 (Commonwealth) no physically or intellectually handicapped person, for example, would have a means of obtaining redress against the Commonwealth or its agencies.

Even where the Commonwealth is engaged in "non-constitutional" activity it may not be possible under the state discrimination laws to bring an action against the Commonwealth. One reason for this is that state law may not apply to Commonwealth places unless made to apply by specific Commonwealth allowance.[335] Another reason is that all of the present state laws provide that substantive remedies are available *only* from certain specialist tribunals. Under section 75 of the Australian Constitution, the High Court (or, under section 77, any other court invested with jurisdiction by the Federal Parliament) has original jurisdiction in matters, *inter alia*, in which the Commonwealth or a person on behalf of the Commonwealth is being sued or where an injunction is sought against an officer of the Commonwealth. This would apply to an attempt to obtain redress against the Commonwealth for an act of discrimina-

[332] For further discussion of the decision and other applications of the supremacy clause in the context of discrimination laws, *see infra* notes 480 & 483–85 and accompanying text.

[333] *See supra* notes 44–49 and accompanying text.

[334] What "non-constitutional" activity might include cannot be simply determined, but perhaps the running of an airline (Qantas the international airline, or TAA an inter-state airline internal to Australia, both owned by the Australian Federal Government) would be included. *See* C. HOWARD, *supra* note 34, at 102–34 for extensive treatment of this, and *supra* notes 57–60 and accompanying text.

[335] *See* Worthing v. Rowell Muston Pty., 123 C.L.R. 89 (High Ct. 1970); Commonwealth Places (Application of Laws) Act, 1970 (Cwlth.).

tion prohibited by state law. In other words, the various state tribunals would have no jurisdiction. The simple solution, of course, is for the states to amend their statutes to allow any court of competent jurisdiction to grant appropriate remedies (as the Racial Discrimination Act, 1975 (Commonwealth) itself does). As it stands, the High Court has no jurisdiction under these state laws (except, ultimately, on appeal), and the state tribunals have no jurisdiction in matters against the Commonwealth.

What type of protection do these statutes offer? Intially, one can observe on a somewhat formal level that none of the federal or state statutes have any form of entrenchment. More concretely, any protections which they have (relatively recently) established could be removed by simple statutory amendment, although this may entail some political costs.

Moving to the substantive nature of the statutes, at the federal level the Racial Discrimination Act and the Sex Discrimination Act, in contrast with the Human Rights Commission Act, can be regarded as offering substantial protection. The former makes unlawful any discrimination on the ground of race, colour or national or ethnic origin, as occurs in the context of the exercise of any fundamental freedom or right guaranteed under the law (including the right to join a trade union), in access to public places, in the purchase or use of land or accommodation, the provision of goods and services, and in employment. The Sex Discrimination Act proscribes discrimination on grounds of sex (including sexual harassment and pregnancy) and marital status in the contexts of employment, education, accommodation, goods and services, and clubs. Under both these statutes, if such unlawful discrimination occurs there is ultimately (after crossing certain administrative thresholds) a right to bring a civil action for various remedies (damages, injunctive relief, and mandatory orders).[336] Common to the states which have discrimination laws are the categories of discrimination on the grounds of race, sex and marital status. Additional specified discriminatory criteria, inconsistently spread across these four states,[337] are physical handicap, intellectual impairment, sexuality, political and religious conviction and family status. Generally, discrimination on any of these grounds (which a given state has specified) is proscribed in the contexts of employment, education, accommodation, provision of goods and services, and clubs.

What redress is available for discrimination occurring in such prohibited contexts? A range of civil remedies (damages, injunctive relief, certain orders) is available from a specialist tribunal,[338] (unlike the remedies under the Racial Discrimination Act, 1975 (Commonwealth) which can be obtained from any

[336] Under the Sex Discrimination Act, 1984 (Cwlth.) only after a ruling by the Human Rights Commission as a quasi-judicial tribunal.

[337] New South Wales, Victoria, South Australia, and Western Australia.

[338] Human Rights Commission (Cwlth.); Equal Opportunity Tribunal (N.S.W.); Equal Opportunity Board (Vict.); Equal Opportunity Tribunal (S.A.); Equal Opportunity Tribunal (W.A.).

court competent to issue the remedy sought).[339] However, in all jurisdictions, before such remedies can be sought, a statutory officer must attempt to settle the matter by conciliation.[340] Conciliation is also part of the Commonwealth Government's purported implementation of International Labour Convention No. 111 – Discrimination (Employment and Occupation). In that Commonwealth programme one national and six state Committees on Discrimination in Employment and Occupation were established. The Committees, apart from general investigative and educational roles, are to attempt to resolve by conciliation complaints concerning various types of discrimination.[341] The Human Rights Commission[342] has a similar function: "to endeavour to effect a settlement of the matters which gave rise to [an] inquiry" into an "act or practice that may be inconsistent with or contrary to any human right."[343] Neither the Commission nor the Committees has any power to insist on any particular settlement or result to a complaint. Apart from the possibility of an adverse report to Parliament, there is no means by which a person guilty of unlawful discrimination might be required to give redress. As already mentioned, under the federal Racial Discrimination Act and Sex Discrimination Act substantive remedies are available, in the case of the former in general courts of competent (federal) jurisdiction, and in the case of the latter before the Federal Court of Australia.

It is difficult to judge the success of such laws. In all jurisdictions, including the federal, there is a reasonably high rate of settlement of disputes by the conciliation process, and relatively few cases have gone to decision by the tribunals, or under federal law, the general courts. Indeed, the *Koowarta*[344] case is the *only* case which has come before the courts under the Racial Discrimination Act, 1975 (Commonwealth), although the Commissioner has on a few

[339] Racial Discrimination Act, 1975 (Cwlth.) § 24(1). Under the Sex Discrimination Act, 1984 (Cwlth.), the Human Rights Commission can make non-binding determinations which can, in subsequent proceedings, be enforced by an order of the Federal Court: §§ 81, 82.

[340] *See* Sex Discrimination Act, 1984 (Cwlth.) § 52(1) (Sex Discrimination Commissioner); Racial Discrimination Act, 1975 (Cwlth.) §§ 20(a) & 20A(1) (Commissioner for Community Relations); Human Rights Commission Act, 1981 (Cwlth.) § 9 (1) (Human Rights Commission); Anti-Discrimination Act, 1977 (N.S.W.) § 92 (Anti-Discrimination Board); Equal Opportunity Act, 1984 (Vict.) § 42(1) (Commissioner for Equal Opportunity); Equal Opportunity Act, 1984 (S.A.) § 95(3) (Commissioner for Equal Opportunity); Equal Opportunity Act, 1984 (W.A.) § 91(1) (Commissioner for Equal Opportunity).

[341] Including the Convention's grounds of discrimination (race, colour, sex, religion, political opinion, national extraction or social origin), and certain others: sexual preference, age, disability, personal attributes, criminal record, medical record, trade union activities, and education qualifications.

[342] Established under the Human Rights Commission Act, 1981 (Cwlth.).

[343] Human Rights Commission Act, 1981 (Cwlth.) § 9. The Commission is also given a conciliation function under the Sex Discrimination Act, 1984 (Cwlth.) § 73 and under the Racial Discrimination Act, 1975 (Cwlth.) § 21.

[344] 39 A.L.R. 417 (High Ct. 1982).

other occasions issued a certificate to allow such proceedings. If one takes the view, as this author does, that discrimination is a systemic problem, then there is a limited value in the availability of redress for individual complainants. This is not to say that such redress is unimportant. However, more important is the need for the availability of general remedies of affirmative action (or reverse discrimination). It has not yet been tested, but the scope of the remedies powers under all the statutes discussed may allow a tribunal or court to provide such a remedy. But while the *language* of the statutes might allow it, one would expect that the traditions of Anglo-Australian judicial behaviour would work against such a view. This is all the more likely in a country where the class action is virtually unknown,[345] in contrast with the United States, where, particularly in discrimination suits, the class action is extremely important.

Perhaps the most important institutional response to discrimination in Australia has been the establishment in New South Wales, and more recently in Western Australia, of the office of the Director of Equal Opportunity in Public Employment.[346] Put shortly, the Director has the role of *imposing* on all branches of the state bureaucracy affirmative action employment programmes designed to eliminate discrimination based on race, sex and marital status (in both of the mentioned states), and additionally on religious and political conviction in Western Australia. The success of these programmes can be expected to be extremely influential in determining whether similar programmes will be imposed on, for example, large private employers (perhaps in the manner of the Executive Order of the United States President,[347] or by direct statutory burden). It seems clear that only through the imposition (or voluntary acceptance) of such programmes, particularly on employers and educational institutions, will the systemic nature of discrimination be addressed.

Even with such programmes, one would not suggest that the disadvantages suffered by women or minority groups can be cured by so-called "anti-discrimination laws." Such laws may have some effect in increasing labour market mobility (as articles 48 and 52 of the Treaty of Rome attempt to do with respect to certain criteria), or improving educational opportunities for certain groups. However, the commitment of Federal and State Governments to a wide range of other public activity is necessary to achieve genuine equity and efficiency in connection with these social and economic factors. For exam-

[345] Anti-Discrimination Act, 1977 (N.S.W.) § 102, Equal Opportunity Act, 1984 (W.A.) §§ 114, 115, and Sex Discrimination Act, 1984 (Cwlth.) §§ 69, 70, all provide for the hearing of "representative complaints"; none have yet been used.

[346] Established by Anti-Discrimination Act, 1977 (N.S.W.) §§ 122E–122H, Equal Opportunity Act, 1984 (W.A.) §§ 138–153; the Commonwealth has plans for a similar scheme and has introduced a voluntary pilot scheme among large private employers.

[347] *See* Executive Order 11246 which directs federal government agencies which contract with private companies or state and local governments to include non-discrimination clauses in their contracts, and to monitor the employment policies of the contractors.

ple, significant reforms of the taxation system are necessary to improve the position of women.[348] An expansion of specialist health care (particularly addressing eye illness, nutrition and infant mortality) is necessary for the benefit of the Aboriginal people.[349] Fundamental changes are necessary in the system of housing tenure and housing finance for low-income groups, of which Aboriginal people are the most desperate.[350] Substantial, and unqualified, land rights must be accorded to Aboriginal people, not primarily, as is sometimes thought, to allow them to return to nomadic tribal ways, but rather to provide them with a sound and indefeasible capital basis for the improvement of their welfare, whether individually or in specific groups.[351] Significant expansion is needed of remedial reading programmes in Australian schools in order to overcome the consistent disadvantage which is suffered by children of non-English-speaking immigrants to Australia.

The particular programmes just mentioned are only a small part of the measures, apart from anti-discrimination law as such, which are important for the development of an egalitarian Australian society. In view of current political attitudes it is not clear that one will see much immediate change.

Australia and the European Community share some major problems of discrimination – principally discrimination based on sex, but also others based on age, marital status, physical and intellectual handicap or impairment, sexual preference (homosexuality, etc.), political affiliation and religious belief. Other discrimination problems are not so obviously shared: racial discrimination against an aboriginal population is not an issue in Europe, in sharp contrast with Australia; on the other hand discrimination in Australia against individuals originating in another state of the federation exists but seems virtually negligible,[352] whereas discrimination in Europe on grounds of origin in another Member State has been, and still is, a major problem fundamental to the existence of the Community. The importance of national origin discrimination in Europe relates not just, or even primarily, to discrimination against people: removing discrimination against goods (through various trade barriers) from other Member States was arguably the principal specific function of the Treaty of Rome.[353] As we have seen, in Australia there was a similar function for

[348] *See, e.g.*, P. Apps, Income Inequality and Taxation (Cambridge, C.U.P., 1981).

[349] *See, e.g.*, Foley, *Aborigines and Racism*, in Racism in Australia in the 1980's, at 19–20 (Rollason ed., Sydney, Collection of Addresses for the Austl. Council of Churches, 1981).

[350] *See, e.g.*, Savage & Rowe, An Aboriginal Housing Assistance Scheme for Western Australia (Univ. of Sydney, Grad. Sch. of Planning, Working Papers, Econ. Ser., 1984).

[351] The subject of Aboriginal land rights is discussed in more detail *infra* at § IV.A.

[352] *See supra* notes 213 & 224.

[353] *See* Schermers, *The Role of the European Court of Justice in the Free Movement of Goods*, in Courts and Free Markets: Perspectives from the United States and Europe 222 (T. Sandalow & E. Stein eds., Oxford/New York, Clarendon Press, 1982) for discussion of the achievement of this goal.

section 92 of the Australian Constitution. In both Australia and the European Community there is the problem of discrimination against nationals of, or immigrants from, states not members of the larger political and legal unit. The dimensions of this latter problem vary between Australia and Europe principally for historical and geographical reasons, but there are nevertheless similarities in these problems, particularly in the legal theory and technique relevant to them.

A curious parallel can be drawn between the substantive discrimination problems which exist in Australia concerning members of ethnic minorities (formerly, and in some cases still, foreign nationals) and those which exist in Europe concerning discrimination in one Member State (to varying degrees) against nationals of other Member States. The apparent, or formal, differences in the natures of these types of discrimination disappear if one sees Australia – as it essentially is – as a politically unified state (albeit ethnically diverse[354]), and Europe – as it arguably is – as a group of states, each within itself politically and ethnically unified,[355] but which in relation to one another are as yet only loosely politically unified and ethnically hardly at all. Immediately, then, one can see that the problem of national origin discrimination in Australia is one which relates only to cultural, economic and social harmony within the larger unified body politic, whereas in Europe it is one which also relates to the political and economic interaction of a number of separate, smaller political units. The solution to problems of Member State national origin discrimination (against both people and goods) in Europe is crucially related to the survival and success of the *attempted* larger political unit, and this explains why so much initiative in law and policy for a solution has come from the organs of that political unit. The solution to problems of national and ethnic origin discrimination in Australia has little to do with the survival of the larger political unit itself and more to do with justice and harmony in local communities; this explains why little initiative in law and policy for a solution has come from the Federal Government, but not, of course, why so little has been done, until very recently, at any level of government in Australia. In Europe, also, problems of *non*-Member State nationality discrimination are not generally treated as problems for the Community organs to solve and, unless they interfere with the free movement principles, are usually left to be regulated by Member State law.[356]

[354] With over 250 different ethnic or national groups represented among its residents; notice, however, that ethnic divisions hardly ever, if at all, correspond to political boundaries, except perhaps at a local government level in some areas: *see* M. Poulsen & P. Spearrit, Sydney: A Social and Political Atlas (Sydney, Allen & Unwin, 1981).

[355] Excepting Belgium, the ethno-linguistic minorities of Italy, the Basques, the Islamic minority of Greece, the gypsies of Spain, and the linguistic distinction of Wales.

[356] *See generally* Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law Community and Citizenship in the Welfare State, infra* this vol., Bk. 3.

The relative lack of initiative at the Australian federal level to address national and ethnic origin discrimination is in sharp contrast with the degree of responsibility at that level for the circumstances which allowed such discrimination to arise. It was the Federal Government's post-war immigration policy which generated the ethnic mix which both refreshes Australian culture and gives rise to discrimination problems. This policy was pursued with virtually no effort to minimise the social and economic problems which would predictably accompany it, and its companion was a selectivity in immigration, called the "White Australia" policy,[357] which carried with it the implication that even those who were admitted under the immigration programme were not what one would have preferred. The attitudes which informed the "White Australia" policy can still be identified in some quarters with regard to Aboriginal people.

There is then, a similarity between Australia and Europe in that national (or ethnic) origin discrimination is an important problem for both, but there is a distinction in the impact of that problem and its solutions on the political order in each of them. The general similarities do give rise to more detailed similarities in the legal, economic and institutional analysis of the problems. For example, when one speaks of employment discrimination it is clear that in both contexts this includes discrimination not only in the hiring of workers, but also in wages, conditions and dismissal. Again, when one speaks of "discrimination" the analysis in both contexts addresses the concepts of "direct" and "indirect" discrimination. Differences, arising from the general distinction made earlier as to the levels from which laws and policy emanate to solve the problems, can be observed in detailed matters also. For example, the proposition that a Member State might, under the Treaty, be permitted to discriminate against its own nationals[358] is one that would probably arise only in the European context where, as I have suggested, the motivation for anti-discrimination measures is the integration of states and not purely (at this stage) the just and harmonious integration of individuals, whatever the long term goals or achievements of that political integration might be in terms of individual welfare.

Similarly the way in which detailed effect is given to non-discrimination policy in Europe, through the general injunctions of the Treaty and by the (usual) means of directives to the Member States, is perhaps a further reflection of the "state-based" nature of non-discrimination, compared with the directly applicable and individually directed non-discrimination laws (such as they are) which have emanated from the Australian Federal Government.

To bring out these comparative points somewhat more sharply, but without offering either a detailed analysis or appraisal of it, the next part of this study

[357] Now happily abandoned, but not without occasional calls for its re-instatement, for example, by the Returned Soldiers League, 20 June 1982.

[358] *See, e.g.*, B. SUNDBERG-WEITMAN, DISCRIMINATION ON GROUNDS OF NATIONALITY ch. 9 (Amsterdam, N. Holland Pub. Co., 1977).

canvasses in a general way the Community's legal and institutional responses to discrimination problems.

As has been suggested, the type of discrimination which was, and is, at the core of the Community's very existence is that of national origin discrimination as between the Member States. Without some legal protection of the free movement between Member States of labour and goods (but not, it seems with hindsight, of capital which appears in practice to require no protection) in Europe the whole concept of a Common Market could not even have come into being. Of course, in the joining together of the Australian nineteenth-century colonies at federation in 1901 there had to be dismantled a considerable system of protectionist barriers, such as existed between the Member States of the European Communities. The Australian Constitutional provisions which bear on that dismantling have already been addressed.[359] However, one element in the types of non-discrimination rules which were necessary significantly distinguishes Australia from Europe: the federating units of Australia were not only not each characterised by a people with a language and ethnic type distinct from one another, but as former British colonies had much in common including citizenship. The potential, therefore, for discrimination against the citizen, as distinct from goods, of other states was minimal. This is not to say that there has been no need for rules prohibiting discrimination among the states or that there has been, since federation, no attempt to discriminate on this basis. The discussion of sections 92 and 117 of the Australian Constitution shows otherwise. However, there have been relatively few of the problems with which article 48 (and, to a lesser extent, article 52) of the EEC Treaty are designed to deal and that is an important distinction between Australia and Europe: those two provisions, one might think, are (with articles 9–37) at the core of European integration.

Almost the whole of the EEC Treaty can be viewed as addressing the problem of nationality discrimination and, to the extent that the ending of discrimination is part of integration, then integration also. For the purposes of this discussion the focus is principally on discrimination which touches individuals in respect of human rights and freedoms. The provisions of the Treaty which bear on this are mainly articles 7, 48 and 52, with articles 3(c), 59 and 67 also relevant. The thrust of these provisions is to require free movement of workers, freedom of establishment, freedom of services provision and free movement of capital irrespective of nationality (within the Community); article 7, more broadly, prohibits discrimination on the ground of nationality.[360]

Although most of these provisions have been held to have direct effect,[361]

[359] *See supra* § III.A.

[360] In this chapter it is not possible to present an exhaustive treatment of these provisions; this has been done in many other places. *See particularly* B. SUNDBERG-WEITMAN, *supra* note 358, and the bibliography therein at 237–43.

[361] EEC Treaty arts. 7 (but only in conjunction with some other provision), 48, 52, 59. For references to ECJ decisions to this effect *see* A.G. TOTH, LEGAL PROTECTION OF INDIVIDUALS IN THE EUROPEAN COMMUNITIES 209–11 (Amsterdam, N. Holland Pub., 1978).

(that is, they grant individual rights enforceable in the courts of the Member States without the need for any intervening legislative or administrative action), they have been assisted by a number of subordinate Community laws and administrative actions. These Community acts and bureaucratic arrangements deal with a number of basic matters which give practical content to the Treaty's nationality discrimination prohibitions. These minimal requirements concern entry into, and (in the case of employed workers) the right to reside in, the various Member States;[362] the ability to learn of employment opportunities;[363] the right to non-discriminatory hiring, wages and other conditions of employment, including trade-union participation, opportunities for promotion, on-the-job training and non-discrimination in dismissal;[364] in the case of the self-employed, the recognition in one Member State of professional qualifications obtained in another Member State and other aspects of establishment;[365] generally equality in living conditions including housing, health care,

[362] *See* Council Directives (EEC) No. 68/360 of 15 Oct. 1968 (JO No. L 257, 19 Oct. 1968, p. 13 ([1968] II OJ (spec. Eng. ed.) at 485)) and No. 73/148 of 21 May 1973 (OJ No. L 172, 28 June 1973, p. 14) which deal with rights of entry and residence for persons respectively employed or seeking employment (and, therefore, covered by art. 48 of the Treaty) or self-employed and providers of services (under art. 52).

[363] *See* Council Regulation (EEC) No. 1612/68 of 15 Oct. 1968, JO No. L 257, 19 Oct. 1968, p. 2 ([1968] II OJ (spec. Eng. ed.) at 475), which deals with the establishment of SEDOC, the European Office for Coordinating Vacancy Clearances and Employment Applications. This office was put into operation in 1975.

[364] *See id.* (with rectification published in JO No. L 295, 7 Dec. 1968, p. 12) dealing generally with the question of discrimination in employment; and Council Regulation (EEC) No. 312/76 of 9 Feb. 1976, OJ No. L 39, 14 Feb. 1976, p. 2, which extends the right to exercise of trade union rights by migrant workers.

[365] Council directives, far too numerous to list here have been issued with respect to the mutual recognition of professional qualifications: for a partial list *see* Commission of the EC, Schedule of Community Acts Concerning Right of Establishment and Freedom to Provide Services, III/1418/77 & Addendum (to 1 Oct. 1980). One should note Sundberg-Weitman's argument that, since the ECJ has (in Case 2/74, Reyners v. Belgium, [1974] ECR 631) declared art. 52 of the EEC Treaty to be directly applicable, even those trades and professions for which there has yet been no directive on common qualifications must be free of discrimination: *see* B. SUNDBERG-WEITMAN, *supra* note 358, at 194–95. *See also* the General Programme for the Abolition of Restrictions on the Freedom of Establishment, 18 Dec. 1961, JO No. 2, 15 Jan. 1962, p. 32 (IX OJ (spec. Eng. ed., 2nd ser.) at p. 3). Important also is Council Directive (EEC) No. 429/64 of 7 July 1964, JO No. 117, 23 July 1964, p. 1880 ([1963–64] OJ (spec. Eng. ed.) at 155) which prohibits a Member State from granting aid to its nationals to assist establishment in another Member State – this rule seems to suggest that while Member States can do nothing to limit freedom of establishment, they cannot do anything to assist either. Plainly the rule is designed to prevent anything akin to economic colonisation, while still allowing (under art. 52 of the EEC Treaty) a free market.

social security, and education for oneself and for one's family, and rights after employment or other undertakings have ceased.[366]

Other Community acts deal with certain specific matters to which the Treaty provisions allude. Article 48 itself provides two broad exceptions to the freedom of movement of migrant workers: one based on "public policy, public security or public health" (article 48(3)) and one which prevents application of the article to "employment in the public service" (article 48(4)).[367] Analogous exceptions apply to article 52's abolition of restrictions on freedom of establishment: there are exceptions for activities in a Member State which are connected "with the exercise of official authority," (article 55) and for public provisions relating to "special treatment for foreign nationals on grounds of public policy, public security or public health" (article 56).[368]

[366] *See* Council Regulation (EEC) No. 1408/71 of 14 June 1971, JO No. L 149, 5 July 1971, p. 2 ([1971] II OJ (spec. Eng. ed.) at 416) concerning the availability of Member State's social security to migrant workers and their families. Procedures for implementing this Regulation were laid down in Council Regulation (EEC) No. 574/72 of 21 March 1972, JO No. L 74, 27 Mar. 1972, p. 1 ([1972] OJ (spec. Eng. ed.) at 159), and this has been amended by Council Regulation (EEC) No. 3795/81 of 8 Dec. 1981, OJ No. L 378, 31 Dec. 1981, p. 1. with regard to the extension of Regulation 1408/71 to the self-employed (*see* below). *See also* the amendments in Council Regulation (EEC) No. 2793/81 of 17 Sept. 1981, OJ No. L 275, 29 Sept. 1981, p. 1, which concerns availability of health care benefits for migrant workers, and Council Regulation (EEC) No. 1390/81 of 12 May 1981, OJ No. L 143, 29 May 1981, p. 1 which extends Regulation 1408/71 to self-employed persons (those who are protected generally by art. 52 of the EEC Treaty).

An example of administrative action in this important area is the decision of the Council in 1974 to extend the scope of the European Social Fund to assist Member States to develop programmes and provide special training for people concerned with providing social services to migrant workers and their families.

Also relevant in this context are the European Convention on the Social Security of Migrant Workers (1957, 1972), and the European Social Charter both under the Council of Europe. *See also* Council Directive (EEC) No. 77/486, 25 July 1977, OJ No. L 199, 6 Aug. 1977, p. 32 on the education of the children of migrant workers; and Commission Regulation 1251/70 of 29 June 1970, OJ No. L 142, 30 June 1970, p. 24, and Directive 75/34 of 17 Dec. 1974, OJ No. L 14, 20 Jan. 1975, p. 10, both of which deal with the situation of persons who have been under the protection of EEC Treaty arts. 48 and 52.

[367] EEC Treaty art. 48(4). For two important ECJ decisions on this provision *see* Case 152/73, Sotgiu v. Deutsche Bundespost, [1979] ECR 153; Case 149/79, Commission v. Belgium, [1980] ECR 3881. As between the states of Australia, such a "public service" exception to the non-discriminatory employment of foreign nationals can obviously have no applications since the states are part of the same national polity; with regard to the power to employ aliens in the several state and federal public services in Australia *see* Booker & Winterton, *The Act of Settlement and the Employment of Aliens*, 12 FED. L. REV. 212 (1981).

[368] EEC Treaty art. 56. This exception (and implicitly that in art. 48(3)) is defined and limited in Council Directive (EEC) No. 64/221 of 25 Feb. 1964, JO No. 56, 4 Apr. 1964, p. 850 ([1963–64] OJ (spec. Eng. ed.) at 117); an important aspect of this

The extension of nationality non-discrimination policies at Community level for persons not strictly (or, like workers' families, implicitly) within the protection of the Treaty has developed in recent years. There are two principal groups which can or could benefit from this: those nationals of Member States who are not, or have not been, workers or providers of services, and those who are not nationals of Member States at all.

With regard to Member State non-workers a Draft Directive has been prepared[369] which concerns freedom of movement in much the same way as the directives regarding workers and freedom of establishment. Such an extension of Community activity could be supported by the terms of article 7 of the Treaty (which are broader than, say, the terms in articles 48 or 52), if article 7 is treated as having an independent function in the Treaty: "Article 7 applies to such discrimination on grounds of nationality as is not covered by another Treaty provision, to the extent that the discriminatory conduct falls within the scope of the Treaty and is not to be considered legal by virtue of any particular provision of the Treaty."[370]

Articles 48 and 52 of the Treaty refer to "nationality... of the Member States" (article 48(2)) and "nationals of a Member State" (article 52). Interestingly, article 7 refers merely to "discrimination on grounds of *nationality*" (emphasis added). It is to be wondered whether it was intended that this provision was to be a general prohibition of nationality discrimination, no matter what the nationality involved, or whether, implicitly, it is to be read down to include only the nationalities among the Member States. Sundberg-Weitmann[371] refers to writing which prefers the latter view, but notes the particularly interesting analysis of van Hecke[372] who thinks that this view is supported if one sees the Treaty as (merely) a compact between the Member States, but that the former (more general) interpretation is supported if one views the

Directive is that the exceptions cannot be invoked for economic purposes, but only with reference to personal conduct of individuals (arts. 2, 3). *Note also* that the scope of "public Policy" is able to vary as between Member States: Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337, 1350. For a recent discussion of aspects of these exceptions, *see* O'Keeffe, *Practical Difficulties in the Application of Article 48 of the EEC Treaty*, 19 C.M.L. Rev. 35 (1982). *Note also* Council Directive (EEC) No. 72/194 of 18 May 1972, JO No. L 121, 26 May 1972, p. 32 ([1972] OJ (spec. Eng. ed.) at 474) with respect to the "public policy" exception in the case of former workers (under EEC Treaty art. 48), and this Directive should be related to those mentioned *supra* note 366.

369 31 July 1979. *See generally* Garth, *supra* note 356, at nn. 104–08 and accompanying text.

370 Directives 68/360, and 73/148, *supra* note 362.

371 B. Sundberg-Weitman, *supra* note 358, at 100.

372 Van Hecke, *Das Diskriminierungsverbot des Vertrages über die Europäische Wirtschaftsgemeinschaft*, in 1 Kartelle und Monopole im modernen Recht 335–40 (Inst. für Ausländ. und Internat. Wirtschaftsrecht, Johann-Wolfgang-Goethe Univ. of Frankfurt, & Inst. for Int'l & For. Trade Law, Georgetown Univ. Law Center, Washington eds., Karlsruhe, C.F. Müller, 1961).

Treaty as being in the nature of a constitution. Although this distinction has certain attractions, it nevertheless can be observed that a "constitution" might be regarded (merely) as a compact of the constituent citizens and that the choice of the expression "nationality" in the Treaty – even if regarded as a constitution – is not significantly different (given the groups coming together to produce the constitution) from the specific reference to non-discrimination on the basis of "states" (as in the Australian constitution) or "race" (in many others).

One could also observe in this context that an important difficulty has developed under the United States Constitution as to whether aliens can take advantage of the completely general prescriptions of the Bill of Rights.[373] One might ask a similar question about any of the Australian non-discrimination laws: could, say, a European applying by letter from Europe for employment in, for example, New South Wales, if refused because of national or ethnic origin, bring a complaint of discrimination under the Anti-Discrimination Act, 1977 (N.S.W.)? The answer does not seem to rest on labelling the particular instrument in which the prohibition occurs in a particular way, as van Hecke does, but rather in addressing the policy goals which are or should be sought to be achieved. If, as suggested earlier, the central reason for concern at Community level with discrimination is the integration of disparate political units, then the limitation of "nationality" in article 7 to nationality of one of the Member States would perhaps be enough. Yet, in light of the reality of a substantial number of third state nationals living and working within the Community, the development of a uniform policy with respect to these people may also be beneficial with respect to European integration as such. This does not, however, require that they be not discriminated against in comparison with Community nationals, but one may have to take into account the argument that, if a third state national enters the Community legally, through one particular Member State, it might be appropriate to regard that person as, *pro forma*, a national of the admitting Member State. Alternatively, following Sundberg-Weitman, if the "foreign" nationals have forged an economic attachment to the Community, by employment or otherwise, they are to be regarded as "subjects belonging to the Community and therefore have the right to claim the same benefits as the nationals of Member States."[374]

At Community level in recent years the position of migrants from third states has received considerable attention. The issues which concern the Community are the provision of equal living and working conditions for those third state migrants who are within the Community,[375] and the regulation of immigration so as to achieve a concerted policy on numbers admitted[376] and to

[373] *See, e.g.*, Note, *Aliens – Constitutionality of Discrimination Based on National Origin*, 21 HARV. INT'L L.J. 467 (1980).

[374] B. SUNDBERG-WEITMAN, *supra* note 358, at 101.

[375] Council Resolution of 9 Feb. 1976, OJ No. C 34, 14 Feb. 1976, p. 2.

[376] *See, e.g.*, Commission of the EC, Consultation on Migration Policies vis-à-vis Third Countries, Doc. COM (79) 115 (23 Mar. 1979).

prevent illegal immigration.[377] At present, the basis of admission of migrants from third countries is strictly under the control of each Member State, and there are substantial variations in criteria and procedures.[378] One of the most important aspects of Community activity concerns the making of international agreements with third countries which tend to be major sources of migration (whether legal or not) into the Community. Some of these agreements are made by the Community itself with third countries (such as Portugal, Turkey, Yugoslavia, Algeria, Morocco and Tunisia) and include many of the non-discrimination concerns which have been mentioned in connection with migrant workers from within the Community. Other agreements are bilateral between a Member State and a third party. The Community has begun to seek a common policy of Member States on the nature of such bilateral agreements.

Turning now to other matters of discrimination in the Community, it is interesting to note that on a fairly limited base the European Communities have managed to develop a not insignificant body of law on the matter of sex discrimination. The EEC Treaty deals with this subject only glancingly, principally in article 119 which requires equal pay for equal work[379] as between men and women. Article 117, dealing with the improvement of working conditions and of the standard of living of workers, might seem to tend towards benefitting women, but if so they would not be the only class benefitted; equally, however, it may be viewed as ultimately detrimental to the promotion of female equality, because not only does it not itself specifically mandate a non-discriminatory improvement for male and female workers, but also – and more significantly – it addresses only conditions of work and the standard of living of *workers* – and since women providing household services are not usually regarded as "workers," despite the lack of any theoretical justification for this, a significant body of women may thus be denied non-discriminatory treatment *particularly* in respect of hiring processes which are, obviously, the way they may become "workers."

Article 119, like many equal pay rules,[380] can be quite ineffectual for similar reasons. If the basis of hiring, firing, promotion, on-the-job training and, in particular, job categorisation is discriminatory, equal pay rules are rendered

[377] *See* Commission of the EC, Proposal for a Council Directive Concerning the Approximation of the Legislation of the Member State, in Order to Combat Illegal Migration and Illegal Employment, Doc. COM (78) 86 (3 April 1978).

[378] *See* Commission of the EC, Comparative Survery of Conditions and Procedures for Admission of Third Country Workers for Employment in Member States, V/510/2/78-EN, Apr. 1981.

[379] This includes similar work and work of similar value: Case 43/75, Defrenne v. Sabena, [1976] ECR 455.

[380] *See, e.g.*, Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970*, 39 U. CIN. L. REV. 615 (1970); and *see* the literature cited in Crisham, *The Equal Pay Principle: Some Recent Decisions of the European Court of Justice*, 18 C.M.L. REV. 501 n.7 (1981).

meaningless. The Council directive on equal pay[381] attempts to address some of these problems. That Directive required the elimination of discriminatory job classifications (article 1), and more generally directed Member States to "abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay" (article 3), and to take measures to deal with private arrangements which "are contrary to the principle of equal pay" (article 4). What seems to be lacking is a provision dealing with *private* discrimination in general, prohibiting any form of private discrimination which might be allowed under the Member States' laws. Article 4, while it deals with private arrangements, lacks that generality. Even with the generality of article 3, it does not seem to have been interpreted so widely as to prohibit all employment sex discrimination, despite the fact that without such a prohibition equal pay laws cannot be effective.[382]

A more general prohibition on sex discrimination in employment derives from Directive 76/207,[383] and also, as in the area of migrant workers, from Directive 79/7[384] which draws attention to the problem of sex discrimination with respect to social security. Article 4 of this latter Directive, perhaps its most notable provision, says that the

> principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
> - the scope of the schemes and the conditions of access thereto,
> - the obligation to contribute and the calculation of contributions,
> - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

Given that this provision applies to unemployment schemes, it provides a striking contrast with the present eligibility under the Australian Federal unemploy-

[381] Council Directive (EEC) No. 75/117 of 10. Feb. 1975 on the approximation of laws of the Member States relating to the application of the principle of equal pay for men and women, OJ No. L 45, 19 Feb. 1975, p. 19.

[382] The various measures of the Member States in response to this Directive are presented in Report of the Commission to the Council on the application as at 12 Feb. 1978 of the principle of equal pay between men and women. *See generally* Burrows, *The Promotion of Women's Rights by the European Economic Community*, 17 C.M.L. Rev. 191 (1980).

[383] Council Directive (EEC) No. 76/207 of 9 Feb. 1976, OJ No. L 39, 14 Feb. 1976, p. 40, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. *See also* Report From Commission to the Council on the situation at 12 Aug. 1980 with regard to the implementation of that principle, 11 Feb. 1981, Doc. COM (80) 832.

[384] Council Directive 79/7 of 19 Dec. 1978, OJ No. L 6, 10 Jan. 1979, p. 24, on the progressive implementation of the principal of equal treatment of men and women in matters of social security.

ment benefits scheme which essentially disables most married women from obtaining benefits.[385]

Directive 76/207[386] is the most wide-ranging of Community instruments on this subject, dealing with selection, promotion, and processes associated with these (article 3), vocational training and re-training (article 4), conditions of work and dismissal (article 5). The Directive specifically calls for the repeal of *obsolete* protective legislation (legislation which, ostensibly for the protection of women, excludes them from certain jobs or requires that they be provided with certain conditions of work). The fact that the Directive allows for the continuance of (non-obsolete) protective laws is in sharp contrast with the United States where *all* state-protective legislation was held to violate Title VII of the Civil Rights Act, 1964 and therefore to be invalid.[387] Importantly, the Directive also deals with private rights of action to redress discrimination, with protection against victimisation of complainants, and with measures to inform people of their rights at law (articles 6–8).

The Community has also adopted certain administrative strategies to assist women, notably through financial support for special training for women to equip them for jobs in which they been un- or under-represented.[388] This strategy is an example (admittedly, fairly limited) of the "affirmative action" which is referred to in article 2(4) of Directive 76/207. Put loosely, affirmative action (also called "positive discrimination," "positive action," or "reverse discrimination") is a means of breaking down ingrained patterns of discrimination which are self-perpetuating[389] by focussing sharply on key aspects of decision-making processes and restructuring them so that non-discriminatory practice is strictly observed or sometimes, frankly, adopting short-term unequal treatment in favour of a disadvantaged group to secure longer term equality. The importance of further affirmative action measures is recognised by the Commission in its draft Council Resolution concerning a new Community Action Programme on the promotion of equal opportunities for women.[390] Similarly, the Resolution of the European Parliament on the postion of women[391] makes some reference to affirmative action, for example in paragraph 30 dealing with education, and paragraph 57 dealing with the establishment of a special European fund for women, but surprisingly does not emphasise it as a key element in a programme to end sex discrimination. It can be not-

[385] This result follows from rules, under Social Security Act, 1982 (Cwlth.) § 107, which, in deciding on eligibility for unemployment benefits of a person with a spouse, take into account the income, if any, of the spouse; this effectively disentitles any married woman who has a husband receiving an income.

[386] *Supra* note 407.

[387] *See* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (U.S.).

[388] This followed from Council Decision 77/804 of 20 Dec. 1977, OJ No. L 337, 27 Dec. 1977, p. 14 concerning appropriation from the European Social Fund.

[389] *See* Stiglitz, *Approaches to the Economics of Discrimination*, 63 AM. ECON. REV. PROC. 387 (1973).

[390] *See* Communication from Commission to Council 9 Dec. 1981 on this subject.

[391] 11 Feb. 1981, OJ No. C 50, 9 Mar. 1981, p. 35.

ed here that the understanding among the Member States of "positive action" in article 2(4) of Directive 76/207 seems to be rather narrowly limited to training programmes and such like. Comparison should be made with the plainly more extensive affirmative action programme which operates in the public service of New South Wales and Western Australia.[392] It is important to observe that affirmative action programmes need not be limited to the context of sex discrimination, as those programmes demonstrate.

Discrimination other than on the basis of nationality or of sex receives no significant attention at Community level. Indeed, it is notable that the "public policy" exceptions in articles 48 and 52 of the Treaty may specifically allow a number of those discriminatory criteria. For example, political affiliation might justify non-application of the non-discrimination rule;[393] so might homosexuality.[394] However, it seems that previous criminal conviction is not an available criterion of distinction.[395]

With reference to homosexuality (or discrimination on the grounds of "sexuality," "sexual preference" or "sexual orientation") there seems to be some potential for conflict with the developing jurisprudence of the European Court of Human Rights in Strasbourg. That Court has held[396] that certain laws which criminalise homosexual acts are in breach of article 8 of the European Convention of Human Rights which deals with private and family life. Although the reliance on a homosexuality criterion when applying the exceptions in articles 48 and 56 may not involve a law as such, surely an important question arises as to whether the "public policy" of a Member State might be held to be in breach of the European Convention.[397]

The Community has, however, not completely ignored all matters of discrimination other than sex and nationality. Council Directive 76/207, principally concerned with equal treatment of men and women goes beyond sex discrimination in the narrow sense, to include at least some of what is called in the United States "sex-plus" discrimination,[398] when it says in article 2(1):

> the principle of equal treatment shall mean that there shall be no discrimination

[392] *See supra* text accompanying notes 346–47.

[393] *See* Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337.

[394] *See, e.g.*, O'Keeffe, *supra* note 368, at 41.

[395] *See* Council Directive (EEC) No. 64/221 (*supra* note 368) which in art. 3(2) says that the public policy exceptions under arts. 48 and 56 of the EEC Treaty do not allow previous criminal convictions to ground a refusal of entry to, or the expulsion of, a national of another Member State. *Note also*, Case 30/77, R. v. Bouchereau, [1977] ECR 1999.

[396] Case of X v. United Kingdom, Judgment of 5 Nov. 1981, Series A: vol. 46 (Pubs. of Eur. Ct. H.R., 1982); Dudgeon Case, Judgment of 22 Oct. 1981, Series A: vol. 45 (Pubs. of Eur. Ct. H.R., 1982).

[397] *See* Schermers, *The Communities Under the European Convention of Human Rights*, [1978] L.I.E.I. 1; Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, [1979] L.I.E.I. 1, 12–21.

[398] *See, e.g.*, Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969) (U.S.).

whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.[399]

So, for example, discrimination against married women, or against women with school-age children, would be drawn within the ambit of the Directive. The wording of this article does not on its face require the principle of equal treatment to mean no discrimination at all on the basis of marital or family status, although curiously, some of the Member States take it as going that far.[400]

Finally, the Community has moved at a bureaucratic level with respect to handicapped persons, with the Council's adoption in 1974 of an Action Programme on the Development of Vocational Rehabilitation[401] and certain research activities designed to achieve uniform standards in building access, transport and other specific needs. No legal measures specifically directed to controlling discrimination against the physically or intellectually disabled have been taken at Community level.

IV. The Practical Implications of Federalism in Australia: A Case Study

In order to get a better understanding of how the Australian system of federalism works, it may be useful to examine how the issues are dealt with in a concrete case. All the major themes of the earlier discussion in this study are collected and illustrated in *Koowarta*,[402] a leading case in the Aboriginal land rights movement recently decided by the High Court, which will now be briefly examined to show how the various interests and tensions are balanced in practice.

A. The Background to *Koowarta*: The Aboriginal Land Rights Movement

An important issue in Australian civil rights and federal politics in recent years has been the question of Aboriginal land rights. The Aboriginal people of Australia are, for historical reasons and by reason of cultural diversity, the country's most significant ethnic or racial minority. They are also the most badly-off minority group, and its members individually are generally among

[399] Directive 76/207, *supra* note 383, at art. 2(1).

[400] *See* the Member States' responses to Commission enquiry on the implementation of Directive 76/207: Report from Commission to the Council, *supra* note 383, at 17–20.

[401] Council Resolution of 27 June 1974 establishing the initial Community action programme for the vocational rehabilitation of handicapped persons, OJ No. C 80, 9 July 1974, p. 30.

[402] 39 A.L.R. 417 (High Ct. 1982).

the people worst off.[403] The Aboriginal population today comprises descendants of the original indigenous population of the Australian continent (including the island of Tasmania, and certain other small islands such as those in the Torres Straits) at the beginning of European settlement in 1788.[404] The first one hundred years of European settlement is simply a story of the driving from their land of the Aboriginal inhabitants, largely by nothing less than massacre and genocide.[405] It was not until about 1890 that this pattern showed any change,[406] when there began to be created, slowly and without uniformity throughout Australia, reserves where Aboriginal people could live in a highly controlled and oppressed way.[407] In some cases where white pastoralists took over Aboriginal tribal lands, Aboriginal people were kept to work on the land.[408]

It was with the arrival of mining companies (usually substantial multi-nationals) on Aboriginal reserves, and the beginning of yet another cycle of the

[403] *See generally* A.T. YARWOOD & M.J. KNOWLING, RACE RELATIONS IN AUSTRALIA: A HISTORY (1982); E. EGGLESTON, FEAR, FAVOUR OR AFFECTION: ABORIGINES AND THE CRIMINAL LAW IN VICTORIA, SOUTH AUSTRALIA AND WESTERN AUSTRALIA (Canberra, Austl. Nat'l U.P., 1978); H. REYNOLDS, THE OTHER SIDE OF THE FRONTIER: ABORIGINAL RESISTANCE TO THE EUROPEAN INVASION OF AUSTRALIA (Harmondsworth, Penguin, 1983); G. NETTHEIM, *supra* note 85.

[404] Today, the Aboriginal population numbers about 150,000. *See* C.D. ROWLEY, THE DESTRUCTION OF ABORIGINAL SOCIETY 365–68 (Canberra, Austl. Nat'l U.P., 1970). At the time of settlement (dating from the establishment of a British Colony on the present site of Sydney in 1788) the Aboriginal population is estimated to have been 300,000: *see* COMMONWEALTH DEPARTMENT OF ABORIGINAL AFFAIRS, BACKGROUND NOTES: THE HISTORY OF ABORIGINAL AFFAIRS AND POLICIES (1980). The number of Aboriginal people in Australia in 1921 is estimated to have been 60,000.

[405] *See generally* A.T. YARWOOD & M.J. KNOWLING, *supra* note 403; J. ROBERTS, FROM MASSACRES TO MINING: THE COLONIZATION OF ABORIGINAL AUSTRALIA (London, War on Want, 1978); D. CARNE, LAND RIGHTS: A CHRISTIAN PERSPECTIVE 87–105 (Chippendale N.S.W., Alternative Pub. Cooperative, 1982); C.D. ROWLEY, *supra* note 404.

[406] Apart from a few minor exceptions in the southern states: *see* J. ROBERTS, *supra* note 405, at 30–35.

[407] Church missions or government officers were placed on these reserves to manage and control the inhabitants. Such management was usually achieved by the most oppressive and illiberal rules controlling the lives of the Aboriginal people. Where church missions were present, religion provided a basis for the encouragement of, or insistence upon, the destruction of traditional tribal belief, custom and culture: J. ROBERTS, *supra* note 405, at 54–60. The choice of land (like that of Indian reserves in the U.S.) rarely, if ever, was based on the original location of the tribes to be settled, and the quality of the land was based on its not being required by white settlers.

[408] Their "employment" often was nothing different from slavery. Even where some payment was made it was substantially lower than what equivalent white workers received: J. ROBERTS, *supra* note 405, at 61. This was also the case when Aboriginal workers were employed by mining companies which have been allowed to conduct their activities on reserves: *id.* at 56.

dispossession of the Aboriginal people, that the modern land rights movement began. The first modern[409] assault by miners on Aboriginal lands came in the 1950's, principally with the demand for uranium and bauxite, both of which abound in northern Australia (in the States of Queensland and Western Australia, and in the Northern Territory), and are commonly found on Aboriginal reserves. One of the earliest reserves affected, in 1957 by the exploitation of bauxite deposits by Conzinc Rio Tinto, was that of Aurukun.[410]

The exploitation of the mineral deposits in Aboriginal reserves raises major problems involving the rights of the Aboriginal people. But it also raises important issues concerning the federal organisation. Clearly the problem of Aboriginal land rights has a national or federal dimension, not only because it is a problem common to several states, but also, and more importantly, because the societal implications and historical origins of the problem are national and not peculiar to the states, and the fundamental rights and discrimination issues involved are, as we have seen, not only of federal relevance but also may have international import thus involving federal responsibility. On the other hand, territorial control over state lands and natural resources and proprietary interests therein are matters which, in general, can be regarded as appropriately subject to the state's jurisdiction, unless there is an overriding federal interest sanctioned by the Constitution. Thus once the problem of how far the rights of the Aboriginal population can and should be protected by the law (if, indeed, any "rights" are recognised) has been confronted, the question still remains whether such legal protection should be afforded by federal or state law, or by both.

It is against this background that the *Koowarta* case arose, being a case brought on behalf of the Winchinam Aboriginal people at Aurukun Reserve (Queensland) in an attempt by the people of Aurukun to obtain a long term interest in land. They sought to do this by relying on a Federal Government initiative, the Aboriginal Land Fund Commission (which has since been replaced by the Aboriginal Development Commission). The Commission, established in 1975, was empowered to use federal funds to assist Aboriginal groups either to buy land for themselves or to make land available to them for lease. The Commission has had quite extensive operations in all states except Queensland, partly because much of the land in that state is Crown Land held under lease, making it necessary for the Commission to obtain Queensland Government approval to obtain title to particular land.[411] It was over the Queensland Government's refusal to give such approval that the plaintiffs in

[409] The gold rushes of the 1850's were probably the actual beginnings.

[410] A recent mining incursion into the Aurukun Reserve occurred in 1975. The Queensland Government granted a lease, to a consortium of Billiton (a subsidiary of the Anglo-Dutch Shell) and Pechiney (of France), over 736 square miles of land in the Aurukun Reserve for strip mining of bauxite. This lease was granted without any negotiation with the Aboriginal community, contrary to an undertaking by the Queensland Government three years before: J. ROBERTS, *supra* note 405, at 119.

[411] G. NETTHEIM, *supra* note 85, at 9.

Koowarta brought a complaint against the State of Queensland, relying upon another federal initiative, the Racial Discrimination Act, 1975 (Commonwealth).[412] This complaint was successful, but it should be observed that the success of the *Koowarta* case is hardly to be regarded as the obtaining of land rights, although the case certainly has an important place in the overall struggle of the Aboriginal people for repossession of their land. One reason for the great importance of *Koowarta*, despite its somewhat limited consequences for the people of Aurukun themselves, is its success as compared with some other more ambitious attempts through the legal system to assert land rights. Before passing to a more detailed treatment of *Koowarta* some aspects of those other attempts should be set out.

An earlier example of the incursion of mining ventures into Aboriginal reserves occurred on the Gove peninsula in 1969, when Nabalco (70% owned by Alusuisse) obtained a bauxite mining rights lease in the Arnhemland Reserve in the Northern Territory.[413] The Aboriginal people brought a careful and wide-ranging challenge to the granting of this lease, asserting a native title to the land and thereby seeking legal protection of land rights. The action failed. The evidence and argument presented in that case (*Millirrpum*), heard in the Supreme Court of the Northern Territory,[414] is a rich collection of cultural material reflecting both aspects of Aboriginal society and the single-mindedness of Anglo-Australia law. In *Millirrpum* a number of Aboriginal people sued for declarations (and consequential injunctions) that they were entitled to occupy and enjoy land free from interference, that a federal ordinance[415] purporting to have compulsorily acquired bauxite deposits was void, and that the Australian Federal Government had no interest in the land which enabled it to grant the lease to Nabalco. The jurisprudential interest of the case lies in the argument put to support the claim. These arguments turned on the central proposition, which was not accepted by the Court, that the Aboriginal people had a proprietary interest in the land and that this interest, while not deriving from or under English law, was and is nevertheless recognised by English law.[416] It was not only for the lack of a proprietary interest that the

[412] *See supra* notes 320–26, 336–39 & 344 and accompanying text.

[413] These rights were granted by the Australian Federal Government. Since that time, the Northern Territory has obtained a considerable measure of self-government (*see infra* note 465) and such rights can now be granted by that Administration.

[414] Millirrpum v. Nabalco Pty. & Australia, 17 F.L.R. 141 (N. Terr., Sup. Ct. 1971).

[415] Minerals (Acquisition) Ordinance, 1953 (Cwlth.).

[416] In attempting to show that they had proprietary rights in the land, the Aboriginal plaintiffs presented a wealth of cultural and anthropological material. This went to two principal elements. Firstly, that they did indeed have a system of law in which the notion of "rights" could arise. Secondly, that the relationship between plaintiffs and the land could be described as "proprietary." The first element was accepted as proved by Blackburn, J., of the N. Terr. Supreme Court. The second was rejected, because his Honour took the view: (1) that the expression "my land" used by the people was not determinative; (2) that the fact that other clans did not dispute the

Aboriginal plaintiffs failed; they would also have been required to show that such proprietary interest as existed in them was recognised by English law,[417] and that it had not since been removed expressly by local law. On these two aspects also they failed.

Presently before the High Court is another attempt to explore issues raised in *Millirrpum*. This action, *Eddie Mabo v. State of Queensland and the Commonwealth of Australia*,[418] has been brought by a group of Torres Strait Islanders[419] who claim a proprietary interest (dependent on a number of different bases) in reserve lands and seek a declaration that only the Commonwealth, and not the State of Queensland, has any power or right to act inconsistently with such an interest. They further allege that to the extent that the Commonwealth does interfere with such interest, it is bound by the federal takings clause[420] to provide compensation on just terms. The source of the con-

relationship of the Gurnatj and the Rirratjingu (the clans of plaintiffs) did not determine what that relationship was; (3) that the evidence did not support a view that the clans were "given" the land by their spirit ancestors (as they claimed) but rather they were put under "obligations" with regard to the land; (4) that the clans did not have a right to use or enjoy the land distinct from other clans, but rather had duties with respect to the land; (5) that the clans did not have a right to exclude others despite evidence of a strong deferential pattern in which one clan informed another of its wish to visit that other's land; and (6) that the clans had no power to alienate the land.

Despite a warning (acknowledged by Blackburn, J.) by the P.C. in Amodu Tijani v. Secretary, S. Nigeria, [1921] 2 App. Cas. 399, 402–03 (U.K.), that questions of title in cases such as this should not be considered conceptually in terms which are appropriate only to systems which have grown up under English law, it seems that this is what Blackburn, J. did. In some respects he even imposed standards which not even English law would require. For example, in English law a trustee, with an undeniable proprietary interest, has no rights to use and enjoy but merely duties; a lessor when giving a lease does not necessarily retain a right to exclude persons from land and yet plainly has a proprietary interest; a statutory authority in whom lands dedicated for public use are vested often has no rights to alienate and yet has a proprietary interest. Much critical writing was generated by this decision: *see, e.g.*, U. Baxi, The Lost Dreamtime: Now Forever Lost. A Critique of the Gove Land Rights Decision (Paper delivered at Austl. U. Law Schs.' Assoc. Annual Conf., Hobart, 1972); Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Land in Australia?*, 5 FED. L. REV. 85 (1972).

[417] They argued that this was so, by reference to the "doctrine of communal native title." In part this required the Court to consider what law applied in the continent of Australia on English settlement: *see supra* notes 187–88 and accompanying text.

[418] Action commenced in the High Court by statement of claim, relying on AUSTL. CONST. § 75(iii) (since one of the defendants in the action is the Cwlth.) and on AUSTL. CONST. § 76(i) and Judiciary Act, 1903 (Cwlth.) and § 30 (since the matter also arises under the Constitution or involves its interpretation).

[419] The Torres Strait is a body of water at the northern tip of Australia located in the State of Queensland adjacent to Papua-New Guinea. The inhabitants of islands in the Torres Strait are usually classed distinctly from Australian Aboriginal people, but have suffered the same historical problems as the latter.

[420] AUSTL. CONST. § 51(xxxi).

flict motivating this litigation is a threatened termination by Queensland of the "reserve" status of certain Torres Strait Islands under the Torres Strait Islanders Act, 1971 (Queensland). Although apparently a rather esoteric matter, the "reserve" status of the islands is critical for the application of two *federal* statutes, the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act, 1975 (Commonwealth), and the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self Management) Act, 1978 (Commonwealth).

The 1975 federal Act was passed by the Federal Parliament in an attempt to counter unsatisfactory rules deriving from two 1971 Queensland statutes.[421] Those rules principally restricted access of Aboriginal people to reserves, provided for management of an Aboriginal person's property without consent and allowed an unlimited right to the Director of Aboriginal and Islanders Advancement (or his or her delegate) to enter and inspect any premises.[422] The Act was passed, relying on section 51(xxvi) of the Australian Constitution,[423] in an attempt to alter those Queensland rules.[424]

The 1978 federal Act was a response to a proposed assumption of control of the Aurukun and Mornington Island reserves by the Queensland Government, supplanting the Uniting Church which had had control for a long period. The Act was designed to allow local management of reserve affairs. Queensland, however, avoided the impact of this law by simply terminating the "reserve" status of both reserves, and since the federal Act operated only with respect to lands which were classed as reserves under state law, this technical move was perfectly successful. Throughout 1978 tense and turbulent negotiations between Federal and State Governments took place,[425] with the result that the two Aboriginal communities received a measure of self-management by the grant of leases (of only fifty years duration) over the former reserve lands under another Queensland statute.[426]

The pending action in *Mabo*[427] is an attempt by Torres Strait Islanders to avoid the same use of the technicality of "reserve" status under state law to evade the application of the federal law. Such action would, of course, be quite unnecessary if the Federal Government were to amend the 1975 and 1978 Acts to make them apply to lands defined by criteria independant of Queensland law. The fact that the Commonwealth has not done this reflects the political

[421] Torres Strait Islanders Act, 1971 (Queens.), as amended; the Act has a parallel, in almost identical terms, the Aborigines Act, 1971 (Queens.).

[422] Such an unlimited right does not exist in the parallel Aborigines Act, 1971 (Queens.): *see* G. NETTHEIM, *supra* note 85, at 32–33.

[423] This provision gives legislative power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws."

[424] For an assessment of the effectiveness of those provisions *see* G. NETTHEIM, *supra* note 85, especially at chs. 6 and 13.

[425] For a full history of these, *see* G. NETTHEIM, *supra* note 85, at 11–15.

[426] Local Government (Aboriginal Lands) Amendment Act, 1978 (Queens.).

[427] Eddie Mabo v. Queensland & Commonwealth, presently pending before the High Ct., Austl.

elements which are inter-woven with the constitutional and legal matters. There seems to be no lack of power in the Commonwealth in this area under section 51(xxvi) of the Constitution although, paradoxically, the only occasion on which the scope of that provision has been tested was in *Koowarta*, and it was there held not to support the federal legislation in question.[428] However, even if the legal power was there, there could have been political costs both at a political party level and at a national level. The same coalition of parties, National Party and Liberal Party, was until March 1983, in government both federally and in Queensland, so both in the interests of party and coalition stability and, perhaps to a lesser extent, because of some identity of interest, the full limits of constitutional power were never reached by the Commonwealth in this area. Whether, now that the Australian Labor Party is in government federally, any change will occur remains to be seen. However, even without possible intra-party conflicts along state-federal lines, or nationally, the Commonwealth may not wish to risk encouraging other states to stand by Queensland in a "states' rights" position. In addition to possible federal action under section 51(xxvi), the Commonwealth could also exercise its takings power (section 51(xxxi)), but apart from the same political constraints, there is also the requirement of payment of compensation which could embarrass the Commonwealth, particularly if other communities apart from those involved in, for example, the *Mabo* action sought protection against Queensland through federal acquisition.

Similar issues of governmental conflict arise with respect to the granting of land rights under Commonwealth law in the (federal) Northern Territory. Following the *Millirrpum* decision[429] the Commonwealth established the Aboriginal Land Rights Commission,[430] and on the recommendation of this Commission passed the Aboriginal Land Rights (Northern Territory) Act, 1976 (Commonwealth).[431] Under the Act, machinery was established by which Aboriginal people could make claims to have title to certain lands passed to them. The claims are heard by the Aboriginal Land Commissioner who has the power to recommend to the Government as to whether the claims should be granted. Since the passing of the Act, sixty claims have been made, fifteen heard by the Commissioner, and four granted.

[428] The paradox is explained *infra* notes 453–59 and accompanying text.

[429] 17 F.L.R. 141 (N. Terr. Sup. Ct. 1971) (discussed *supra* notes 414–17 and accompanying text).

[430] Chairman was Woodward, J., who had been Counsel representing the Aboriginal Plaintiffs in *Millirrpum*.

[431] The Commission had been established by the then Labour Government and a Bill had been introduced into the Commonwealth Parliament in 1975, prior to the Labour Government's dismissal from office on 11 November 1975. A new Bill was introduced in early 1976 by the incoming Liberal-National County Party Government, and this Bill was passed into law; it "emasculated the recommendations of the Woodward enquiry": Goldring, *Aboriginal Land Rights Legislation*, 2 LEGAL SERV. BULL. 75, 76 (1976–77). *See also* Keon-Cohen, *Aboriginal Land Rights in Australia*, in LEGISLATION AND SOCIETY IN AUSTRALIA, *supra* note 232, at 382–415.

Although the Act and the machinery apply to what is strictly a federal Territory, many of the same federal conflictual problems as exist with respect to Queensland also exist here, because the Territory has a considerable measure of self-government preparatory to full statehood.[432] It has been alleged that the Nothern Territory Government is determined "to do everything in its power to frustrate the intentions of the Aboriginal Land Rights (Northern Territory) Act."[433] An illustration of such behaviour by the Territory Government is perhaps provided by another recent High Court action, *Re Toohey (Aboriginal Land Commissioner), ex parte Northern Land Council.*[434] Under the federal land rights legislation the Aboriginal Land Commissioner could hear claims to land excluding, *inter alia*, "land in a town." The Northern Territory Land Council (an Aboriginal organisation recognised under the federal land rights Act) made a claim over land on the Cox Peninsula. The Commissioner refused to hear the claim because he took the view that certain planning regulations made by the Administrator of the Northern Territory under the Planning Act, 1979 (Northern Territory) were valid and that these regulations designated the area on the Cox Peninsula as land "to be treated as a town." The Commissioner would not regard as relevant the argument that the Administrator had made the regulations for an improper purpose, that is, to take the land outside the federal Act. The High Court took the view that the Commissioner should have taken such an argument into account, and ordered him to do so.[435]

It can be seen that, assuming this change of land designation was designed to frustrate the federal land rights law, the attempted tactic here was virtually identical to that which Queensland used with respect to the Aurukun and Mornington Island Reserves. These cases show the essentially trivial, technical grounds which are used to determine issues of considerable importance, both in terms of the public choice process and in terms of Aboriginal welfare.

So far, in this part of the study, several points can be seen to emerge: Aboriginal Australians have been and still are treated in a manner which fundamentally offends basic human rights;[436] central to this concern is their access to

[432] This has been achieved principally by a federal statute, the Northern Territory (Self-Government) Act, 1978 (Cwlth.), made under the "territories power," AUSTL. CONST. § 122.

[433] AUSTRALIA, PARLIAMENTARY DEBATES (HANSARD) – SENATE, 18 March 1982, at 951, *per* Senator Susan Ryan.

[434] 56 A.L.J.R. 164 (1980).

[435] The case turned on a number of technical and, for present purposes, somewhat esoteric matters regarding the rights to call into question the good faith of the Administrator and, in order to do that, considering whether he was the "Crown" for the purposes of the alleged "immunity of the Crown." The majority of the Court decided on the basis of narrow principles of administrative law and the power of judicial review. Murphy, J. took a broader view seeing the notion of Crown immunity as irrelevant to a modern democratic state: 56 A.L.J.R. 164, 188. *See also* R. v. Kearney, *ex parte* Northern Land Council, 58 A.L.J.R. 218 (High Ct. 1984).

[436] For a thorough assessment of the position of Queensland Aboriginal people in terms of a number of international human rights instruments *see generally* G. NETTHEIM, *supra* note 85.

and use of lands by Aboriginal people. The Aurukun problem illustrates the difficulties experienced by all Aboriginal people: *Koowarta*[437] concerned their obtaining additional land for pastoral activity; in another case, *Peinkinna*,[438] they sought to obtain the benefit of royalties paid for mining of bauxite on their lands; the 1975 and 1978 federal statutes[439] were passed to avoid or minimise the effects of certain oppressive laws of Queensland. As will be seen in further discussion of *Koowarta*, these difficulties involve substantial questions relating to the Australian federal compact: how are the powers of the Commonwealth and state governments allocated, how are conflicts between them resolved, and what role do the courts have?

It can be seen that in many respects the Commonwealth Government has not yet explored the limits of its constitutional power in this area as fully as it might. Its attempts to control human rights violations by Queensland are fairly limited. Its activity in promoting the achievement of Aboriginal land rights has been restricted to the Northern Territory (wherein it relies on the Constitution's "territories power" (section 122)) and has not been extended to the states proper, although its power to do so seems clear. One consequence of this latter point is that the success of the land rights movement has varied

[437] 39 A.L.R. 417 (High Ct. 1982).

[438] Corp. of Director of Aboriginal and Islanders Advancement v. Peinkinna, 52 A.L.J.R. 286 (P.C. 1978). As part of the mining lease granted to Billiton (*see supra* note 410) an officer of the Queensland Government, the Director of Aboriginal and Islanders Advancement, entered into an agreement with the miners to allow the taking of bauxite from the Aurukun Reserve. This agreement, sanctioned by the Aurukun Associates Agreement Act, 1975 (Queens.), provided that the companies would pay a three percent share of net profits to the Director "on behalf of Aborigines generally." The Aboriginal people of the Reserve alleged that the Director, as trustee of the Reserve, had acted in breach of trust by allowing the agreement without negotiation with them, the beneficiaries of the trust, and by allowing the payment by the companies to be used generally (for the Aboriginal people) rather than for them as residents of the Aurukun Reserve. Their argument, even within rather narrow political bounds, illustrates a fundamental element in the treatment of the Aboriginal people: that they are regarded favourably only, if at all, as the general non-individual objects of charitable schemes. Unlike most white Australians, their opportunities for improvement in welfare as individuals, or even as specific communities (as here), are ignored. This case ultimately was no exception. Although successful in the Queensland Supreme Court an appeal to the Privy Council by the Queensland Government reversed for the reason that the Act which sanctioned the agreement and the Act under which the Director operated allowed such a result. Finding no legal solution to their difficulty the people of Aurukun sent a delegation to The Hague (the headquarters of Billiton and Shell). They obtained from Billiton an undertaking not to commence mining at Aurukun without agreement of the Aboriginal people, despite an earlier undertaking by the company to the Queensland Government to begin work by 1983. There the mining of the Aurukun Reserve stands at present.

[439] Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act, 1975 (Cwlth.); Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act, 1978 (Cwlth.).

significantly from state to state. South Australia has had legislation providing machinery to achieve land rights since 1966;[440] New South Wales has recently passed legislation (of only minimal substance).[441] A Bill was recently introduced into the Victorian Parliament but has been deferred until 1984 at the earliest.[442] Western Australia has established a Commission of Enquiry to examine the subject and to draft appropriate legislation. Queensland has a policy which is frankly opposed to such rights,[443] and with regard to Queensland particularly, therefore, *Koowarta* is significant for what it achieves, and for what it illustrates about the Federation.

B. The Facts and Issues in *Koowarta*

Against the background just described, the facts of the *Koowarta* case[444] can be set out. The plaintiff, an Aboriginal person, sought to obtain, for himself and certain other Aboriginal people, occupation and use of some land in the State of Queensland. The land was in the freehold ownership of the Crown in the right of the State of Queensland, leased to one Broinowski and others. The lessees had contracted to assign their lease to the Aboriginal Land Fund Commission[445] which had agreed to provide the plaintiff with the occupation and use he sought.

The assignment of the lease required the permission of the Queensland Minister for Lands,[446] second defendant in the action. Permission was refused. The reason given (some months after refusal) related to a declared policy of the Government of Queensland, that it did "not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation,"[447] and to the view that "sufficient land in Queensland is already reserved and available to use and benefit of Aborigines."[448]

[440] Aboriginal Land Trust Act, 1966 (S.A.), Pitjantjatjara Land Rights Act, 1981 (S.A.); Maralinga Tijarutja Land Rights Bill, 1984 (S.A.).

[441] Aboriginal Land Rights Act, 1983 (N.S.W.).

[442] Aboriginal Land Claims Bill, 1983 (Vict.). *See also* regarding Victoria, Keon-Cohen, *Victorian Land Rights Discussion Paper*, 7 LEGAL SERV. BULL. 245 (1982). For a comprehensive treatment of laws in all states, including some inchoate measures to make land available to Aboriginal people, *see* ABORIGINAL LAND RIGHTS – A HANDBOOK (N. Peterson ed., AIAS New Ser. No. 30, Canberra, Austl. Inst. of Aboriginal Studies, 1981).

[443] *See* remarks of the Queensland Director of Aboriginal and Islanders Advancement, quoted in G. NETTHEIM, *supra* note 85, at 2.

[444] 39 A.L.R. 417 (High Ct. 1982).

[445] *See supra* note 411 and accompanying text.

[446] This requirement derived from cl. 25 of the contract with the lessees, and from the Land Act, 1962 (Queens.) under which the Crown lease was created.

[447] This policy was expressed in a Queensland Cabinet decision of September 1972.

[448] This was stated by Queensland Cabinet in June 1976, in its decision to refuse the permission sought.

The plaintiff complained, under the Racial Discrimination Act, 1975 (Commonwealth)[449] that defendants[450] had acted unlawfully, in refusing permission by reason of the Aboriginal race, colour or ethnic origin of the plaintiff, or of persons associated with him. The central element of the defence was to assert the constitutional invalidity of the Racial Discrimination Act, and in a companion cross-action[451] the State of Queensland sought a declaration that that Act was *ultra vires* of the Australian Federal Government and invalid.

The High Court of Australia decided, by a 4:3 majority, that the Act was a valid exercise of Commonwealth legislative power. The overriding nature of the Constitution of the Commonwealth of Australia, the jurisdiction of the High Court to resolve such a dispute, the particular sources of power in the Federal Government to legislate with respect to discrimination, the responsibilities of Australian courts, and particularly of the High Court, with respect to matters of discrimination, the decisional style of the High Court and the nature of state laws (and power to make them) with respect to discrimination: these are all matters which are raised by a consideration of the opinions in this case. These matters will now be discussed relying on the focus provided by the *Koowarta* case and its context.

[449] Section 12 of this Act reads:

(1) It is unlawful for a person, whether as a principal or agent –
  (a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person;
  (b) to dispose of such an estate or interest or such accommodation to a second person on less favourable terms and conditions than those which are or would otherwise be offered;
  (c) to treat a second person who is seeking to acquire or has aquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances;
  (d) to refuse to permit a second person to occupy any land or any residential or business accommodation; or
  (e) to terminate any estate or interest in land of a second person or the right of a second person to occupy any land or any residential or business accommodation,

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

(2) It is unlawful for a person, whether as a principal or agent, to impose or seek to impose on another person any term or condition that limits, by reference to race, colour or national or ethnic origin, the persons or class of persons who may be the licensees or invitees of the occupier of any land or residential or business accommodation.

[450] The named first defendant was, and is, Premier of the State of Queensland; the second was the Minister for Lands; other defendants were members of the Cabinet.

[451] Queensland v. Australia, 39 A.L.R. 417 (High Ct. 1982).

C. Constitutional Aspects of Responses to Discrimination

A central issue in *Koowarta* was the constitutional validity of the Racial Discrimination Act, 1975 (Commonwealth), which has been briefly discussed in Part III above. The challenge by the plaintiff against the failure to lease certain lands to the Aboriginal Land Funds Commission was brought under sections 9 and 12 of that Act, and appropriate declarations, injunctions and damages were sought. The defence, and the companion action by the State of Queensland against the Commonwealth Government, was simple in form: that the Act was invalid as being outside the powers of the Commonwealth under the Constitution.

Certainly, in terms of the express *exclusive* legislative powers given to the Commonwealth, under the Constitution only the territories power (section 122) would support the Act. Since, however, the Act was not in form limited to a federal Territory, and since Queensland is in any event not such a Territory, that power would not assist. The power, if it existed at all, had to be found within the *shared* legislative powers.[452] The High Court examined two such powers which could possibly support the Act: the power to make laws for particular races (section 51(xxvi)) and the external affairs power (section 51 (xxix)).

The power of the Federal Government to make laws with respect to the people of any race for whom it is deemed necessary to make special laws was, somewhat oddly, accepted by only one Justice of the High Court (Justice Murphy). The opinions are briefly summarised below, but before dealing with the application of section 51(xxvi) in *Koowarta* two points can be made. First, prior to 1967 this power was exercisable subject to the express exception of the Aboriginal people as possible objects of legislation. In 1967, by constitutional amendment,[453] the provision was changed because, it seems, it was thought that this would better enable Aboriginal welfare to be improved. Second, and as an irony to the first point, this provision was probably inserted into the Constitution in 1900 not to protect or improve the welfare of any particular races, but rather to allow adversely discriminatory laws against a range of people. Chief Justice Gibbs in his opinion in *Koowarta* takes this view of the original purpose of the provision.[454] As already indicated, the provision was no more successful in *Koowarta* in assisting Aboriginal people than its original drafters would have wanted it to be for other minority groups. Justice

[452] Given that the powers are shared, a potential problem exists if both levels of government exercise the power: here the "supremacy clause," AUSTL. CONST. § 109, is relevant; its particular potential relevance in the context of discrimination laws will be mentioned *infra* notes 480–91 and accompanying text.

[453] Under AUSTL. CONST. § 128; *see supra* note 55.

[454] 39 A.L.R., 417, 428. Presumably the framers of the Constitution wanted to leave the privilege of discriminating against the Aboriginal people to the fledgling states of the new Federation.

Murphy, however, in the extremely short part of his opinion accepting section 51(xxvi) as support for the Act's validity, asserts that the special use of the word "for" in the provision means "for the benefit of" and not merely "with respect to." Therefore no adversely discriminatory laws would be permissible under it in his view.[455]

Those who find no support for the Act in section 51(xxvi) (all the Justices, except Justice Mason who does not consider it) offer much the same reason: sections 9 and 12 of the Racial Discrimination Act (which were the contentious provisions in this case) are general prohibitions of race discrimination; they are not prohibitions of discrimination against a particular race or particular (identified) races, whereas section 51(xxvi) requires the identification of a particular race (or races[456]) for whom it is deemed necessary to make special laws. "A law which applies equally to the people of all races is not a special law."[457] Both Chief Justice Gibbs and Justice Stephen reject the view that a person (of any race) who is (or is likely to be) discriminated against on the ground of race is a person who belongs to a race (whichever it might be) needing a special (protective) law.[458] No Justice specifically adverts to the normal condition of racist discrimination (that it is practised on one minority race, or a few of them, by a majority) which would, implicitly, give the Act a greater specificity. It seems that if the Act had specifically prohibited discrimination against Aboriginal people it would be supported by section 51(xxvi).[459]

The power of the Federal Government to make laws with respect to external affairs (section 51(xxix)), which may seem on its face to be an unlikely basis, was regarded by four Justices as supporting the Racial Discrimination Act.[460] The opinions on this point relied principally on the connection between the Act and an international convention.[461] Untangling the opinions in *Koowarta* on the nature of the particular constitutional provision is, however, difficult; in this the case provides an example of an often expressed criticism of the method of the High Court: the usual writing of separate opinions by, particularly, the majority, clouds the principles which might be drawn from a case,[462] and even where the Justices may agree in substance, the differences of expression may obscure this fact.

The central question in the case was what constitutes an "external affair," for it would only be when this element was present that the power in section 52(xxix) would be available. A basic division of view was between those Justi-

[455] *Id.* at 473.
[456] So some Justices allow: *id.* at 476 (Wilson, J.); 448 (Stephen, J.).
[457] *Id.* at 428–29 (Gibbs, C.J.).
[458] *Id.* at 428–29 (Gibbs, C.J.); 448–49 (Stephen, J.).
[459] *Id.* at 429 (Gibbs, C.J.).
[460] Murphy, Mason, Brennan and Stephen, JJ.
[461] International Convention on the Elimination of All Forms of Racial Discrimination.
[462] *See, e.g.*, G. SAWER, *supra* note 13, for general discussion of this problem in the High Court.

ces (Murphy, Mason and Brennan) who thought that the existence of a treaty entered into by the Federal Executive Government was sufficient to create an "external affair" justifying Federal Parliamentary activity; and those Justices (Chief Justice Gibbs and Justices Wilson, Aickin and Stephen) who sought a subject matter which was inherently "international." Of the latter, it was only Justice Stephen who found a sufficiently "international" element with which the legislation dealt, even though Justice Wilson was able to assert that Australia was under an outstandingly important international obligation, under the Convention, "to eliminate racial discrimination in all its forms."[463] The 4:3 majority supporting the Act is, even at a superficial level, a slender one; when the reasoning underlying the decision is understood in the terms just discussed, it becomes even more slender. Certainly, the decision cannot be seen as a dramatic widening of the power of the Federal Government. Perhaps the most significant element which led Justice Stephen away from the (eventual) minority position was the view that even an "objective" characterisation of matters as "international" can and does change over time depending on the perception of the "community of nations of which Australia forms a part."[464] Chief Justice Gibbs in contrast would not allow popular international perceptions to be determinative.[465]

It should be observed that all the Justices accepted the view that, whatever "international" meant, or irrespective of whether there was a treaty, the specific prohibitions contained in the Constitution[466] are always overriding, and also that there are certain implied limits deriving from the federal nature of the Constitution which are always binding. These latter[467] included "the structural integrity of the State components of the federal framework,"[468] the "existence of the States,"[469] and the limitations "associated with the implications of freedom of expression and other attributes of a free society."[470] Justice Mason also asserted that the Commonwealth cannot discriminate against the states.[471]

Even with these limits, and with the somewhat slender majority in support of the proposition, one important implication for the subject of fundamental rights and non-discrimination which flows from finding that section 51(xxix)

[463] 39 A.L.R. 417, 477–78.

[464] *Id.* at 454.

[465] *Id.* at 441.

[466] AUSTL. CONST. §§ 80, 92, 99, 113, 114, 116, 117 and 128. *See supra* text accompanying notes 207 & 209.

[467] *See supra* text accompanying notes 80 & 81.

[468] 39 A.L.R. 417, 452 (Stephen, J.); 459–60 (Mason, J. to same effect).

[469] *Id.* at 472 (Murphy, J.); 459–60 (Mason, J. to same effect). These propositions were considered earlier when discussing the High Court's technique of contextual interpretation: *supra* text accompanying notes 194–96.

[470] 39 A.L.R. 417, 472 (Murphy, J.). This implied limit was discussed *supra* text accompanying note 291, with respect to the protection of fundamental rights in Australian law.

[471] 39 A.L.R. 417, 459–60.

supports a law such as the Racial Discrimination Act is that the Sex Discrimination Act, 1984 (Commonwealth) and Human Rights Commission Act, 1981 (Commonwealth),[472] which also rely on international instruments, are also presumably valid. Even more importantly, given that the last of these Acts is a very weak instrument for dealing with discrimination or allowing for the assertion of fundamental rights, it seems plain that the Federal Government has power to take bolder measures in this area. For this to occur requires the appropriate political will which is not always present. A recent example of the somewhat bold use of federal legislative power under section 51(xxix) is the World Heritage Properties (Conservation) Act, 1983 (Commonwealth). This legislation was (in a very long judgment) held constitutionally valid by the High Court in a dispute between Tasmania and the Federal Government over the building of a dam on the Gordon River in South-West Tasmania.[473] This dispute generated an extraordinary amount of interest and concern in the central public choice question of federalism – who has the right to decide.[474] The Federal Government once again relied on (*inter alia*) an international agreement, the World Heritage Convention, to claim the constitutional power to prevent the Tasmanian Government's interference with an area of land which the Federal Government and seemingly many non-Tasmanian Australians[475] believe should be preserved as an invaluable part of Australia's, and the world's, environmental heritage. The element of heated political controversy surrounding the *Tasmanian Dam* case lead to some perception that the decision is a constitutionally radical one, and indeed perhaps a radical departure from federalism. It can be argued, however, that it was a perfectly predictable decision in the light of the gradual development of interpretations of the "external affairs" power.[476] The decision does go further than that in *Koowarta*, if only because in the *Tasmanian Dam* case there is a majority (Justices Mason, Murphy, Brennan and Deane) for the view that the existence of a treaty is

[472] *See supra* text accompanying notes 323–24.

[473] Australia v. Tasmania, 46 A.L.R. 625 (High Ct. 1983). The judgment is over 225 pages long, consisting of seven separate opinions.

[474] Although the dispute was between one state and the Federal Government, other states obtained leave to intervene in the case taking, paradoxically, different positions: Queensland supported Tasmania; New South Wales and Victoria supported the Federal Government. For discussion of a wide range of the issues in this case, *see* THE SOUTH WEST DAM DISPUTE: THE LEGAL AND POLITICAL ISSUES (M. Sornarajah ed., Hobart, U. Tas. Law Sch., 1984).

[475] In Australian Federal elections in March 1983, the Australian Labour Party was elected to government with a very large majority, yet from Tasmania it failed to obtain even one seat in the House of Representatives. Many commentators attribute this to the declared policy of that Party, prior to the election, of using federal legislative power (assuming it could be found constitutionally) to prevent the erection of the dam. The *Tasmanian Dam* case is the litigative consequence of the Labour Party's fulfilment of that promise by the enactment of the legislation challenged before the High Court by Tasmania.

[476] *See* M. COPER, THE FRANKLIN DAM CASE 25 (Sydney, Butterworths, 1983).

enough to create an "external affair" which could ground federal legislation, whereas in *Koowarta* this had been only a minority view.[477] Even without this, the same majority would probably have characterised the protection of the environment to which the World Heritage Convention is directed as "sufficiently international," although Justice Deane does not say so in so many words.[478] The case canvasses other aspects of federal legislative power which cannot be covered here; it is worth observing that Justice Deane (who widened Commonwealth power in the way just described) was prepared to find some limit on federal power through the compensation requirement of the federal takings clause,[479] allowing one to suggest, on this basis if on no other, that the end of the states is not, in the Court's view, imminent.

Another significant federal aspect of the general holding in *Koowarta* that the Racial Discrimination Act is constitutionally valid is that this has recently led to the failure of one state law which deals with racial discrimination.[480] Similarly all other state discrimination laws may fail as inconsistent with that Act, with the Human Rights Commission Act, or with the Sex Discrimination Act, although this is less certain in the case of the Human Rights Commission Act because of the limited remedial character of that Act. The challenge to the state laws[481] came (or would come) under the supremacy clause (section 109) of the Australian Constitution.[482] In the recent application of the supremacy clause, the High Court held, in a unanimous judgment, that there was inconsistency between the state and federal discrimination laws because of the width of the federal law:

> The subject matter of the Commonwealth Act suggests that it is intended to be exhaustive and exclusive . . . it is intended as a complete statement of the law for Australia relating to racial discrimination.[483]

[477] The change in relative numbers on this issue is attributable to a change of membership in the Court: Stephen, J. became Governor-General of Australia; Aickin, J., died; Deane and Dawson, JJ., were appointed.

[478] The inference that Deane, J., would take this view can be based on his discussion of the World Heritage Convention in terms which acknowledge the seriousness of purpose of a very large number of international parties: 46 A.L.R. 625, 808.

[479] AUSTL. CONST. § 51(xxxi); 46 A.L.R. 625, 824–33.

[480] Anti-Discrimination Act, 1977 (N.S.W.); strictly only § 19 was held invalid, but it is difficult to see that it would ultimately be limited to this. The invalidity of this provision was declared in Viskauskas v. Niland, 57 A.L.J.R. 414 (High Ct. 1983).

[481] Presently only in New South Wales, Victoria and South Australia.

[482] *See supra* notes 39–40 and accompanying text.

[483] Viskauskas v. Niland, 57 A.L.J.R. 414 (High Ct. 1983). Another recent decision, of the Supreme Court of South Australia, has also applied AUSTL. CONST. § 109 to strike down a provision of state law under the Racial Discrimination Act. One of the South Australian laws granting Aboriginal people land rights (*see supra* note 440 and accompanying text), the Pitjantjatjara Land Rights Act, 1981, made it an offence for a person to come on to land granted under the Act without the permission of the relevent Aboriginal community authority, the Anangu Pitjantjatjaraku. Justice Millhouse decided in Gerhardy v. Brown, 49 A.L.R. 169 (1983) that this provision pro-

There was inconsistency even though the two laws could both be obeyed, and even though it had been argued that the Commonwealth Act was intended to be merely supplementary to the state laws. Following this decision the Commonwealth Act was amended[484] in order to avoid this result on state laws under the supremacy clause and it seems that this amendment is effective for the purpose.[485]

Another recent decision of the High Court of Australia gives a further illustration of a section 109 challenge in the same context. In *Ansett v. Wardely*[486] the question came to the Court of the relationship between a federal industrial

vided for exclusion on racial grounds and was therefore invalid under AUSTL. CONST. § 109 being inconsistent with the Racial Discrimination Act. There are strong arguments to say that this decision is wrong, but these are not able to be canvassed here: *see, e.g.*, Rowe, *Land Rights as Property Rights*, 9 LEGAL SERVICE BULL. 130 (1984); Nettheim & Rees, *Discrimination and Land Rights*, 9 ABORIGINAL L. BULL. 2 (1983). It should be observed that no consideration was given in the case to § 6A of the Racial Discrimination Act (*see infra* note 484), an amendment which took effect merely two days before the hearing in *Gerhardy*. On appeal to the High Court it was held (not yet reported, Feb. 1985) that the South Australian legislation was valid, but only because the Racial Discrimination Act § 8 allows for temporary measures of positive discrimination. The long-term effect of this decision is by no means free from confusion (for example, might it require that the land rights grant be revoked some time in the future, and, if so, with or without compensation). In any case, the influential role of § 109, at least as a barrier to be circumvented, remains clear.

[484] Racial Discrimination (Amendment) Act, 1983 (Cwlth.) § 3, which inserted a new § 6A into the principal Act which says in part:

> 6A(1) This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

The Sex Discrimination Act, 1984 (Cwlth.) has differently worded provisions with the same aim: §§ 10 & 11.

[485] A challenge to the effectiveness of Racial Discrimination Act, 1975 (Cwlth.) § 6A has recently been decided by the High Court. In Metwally v. University of Wollongong, (unreported, Equal Opportunity Tribunal, N.S.W., 23 Nov. 1983) it was held that a complaint of race discrimination under the Anti-Discrimination Act, 1977 (N.S.W.) was substantiated. This decision was appealed against, on the ground that, as in *Viskauskas*, the Anti-Discrimination Act, insofar as it deals with race discrimination, is invalid by virtue of AUSTL. CONST. § 109, despite § 6A of the federal Act which is intended to save state laws of this kind. The High Court held, in University of Wollongong v. Metwally, 56 A.L.R. 1 (1985), that § 6A was not effective retrospectively, so that the complaint of race discrimination under N.S.W. law failed in this case. It seems, however, that the Court would be prepared to give prospective effect to § 6A in other cases.

[486] Ansett Transp. Indus. (Operations) Pty. v. Wardley, 28 A.L.R. 449 (High Ct. 1978).

award[487] and the Equal Opportunity Act, 1977 (Victoria). Under that Act, the Equal Opportunity Board (Victoria) held that an airline had unlawfully discriminated against a woman, on the ground of sex, by dismissing her from employment as a pilot. It ordered the airline to take certain measures, including employing her as a pilot. The airline sought a declaration from the High Court that it was not bound by the Act, in this case because it was inconsistent with a law of the Commonwealth, namely the Airline Pilots Agreement, 1978 (an industrial agreement certified under the Conciliation and Arbitration Act, 1904 (Commonwealth)), and therefore should fall by virtue of section 109.

The Court[488] held that there was no inconsistency. Part of the reasoning for this decision relied on a detailed interpretation of the terms of the Agreement: that it did not confer an absolute right on airlines to dismiss for any reason. Justice Stephen said, "The right which it [the Agreement] confers is not one which is capable of exercise regardless of the unlawfulness under State law of the ground for its exercise."[489] However, it is clear from this opinion, and the opinions of the rest of the majority except Justice Murphy, that if the Agreement were to confer such a right, the airline's case would succeed: the more plainly discriminatory the Agreement the more likely it is to survive. The view was, however, that, whereas the Act addressed "widespread areas of human activity" when prohibiting discrimination, the Agreement dealt with the quite narrowly confined area of employment relationships without adverting to any question of the status or treatment of women. Justice Mason took the view that it did not exhaustively determine the respective rights of employer and employee, and so did not displace the general law. So there was no inconsistency, because the two measures concerned different subjects.[490]

In a remarkably short judgment, partly to the same effect as the propositions just summarised, Justice Murphy also said:

> the validity of the termination [of employment] may not depend on supposed inconsistency between the Act and the Agreement. Larger questions may arise, for example, whether Parliament has authorized the tribunals established under the Conciliation and Arbitration Act to make or certify awards or agreements which provide for unjustifiable sex discrimination, and whether Parliament has legislative power to authorize such discrimination. The Constitution makes no discrimination between the sexes. It may be then an implication should be drawn from its

[487] Such an award is made by the Commonwealth Conciliation and Arbitration Commission, under the Conciliation and Arbitration Act, 1904 (Cwlth.). The Commonwealth legislative power with respect to industrial matters is limited by the terms of AUSTL. CONST. § 51(xxxv) which allows legislation directed to the settlement of industrial disputes extending beyond the limits of any one state only by conciliation and arbitration; no direct legislative interference with industrial disputes is possible by the Commonwealth although it is for the states.

[488] Stephen, Mason, Murphy, Wilson, JJ. (Barwick, C.J. and Aickin, J. dissenting).

[489] 28 A.L.R. 449, 454.

[490] *Id.* at 467–68 (Mason, J.).

terms that the Parliament's legislative powers do not extend to authorizing arbitrary discrimination between the sexes.[491]

This pronouncement, although it contains no attempt to answer the questions posed, leads us back to an earlier observation that the courts, in a system without a written Bill of Rights, protect rights by a strict constructionist method. If Parliament does not plainly take away a right, it persists. Justice Murphy is here suggesting an extended reliance on the same method, this time with respect to the Constitution as a source of power for the Parliament: if it does not plainly give the power to take away rights, perhaps the Parliament does not have the power.

Turning to another aspect of federal interaction, can federal discrimination laws bind the states themselves? Of course the law will operate throughout Australia, *in* all the states, but are the state instrumentalities subject to them? For example, if an Aboriginal person is refused employment by a government department of Western Australia can he or she bring a complaint under the Racial Discrimination Act, 1975 (Commonwealth)? Plainly the *Koowarta* case answers affirmatively, since the action there was against the Cabinet and a Minister of the Crown. In any case, one would have expected an affirmative answer since although there was in the early years of the federation an "immunity of instrumentalities" doctrine asserted by the High Court,[492] this has long been rejected.[493] The converse constitutional problem (which obviously will not arise where section 109 challenges are successful), relating to whether a state statute prohibiting discrimination or providing a remedy against it can bind the Crown in the right of the Commonwealth, has been mentioned earlier.[494]

It should be clear from earlier discussion that the Australian Federal Government has no power similar to that of the European Council or Commission, to direct state governments to enact laws to cover certain aspects of discrimination (or anything else). Of course, the power of the Council and Commission in this area is neither unlimited nor unchallengeable,[495] but the Commonwealth of Australia certainly lacks such a power in any area. At most, where there is a shared legislative power, the Commonwealth can enact laws which will prevail over, and therefore render void, state laws. An example of this, considered already, is the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act, 1975 (Commonwealth) which, somewhat ineffectually, attempted to prevent certain discriminatory actions by the Govern-

[491] *Id.* at 469.

[492] D'Emden v. Pedder, 1 C.L.R. 91 (High Ct. 1904); Deakin & Lyne v. Webb, 1 C.L.R. 585 (High Ct. 1904); Federated Amalgamated Gov't Ry. & Tramway Serv. Ass'n v. New South Wales Ry. Traffic Employees Ass'n, 4 C.L.R. 488 (High Ct. 1906).

[493] *The Engineers Case*, 28 C.L.R. 129 (High Ct. 1920).

[494] *See supra* notes 333–35 and accompanying text.

[495] *See, e.g.*, Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty*, 18 C.M.L. Rev. 447 (1981).

ment of Queensland. Even though there is no power in the Commonwealth to require the states to do anything like, for example, what the Community Lawyers Directive,[496] the Equal Pay Directive,[497] the Sex Discrimination Directive,[498] and so on, have achieved, whenever the Federal Government does have legislative power, whether exclusive or joint, it can pass laws which by their direct effect can achieve uniformity throughout the federation. The only advantage which might be gained by a power to require the passing of laws by the states is that through that method a uniformity of principles and standards might be achievable through a diversity of methods and techniques. This might be regarded as a welcome means of achieving or maintaining some of the disaggregative advantages of federalism while recognising where appropriate the need to adopt aggregative values.

V. Conclusion

Some of the themes of this study have already been drawn together in the latter section of Part IV. That discussion illustrated the power of the High Court to decide on the constitutional validity of Commonwealth laws, the supremacy of valid Commonwealth laws over state laws under certain conditions, the sources of federal legislative power and the capacity for federal legislation to control state action. It highlights the importance to the federal balance of power in international matters, an importance which seems to be increasing, as the recent litigation over the Tasmanian dam illustrates. With regard to the specific subject of human rights and non-discrimination in Australia, two broad observations arise from the preceding discussion which relate to the general federalism themes of this study.

First, Federal Government activity in the field of human rights and discrimination has been quite limited, especially when compared with the activity of the European Community organs (this comparison is brought out in Part III.B). Although one can anticipate a growth in Australian federal initiatives in this area, it is interesting to speculate on why the central government of a "true" federation should have done so little, while the (merely) inter-governmental organs of the European Community should have been more active. One reason for the relative inactivity might be that such activity has little or nothing to do with the federal/non-federal dichotomy, and even might be the hallmark of a less integrated political and governmental system, or, under certain conditions, a means of achieving integration. This leads to a second possible reason – that such activity in Europe might well be part of a process of

[496] *Supra* note 225.

[497] Council Directive (EEC) No. 75/117 of 10 Feb. 1975, OJ No. L 45, 19 Feb. 1975, p. 19.

[498] Council Directive (EEC) No. 76/207 of 9 Feb. 1976, OJ No. L 39, 14 Feb. 1976, p. 40.

achieving something like that integration which Australia already possesses in large measure. In general, then, it might be simply of less relative importance in Australia not only to the achievement of integration, but also because of the problems which are to be confronted. While this author believes that human rights and non-discrimination laws are probably extremely important to the achievement of integration (whether or not integration is important or beneficial for human rights is another separate question), it is not clear, however, that the problems to be confronted by such laws and policies are in fact greater in Europe than in Australia. A third possible reason for the relative inactivity of the Australian Federal Government in the field of discrimination compared with the Community organs is that Member States of the Community (the United Kingdom excepted) have had a longer somewhat more explicit concern with these issues in their constitutional and jurisprudential histories (even if the substantive results may not demonstrate this). Arguably the Community is reflecting this. In Australia the several states have had very little interest in these matters. (The courts, too, whether applying statutes or fulfilling their Common Law role have been similarly inactive.) Even though four out of six states (and two Territories) have legislation on the subject, this is only of relatively recent origin for most of them. Arguably the Federal Government is reflecting the general level of (un)concern of the country as a whole.

A second broad observation relating non-discrimination laws and policies to the federalism theme of this study has a number of elements, and concerns the techniques and institutions of *central* intervention in this area – and many others. First, in terms of legislative technique the differences between the Community and Australia are profound. The essential Community device used in this area is the Council directive, requiring Member States to produce conforming legislation. In Australia, the device is federal legislation, with invariably direct effect both on citizens and states; state legislation in the same subject field (even if in itself constitutionally supported, and irrespective of whether it tends in the same direction or is plainly contradictory) must fall (absent an effective Commonwealth allowance). Second, the result of Australian federal legislation, given its direct effect, is that it is implemented and enforced in the normal courts (whether in federal courts, or state courts exercising federal jurisdiction) or through the special agencies which the legislation might establish. The result of Community directives is Member State laws, and enforcement of those Member State laws at a disaggregated level through Member State agencies and courts, with mere supervision by the Community of the implementation of the directive in the Member States. The only Australian device which has some similarity with the directive and its processes is the imposition of a condition on a federal financial grant to a state,[499] and traditionally federal supervision of precise satisfaction of the conditions has been slack. The third element is that the Community directive issues from bureaucratic and Member-State-representative organs – the Commission, which proposes,

[499] AUSTL. CONST. § 96. *See supra* notes 50–55 and accompanying text.

and the Council, which disposes. Australian federal legislation emanates from an (admittedly Executive-dominated) popularly-elected Parliament. Fourth, the constitutional support for Community acts is, at this stage, arguably (at least according to the Danes) narrower, and certainly less specifically enumerated, than that of the Australian Federal Parliament. One must admit, however, that both constituent documents offer key opportunities for persuasive widening of central powers: the EEC Treaty in the wording of article 235, the Australian Constitution in the "external affairs" power (section 51(xxix)) and in such others as the corporations power.[500] Fifth, the most similar common element in the two systems are the constitutional courts, the European Court of Justice and the High Court of Australia, and yet these both display considerable differences. They are similar in their powers to pass on the "constitutional" validity of central acts, and yet the ways in which the opportunity to exercise this power comes to them are, as discussed, quite different. Further, in terms of judicial technique in these courts the differences are substantial. This is particularly well demonstrated in the discussion of possible "common law" development of fundamental rights by the two courts.

At the core of this study has been the nature of the Australian Federal Government and the relationship between that Government and the several states and Territories of the federation. The role of the central government as an integrative force for the larger body politic has taken a somewhat similar direction in both the Australian and Community experiences, albeit with somewhat dissimilar techniques. Yet the direct taxing power and conditional grants power, the wide, direct legislative powers, the (probably) largely exclusive power or responsibility internationally of the Australian Federal Government, and the completely dominant position of the High Court, all suggest a more integrated political and governmental system in Australia. These seem important indicia, but they are not the only ones. The generally *ad hoc* nature of multi-state cooperative initiatives, their delay and frequent frustration, invite a contrary interpretation. Similarly, the mainly indirect ability[501] of the Federal Government to require states to conform to particular policies not strictly within its jurisdiction, and the somewhat limited use which has been made of this ability, also should lead to a cautious view of the degree of integration. Nevertheless, the considerable uniformity of life-style across the states and the quite strong self-perception of citizens as "Australians" strongly suggests an integrated social unit, even if the political and governmental processes are more ambiguous.

[500] AUSTL. CONST. § 51(i). The expansive possibilities of this provision can be illustrated by contrasting an early restrictive High Court view in Huddart Parker & Co. v. Moorehead, 8 C.L.R. 330 (High Ct. 1909) with a considerably wider view in Strickland v. Rocla Concrete Pipes Ltd., 124 C.L.R. 468 (High Ct. 1971).

[501] To recapitulate, summarily, the Commonwealth can directly control states only through supreme federal laws which bind states and citizens alike; it can "indirectly" control states through the conditional grants power, AUSTL. CONST. § 96.

This self-perception does not, however, produce a desire for a unitary-system of government (that is, the abolition of the states), for it seems that most Australians support the present federal system.[502] This is so even though many disadvantages of federalism can be discerned. Aitkin refers to "discordant [federal-state] relations" which he attributes in part at least to the federal structure.[503] Whitlam provides a lengthy list of the disadvantages of "a political structure that is out-dated, reactionary and resistant to change":[504] overlapping trade union laws which give rise to fragmented union organisation and consequent difficulty for industrial relations; disparities in health services between the states; multiplicity of Ministers and similar officials and the costs of coordinative meetings between them which do not often lead to clear decisions; unnecessary duplication of services (such as overlapping state and federal inspectorates for meat products);[505] lack of coordination (as illustrated by the existence of three different railway line-gauges in different states, and by the fact that even on the standard gauges which now exist between the state capitals locomotives of one state system are not allowed to run on the track of another state);[506] and many other illustrations.[507] The general conclusion one would draw from Whitlam is that a unitary Australian Government would be preferable.

Despite criticism of federalism of the kind made by Whitlam, Australia does in some respects function like a unitary system. It has a highly centralised public revenue raising system, which leads Mathews to say that if "vertical fiscal balance is defined as a situation where each level of government – Federal, State and local – can command the financial resources necessary for it to carry out its constitutional responsibilities, the Australian federal system can only be described as being in a state of chronic imbalance."[508] He sees both advan-

[502] *See* the statistics of opinion polls in Aitkin, *Australian Politics in a Federal Context*, in PUBLIC POLICIES, *supra* note 219, at 48.

[503] *Id.* at 47. *Also see generally* M.H. SPROULE-JONES, PUBLIC CHOICE AND FEDERALISM IN AUSTRALIA AND CANADA (Canberra, Austl. Nat'l U., Centre for Research on Federal Financial Relations, 1975).

[504] Whitlam, *The Cost of Federalism*, in PUBLIC POLICIES, *supra* note 219, at 293. Whitlam was the Prime Minister of Australia 1972–75.

[505] Whitlam quotes from the Report of a Committee of Inquiry to Examine Commonwealth and State Meat Inspection systems:

> [T]he European Economic Community has been able to agree to common standards throughout the whole Community, particularly on imports from third countries. Yet in the single nation of Australia this has not been possible.

Id. at 288.

[506] In respect of locomotives, Europe is no different from Australia. As Spain has a different line gauge from the other Members of the EEC some of the lack of coordination found in Australia can be found also within the Community.

[507] Whitlam, *supra* note 504, at 290–93.

[508] Mathews, *supra* note 220, at 167. He contrasts Canada as having "a substantial degree of vertical fiscal balance": *id.* at 173.

tages (*e.g.*, for the taxpayer, a uniform system of taxation; avoidance of some, but not all, borrowing and taxing competition between governments; opportunities for redistributive taxation) and disadvantages (loss of local and regional diversity and of the expected "federal" distribution of governmental responsibility).[509] But Mathews also observes, like Whitlam, that even with this highly centralised system

> [t]he result has been either wasteful duplication of activities across the States or a complete policy vacuum, with the consequence that effective policy co-ordination is virtually non-existent in major functional fields such as economic development, energy policy, transport, urban affairs, community development, Aboriginal affairs, environmental policy and law reform.[510]

It is not possible here to evaluate the competing merits of the broad alternative structures and it is my inclination that the more important, and manageable, questions about appropriate public choice structures are those relating to the allocation of *particular* powers and responsibilities. Indeed, the question which presses itself upon one in concluding a study such as this is: "How does one judge integration as a political and institutional form or goal?"

The structural differences and similarities discussed in this study have principally been illustrated by problems of discrimination. Many of Australia's other contemporary political and economic characteristics and problems are shared with the countries of the EC. The immediate difficulties of recession, unemployment and inflation, and the perennial (but still immediately pressing) challenges of world peace, environmental degradation, domestic and international economic justice, public regulation of economic activity and the

[509] *Id.* at 167–68.

[510] *Id.* at 168. Mathews offers other criticisms of Federal and State Governments related to their fiscal interactions, and of the Australian public financial system generally. The following lengthy extract sums up these criticisms, and seems implicitly also to criticise federal arrangements, at least those in Australia:

> If governments and taxation authorities were to set out deliberately to design a taxation system which would erode the liquidity that small businesses need to function effectively, which would discriminate in favour of speculative activity and against enterprise and thrift, which would give preference to foreign taxpayers over Australian residents, which would redistribute income from the poor to the rich while substantially relieving the latter of the cost of financing social welfare transfers and public services, which would consciously discriminate against wage and salary incomes in favour of other incomes and capital gains, which would unintentionally distort the pattern of consumption and production, and which would provide a major stimulus to wage inflation and industrial conflict, it would be difficult for them to develop a set of tax arrangements that would be more successful in meeting such perverse objectives than the existing Australian system. But after years of debate about tax reform, governments seem to be paralysed by the political and administrative difficulties of implementing significant structural changes in the tax system.

Id. at 181.

appropriate level and direction of public investment are all examples. The ultimate assessment of political, legal and institutional structures, and particularly of any increase in integrative arrangements, rests on how well they respond to these challenges.

The Canadian Federal Experience – Selected Issues

DAN SOBERMAN*

I. Introduction: Federalism in Canada – The Theory and the Reality

No country corresponds exactly to a general scheme of political, constitutional and legal theory and Canada is no exception. Ordinarily, it is described as a federation, but insofar as its written constitution is concerned it defies the usual definition. Professor Wheare's classic statement defines the federal principle as,

> an association of states so organized that powers are divided between a central government which in certain matters ... is independent of the governments of the associated states, and, on the other hand, state governments which in certain matters are, in their turn, independent of the general government. ... General and regional governments both operate *directly* upon the people: each citizen is subject to two governments. ... Once granted that a government is acting within its allotted sphere, that government is not subordinate to any other.[1]

Canada immediately presents difficulties when examined on the basis of the Wheare definition.

A. The Formal Structure in Theory and Practice

As Wheare himself points out, Canada's written constitution, the Constitution Act,[2] has important unitary characteristics, and he calls it a "quasi-federal

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[1] K.C. WHEARE, FEDERAL GOVERNMENT 2 (4th ed., London, O.U.P., 1963). This definition has been modified in recent years in that the general view of modern industrial states is one of increasing economic and hence political interdependence. Thus there is mutual interdependence rather than independence in many matters, so that either level of government may find itself unable to act effectively without the collaboration of the other.

[2] Canada's original constitutional document was an Act of the British Parliament, the Constitution Act, 1867, 30-31 Vict. c. 3 (UK). This Act was formerly known as

constitution."[3] It is true that the Act contains several important characteristics of a federation: each Province has its own legislature, directly elected under its own rules (as does the central government);[4] each Province "may exclusively make laws in relation to matters coming within the [sixteen] classes of

the British North America Act, but its name was changed by the Constitution Act, 1982 (enacted by the Canada Act, 1982, 30-31 Eliz. II c. 11 (UK) discussed *infra* notes 88–98 and accompanying text). The 1867 Act joined four Provinces – Ontario, Quebec, Nova Scotia and New Brunswick – in a new federal union. At the time, it was contemplated that several other Provinces would be added fairly quickly. Manitoba joined in 1870, followed by British Columbia in 1871 and Prince Edward Island in 1873. For the next 32 years, Canada contained seven Provinces, along with vast prairie and northern territories administered directly from the federal capital of Ottawa. In 1905, two further Provinces, Saskatchewan and Alberta, were carved out of the prairie territories. Canada remained with nine Provinces until 1949, when Newfoundland, a fellow, self-governing member of the British Commonwealth, became the tenth Province on ratifying the Terms of Union.

Canada did not follow the U.S. congressional model of government but stayed with the British parliamentary system. In both the Canadian Parliament and provincial legislatures, a cabinet is formed by a majority party or coalition within the legislature to make up the administration of the day. Cabinet ministers are elected members of the legislature. When a governing party is defeated in a vote of confidence, or a major bill is rejected, it calls upon the executive ceremonial head (the Governor General or Lieutenant-Governor) to dissolve the House and call an election. Thus, unlike the congressional system, the Canadian system does not maintain a separation of powers between legislature and administration. (There is, of course, separation between the judiciary and the other two branches of government.) Until passage of the Constitution Act, 1982, with its entrenched Charter of Rights and Freedoms (discussed *infra* text accompanying notes 166–78), the Canadian constitutional system was founded on the supremacy of Parliament doctrine much as it exists in the United Kingdom. As we shall see, the supremacy doctrine has always been strained in a federal system where powers are distributed between the federal and provincial legislatures; the courts, while not denying the supremacy of a legislature within its own sphere, might nevertheless declare an act beyond the powers of the legislature because it belongs in the sphere of the other level of government. *See, e.g.*, Union Colliery Co. v. Bryden, [1899] A.C. 580.

Canada's population is only about one-tenth that of the European Community and it covers a much vaster area (Quebec alone is the size of the ten members of the EC). Nevertheless, the similarities create some interesting parallels between Canada and the Community: each has ten members; like the Community, Canada has four larger, more powerful members, each with divergent interests, strengths and weaknesses (Quebec, Ontario, Alberta and British Columbia); each has several smaller, more dependent members; Canada also has language and cultural differences among members although they are less complex and numerous than in the Community. As a result, relations among member states and the dynamics of central decision-making are interesting aspects for comparative study.

[3] K.C. WHEARE, *supra* note 1, at 19.

[4] *See* Constitution Act ss. 9–57, 58–89.

subject" enumerated in the Act;[5] the central government is given the power to make law over twenty-nine subjects, as well as a general residuary power, including an emergency power.[6] Neither the Federal nor Provincial Governments may alter the distribution of powers in the Constitution Act unilaterally.[7]

However, the Federal Government is also given important powers to interfere with and subordinate the will of the Provincial Governments even in those areas apparently allocated exclusively to them. Thus, the Federal Government:

(1) appoints the executive head (the lieutenant-governor) of each Province;[8]
(2) may instruct him to withhold his assent from any provincial bill before it becomes law, thus for one year preventing that legislation from becoming effective;[9]
(3) may disallow any piece of provincial legislation within one year of its passage – whether first reserved by the lieutenant-governor or not – thus nullifying an otherwise valid provincial statute;[10]
(4) may declare "[l]ocal works and undertakings..., although wholly situate within the Province... to be for the general advantage of Canada," and accordingly subject to federal legislative power;[11]
(5) appoints all superior court judges in the Provinces, including all county, supreme and appeal court judges.[12]

As Professor Wheare notes, "These are substantial modifications of the federal principle."[13]

If the Federal Government were to use the powers of reservation and disallowance frequently, or to declare many local undertakings to be for the general advantage of the nation and if it were to appoint judges with a view to ensuring that its own view of the Constitution would be vindicated before the courts,[14] the federal principle in Canada would certainly be seriously undermined; Canada might well resemble a unitary state with an elaborate system

[5] The sixteen subjects listed include amendment of the provincial constitution; direct taxation for provincial purposes; municipal institutions; property and civil rights; and the administration of justice. *See* Constitution Act s. 92.
[6] Constitution Act s. 91.
[7] We shall return to the problem of amending the Act below. *See infra* § II.D., especially notes 69–76 and 88–98 and accompanying text.
[8] Constitution Act s. 58.
[9] Constitution Act ss. 55 & 90.
[10] Constitution Act ss. 56 & 90.
[11] Constitution Act s. 92(10)(c).
[12] Constitution Act s. 96.
[13] K.C. WHEARE, *supra* note 1, at 18.
[14] As we shall see, however, until 1950 the final court of appeal for Canada was the Judicial Committee of the Privy Council (P.C.) in Britain, a court over which the Federal Government had no control. *See infra* notes 120–23 and accompanying text.

of regional governments. However, the reality is quite different. From the beginning the Federal Government attempted no such thorough-going assertion of supremacy. While it is true that in Canada's first fifty years the powers of reservation and disallowance were used quite often, since World War I they have fallen steadily into disuse and they were last used in 1942.[15] The current view, shared by the Federal and Provincial Governments, is that it is for the courts to decide whether the Provinces have acted beyond their constitutional powers. The Federal Government no longer has any business interfering with a legally valid exercise of those powers. It is highly unlikely that Ottawa would dare use these powers again.[16] Nor is there any evidence that judicial appointments have been used to influence constitutional interpretation. Thus, as long ago as 1945, Professor Wheare concluded that, "although the Canadian Constitution is quasi-federal in law, it is predominantly federal in practice."[17]

B. The Federal Relationship: The Interaction Between and Among the Federal and the Provincial Governments

1. The Extension of Central Government Power Through Economic Intervention

An aspect of federalism as important as constitutional law and practice, is the nature and extent of economic intervention by the central government, since this affects the economies of the Provinces and the ability of the Provincial Governments to act according to their own established priorities. Of necessity, the Federal Government became quite strongly interventionist in the depression years of the 1930's, helping the severely weakened Provincial Governments to meet the demands for social welfare. This trend was accelerated during World War II, when it was essential to have strong central control over resources and production for the war effort. At war's end, Canada would have been considered a highly centralized federation when judged by economic indicators, such as the proportion of the Gross National Product levied as revenues and spent directly by the Federal Government.

The trend toward a dominant central government continued for at least a decade longer, for a number of reasons:[18]

(1) Traditional provincial revenue resources were inadequate to meet the most quickly growing areas of expenditure, for which the Provinces were responsible under the Constitution Act – such things as education, public health, pensions and welfare payments – leading to a continuing dependence on federal resources.

[15] G.V. La Forest, Disallowance and Reservation of Provincial Legislation (Ottawa, Dep't of Justice, 1955).

[16] *See* P.W. Hogg, Constitutional Law of Canada 39 (Toronto, Carswell, 1977).

[17] K.C. Wheare, *supra* note 1, at 20.

[18] The following points are an elaboration of some of the general observations of Professor Wheare, *supra* note 1, at 109–16, 147–52.

(2) Social services were needed by a higher proportion of the population in poorer Provinces, those least able to raise the needed revenue.
(3) Even wealthier Provinces, able to afford a higher level of services, worried about the consequences of doing so without similar services being made available in their poorer neighbors. They feared an influx of welfare recipients from the poorer regions.
(4) The Federal Government, released from the enormous war-time expenditures, and left with generally less expensive responsibilities than the Provinces, nevertheless had the full range of taxation resources available from the country as a whole, as well as easier access to borrowing in world capital markets.
(5) In view of the inability of the poorer Provinces and the reluctance of the richer ones to provide services, it was natural for Ottawa to take the initiative. In so doing, the Federal Government saw several benefits: the altruistic ones of raising national standards of social welfare and of redistributing wealth from richer regions to poorer; and its own interest in capturing the loyalty of recipients of federal benefits.

An integral part of the Canadian federation – and indeed of any federation – is a redistribution of wealth from richer to poorer regions by levying revenues on a national basis and disbursing part of them on the basis of regional needs.[19] When the redistribution takes the form of unconditional grants, or payments based on an agreed formula operating more or less automatically, interference with provincial priorities may be negligible. However the effects are quite different when a central government attaches conditions to its grants. In the post-War era, federal government intervention took the form of energetic use of its taxing powers – a relatively painless task in the burgeoning post-War economy – and of making revenues available to the Provinces in the form of conditional grants. By insisting that Provinces, in order to receive grants, contribute a specified percentage from their own revenues, say one-half or one-third, and that they maintain minimum standards of availability and quality of service to the public, the Federal Government used its "spending power" in effect to legislate in areas of provincial jurisdiction: Provinces were forced to pass appropriate statutes and establish the necessary administrative machinery in order to qualify for grants.[20] In most cases, even Provinces that objected strenuously to these federal initiatives had to give in. Thus in 1966–67, the Federal Government introduced a universal medicare program. Ontario in particular, the largest and at the time the wealthiest Province, objected strongly to

[19] Professor Wheare articulates this view, *supra* note 1, at 112, as follows: "One function which the general government of a federation is coming increasingly to perform, rightly or wrongly, is the redistribution of the wealth of the whole country, taking it from more prosperous regions and giving it to the poorer."

[20] For an illuminating discussion of the intensive bargaining and acrimony in the negotiations over shared programs and related financial agreements, *see* R. Simeon, Federal-Provincial Diplomacy: The Making of Recent Policy in Canada 66–87 (Toronto, U. Toronto P., 1972).

certain aspects of the scheme, but it could not afford to "opt out" and lose hundreds of millions of dollars annually in grants by doing so.[21]

Federal government initiatives in raising minimum standards of services across the country have provided substantial benefits to Canadians generally, and have helped reduce regional disparities. But there has been a price paid, both in the heightened tensions between Federal and Provincial Governments as a result of battles over specific programs, and in the pressures exerted against the regions keeping them from developing policies and programs which would more closely reflect their own priorities.

Throughout the years of federal intervention in social services, Quebec was especially sensitive to federal schemes that in its view interfered with the social and cultural fabric of its francophone population. In several important areas it rejected federal programs. The most important was the agreement reached in 1964 that the new Canada Pension Plan should not apply to Quebec and that Quebec should have its own plan, ordering its own priorities.[22] In some cases, Quebec was responsible for "opting-out" arrangements from nationwide social programs whereby Quebec undertook to run its own programs in exchange for unconditional compensation from the Federal Government.[23]

2. Conflict in the Federal System: The Assertion of Provincial Interests and Factors Contributing Toward Centrifugal Tendencies

The introduction of the medical care scheme was the high water mark of federal government activism, and also led to widespread concern among the Provinces. Even the strongest supporters of universal medical care were uneasy about Ottawa's trampling on provincial responsibilities for, and power over, health matters. During the 1950's and early 1960's, before the great debate over medical care, countervailing tendencies had been steadily developing. For a lengthy period, the Provincial Governments had been administering, in whole or in part, most of the programs financed by Ottawa, and on an increasingly large scale as the country's population grew rapidly through heavy immigration and a high birth rate. As Provincial Governments and their specialized agencies grew in size, experience and sophistication, they became less and less willing to defer to the priorities established in Ottawa. Unfortunately for federal-provincial relations, the Federal Government in Ottawa had over many years acquired a paternalistic and patronizing attitude toward Provincial Governments. Whether justified or not at an earlier stage of Canadian develop-

[21] Almost a decade later, the Government of Ontario in 1975, still smarting from the medicare battle, stated: "Provincial priorities are distorted by the availability of federal dollars. The classic example of this ... was medicare. Massive financial leverage by the federal government forced Ontario to join this program even though the Province already had a perfectly satisfactory system of medical insurance." *Ontario's Experience Under Cost-Sharing*, in GOVERNMENT OF ONTARIO, SUPPLEMENTARY ACTIONS TO THE 1975 ONTARIO BUDGET 2–3 (Toronto, Queen's Printer, 1975).

[22] *See generally* R. SIMEON, *supra* note 20, especially at 43–65.

[23] *See id.*

ment, this attitude was not appropriate in the 1960's and was increasingly resented by the Provinces.

As provincial resistance stiffened, Ottawa found it necessary to make compromises. A number of grant programs were converted from conditional to unconditional, that is, a formula was devised transferring specified revenues directly to the Provinces without Ottawa stipulating the criteria for their expenditure.[24] Thus, gradually more decisions were being made provincially on the distribution of social benefits, leading to greater variation in standards and in types of services. In 1960 Ottawa controlled a larger portion of public spending in Canada than did the Provinces, but twenty years later the proportion over which Provinces and municipalities made spending decisions was substantially greater.[25]

This shift did not lead to a lessening of tension between the two levels of government. In fact the conflict increased in intensity as a result of a number of factors.

a) Cultural Diversity: Quebec and the Separatist Movement

At Confederation in 1867, Canada contained two historic communities, the French Canadians who were the majority in Quebec and substantial minorities in Ontario and New Brunswick, and the English speaking settlers from Britain and the United States who were the majority in Ontario, New Brunswick and Nova Scotia. In terms of total population in the four original Provinces, anglophones were in the majority, but not greatly.[26] The fifth Province to join the Union, Manitoba (in 1870), was roughly equally French and English.[27] In

[24] D.V. Smiley, Canada in Question: Federalism in the Eighties 175–78 (3d ed., Toronto, McGraw-Hill Ryerson, 1980).

[25] In 1960, federal government expenditures – exclusive of transfer payments to the Provinces – were 15.0% of the GNP. The provincial and municipal governments each spent 7.3%, for a total of 14.6%. *See* R.M. Bird, Financing Canadian Government (Toronto, Canadian Tax Found., 1979). In 1979, federal expenditures were 15.7%, while the Provinces spent 12.2%, municipalities 8.6%, and a further 2.8% was spent on hospitals, mainly under the control of Provincial Governments. Thus, the last three categories totalled 23.6%, or 50% more than federal expenditures. *See* The National Finances 1980–81 (Toronto, Canadian Tax Found., 1980).

[26] According to Census of Canada 1871 (Ottawa, Dep't of Agriculture, 1873), of the population of 3.5 million, about one-third were of "French origin" and most of the rest were of "British origin." There were over 200,000 of "German origin." However, these figures are difficult to interpret because many groups, living in relative isolation, such as the German and Gaelic communities, spoke neither of the major languages. In addition, "origin" does not necessarily connote mother tongue. Today in Canada there are many "Ryans" and "Burns" whose first language is French and vice versa with francophone surnames. The present-day census practice of asking which language is ordinarily spoken in the home was not used in early census taking.

[27] R. Cook, Canada and the French-Canadian Question 33–34 (Toronto, MacMillan, 1966).

these first years of the new federation, in the eyes of French Canadians the country was the result of a compact between two communities or "nations" as equal partners. However, the demography of Canada tilted inexorably in favor of the English with each new boatload of non-French speaking immigrants and with the entry of each new Province so that the proportion of French Canadians continued to diminish.

In the 1870's, there was a serious rebellion by French speaking "Metis" – half breeds of Manitoba and the Western Territories – led by a visionary, Louis Riel. The rebellion was suppressed by military action and Riel was ultimately hanged for treason in 1885, leaving scars of bitterness and hatred for generations, not only in the West but also in the East, between French Quebecers, who looked upon Riel as a hero, and anglophones, who regarded him as a traitor. The Riel Rebellion provided an excuse for an anti-French movement that led finally to the suppression of the French language in Manitoba in schools and in official usage, and eventually in Ontario schools as well.[28] French Canadians found themselves discriminated against in education and in the use of their language generally.

In Quebec, although French Canadians were always the majority in the Provincial Government, the economy remained dominated by the English-speaking business community in Montreal and Quebec City, as it had been since the British conquest in 1759. French Quebecers were mainly rural and small town inhabitants, devoutly Catholic farmers and artisans; in the urban centers they were factory workers. Their educated elite went into the church, the law and medicine – the traditional professions of a clerical education system – with only a handful joining industry, banking or commerce. Despite their relatively weak position economically throughout Canada and their lack of influence in Provincial Governments outside Quebec, French Canadians did have influence in federal politics. Their traditional support for the Liberal Party permitted it to dominate federal politics in this century and gave French Quebecers a prominent role in Liberal cabinets, including three prime ministers.[29]

French-speaking Canadians were never content with their diminishing role in Canada, nor with the denial by most anglophones of the partnership between two founding communities, but outside Quebec they were mainly passive. Within Quebec, however, they were always concerned to protect their culture and their social values, and, as they witnessed the ebbing strength of French communities outside Quebec, increasingly they thought of their soil as the homeland for all French Canadians. The Federal Government's strongly interventionist role in social programs in the post-War period coincided with a national awakening within Quebec in the 1950's and no doubt helped to galvanize the forces for change. The War, the return of the veterans, a new

[28] *See* Statutes of Manitoba, 1890, 53 Vict. c. 14, and Regulation 17 of the Ontario Department of Education, as discussed in Ottawa Separate School Trustees v. Mackell, [1917] A.C. 62 (P.C.).

[29] Sir Wilfrid Laurier 1897–1911; Louis St. Laurent 1949–57; and Pierre Trudeau 1968–79 and 1980–84.

prosperity and new energetic political leadership led to the overturn of the old, paternalistic political order of the Duplessis Government in the 1959 provincial election. The Government of Premier Jean Lesage, with the slogan *"maîtres chez nous,"* began what became known as the "Quiet Revolution," with a revised modern system of secular education as its cornerstone.

In the 1960's and early 1970's Quebec moved from the status of a relatively poor and under-educated agrarian society (especially when measured against its prosperous neighbor, Ontario), to a more diversified economy with a much better educated population which included a new generation trained in engineering, business and science, as well as in the traditional professions. In fact, the education system became the breeding ground for a mainly young, nationalist movement. A new separatist movement was forged in the heat of federal-provincial controversy, heightened by the desire to wrest control of the provincial economy from the English of Montreal.

Independence for Quebec ceased to be a remote possibility – the dream of an extreme fringe and the nightmare of the majority – in 1976, when Quebecers elected the *Parti Quebecois,* a party committed to taking Quebec out of Confederation as an independent country, which would then form an economic association with the rest of Canada.[30] As we shall discuss below, Canada has undergone a continuing constitutional debate about changes in the Constitution, at least since 1931, and the debate was itself intensified as a result of the 1976 Quebec election.[31] The *Parti Quebecois,* as part of its election platform in 1976, promised not to take any steps toward independence without first holding a referendum on its proposal for "sovereignty-association." It correctly perceived that although the electorate of Quebec was disillusioned with the then creaking Liberal Party (which had ushered in the Quiet Revolution seventeen years earlier), it was not prepared to fracture the nation. The *Parti Quebecois* delayed three and a half years before holding its referendum in May 1980, and even then it had watered down the independence question to one asking only for a "mandate to negotiate" sovereignty-association with the rest of Canada. Furthermore, it promised to hold a second referendum after negotiations and before taking any steps to change the status of Quebec. Despite the great care in framing the question and in re-assuring Quebecers about the mildness of its approach, the *Parti Quebecois* lost its referendum by 60% to

[30] The proposal was first set out by the Party founder and present Premier of Quebec, René Lévesque, in his book, AN OPTION FOR QUEBEC (Toronto, McClelland & Stewart, 1968) (the English translation of OPTION-QUÉBEC (Montreal, Les Editions de L'Homme, 1968)). For a criticism of these proposals as developed subsequent to the election of the *Parti Quebecois see* Soberman, *The Parti Quebecois and Sovereignty/Association,* in THE CONSTITUTION AND THE FUTURE OF CANADA, ch. 5 (Law Society of Upper Canada eds., Toronto, Richard DeBoo, 1978). As of 14 November 1981, the *Parti Quebecois* has dropped the linkage between sovereignty and association and stated its goal as "independence." In January 1985, the *Parti Quebecois* decided to drop "independence" from its platform altogether for the next Provincial elections. This decision caused a substantial faction to leave the Party.

[31] *See infra* § II.D.

40%. We shall return to subsequent developments below, but it is enough for now to note that these events in Quebec also contributed to two other important elements in Canada's evolution, namely the conflict about the distribution of the benefits of being a member of the Canadian federation; and the growing discontent in the Western Provinces, above all in oil-rich Alberta.

b) Regional Disparities and Discontent

i) The distribution of benefits and inter-provincial tension

Built into the Constitution Act was a recognition of regional disparities in the new country. The Act provided for payments to be made by the Federal Government to the Province of New Brunswick,[32] and for other "equalization payments" designed to help the poorer Provinces.[33] Redistribution was thus an integral part of the Canadian federal system, an expectation as a matter of right. Implicit in such arrangements are two equations about the federal union: poorer Provinces surrender their independence as separate economic and political units in return for becoming part of a larger entity and for being looked after by that new entity in terms of minimum levels of economic protection; richer Provinces also surrender their independence as well as contributing tax revenues for transfer to poorer members in return for becoming part of the larger entity – which incidentally they are able to dominate – and for the enlarged protected market in which to sell their goods and services.

The inevitable tensions between richer and poorer regions take many forms, but two principal debates may be labelled the "balance sheet" and the "influence" controversies. In the balance sheet debate, the poorer Provinces often complain that they receive too few benefits and are exploited by the richer members. They also complain that they have too little influence in national decision-making, but at the same time they are aware that the benefits of the system of redistribution are essential to their well-being if not to their survival. (Even this last point is vigorously contested by the *Parti Quebecois* which has argued that Quebec has not benefitted from Confederation and contributes more than she receives.) Thus, although receiving Provinces fight hard for every benefit, only rarely have they questioned the fundamental federal arrangements.[34] Even so, almost every round of negotiations between the Provinces and the Federal Government on shared programs and transfer payments has been a highly contentious struggle, culminating in the Federal Government making its final "offer" – really a decision on how far it is prepared to go – which the Provinces must accept, sometimes with vehement criticism. Unre-

[32] Constitution Act s. 119.

[33] Constitution Act s. 120.

[34] In 1868, barely after the birth of Canada, Nova Scotia petitioned London for permission to secede from the federation. Nearly two-thirds of Nova Scotia's voters supported the petition, but it was ignored by London on the basis that only the Federal Government could act on behalf of the country. *See* Matas, *Can Quebec Separate?*, 21 McGill L.J. 387, 391–92 (1975).

strained competition for increased shares by the Provinces is encouraged by the Federal Government's claim to speak for the nation as a whole, thus freeing the Provinces to pursue self-interest alone.

Since the preponderant weight of population has always been in the two large central Provinces of Ontario and Quebec, the debate over dominant influence in federal affairs has been part of Canadian internal conflict from the beginning. Ontario and Quebec together have contained at least 60% of the total population and have generally been able to control Parliament. The other eight Provinces have harbored varying degrees of resentment, probably always stronger in the West than elsewhere. Western resentment has been related to the fact that two of Canada's principal exports, grain and forest products, have come mainly from the West, generating much of the country's foreign currency balances, but Westerners have been required to pay much higher than world market prices for goods manufactured in Ontario and Quebec behind tariff barriers protecting generally small and inefficient industries. Although similar arguments are made by the Atlantic region they have been more muted. There, the main export industry, fishing, is proportionally smaller and the region is poorer than the West, making it more dependent on federal government support.

The inability to change the balance of power in Ottawa and to get what Westerners believe would be a fairer deal has been at the core of a Western sense of injustice for many years. Thus, in addition to the tension between Ottawa and Quebec, Canada has been subject to increasing internal conflict between the central Provinces and the periphery.

ii) The concentration of population and power: Western discontent

Before World War I, the western plains of Canada were a sparsely populated hinterland – in effect, eastern Canada's colony to be developed and exploited. From the vast area that formed Rupert's Land and the North-Western Territory, the Provinces of Alberta and Saskatchewan were carved out as late as 1905.[35] With their semi-colonial status, financed and directed by Eastern business interests and the Federal Government, Western settlers harbored growing resentment after World War I. However, the Great Depression compounded by the disastrous effect of a prolonged severe drought across western North America in the early 1930's, created great economic hardship for Western Provincial Governments as well as for their citizens, leaving the region heavily dependent on federal aid. Just as the recovery process began and federal-provincial relations were being questioned anew,[36] World War II broke out, once more pushing the questions into the background.

[35] The Alberta Act and the Saskatchewan Act, St. of Can. 1905, 4–5 Edw. VII c. 3 and c. 42 respectively.

[36] *See* REPORT OF THE ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS (Ottawa, 1940) [the *Rowell-Sirois Report*] examined in detail in D.V. SMILEY, THE ROWELL-SIROIS REPORT (Toronto, McClelland & Stewart, 1963).

In 1947, substantial petroleum finds in Alberta ushered in an era of continuous Western growth and prosperity that lasted until the early 1980's. World War II had also transformed Canada into an industrial nation, although it also continued in its traditional role as a supplier of agricultural products and raw materials. Post-War industrial prosperity was centered in Ontario, permitting it to maintain the highest standard of living in the country into the mid-1970's, despite the West's steady progress. Ontario remained the principal net contributor to transfer payments which found their way to the West as well as to the Atlantic region. However, first British Columbia and then Alberta entered the ranks of the wealthy, becoming net contributors to the federal treasury and helping in the redistribution to poorer regions.[37] Reluctant acquiescence in domination of the country by the wealth of Ontario was transformed into increasing hostility as the Western Provinces grew in population and economic strength but without gaining a commensurate increase in influence upon national decisions emanating from Ottawa.

Two developments acted as catalysts to raise dramatically this East-West conflict to new levels. First, the rapid rise in the price of petroleum by OPEC following the Arab-Israeli War of October 1973, changed Alberta reserves from being a useful long-term national asset, but one requiring a market protected from cheaper Persian Gulf and Venezuelan supplies,[38] into an immensely valuable and profitable short-term asset. As world petroleum prices rose sharply, the question also arose of how the benefits from Alberta oil were to be divided. By keeping the Canadian domestic price well below the world market price Canadians were reaping a valuable economic benefit. The Government of Alberta, and most of its citizens, viewed the lower domestic price as a tax on Albertans for the benefit of the rest of the country, and especially for wealthy Ontario – a tax over which they had no effective voice although the asset came from their land, which under Canadian law belongs to the Province and those who own it pursuant to provincial laws.[39] Albertans have not claimed that profits earned on these valuable assets should not be taxed reasonably by the Federal Government, nor has the Federal Government claimed that it could or should extract every penny of that profit from Alberta and distribute it among all Canadians. However, the issue is complex: what percen-

[37] For a general discussion of the changes in income and wealth, *see* J. Maxwell & C. Pestieau, Economic Realities of Contemporary Confederation 59–76 (Montreal, C.D. Howe Inst., 1980).

[38] The national energy policy of the 1960's and early 1970's prohibited the transportation and sale of oil imported into eastern Canada to points west of the Ottawa valley. Thus, the Canadian industrial heartland of southern Ontario was required to buy more expensive Alberta oil. The regulations amounted to an internal trade barrier, upheld by the Supreme Court of Canada in Caloil Inc. v. Attorney-General for Canada (1971), 20 D.L.R.(3d) 472.

[39] Constitution Act s. 109. The four western Provinces did not acquire mineral rights when they entered the Confederation, but were put in the same position as the original Provinces by an amendment to the Constitution Act by the British Parliament in 1930. *See* Constitution Act, 1930, 20–21 Geo. V c. 26 (UK).

tage should go to the enterprises which have developed the resources, to the Alberta Government as royalties, to the Federal Government in tax revenues, and to Canadians generally in the form of lower fuel prices? These issues have been the single greatest cause of conflict between Federal and Provincial Governments in recent years. The gap between the parties was finally resolved after sixteen months of intensive bargaining, in September 1981.[40] But the underlying tensions still remain in 1985, in negotiations between Alberta and the new Conservative Government in Ottawa.

Non-renewable natural resources have special qualities that exacerbate the current conflict. We may note, first, that people in primarily prosperous industrial regions regard themselves essentially as traders; they buy raw materials or semi-finished goods at the best possible prices in world markets and sell their products at the highest prices obtainable. They need an assured minimum size of market to cover their capital and overhead costs and to provide sufficiently large production runs to keep prices reasonably competitive. A Province like Ontario has depended on a protected domestic market to permit its industries to flourish. Accordingly, it can view large transfer payments of revenues to poorer regions as helping them to buy Ontario products – in effect recycling the tax dollars to Ontario in the form of the price received for those products. Extra productive capacity can then be used to sell in world markets. In the eyes of the trader the equation is a continuously adjusting one, and is one a middleman can accept quite dispassionately. At least until the current decade, this approach has always assured industrialized regions of substantial job creation and relatively high levels of employment.

By contrast, non-renewable resources, such as petroleum and natural gas – about whose date of exhaustion (and within the foreseeable future) more or less ascertainable mathematical predictions can be made – create a quite different response in the inhabitants of the region, who regard the resources actually found in their soil as part of their patrimony. The extraction cost of resources frequently bears no relation to the world market price; there is no need for a guaranteed domestic market to achieve economies of scale; and to sell at home for less than the world price is to confer a benefit directly on domestic consumers in other regions with no recycling of the savings made in those other regions. In fact, poorer regions will probably use the savings to buy goods from the industrial regions, and industrial regions will use the savings to make their goods more competitive in world markets. In addition, resource industries like those in petroleum and natural gas are capital intensive and create very few new jobs. When the resources have been exhausted, the re-

[40] The agreement between the Federal and Alberta Governments was to lead to a series of substantial price increases semi-annually for the duration of the five-year agreement. Subsequently, similar agreements were reached with the smaller oil producing Provinces of British Columbia and Saskatchewan. The 1983 unpredicted drop in world oil prices has stirred new controversy by calling the agreements into question.

gion may well find itself a "have-not" in relation to the wealthy industrialized regions.

For these reasons, it is not surprising to find Western Canadians possessive, indeed emotionally possessive, of their energy resources, and bargaining for their sale with much zeal and tenacity. When added to the lingering bitterness about their former colonial status, the mixture has led to a smoldering resentment that has made negotiations much more difficult than one would expect in inter-government bargaining.

Second, the victory of the *Parti Quebecois* in 1976, made the unthinkable – dismemberment of the country – not only conceivable, but no longer a remote prospect. Canadians had to come to terms with alternative scenarios.[41] Thinking the unthinkable with regard to Quebec made it important to inquire whether after separation the rest of the country would, or even could, hold together as a single nation, whether it might divide into two or more nations, or whether part or all might seek to join the United States. It was natural, then, for some Westerners to ponder the future of their region: could it form a separate nation, with or without Ontario, or the Atlantic Provinces? Moreover, the balance sheet argument between Quebec and Ottawa – whether Quebec has benefited financially from being part of Canada – could easily be turned into a parallel argument between western Canada and Ottawa. In the 1980's the answer seems clear enough: the prodigious natural wealth of the West will keep it in the ranks of a large net donor to Ottawa. Putting aside the complexity of such issues as total population and markets, industrial balance and the vulnerability of a smaller nation, it may seem reasonable to suggest that the four western Provinces would be economically better off as a separate country than as a part of Canada.

All this is not to say that Westerners do not consider themselves Canadians,[42] nor that there is a strong separatist movement about to take power in some of the Provinces. Rather it is to suggest that with the Quebec controversy temporarily in the background, and given the unquestionable fact that the West has immense wealth but little influence in Ottawa, Western resentment and demands for a better deal – regardless of their high comparative wealth – have risen to a new order of magnitude. Indeed, Westerners argue, *because* they contribute so much to the nation's wealth they ought to have a much greater influence on both the levels and the direction of national expenditures. An ironic twist to the large "no" vote in the Quebec referendum of May 1980 was that it temporarily took the pressure and the limelight from the Quebec issue, and focused attention instead on the long repressed hostility of the West.[43]

[41] For an extensive discussion *see* MUST CANADA FAIL? (R. Simeon ed., Montreal, McGill-Queen's Press, 1978).

[42] Since the mid-1970's opinion polls have consistently shown that the overwhelming majority of Western residents consider themselves Canadians first in spite of their increasing anger with the Federal Government.

[43] Immediately after the Quebec referendum, apart from the continuing constitutional debate, described *infra* in § II.D., the main story dominating the press, radio

3. Reconciling the Provincial and the National Interest: The Accomplishments of the Federal System

The problems discussed above must not be minimized; neither should they be taken as the sum of Canadian federal experience. Readers will know that since World War II Canada has enjoyed one of the highest standards of living in the western world. It is one of the handful of nations that is a net food exporter and is in net terms also an energy exporter. Judged by the usual criteria of quality of life – infant mortality rates, longevity, education levels, crime rates, democratic institutions and human rights – Canadians enjoy an enviable level of well-being. Despite its shortcomings and crises, Canada has managed to provide these substantial benefits for its citizens and to make a contribution in alleviating food shortages and other problems in the world. The system of government has had its share of successes.

Perhaps the most notable success, especially in the light of the country's enormous distances and widely dispersed population through regions of greatly different levels of prosperity, is in the delivery of social services and the reduction in regional disparity. Canada has a national system of unemployment insurance, which has alleviated the worst effects of employment cycles. The system was made possible by an amendment to the Constitution Act – by unanimous agreement of the Provinces and the Federal Government – in 1940.[44] The country also has universal medical care which, in spite of the controversy that raged at the time of its introduction and problems of cost related to economic recession, has become a cornerstone of the health service system, and which no Provincial Government has proposed to dismantle. There is an extensive program of regional development to assist poorer regions of the country but, like such schemes in almost every country, success has been highly variable and often disappointing. However, the system of transfer of revenues through federal taxation and redistribution to the least fortunate Provinces has been a substantial success. The transfers occur on a large scale both directly through payments to citizens of unemployment benefits, family allowances, support allowances during manpower retraining programs, pensions, and other programs, and indirectly through payments to Provincial Governments which then provide health services, educational facilities, welfare payments and a host of other services that would be beyond the capacity of the weaker provincial economies. The difference in per capita incomes between the richest and poorest regions of Canada, although certainly still substantial, has been significantly reduced through the cumulative effect of these programs. In Canada the difference in income levels between Newfoundland, the

and television until the settlement fifteen months later was the acrimony between Alberta and the Federal Government over failure to reach an energy pricing agreement.

[44] By the Constitution Act, 1940, 3–4 Geo. VI c. 36 (UK).

poorest region, and Alberta, now the richest, was in 1979, about 1.5 to 1,[45] whereas in the European Community, among the original six Member States, the difference between Calabria and the Hamburg region is between 4.4 to 1 and 6.0 to 1.[46]

While it may be true that the reduction of disparities is easier to accomplish in a population of twenty-four million than in one ten times as large, the size of the problem is not the sole or even dominant factor. For instance, in the United States the difference in income levels between Mississippi and Connecticut is about 2.0 to 1.[47] It is apparent that the revenue raising ability of the Federal Government (about 40% of the GDP of Canada) and its redistribution role (about 46% of those revenues) must be very important factors.[48] By comparison the budget of the European Community is about 1% of the Community's GDP.

Material success alone cannot be an adequate measure of accomplishment; as grave as the present conflict in the Canadian federal system is, it has nonetheless taken place within the framework of democratic government. Provincial and Federal Governments have regularly to "go to the people" to have their mandate renewed, and they have frequently been replaced, with the striking exception of Ontario, where a shrewd Conservative Party has managed to retain power – sometimes as a minority government – for more than forty years. It is fairly rare for meetings of First Ministers in successive years to take place without some change in faces. In terms of electoral processes at least, Canadians appear to accept their divided loyalties between Province and country with relative ease. Although close identification of citizens with provincial interests seems to have grown markedly in the 1970's as a result of increasing regional conflict, nevertheless the proportion of voters in federal elections, always above 70%, is higher than in most provincial elections and much higher than in United States federal elections.[49] This voting pattern is quite remarkable when we consider the immense distances between seats of government, both federal and provincial, and the majority of the Canadian electorate. It is paradoxical that at the same time the country is suffering from a deep-seated malaise and "identity crisis," with federal and provincial politicians waging to battle for the hearts and minds of its citizens.

[45] *See* INCOME DISTRIBUTION BY SIZE IN CANADA, 1979 CATALOGUE 13–207, at 94 (Ottawa, Statistics Canada, May 1981). The Constitution Act, 1982, s. 36 formally declares a commitment toward equalization of wealth among Canada's Provinces.

[46] *See* 1 REPORT OF THE STUDY GROUP ON THE ROLE OF PUBLIC FINANCE IN EUROPEAN INTEGRATION 27 (D. MacDougall *et al.*, Brussels/Luxembourg, EC Commission, Office for Official Pubs. of the EC, 1977) [the *MacDougall Report*]. The differences in interpretation caused by lack of a common currency and problems of comparative purchasing power make these figures less precise than in a federation such as Canada.

[47] *See id.* at 27.

[48] *See* R.M. BIRD, *supra* note 25, at 19.

[49] In the last several presidential elections in the United States the proportion of the electorate who voted has not exceeded 63%.

II. Issues of Federal Democracy: Popular and Provincial Participation in Government at the Federal Level

A. Popular Democracy and the Problem of Divided Loyalties

The question of divided loyalties is not unique, of course, either to federations or to governments generally; it arises in many relations between individuals as well as between groups. It presents a continuing, indeed an insistent, problem for federations and looser forms of association such as the European Community, because the two levels of institutions are constantly making independent demands upon their citizens, sometimes complementary but more often competing. Governments of the states and Provinces in the U.S. and Canada, and of the Member States in the EC, are relatively close to the people and have an easier task in laying claim to the loyalty of their citizens. In many instances, these governments long antedated the creation of their respective unions and thus had a prior historic call on their inhabitants (although this is not true of most western states and provinces of North America, created by acts of their central governments).

Institutions at the center start from a more difficult position, since they are more remote from the citizens of the various regions, and usually well aware of the dangers. Indeed, during the days of the American Confederation it quickly became recognized that the remoteness of the new Government in Washington from direct involvement with the people of the various states would ultimately be a fatal flaw: hence the necessity of the new Constitution of 1787. The higher the degree of integration and decision-making at the center, the more likely it is that those decisions will ultimately affect citizens in ways they can recognize as coming from the center. However, there can be a substantial degree of integration – quite effective in dealing with enterprises and in influencing the economy more generally – without it being readily apparent to citizens. To a considerable extent this appears to be the situation in the European Community, where much of substance dealt with by the Commission and Council has no direct recognizable effect on the lives of its citizens. Unless integration has a solid foundation in the perception and approval of citizens of member states, a union is likely to remain unstable because member state governments will retain the practical option of withdrawing with relative impunity; a government can seriously contemplate unilateral withdrawal when it does not fear defeat at the ballot box as a result.

Central governments in federations seek quite naturally to compete with states or provinces by establishing direct communication with citizens, and by conferring benefits to offset the inevitable negative effects of such burdens as taxation or liability to compulsory military service. Effective participation in decision-making through elected representatives is not so much a benefit as a precondition to a satisfactory relationship between citizens and central institutions. But much more is also needed in the form of material benefits recognized by citizens as coming from the center. Federal governments take advantage of every opportunity to communicate directly with citizens in every re-

gion and to emphasize how much they contribute to the local economy. In the U.S. and Canada they seize every chance to display prominently their contributions in public works, with large signs at the sites of new housing projects, highways, post offices and other federal buildings. Similarly, they are anxious to confer financial benefits directly on taxpayers by sending their own checks in payment of pensions, family allowances and other types of social welfare. In Canada, there have been many battles over who signs the checks, the Federal or Provincial Government. The Federal Government remains reluctant to make block-grant payments to Provinces in any field where Provinces in turn send out their own checks to citizens.[50]

In spite of Canada's relative success in reducing regional disparities, and of the initiatives of the Federal Government in securing social benefits for Canadians, the conflicts discussed above[51] have dominated Canadian politics and aggravated federal-provincial rivalry. These conflicts alone seem inadequate to explain Canada's current malaise: we need to look further, at some of the shortcomings in the background and development of the constitutional system.

B. Representation of Provincial Interests in the Central Governmental Processes: Institutional Deficiencies

Combining English parliamentary democracy and federalism is a formidable task. The supremacy of Parliament is hard to reconcile with a vertical distribution of powers, each Government Federal and Provincial, being supreme in its own spheres. Even in 1867, it was apparent that clearcut lines between two jurisdictions within the same territory would frequently be impossible. Part of the solution to this problem in the Constitution Act was to create a hierarchy, giving the Federal Government the senior power to sort out problems through a general residuary power[52] and the power to disallow provincial legislation.[53] As we shall see,[54] the courts quickly became umpires of the distribution of powers between the two levels of government, although initially they trod very cautiously, permitting each level of government to legislate in related areas on appropriate "aspects" of problems.[55] However, since jurisdictional problems are inherent in the system and interfere with the ability of each level to perform the functions it is assigned under the Constitution Act, clearly it is important that jurisdictional disputes should not always lead to a contest before the

[50] The trend has been running against the Federal Government. *See, e.g.,* R. SIMEON, *supra* note 20, at 112.

[51] *See supra* § 1.B.2.

[52] Constitution Act s. 91.

[53] *See supra* notes 9–10 and accompanying text.

[54] *Infra* § III.B.

[55] *See, e.g.,* Citizens Insurance Company v. Parsons, (1881–82) 7 App. Cas. 96 (P.C.); Hodge v. The Queen, (1883) 9 App. Cas. 117 (P.C.).

courts. Some form of political dispute resolution mechanism is needed to allow conflict to be resolved in the early stages of the law-making process. In any event, there are important issues which are not justiciable: the level of taxation, the proportional distribution of revenues among the regions, the agreement on public priorities, are matters for debate and negotiation, rather than for an adversary procedure before a tribunal.

1. Regional Representation in Parliament: The Role of the Upper Chamber

A legislative forum that gives representation to regions as opposed to representation by population, is usually found in the upper chamber of a federation.[56] However, an upper house which is not responsible to the electorate and which can defeat the programs of the governing party elected to the house of commons of a modern parliament, is at odds with the theory of parliamentary responsibility. In a unitary state, such as the United Kingdom, the defeat of the governing party either through a successful motion of no-confidence or through the defeat of a major bill, is expected to lead to dissolution of the house and the calling of an election where the electorate can decide who shall form the new government. Australia has a modified system that tries to take this problem into account in the way the Upper House is elected and responds to different majorities in each House, but the system has not been altogether successful.[57]

In Canada, the Constitution Act also provides for an upper house, the Senate, but unfortunately it suffers from virtually fatal defects. First, while it does give added weight to regional representation, it still gives so many seats to the central Provinces that they are dominant even in the Upper Chamber.[58] Second, senators are neither directly elected by the people of the Provinces nor indirectly elected by their Provincial Governments; rather they are appointed for life by the Federal Government, generally following the Party that is in power at the time of the appointment. Therefore senators tend to follow party interests rather than regional interests – and they have no institutional connection with their Provinces or the electorate. Bargaining between the Federal Government and the Provinces – the substance of federal-provincial relations – is entirely outside the purview of the senators. Their contribution is negligible. Third, because they are appointed (and regardless of the undoubted quality of some appointments), senators are generally regarded as lesser politicians who are rewarded for long service to their parties by appointment to the Sen-

[56] The U.S. Senate is the paradigm, where each state has two senators regardless of population.

[57] Resolution of deadlock between the two popularly elected Houses in Australia is achieved by "double dissolution" requiring a new election for both Houses. *See* the Commonwealth of Australia Constitution Act, 1900, s. 57, 63–64 Vict. c. 12 (UK). On three occasions deadlock has produced varying degrees of constitutional crisis – in 1913, 1951 and 1974.

[58] Ontario and Quebec each have 24 senators – *i.e.*, 48 out of a total of 104 senators. Constitution Act s. 22.

ate. The Senate's legitimacy, even as a chamber of "sober second thought," is limited and frequently under attack. Generally speaking, the Senate does not hold up important legislation even in the spheres where it may do so under constitutional convention. The Senate simply is not an effective body to resolve problems that arise between the Federal Government and the Provinces.

It may have been possible through the evolving conventions and constitutional practices – as is true of so much of parliamentary government – for alternative forms of inter-governmental collaboration to develop and to remedy this serious deficiency. Unfortunately, no satisfactory mechanism has developed. For many years there have been numerous inter-governmental committees established to study specific problems and to make recommendations.[59] In addition, there are more or less regular meetings of First Ministers of the Provinces among themselves and with the Prime Minister, as well as meetings among federal and provincial ministers charged with specific responsibilities such as transportation, health and regional development. But all these many contacts share an ad hoc quality; they deal with specific problems that have already arisen, and have almost invariably led to sharp differences of view. Rather than resolving conflict they frequently exacerbate it. Participants in successive meetings are rarely the same; they do not have a common background nor are they equally familiar with the problems on their agenda; and they are frequently openly suspicious of one another.[60] There is no permanent joint secretariat to provide continuity, to prepare background studies and anticipate problems, and to encourage early input from the Provinces in order to influence federal thinking and planning. Generally speaking, the Federal Government does its own background work and provides the agenda and the questions for federal-provincial meetings. In short, there is no institutional mechanism to mediate among divergent views, to find common ground and to encourage substitution of consensus for confrontation as exists in the European Community.

This institutional deficiency was perhaps not as serious in times of a simpler economy, when the Federal Government was clearly the senior partner and the Provinces were expected to follow – and when the Federal Government sometimes did overrule provincial priorities directly by disallowing legislation. But in the present complex economic conditions, with substantial areas of conflict as described above, the deficiency has become very serious indeed. While it is true that the presence of appropriate, effective machinery is by itself no assurance that disputes will be satisfactorily resolved, in the absence of any useful machinery the likelihood of resolving serious conflict is reduced almost to a level of despair. That is where the current impasses in Canadian federalism appear to be.

[59] *See, e.g.*, D.V. Smiley, *supra* note 24, at ch. 4.

[60] For an earlier, rather more optimistic view, *see* R.E. Simeon, *supra* note 20, at 124–45.

2. Federal Parties and Regional Representation in the Lower Chamber

Western discontent and the institutional deficiencies we have examined might not have developed to their current degree of intensity if the keystone of federal government in Canada, the House of Commons, adequately represented the diverse interests within the country. A parliamentary system of government is a remarkably flexible tool: not only do elected members from various constituencies across the nation represent their constituents in debate in the House of Commons, in committees and in their Party caucuses, but they may also be appointed to the cabinet where legislative policy is formulated and the final word on the administration of programs is decided. The Party in power has traditionally selected cabinet ministers with regional distribution in mind as a major factor. Thus, for example, a Party forming a new cabinet might well appoint a minister of fisheries from a Province such as Nova Scotia – which has a primary concern in fisheries policy – although the party had itself fared very poorly in electing members from that Province. Of course, the Government would like the opportunity to choose the most suitable candidate for the cabinet post from among several sitting members, but if necessary it may, even reluctantly, select the lone elected member of the Party from that Province. If that member is less competent and experienced than the Government would wish, at least it can be assured that the views and concerns of the Province will be directly available to the cabinet from an elected member.

Until the post-World War II era, each of the two national Parties generally succeeded in returning members to the House of Commons from every Province, and the Government of the day could form a cabinet with representation from every part of the country. It was rare, in any of the more populous Provinces, for the Opposition Party to make a "clean sweep" in an election, especially when it failed to gain or keep power nationally. Under these conditions, whatever the nature of federal-provincial controversies, a Federal Government with nationwide cabinet representation could reasonably claim to speak for the national interest.

Since the War, two developments slowly but steadily altered the picture in fundamental ways. First, the Conservative Party,[61] identified as it was with the anglophone majority outside Quebec and almost invariably much weaker in Quebec than the Liberal Party, had its minority position gradually eroded.[62] In the 1970's it never had more than three members in Quebec's federal representation of seventy-five seats. With over 25% of the total population, Quebec would normally expect a substantial number of cabinet positions for its members. In the short-lived Clark Government of 1979–80, cabinet representation for Quebec was a serious problem and probably contributed to

[61] In the 1950's the Conservative Party changed its name to the Progressive Conservative Party.

[62] In the 1980 general election only one member of the Party was elected to Parliament from Quebec. However, in the 1984 Conservative victory, the Party elected 58 out of 75 members from Quebec.

that Government's failure to understand how to appeal to Quebecers, and this in turn further eroded the position of the Party there.[63] Second, the Liberal Party suffered a similar demise in the four western Provinces. Indeed, in Alberta – the focal point of the federal-provincial controversy over energy pricing and control of natural resources – the Liberals have failed to elect a single member since the 1960's! Except for a short period when a sitting Conservative member crossed the floor to join the Liberal cabinet,[64] from 1972 Alberta was without a federal cabinet member in the Liberal Government,[65] which held power continuously, apart from the few months of the Conservative Clark Government, until September 1984. The fact that the Liberal Party always polled more than 20% of the popular vote did not reconcile the Conservative majority in the West to their exclusion from the corridors of powers, and from the influence on policy that even a few ministers from their region might have.

The Atlantic region, with a total population of two million, and thirty-two seats in the House of Commons, has continued to elect members from both major Parties and has not had a great influence on the outcome of recent elections. The balance of power rested in Ontario, the most populous Province with ninety-five seats, over one-third of the total of 282 seats. Although the Conservatives had substantial strength in Ontario, the Liberals, so long as they managed to hold about half the Ontario seats combined with their overwhelming majority in Quebec, were able to win an overall majority in the House of Commons and form the Government. Increasingly, Westerners viewed the Federal Government not as a legitimate representative of the national interest, including Western interests, but a form of Eastern, and more especially Ontario-Quebec, domination of the country at the expense of the western Provinces. Of course, the obverse side of the coin, if the Conservatives should win power, was the fear in Quebec of an anglophone dominated government shutting out Quebecers.

The failure of the two major Parties to remain truly national – each having become overwhelmingly successful in one key region and being effectively shut out in another – exacerbated all the conflicts we described earlier. The Parties seemed incapable in the immediate future of remedying the situation by re-establishing themselves in all regions, at least under the present system of single-member constituencies. As a result, there were a variety of proposals for modified proportional representation, assigning additional seats in each region to Parties which win substantially fewer seats in the Commons

[63] Senators may be named to the cabinet in order to improve regional representation, but for the reasons already discussed (*supra* text accompanying notes 58–59) they lack legitimacy as representatives of regional interest.

[64] In 1978 Jack Horner resigned from the Progressive Conservatives and joined the Liberal cabinet. However, he was defeated when he ran as a Liberal in the 1979 general election.

[65] No Liberal members were elected in the general elections of 1972, 1974, 1979 and 1980.

than their proportion of the popular vote would indicate.[66] Although there was virtually universal concern about the current electoral patterns none of these proposals has yet been given serious consideration and support by a major Party. However, the problem has been alleviated temporarily by a sweeping victory of the Conservative Party in September 1984, when it won a majority of the seats in every Province, including Quebec, and can claim to speak with a national voice. It remains to be seen whether the change in electoral patterns is ephemeral.

C. A Comparison with the European Experience

The institutional deficiencies and the regionalization of Canada's major Federal Parties, just described, led to a decline in the legitimacy of federal powers. While constitutionally crucial powers of decision remain with the Federal Parliament, the exercise of those powers is under continual attack by the Provinces. We can find here an almost inverse comparison with decision-making in the European Community.

In Europe, the main skepticism concerns lack of central decision-making power. The convention since 1966 of recognizing the veto of each Member State in matters of essential interest to it, and the difficulty of achieving a consensus on such major issues as monetary policy, are seen as continuing unanswered questions about the long-term survival of the Community.[67]

On the other hand, where the Canadian federation has failed miserably in recent years, in terms of establishing a consensus-building infrastructure between Federal and Provincial Governments, the Community has learned to compensate, at least in part, by developing a highly sophisticated infrastructure among the Member States and Community institutions.

An infrastructure takes time to develop and would have existed only in a fairly rudimentary form in the early years of the Community. However, in those years there were unique intangibles to guide the Community over its initial hurdles. The founding of the Community was an act of creative statesmanship of the highest order. It required men of the stature and vision of a Schuman and a Monnet, and it required too, the background of World War II and the determination to link France and Germany in an indissoluble union in order to make future wars between them impossible. The early leadership, the momentum and excitement created by ratification of the Treaties, the optimism in rebuilding Europe from the ashes of the war, all these things helped the Community through its initial problems. In addition, the Treaty of Rome

[66] *See, e.g.*, W.P. IRVINE, DOES CANADA NEED A NEW ELECTORAL SYSTEM? (Kingston, Queen's Univ., 1979).

[67] For further discussion of the European position *see generally* Krislov, Ehlermann & Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, *infra* this vol., Bk. 2.

gave fairly precise instructions for the first and second stages of integration. The tasks were easier within that framework.

Meanwhile a new Community bureaucracy was growing and a new transnational class of civil servants was being established. In its upper ranks a number of the Community's officials already knew each other through contact within the European diplomatic network, before, during and after World War II; distances between western Europe's capitals even before the age of air travel were generally not more than a few hours by comfortable train. Any initial wariness or hostility that might exist when parties approach a new area of potential conflict is allayed when the negotiators have had years of professional and social contact; each new round helps build mutual confidence on a personal basis, so important in the ultimate resolution of conflict.

We should note that a number of those civil servants who chose to remain in Brussels beyond a two or three year posting were generally committed to the "European Ideal." Especially in the Commission, where by express terms of the Treaty members are formally committed to an independent position and to work for the welfare of the Community as a whole,[68] senior officials are in an environment that encourages them to work toward common positions with colleagues from other Member States. Of course, it must be remembered that lifelong national loyalties do not disappear; at the very least they provide the values and frame of reference affecting individual positions taken in controversial problems. Accordingly, while these able civil servants acquire a remarkably broad European view of their tasks, they are by no means detached, altruistic idealists. They retain their contacts at home with their peers in national governments.

Over the years there has grown a network of senior Community servants who know each other well and who have high level contacts at home. Now that the Community is well into its third decade, a number of senior officers, after spending as many as a dozen years or more in Brussels, have returned to positions of high responsibility in their national capitals. They have an intimate understanding of (and usually a sympathy for) the Community and its problems. And they are just a telephone call away from their former colleagues in Brussels, available to discuss sensitive issues and provide realistic assessments of likely reactions of their Governments to particular proposals.

Unlike traditional cabinet secrecy, jealously guarded by parliamentary governments in Canada, the Community information system is remarkably open: officials at every level talk freely to each other and to interested visitors about the Community's programs, proposals, problems and shortcomings. Indeed, there is some complaint that the system is too open; there are times when a certain amount of discretion is useful especially at the early stages of development of new proposals.

The system of broad consultation and easy communication among Community officials and with officials of Member States, allows many influences

[68] *See* Merger Treaty art. 10(2).

to be brought to bear early in the formulation of new proposals by the Commission. The reactions and suggestions of Member State Governments, of experts and of other interested parties such as unions and management in various sectors of the economy, sometimes cutting across national borders, are communicated to those persons formulating policies, and can influence them well before ideas are hardened into specific policies and plans.

The strength of this open system is in its effectiveness as a consensus building mechanism, providing easy access to information and enabling interested parties to view the process as it slowly unfolds and to participate in it at every stage. Those who participate acquire an investment in the outcome of a proposal from long association to ultimate decision. Of course, it is that ultimate decision which justifies the lengthy, often painfully slow process; the parties are aware that they are not simply playing a part in a game of international diplomacy. The consultations, research and debate, the negotiations and compromises are all undertaken with a view to reaching a consensus on as large a portion as possible of a particular project – so that when eventually it is sent to the Council of Ministers for decision, the gap between conflicting sides will have been narrowed to a minimum, permitting the needed compromise to take place at the highest political level. Such an elaborate game would not be sustainable as simply a consultation process; the main actors need to be motivated by the belief that all their efforts are part of, and preliminary to, the making of significant decisions.

In this view of the system, the Community infrastructure is not merely supplementary to the tasks of the Commission and Council, easing their decision-making processes. Rather, it has become essential to the processes – without it there would be little chance of major decisions being taken. It may even be argued that because the Council of Ministers is inadequate as a central decision-making body, the infrastructure *had* to be developed to compensate for the inadequacy. Otherwise there would likely have been a breakdown of the Community years ago.

This rather lengthy description of Community infrastructure development is, of course, only part of the story. The evolution of the Committee of Permanent Representatives and the Permanent Delegations in Brussels, and the incessant round of contacts demonstrate a functional evolution of institutions to cope with deficiencies in the Treaties themselves. It would be misleading to suggest that these informal arrangements are a complete substitute for a more effective decision-making institution at the center. Clearly, they are not: with the best of will, with persistence and intelligent application of an essentially mediative process, the gap between some parties frequently remains too wide to be bridged by a Council dependent on reaching consensus.

Nevertheless, this Community evolution of informal processes stands in stark contrast with the deterioration in communications and the widening gap between Federal and Provincial Governments in Canada. It can be asked, "If the Community, with a much lower degree of centralization can learn to compensate in informal ways why cannot Canada learn to do so?" I believe there are two responses which help explain in part Canada's current dilemma. First,

the will must be present in the leadership of a nation, and for reasons that are complex and little understood Canadian leadership has not placed a high value on building consensus; the will simply has been lacking. Second, the dynamics are different in Europe and Canada: Europe is still building, however slowly and painfully, some unifying structures – movement, even if barely perceptible for prolonged periods, is toward the center; the forces at work in Canada have been primarily centrifugal – movement is toward greater decentralization and toward weakening central structures. The pity is that the increasing complexity and interdependence of levels of government within an industrial nation cannot afford the luxury of noncollaboration in solving major economic and social problems; in Canada's case it aggravates existing tensions and increases polarization.

D. Crisis and Resolution: The Dynamics of the Federal Relationship in Canada

There is a positive side to crisis, a side which may be too easily overlooked: the resolution of a crisis is a sign not only of a country's or a community's will to survive but also of its continuing vitality. Unless a crisis turns out to be the ultimate one, leading to dissolution of the union, it indicates that the parties to the dispute are able to reconcile their differences in a workable accord. This aspect is as true of the Community as it is of Canada and other enduring associations of states. The fact of success ordinarily outweighs the cost of the crisis. Although Canada lacks the network which has proved essential to consensus building in normal circumstances in the Community, its federal system has shown resilience in the face of major crises. The system's capacity for coping with crisis and the mechanisms, both political and legal, for resolving conflict so as to arrive at a working relationship, are well illustrated in the constitutional crisis of 1980–82, a crisis over central questions of consensus building in basic constitutional reform.

1. The Crisis of the Early 1980's: Its Causes and Resolution

a) Constitutional Amendment and the Colonial Heritage

In one important respect Canada was until 1982 unique among modern independent nations: her constitution contained no express provisions for amendment. The anachronism had a straight-forward historical explanation. In 1867, Canada became the first self-governing member of the British Empire. "Self government" was then at a fairly early stage in a lengthy evolutionary process toward full independence of certain British colonies which had a substantially European population. The Constitution Act, a statute of the Parliament at Westminster, could be amended by that Parliament at any time, and there seemed to be no need to provide for an internal amending process. In the remaining years of the nineteenth century, any interest Britain may have had in supervising its former colony diminished to a negligible point; the Constitution Act was amended only at the request of Canada. The evolutionary proc-

ess in the colonies had advanced to such a stage that by the time Australia became self-governing in 1900 its constitutional Act provided an internal amending formula.

In 1867 Canada's external affairs were still looked after by the mother country, and Canada's Parliament remained subject to the Colonial Laws Validity Act,[69] precluding Canadian laws from taking effect so as to interfere with any Imperial statute which applied to Canada. In addition, even after confederation Canadian laws could have no extra-territorial effect as Britain was the sole guardian of the Empire's foreign affairs. Evolution in foreign affairs began very slowly.[70] Although Canada created a ministry for "external affairs" in 1909, and participated in international negotiations which might affect it, Britain remained the signatory on behalf of the Empire. In 1914 when the United Kingdom declared war on the German Reich, the Empire, including Canada, was automatically at war as well. Despite its small population, Canada made a major contribution to the war effort, in supplying armed forces as well as food and war materials. As a result it was present at the signing of the Treaty of Versailles in 1919 and was a separate signatory. This act was the first major act of independence in the international sphere and marked the beginning of Canada asserting itself as a sovereign state. In the early 1920's series of developments occurred in which Canada took positions in international affairs departing from those of Britain.

It was becoming apparent among all the self-governing dominions that they would continue within the former British Empire only as fully independent equals with the mother country. At the Imperial Conference of 1926 were assembled the self-governing dominions of the Empire (Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland) who joined in the Balfour Declaration, containing the following statement of principle:

> They [the dominions of the United Kingdom] are autonomous Communities, within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[71]

The next few years saw negotiations, both internally within Canada and externally among the Commonwealth members, to determine the most satisfactory way to implement in legislative form the sentiments expressed at the 1926 conference. The result was the Statute of Westminster, 1931,[72] which formally conferred legislative independence from London on the self-governing domin-

[69] 1865, 28–29 Vict. c. 63 (UK).

[70] *See generally* A.E. Gotlieb, Canadian Treaty-Making (Toronto, Butterworths, 1968).

[71] *See* Report of the Imperial Conference, 1926, Cmd. 2768, at 14 (London, H.M.S.O., 1926).

[72] 22 Geo. V c. 4 (UK).

ions, including the power "to make laws having extra-territorial operation."[73] However, the Statute did not deal with foreign affairs in any other way and in particular did not confer a treaty-making power which had already been fully assumed by the dominions in the 1920's. Most important, at the request of the Canadian Government and with the unanimous approval of the Provinces, a provision was inserted in the Statute stating that nothing in it affected the distribution of powers between the Federal Government and the Provinces.[74] Nor did the Statute disturb the customary way in which the Constitution Act had been amended, that is, by joint resolution of the two Houses of the Canadian Parliament to Westminster.

The Constitution Act was amended eleven times before the passage of the Statute of Westminster, each time by joint address of the Canadian Parliament.[75] With one irrelevant exception, after 1931 the Act was amended a further nine times in the same way.[76] From the 1926 Conference onward, Canadian politicians became acutely aware of the anomalous situation: Canada was an otherwise fully independent nation without any express method of amending its own constitution. During the more than half century since the Statute of Westminster it was generally assumed that eventually all the principal actors, that is, the Provinces and the Federal Government would agree on an amending formula that would permit Canada to make changes to its Constitution without further resort to the British Parliament. The question was discussed from time to time among the Governments concerned, and debated in Parliament, but it was not until the 1960's that substantial pressure developed to resolve the problem. In part this pressure grew from concern about the status of Quebec within the Canadian federation. Within Quebec itself there was a movement for "special status" during the 1960's, although it did not become the explicit policy of any Quebec Government. Increasing unease about the last vestiges of colonialism which the lacuna in amending power represented, as well as growing concern over the inadaptability of the Constitution to changing needs, added to the pressures for reform.

b) Negotiating the Constitutional Reform

i) Conflict between the Federal Government and the Provinces

Twice, unanimous agreement between the Federal Government and all the Provinces seemed within grasp. In 1965, the "Fulton-Favreau formula" received tentative approval by all parties, and in an introduction to a federal government White Paper explaining the proposed formula, Prime Minister Pearson wrote: "It is a matter of profound satisfaction that the result of such

[73] *Id.* s. 3.

[74] *Id.* s. 7.

[75] G. Favreau, Minister of Justice, The Amendment of the Constitution of Canada 5–7 (Ottawa, Queen's Printer, 1965).

[76] *See* Constitution Act, 1982, Schedule, Column I, items 18–23, 25 & 26. The ninth was the Canada Act itself.

prolonged effort by so many public men has been agreement at last on a formula that all governments regard as an acceptable balance. . . ."[77] Unfortunately this satisfaction was short-lived; the Province of Quebec rejected the formula early in 1966 because of intense controversy within the Province, and the proposal was abandoned.[78] Within a year a fresh start at constitutional review was made, culminating four years later in the "Victoria Charter" of 1971, a proposal which included a broader set of constitutional changes in addition to an amending formula. Again, all parties had apparently agreed, although the Premier of Quebec reserved his position in order to return home for consultation. Once more, a Quebec Premier was confronted by intense controversy within the Province. A few days later he announced that Quebec could not accept the package, including the amending formula, because certain provisions concerning jurisdiction over social policy were objectionable. The Victoria Charter was also abandoned. In the decade that followed, the parties were never again to approach a consensus so closely until November 1981.

From 1974 to 1976, the Federal Government made repeated attempts to gain approval of the Provinces for more limited reform consisting only of patriation of the constitution with an amending formula. In each attempt, several of the Provinces insisted on attaching conditions in the form of increased provincial legislative powers over such subjects as natural resources and social programs – conditions which were unacceptable to the Federal Government. At no time were the parties near agreement.

ii) The Quebec crisis and pressure for reform: Renewed federalism as an option to sovereignty-association

Although there was a growing sense of frustration in the Federal Government of Prime Minister Trudeau, it was events in Quebec which generated a sense of urgency about the constitution. The separatist *Parti Quebecois,* led by René Lévesque, had since its creation in 1967 advocated independence for Quebec and the formation of an economic union with the rest of Canada modelled in part on the European Community.[79] In each election it increased its popular vote, but won very few seats based on its separatist platform. In 1976, the *Parti Quebecois* changed strategy: it offered the electorate "good government" and promised not to take any action to remove Quebec from the Canadian confederation without first holding a referendum on the question. Thus it reassured Quebecers that they could vote for Lévesque without committing themselves to a separatist position. The strategy combined fortuitously with several politi-

[77] Pearson, *Foreword* to G. FAVREAU, *supra* note 75, at viii.

[78] D.V. SMILEY, *supra* note 24, at 67–69.

[79] *See* R. LÉVESQUE, *supra* note 30. The *Parti Quebecois* proposals were set out more elaborately in J.-P. CHARBONNEAU & G. PAQUETTE, L'OPTION (Montreal, Editions de L'Homme, 1978), and made official Party and governmental policy in, GOUVERNEMENT DU QUÉBEC, QUEBEC-CANADA: A NEW DEAL (Quebec, Editeur Officiel, 1979).

cal developments in the summer of 1976, to lead to a sweeping electoral victory for the *Parti Quebecois* in November 1976.

After the *Parti Quebecois* victory no-one could be sure just when the new Quebec Government would hold the referendum, or the exact content of the question to be asked. It seemed clear that in the interim period there would be no point in trying to negotiate a new constitutional deal with a Quebec led by a separatist government which hoped to obtain a mandate to separate. However, the election of the *Parti Quebecois* stimulated large-scale studies and proposals for an entirely new constitution by diverse groups including independent foundations, the Canadian Bar Association, advisory groups to Provincial Governments and a federal government task force.[80] Some common themes began to emerge from these serious efforts but all awaited the Quebec referendum.

Originally, Premier Lévesque had spoken of a referendum to be held within a year or so of the election, then two years, but finally the period stretched out to three and a half years, all the while his Party seeking the propitious moment, working out detailed alternatives to the federal system, and a carefully worded question that would encourage Quebec citizens to vote yes. Ultimately, the wording of the referendum question was a weak one – it merely asked for a "mandate to negotiate" sovereignty and economic association with the rest of Canada, with the assurance that the results of the negotiation would be put to a further referendum for approval of the terms.[81] Once the campaign began in the spring of 1980, a major argument of the federalist opposition was that Canada was capable of working out a new constitutional deal to the betterment of the nation and to the satisfaction of the people of Quebec. Renewed federalism was held out as a better option than sovereignty-association. Prime Minister Trudeau entered the referendum battle in the crucial last days with a promise to proceed quickly with constitutional negotiations imme-

[80] *See, e.g.*, Canadian Bar Association, Towards a New Canada (Ottawa, Canadian Bar Found., 1978); Harmony in Diversity (Edmonton, Gov't of Alberta, 1978); Task Force on Canadian Unity, A Future Together (Ottawa, Minister of Supply & Services, 1979); Constitutional Committee of the Quebec Liberal Party, A New Canadian Federation (Montreal, Quebec Liberal Party, 1980).

[81] The approved English version of the question was as follows:

> The government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada based on the equality of nations;
> This agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad – in other words, sovereignty – and at the same time to maintain with Canada an economic association including a common currency;
> No change in political status resulting from these negotiations will be effected without approval by the people through another referendum.
> On these terms do you give the government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?
>
> YES
> NO

diately after the referendum, if Quebecers would vote no. In this promise he had the general approbation of the other provincial premiers. On May 20, 1980, the people of Quebec defeated the referendum question, 60% voting no. Within twenty-four hours Trudeau announced his plans to proceed with new constitutional negotiations and he sent his Minister of Justice on a tour of provincial capitals to consult on a schedule for a new round of talks.

c) The Final Resolution of the Conflict

There followed eighteen tumultuous months in Canada's constitutional history, briefly summarized as follows: the eleven First Ministers met in September 1980, but failed to reach agreement on a package of constitutional changes. Shortly afterwards, the Federal Government announced its intention to proceed unilaterally, with or without the consent of the Provinces. It introduced in Parliament a resolution containing an amending formula and a Charter of Rights and Freedoms, with the traditional request to the Queen that the British Parliament enact the appropriate legislation. In late April 1981, the resolution, much amended during committee hearings, was finally referred to the Supreme Court of Canada to rule on whether the Federal Parliament could indeed proceed unilaterally. By that time two Provinces had decided to support the Federal Government but eight remained opposed. Three of the opponents had started separate litigation in their own provincial courts. In late September 1981, the Supreme Court delivered an extraordinary judgment, with two majority decisions on different aspects of the issue, each majority composed of a different combination of judges.[82] One majority asserted that *legally* the Federal Government could proceed without the consent of the Provinces,[83] but the second majority held that there was a constitutional convention requiring "at least a substantial measure of consent" of the Provinces.[84] Although "a substantial measure" was not quantified by the Court, it did state that the consent of only two of the ten Provinces was clearly insufficient.[85]

After a frantic but fruitless five weeks of bargaining a final constitutional conference was convened on November 2, 1981. The pressure for agreement was intense on both sides. Polls showed clearly that the general public wanted an agreement and strongly favored an entrenched charter of rights, thus placing the dissenting Provinces in a difficult position. On the other side, the Federal Government was conscious that the British had been embarrassed by becoming embroiled in an entirely Canadian controversy. As well, there appeared to be much sympathy for the Provinces in Britain; the British Parliament might well have become a battleground over the Canadian Constitution

[82] Reference *re* Amendment of the Constitution of Canada (1981), 125 D.L.R. (3d) 1.
[83] *Id.* at 47.
[84] *Id.* at 103.
[85] *Id.*

if no agreement could be reached in Canada.[86] On November 5, 1982, nine of the ten Provinces and the Federal Government announced that they had reached agreement in the middle of the preceding night. Ironically, the Province that had been the prime cause of the frantic activity of the preceding two years, Quebec, was the lone dissenter. On this occasion, unlike the two previous occasions, the other Governments did not defer to Quebec; it was agreed among them that the new resolution would proceed through the Canadian Parliament and be forwarded promptly to Westminster. The resolution was carried to London in December and was debated and passed by the British Parliament early in 1982. It was proclaimed on April 17, 1982. In response, Quebec asserted that it had a veto with respect to constitutional amendment and attempted formally to assert that veto. However, the Supreme Court of Canada decided that the standard of a "substantial measure of consent" was met when nine Provinces agreed to the resolution, and it rejected Quebec's claim.[87] In terms of constitutional legality the battle appears now to be over.

Despite the legal outcome, many Quebecers believe that as a practical political matter, Quebec had a *de facto* constitutional veto recognized by all governments in Canada as recently as 1971 in Vancouver. For these Quebecers, formal restoration of that veto in the Constitution by agreement among the parties remains Quebec's primary constitutional quest.

2. The Renewed Constitution and the Internal Amending Formulas

Early in 1982, the United Kingdom Parliament passed the Canada Act,[88] and thereby created a new Canadian growth industry: observing, speculating, advising and writing about the Constitution. The Canada Act, 1982 itself is a very short document of four sections. The first section simply states that the Constitution Act, 1982, set out in a schedule to the Act, shall come into force on a day to be proclaimed under the latter Act. Section 2 completes the work left unfinished by the Statute of Westminster fifty-one years earlier. It states: "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law." As is the case with all other former colonies granted complete independence, these words cut off the last element of Imperial power and no subsequent act of the Westminster Parliament can recreate it.

[86] At least three major books have already been written describing the four momentous days of the Conference and the months leading up to it. *See* R. Sheppard & M. Valpy, The National Deal (Toronto, Fleet Books, 1982); K. Banting & R. Simeon, And No One Cheered: Federalism , Democracy and the Constitution Act (Toronto, Methuen, 1983); R. Romanow, J. Whyte & H. Leeson, Canada Notwithstanding: Making of the Constitution 1976–1982 (Toronto, Carswell/Methuen, 1984).

[87] *Re* Attorney-General of Quebec and Attorney-General of Canada (1983), 140 D.L.R. (3d) 385.

[88] 1982, 30–31 Eliz. II c. 11 (UK).

Accordingly, the Canadian Constitution may henceforth be amended only by the formulas set out in the Constitution Act, 1982. This Act changed the names of all former British North America Acts to Constitution Acts, but it neither consolidates nor renumbers these various Imperial statutes so as to integrate them into a single comprehensive document. As a result it would be inaccurate to speak of the Act as a new Constitution. The Constitution Act, 1982 accomplishes two main reforms: the internal amending formulas; and a Charter of Rights and Freedoms. As we shall see in the next section, the inclusion of the Charter was an essential element in the constitutional compromise, but it is the amending formulas which are of central interest to the present discussion.

The complexity and ambiguity of the amending formulas show the weaknesses of a hasty overnight compromise. There are four major amending formulas, each requiring a resolution of consent of the Parliament of Canada, thus giving the Federal Government a veto.

The first, the general amending formula, requires resolutions of consent from at least two-thirds of the legislatures of Provinces containing at least 50% of the population of all Provinces.[89]

The second provides that if an amendment "derogates from the legislative powers [or] proprietary rights" of a Province, then in each consenting Province the resolution must be passed by an *absolute majority* of the members of the legislature, not just a majority of those present and voting:[90] thus, in these circumstances members may vote "no" simply by feigning illness to avoid being present for the vote. In addition, a Province whose legislature dissents by an absolute majority may thereby exempt itself from the application of such an amendment.[91] Disagreement about amendments which do or do not derogate from provincial powers may well invite constitutional litigation over amending procedures. A final aspect of the derogation question is the provision giving a dissenting Province "reasonable compensation" when an amendment affects powers with respect to "education or other cultural matters."[92] Presumably, these words require an annual payment by the Federal Government proportional to the benefits received through federal programs by the other Provinces. Again, prospects for further litigation have been created: suppose an amendment should transfer power over manpower retraining exclusively to the Federal Parliament – would the transfer be classified as being within "education or other cultural matters"?

A third formula requires the consent of all affected Provinces when an amendment applies "to one or more, but not all, provinces."[93] There is a paradox in this provision: an amendment intended to affect nine Provinces –

[89] Constitution Act, 1982, s. 38(1).
[90] Constitution Act, 1982, s. 38(2).
[91] Constitution Act, 1982, s. 38(3).
[92] Constitution Act, 1982, s. 40.
[93] Constitution Act, 1982, s. 43.

for example excluding Quebec because it alone has a Civil Law system – would require a higher level of consent than a general amendment affecting all ten Provinces.

Finally, certain classes of amendments, including amendments to the amending formulas themselves, require unanimous approval (but by an ordinary majority in each legislature).[94] The demarcation line between these and other classes of amendments may well raise major constitutional disagreements. The most remarkable requirement of unanimity is that concerning "the composition of the Supreme Court of Canada."[95] First, the Court is nowhere else mentioned in any Constitutional Act; it was created by an ordinary statute of Canada, the Supreme Court Act, in 1875,[96] eight years after the founding of the federation. It appears then, that those sections of the Supreme Court Act with respect to the Court's composition are incorporated in the Canada Act, 1982, and they are very deeply entrenched by the unanimity requirement. Second, the word "composition" is not a term of art and it is not at all easy to decide what it means beyond perhaps that the Court comprises nine judges, three of whom must be from Quebec.[97] Does it affect retirement age or qualifications for appointment? Third, other amendments "in relation to the Supreme Court" are subject to the general amending formula.[98] Are there any powers left in the Federal Parliament alone, even housekeeping powers regulating, say, the appointment of clerks and registrars? Virtually *any* change in the Supreme Court Act would seem to be an invitation to litigation before the Court about itself!

Canada now has the power to amend its own Constitution, but the price has been made unnecessarily high by the drafters of the formulas.

III. Common Aims and Common Values: The Role of Economic Integration and of the Protection of Human Rights in Forging the Federation

A. The Canadian Common Market: Theory and Practice

A federation is more than an economic union and accordingly is expected to have a very high degree of market integration. We have noted earlier that the original partners in the Canadian federation contemplated both net economic gains from the formation of the new country and the need to redistribute part of that gain in the form of equalization payments to poorer regions.[99] How-

[94] Constitution Act, 1982, s. 41.
[95] Constitution Act, 1982, s. 41(d).
[96] Rev. St. of Can. 1970 c. S-19.
[97] *Id.* at ss. 4 & 6.
[98] Constitution Act, 1982, s. 42(1)(d).
[99] *See supra* notes 32–33 and accompanying text.

ever, the Constitution does not spell out clearly the economics goals of confederation. The preamble to the Act speaks of the "desire to be federally united into one dominion" and of "a Union [that] would conduce to the welfare of the Provinces," but the Act itself contains few specifics about economic objectives. Instead, they must be inferred from the powers granted to the Federal Government under sections 91 and 92, and the limits placed on the Provinces in sections 121 and 122.

1. The Economic Powers of the Federal Government

Section 91 was intended to give the Federal Government wide powers to regulate the economy through legislative jurisdiction over the following matters:

The regulation of trade and commerce;
The raising of money by any mode or system of taxation;
Currency and coinage;
Banking, incorporation of banks, and the issue of paper money;
Weights and measures;
Interest;
Legal tender;
Bankruptcy and insolvency;
Patents;
Copyrights.

Section 92 adds jurisdiction over all forms of inter-provincial and international transportation and communication.[100]

Using these federal power the Canadian Federal Government has created the powerful central institutions expected of a highly integrated economy: a central bank to control money supply, interest and exchange rates; a national taxation system to raise large revenues and to redistribute much of them to Provincial Governments and directly to citizens in all regions; and central agencies to regulate railway and airline routes and rates, telephone, telegraph, radio and television, and a large portion of the energy market.

In other respects, however, some of the basic underpinnings of an integrated market in Canada have always been weak. Only one section of the Constitution Act deals directly with the removal of barriers to trade among the Provinces themselves. Section 121 states:

> All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Exclusive federal power over the levying of any future customs and excise taxes is implicity recognized in section 122, which permitted provincial taxes in these fields only until altered by federal legislation. These minimal nineteenth century provisions may have been sufficient in the sparsely settled, mainly rural Canada of the time, but they are an inadequate substitute for the

[100] Constitution Act, s. 92(10)(a) & (b) excludes provincial jurisdiction over these fields.

broad protection for a common market found in articles 2 and 3 of the Treaty of Rome. In particular, as noted in the following section, the Canadian common market suffers from the fact that section 121 has never been interpreted – it would be very difficult to do so – to prohibit "measures having equivalent effect," as expressly set out in article 3(a) of the Treaty of Rome.

2. Distortions in the Common Market

In the past two decades the Canadian market has been undergoing increasing fragmentation, without any discernible policy of the Federal Government to prevent it. Indeed, as we shall see, the Federal Government has itself been a major participant in the process.

a) Free Movement of Goods

With respect to goods, there has been an increase in non-tariff barriers in recent years in four major areas.[101] First, provincial regulations for all goods, and especially food, based on safety, health and labelling standards, have been proliferating with little or no effort to standardize. Many of the provincial markets are so small as not to make it worthwhile for manufactures to make changes even in product labels in order to remain in or to enter a market; some manufacturers simply abandon those markets to higher priced local producers. Even when manufacturers do decide to meet diverse requirements so that they can maintain their national market, the effect is to raise prices to consumers with no benefit in improved quality or protection.

Second, provincial government purchasing policies have become increasingly protective toward local suppliers and contractors. Protection takes various forms, but the most common policy is to buy local products unless the "import" is at least 10% cheaper.[102] Some Provinces require bidders to maintain local offices or even have their head office in the Province in order to be eligible to provide services or perform construction contracts. Since government procurement has become a very important portion of the Canadian economy, such local preferences are regarded as being very serious.

Third, under the guise of temperance legislation to control the consumption of alcoholic beverages, the Provinces assumed complete control over their distribution and sale in the early years of the twentieth century. For a number of years restrictive provisions concerning retail sale and public consumption might arguably have been considered attempts to reduce drinking and alcoholism. Gradually the regulations have been liberalized, and since the 1960's

[101] *See generally* A.E. Safarian, Canadian Federalism and Economic Integration (Ottawa, Information Canada, 1974); Trebilcock, Kaiser & Pritchard, *Restrictions on the Interprovincial Mobility of Resources: Goods, Capital and Labour*, in Intergovernmental Relations (Toronto, Ontario Economic Council, 1977); Minister of Justice, Securing the Canadian Economic Union (Ottawa, Publs. Canada, 1980); R.E. Haack, D.R. Hughes & R.G. Shapiro, The Splintered Market (Toronto, James Lorimer & Co., 1981).

[102] Minister of Justice, *supra* note 101, at 34–36.

there has been no pretense: provincial liquor boards are simply retail marketing agencies operating local monopolies for the sale of distilled liquors and imported wines. They also closely regulate the sales of locally produced wines and beer although there is considerable variety in methods of distribution. With no competition, liquor boards employ pricing policies openly favoring local products; by making higher mark-ups on out-of-province products, especially wines, they effectively set up provincial tariffs.[103] Since Canada is a major producer and consumer of alcoholic beverages, complaints have been made to the GATT about these practices. While, the Federal Government appears to have taken the position that it cannot interfere with the internal practices of intraprovincial monopolies, it has used persuasion to obtain voluntary concessions from the Provinces.[104]

Fourth, and perhaps most important, are the serious impediments to an integrated Canadian market in agricultural products.[105] Virtually all parts of Canada have major agricultural production but there are substantial differences in production costs, and especially in transportation costs because of Canada's vast distances. A special characteristic of agricultural market distortion – distinguishing it from the first three areas – is the full-scale participation, indeed the primary role, played therein by the Federal Government, beginning in the nineteenth century. Federal Government participation began early in Canada's history. To bind the nation together and link British Columbia on the Pacific coast (over 4,000 km from the capital in Ottawa!) with the central and eastern Provinces, the Federal Government helped finance a transcontinental railway line in the 1880's. Even in those days the relative costs of shipping across the continent were very large. As part of a deal to expand the railway system, in 1897 the Federal Government and the Canadian Pacific Railway entered into an agreement known as the "Crow's Nest Pass Rates" (after a pass through the Rocky Mountains) which was confirmed in legislation.[106] The rates set were substantially lower than actual costs and were in effect subsidized by the rest of the railway system. A pattern was set that has been followed to this day; in fact, the "Crow" rates, with very little adjustment, still remain in force.[107] Preferential rates in the regulation of the transportation system has been a major element in the distribution and marketing of agricultural products and of many nonagricultural goods as well.

[103] Trebilcock, Kaiser & Pritchard, *supra* note 101, at 102–04.

[104] For a full discussion of this issue *see* Bernier, *Le GATT et les monopoles provinciaux des alcools*, 13 CAN. YEARBOOK OF INT'L LAW 98 (1975); Bernier, *La Constitution canadienne et la réglementation des relations économiques internationales au sortir du "Tokyo Round,"* 20 CAHIERS DE DROIT 673 & 682 (1979). Controversy has continued into the 1980's. *See, e.g.*, The Globe and Mail (Toronto), 18 Aug. 1983, p. 6.

[105] *See* R.E. HAACK, P.R. HUGHES & R.G. SHAPIRO, *supra* note 101.

[106] *See* R.E. HAACK, P.R. HUGHES & R.G. SHAPIRO, *supra* note 101, at 1–10.

[107] In 1982 the Federal Government proposed a substantial rise in the "Crow" rate, a proposal which has led to bitter controversy between the Western grain farmers and Governments and the Federal Government.

Among the many other factors impeding a free flow of agricultural goods, the dominant one has been the establishment of marketing boards, beginning in the inter-War years and expanding rapidly after World War II. The evolution of these boards, some federal and some provincial, is a complex story of interwoven constitutional and economic problems.[108] It is interesting to note that some of the provincial boards employ powers delegated by the Federal Government, permitting the boards to interfere with interprovincial trade. The major areas of agriculture subject to marketing boards include wheat, dairy products, eggs, chickens, turkeys and pork. In the name of stabilization – and assured supply to the consumer and a reasonable return to the farmer in good years and bad – boards allocate total provincial production quotas as well as individual producer quotas, and control prices and price-support programs. Farmers are prohibited from shipping and selling many products other than through the boards. They may be fined for exceeding quotas. In sum, the largest portion of Canadian agriculture operates within a government controlled market, in which both Federal and Provincial Governments participate.

b) Free Movement of Other Factors of Production

The Constitution contains no provisions dealing with the free movement of labor. For most of Canada's history mobility of labor was assumed to be largely unhindered, at least apart from the licensed professions. Large-scale westward migration both by recent immigrants and native born Canadians was necessary to the opening of the West. Canada has always suffered a chronic shortage of skilled tradesmen that has not been satisfied by domestic apprenticeship programs and as a result restrictive licensing found little favor. Once again, however, the situation has changed in recent years: occupational licensing has become so pervasive that the Federal Government has intervened to undertake a "red seal program" to harmonize qualifications across the country, and to encourage mobility.[109] The program thus far has had only limited success.

[108] *See generally* R.E. Haack, P.R. Hughes & R.G. Shapiro, *supra* note 101.

[109] There is no express provision in the Constitution Act, 1867, either guaranteeing freedom of movement of people within Canada, or assigning jurisdiction over movement to the Federal Parliament or to the Provinces. Section 95 gives Provinces the power to "make laws in relation to ... immigration into the Province," subject to an expressly paramount power of the Federal Parliament over "immigration into all or any of the Provinces." It was generally assumed until the late 1970's, that provincial power was limited to regulating immigration from outside Canada by aliens, and did not include restricting the rights of Canadian citizens. *See* Winner v. S.M.T. (Eastern) Ltd. and Attorney-General of Canada, [1951] 4 D.L.R. 529, 557–59 (*per* Rand, J.). Federal jurisdiction over manpower within Canada may be implied from jurisdiction over unemployment insurance in section 91 (2A), and from the general residuary power "for peace, order and good government of Canada" in the opening words of section 91. Concern over recent developments in barriers to free movement of persons among the Provinces, as described *infra*, led to the inclusion in the Char-

Professional licensing has always presented a patchwork quilt of regulation. For example, in legal education, law degrees from all the Common Law schools are portable in the nine Common Law Provinces; a graduate from one Province may begin an articling period in any other Province and qualify for the bar along with students who are graduates of the local university. But to move in either direction between Quebec, with its mainly Civil Law system, and the Common Law Provinces requires an additional year of university work. For qualified practising lawyers to transfer from one Province to another, the restrictions are much greater and vary substantially in severity. Barriers also still exist in professions such as pharmacy and architecture, while in others, such as medicine and engineering, there are common standards permitting easy movement from one Province to another.[110]

A new impediment has been introduced by the Quebec Government in the late 1970's: practitioners in most of the public professions who do not claim French as their mother tongue must pass a written French language test to obtain certification, even if they have lived and practised in Quebec for many years. It has been claimed that the tests are difficult enough to fail francophones who are exempt, and as a result these language tests have stirred up controversy when anglophone, Quebec-born citizens have failed the test and lost their licences even after many years of successful practice.[111]

The Federal Government has introduced programs that give preferences in order to enhance local employment in economically depressed regions and also in affirmative action initiatives to assist women and native people. More ominous, however, was the development during the late 1970's of provincial laws that require employers to give preferences in hiring local residents provided they are "qualified." These laws do not state merely that other things being equal a preference should be given to local residents – as difficult both theoretically and practically as such a standard might be to administer. They go farther in stating that if a resident has the minimum qualifications for the job he must be hired in place of a more highly qualified applicant from outside the Province. In two cases, such laws have already led to retaliatory measures by neighboring Provinces.[112]

Finally, the administrative policies used in operating federal welfare and unemployment insurance schemes have discouraged labor mobility. Thus, if an unemployed person decides to move from one region to another, he may lose

ter of Rights and Freedoms of section 6, setting out "mobility rights" for Canadian citizens, and protecting them from infringement by either federal or provincial authorities.

[110] *See* Trebilcock, Kaiser & Pritchard, *supra* note 101, at 112–21; and MINISTER OF JUSTICE, *supra* note 101, at 40–44.

[111] In October 1981 an anglophone nursing assistant who grew up in Quebec and speaks French fluently was failed, causing considerable attention and controversy in the press. *See* 94 MACLEAN'S MAGAZINE 30 (No. 44, 2 Nov. 1981).

[112] *See* MINISTER OF JUSTICE, *supra* note 101, at 41–42.

his benefits if the government office considers the move unsound and one that leaves him "unavailable for work."[113]

With Canada's centralized banking and monitory control it would be natural to assume that the barriers to the free movement of capital across the nation would be negligible. However, in two recent cases this has been shown not to be so. In one, the Province of British Columbia, by threatening indirect sanctions, blocked the take-over of the country's largest forest products enterprise by an eastern Canadian conglomerate.[114] In the second, the Government of Quebec directly blocked the take-over of a provincial financial institution by a trust company from New Brunswick.[115] The latter example was somewhat paradoxical in that the institution to be taken over was controlled by a French parent company. Thus the Government of Quebec blocked a Canadian company from another Province from taking over a foreign-controlled company! There are a host of relatively minor regulations restricting the free movement of capital and the establishment of business, each insignificant in itself, but there is little doubt that as the number of restrictions grow, their cumulative effect is likely to become significant.

3. Comparison with the European Community

It would be very difficult to make overall quantitative or proportional comparisons with the European Community, but the general impression is that after one hundred and fourteen years as a nation, and despite the strong central institutions directing the economy, the fragmentation of the Canadian market in some respects is greater than that in the European Community, after only twenty-six years and without the advantages of powerful central direction available in Canada. Even in a federation, a completely free market is unattainable and probably undesirable. Many social goals require local incentives and financial aid: security of local supplies, especially in food, is an important factor; the protection of cultural regions and the impracticality of large scale migration justify diversion of capital investment and preferences for local workers. However, such distortions require the development of social, industrial and agricultural policies arrived at rationally and explicitly. The present pattern of Canadian distortions shows very little evidence of high political morality. Sadly, it bespeaks of parochial selfishness, underscored by beggar-thy-neighbor tactics.

[113] *See* Trebilcock, Kaiser & Pritchard, *supra* note 101, at 113–15.
[114] MINISTER OF JUSTICE, *supra* note 101, at 44.
[115] *Id.* We have not found any detailed sources discussing these recent events.

B. The Role of Federal Constitutional Law and the Federal Protection of Fundamental Human Rights

1. The Constitution as "Higher Law"

A constitution can be a source of common identity among citizens who share in its declared values and the protections it provides. In Canada's case, whatever inspiration may be gained from ringing prose, such as the eighteenth century writers provided for the United States Constitution – or even the aspirations stated in the more muted cadences of the EEC Treaty – the drafters ignored the opportunity and settled for bland, Victorian, statutory terminology; after all, the Constitution Act was simply an act of the British Parliament. There is no stirring preamble worthy of recital in school textbooks or on ceremonial occasions. Despite the lackluster language, its effectiveness as higher law capable of invalidating domestic Canadian legislation has not for a moment been doubted – but not as in the United States in the grand sense in which that concept was used by Chief Justice Marshall in *Marbury v. Madison*.[116] The idea of unconstitutionality as a basis for striking down an act comes from a common root in both countries in the early eighteenth century, when the Imperial Government could override any local laws made in the colonies. However, the United States Constitution was enriched and elevated by the ideas and language of Paine, Jefferson and the other idealists of the revolutionary period. "Self-evident truths" and "inalienable rights" of citizens were fertile soil for the idea of a higher law above Congress and the state legislatures.

In Canada, however, the reasoning was much more mundane. In the British hierarchy, the legal position that all laws passed by colonial legislatures were merely subordinate legislation, subject to review and disallowance by London, was firmly established before 1867. The governor of a colony would refer any law that gave him cause for concern to the British cabinet for an opinion on its validity, or simply because it would be troublesome to him or to the Imperial Government. In addition, colonial litigants could appeal a local court decision upholding or invalidating a colonial statute by taking the case to London. In theory, all referrals from the governor and all appeals went directly to the monarch for decision, because the colonies were considered to be held directly by the crown and governed by the exercise of crown prerogative (at least until Parliament asserted legislative jurisdiction). As a practical matter, however, appeals on legal questions were referred to judicial advisers. In 1833, the referral procedure was formalized by Imperial statute, and subsequently all appeals automatically went to the Judicial Committee of the Privy Council, composed of Lords of Appeal from the House of Lords.[117] (Unlike normal pratice in the House of Lords, where there can be and frequently are concurring and dissent-

[116] 1 Cranch 137 (1803).

[117] An Act for the better Administration of Justice in His Majesty's Privy Council, 1833, 3–4 Will. IV, c. 41 (UK).

ing opinions, the Judicial Committee issues only a single opinion in the form of a "recommendation" to the monarch.)

After Confederation in 1867, to view Canadian internal legislation as inferior to British statutes did not accord with political reality, but the former technical view was supported in at least three important ways. First, the Constitution maintained powers of reservation and disallowance in a hierarchical fashion. We have already noted the basis for these powers. Surprisingly, the same powers existed at the federal level as well: the Governor General of Canada,[118] as head of state appointed to represent the monarch in Canada, could reserve a federal bill and send it to London. This happened once in 1867, and in 1872 the British Government disallowed another statute to which the Governor General had already assented. The power was never again used, and has now been abolished by the Canada Act, 1982.[119] Although after 1872 the Constitution Act did not reflect political reality with respect to the Imperial power to disallow federal legislation, and although the federal power to disallow provincial bills had also fallen into disuse, this scheme helped perpetuate the legal myth that in deciding whether or not a Canadian statute was *ultra vires* the courts were engaging simply in statutory interpretation rather than interpreting an entrenched constitution.

A second way in which this narrow view of domestic law was maintained was that appeals to the Privy Council in all important legal matters survived the creation of Canada in 1867. Until 1950 the Supreme Court of Canada was not the country's final court of appeal.[120] In fact it was possible, and it not infrequently happened, that appeals went from provincial courts of appeal directly to the Privy Council, thus by-passing the Supreme Court entirely! Of course, the Law Lords in London were not unaware that the Constitution Act, as a federal constitution, was not exactly the same as an ordinary statute even though it had passed through Parliament in the same way. Nevertheless, they spent their judicial lives in a unitary state where Parliament was supreme and the task of the judiciary was merely to interpret statutes, never to invalidate them on the basis of higher principles. Thus a dominating and oppressive influence on constitutional evolution in Canada was the fact that the final arbiter of constitutional disputes was a foreign court, leaving Canada's Supreme Court in the long shadow cast by the Privy Council.

As a result of Commonwealth discussions in the late 1920's and the passing of the Statute of Westminster in 1931, by a kind of wizardry foreign to British

[118] Until 1952, the Governor General was selected by the British Government with the advice and consent of the Canadian Government, and he was British not Canadian. The last British Governor General was the distinguished World War II general Viscount Alexander of Tunis. Since 1952, Governors General have been Canadians, selected by the Canadian Government and automatically approved by the British. The first Canadian was Vincent Massey.

[119] 1982, 30–31 Eliz. II c. 11 (UK). *See also* W.R. LEDERMAN, CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 75 (Toronto, Butterworths, 1981).

[120] *See infra* note 123.

constitutional theology, the Imperial Parliament effectively declared itself bound in the future – that is, bound not to repeal the Statute of Westminster nor to pass legislation affecting the major self-governing members of the Commonwealth, such as Canada and Australia, except at their request.[121] With Canada legislatively free of the British Parliament, legal subservience through appeals to the Privy Coucil appeared more than ever an anachronism. Criminal appeals to the Privy Council were abolished in the early 1930's,[122] but World War II interrupted further development, and it was not until 1949 that all other appeals to the Privy Council were finally abolished.[123] However, a hoped for surge of judicial creativity by the then ultimate tribunal, the Supreme Court, did not follow. Apart from the efforts of one or two able and energetic judges on a few occasions, the Court did not set the Constitution in new directions.

A third and probably more pervasive element is a negative one – the absence of any Bill of Rights in the Constitution Act guaranteeing freedoms in a systematic fashion. Quite apart from the intrinsic values of human rights, basic guarantees entrenched in a constitution and effectively protected throughout a nation can promote loyalty to a central government to whom they are entrusted. (Conversely, the absence of common minimum standards in a nation can be a grave divisive factor especially in a federation where differences are reflected at regional boundaries – as in the United States of the mid-nineteenth century when the system of slavery was maintained in the Southern states but not in the North.) There were a few sections of the Constitution Act, as well as the preamble,[124] that could be interpreted to guarantee certain freedoms, in large measure as part of the bargain that was worked out among the former colonies before 1867, such as protection of sectarian schools[125] and the use of French and English in the Federal Parliament and Quebec legislature.[126] However, in sum the protections were meager – unless they were to be ex-

[121] 1931, 22 Geo. V c. 4, s. 4.

[122] Act to Amend the Criminal Code, St. of Canada 1933, 23–24 Geo. V c. 53, s. 17. *See* British Coal Corporation v. The King, [1935] A.C. 500 (P.C.), upholding the power of the Parliament of Canada to abolish appeals to the Privy Council in criminal cases (a federal matter).

[123] A bill was introduced in the Canadian Parliament to abolish appeals to the Privy Council in civil cases in 1939, just before the outbreak of World War II. In a reference to the Supreme Court of Canada, the bill was found to be *intra vires* of the Parliament of Canada, but a further appeal to the Privy Council itself was delayed until after the War. In Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127, the Privy Council upheld the Supreme Court, and appeals were then abolished by the Supreme Court Act, St. of Can. 1949 c. 37, ss. 3 & 7.

[124] The preamble reads in part: "Whereas the Provinces ... have expressed their desire to be federally united ... with a constitution similar in principle to that of the United Kingdom." These words have been interpreted to create certain protections for freedom of speech and the press. *See infra* notes 133–40 and accompanying text.

[125] Constitution Act s. 93.

[126] Constitution Act s. 133.

panded by a creative and energetic court. Expectations of creative energy from the Judical Committee of the Privy Council would not have been realistic and indeed unfair. If expanded human rights were practicable under the Constitution Act, they could have evolved only under a domestic supreme court that lived closer to the consequences of its decisions. Perhaps by 1950 it was too late to expect great judicial activism from a court that for too long had been confined to a secondary role.

In fairness, the prevailing legal and social climate in former British colonies has remained until recently mainly opposed to entrenched bills of rights. As late as the 1960's, the dominant view was that effective human rights protection depended on much more than constitutional legal protection, that many citizens of the United States – above all black people – despite the words enshrined in the Constitution, received less real protection of their human rights and less social justice than the citizens of other English-speaking, Common Law countries, such as Britain, Canada, Australia and New Zealand, where written constitutional protection of rights was minimal or non-existent. In the British tradition, the protection of liberty was left to the judgment of the legislature. And legislatures are not lacking in sensitivity and concern. In 1960 the Canadian Parliament passed a Bill of Rights as an ordinary act of Parliament.[127] In this form it presented perplexing problems when it conflicted with specific provisions of other statutes, but it was not without effect. Some commentators and legal scholars hoped for a magical transformation of the Bill of Rights by the Supreme Court, making it higher law. They were disappointed. Whatever merit this statutory Bill of Rights may have had, it did not amount to the analogue of its U.S. counterpart. In any event it applied only to areas of federal jurisdiction and did not bind the Provinces.

Perhaps more important in terms of practical protection to a much larger portion of the general public, all ten Canadian Provinces have passed human rights codes giving to citizens and to foreigners lawfully in Canada rights not only against Government but also against private persons such as employers, landlords, hotelkeepers, restauranteurs and other business people in any case of discrimination based on race, religion, sex or age.[128] These provincial statutes, which are widely used, do help complainants in prosecuting claims, and create substantial rights to compensation, to reinstatement in jobs and to accommodation. However, the codes remain subject to amendment or repeal at any time, much as the federal Bill of Rights. No matter how unlikely such retrograde action may appear in settled conditions, in times of civil unrest and apprehension of violence, the danger of suspension of statute based rights persists, and at a time when they may be most needed.

[127] The Canadian Bill of Rights, St. of Can. 1960 c. 44.

[128] *See, e.g.,* Ontario Human Rights Code, Rev. St. of Ont. 1980 c. 340.

2. The Protection of Human Rights

We have noted that the prevailing opinion in Canada, at least until the 1960's, was against entrenchment of human rights. I believe that opinion gradually swung in favor of an entrenched bill of rights in spite of the strong British tradition of trusting in Parliament to protect individual liberty. A number of factors steadily pushed in the direction of entrenchment over more than forty years, causing an increased public awareness and concern, and finally creating a favorable climate for protection.

Until World War II, civil liberties were rarely a prominent issue in Canadian politics and consciousness; it was easy for the general public to believe that there was little or no problem within Canada. It is probably more accurate, however, to say that abuses mainly went unnoticed because they were not reported. However, all that changed with the War. The horrors of the Nazi era, Canada's own wartime restrictions on freedom (however necessary they may have appeared to be at the time), the Universal Declaration of Human Rights and Canada's adherence thereto, and subsequent publicity about the harsh and unfair treatment of Japanese Canadians during the War: all these things created a new awareness of abuse of human rights. Commencing with the "Cold War" and the spy cases of 1947 at home, and continuing with the unparallelled and unrelenting activities of Senator Joseph McCarthy in the United States, extending to 1954, the attention of Canadians was focussed on human rights issues over a long period. Canadian opinion was strongly against "McCarthyism" and public concern was expressed over abuse of the police power for political reasons at home. On the domestic scene during the 1950's much publicity was given to the abuses of civil rights by the dictatorial and increasingly corrupt Provincial Government of Premier Maurice Duplessis in Quebec, while at the same time there was a gradually growing awareness of the second class status of most French Canadians. These developments helped sensitize and educate the public to the importance of human rights.

The single most important factor, however, was the growth of the civil rights movement in the United States from the mid 1950's to the early 1970's. The era of mass television brought to the vast majority of Canadians – who live within the viewing area of U.S. television stations – the daily struggle, the violence, the failures and successes of the movement. Inevitably questions began to be asked about the treatment of minorities in Canada, especially its native peoples, who themselves encouraged by U.S. developments became more vocal and militant in advancing their claims. Evidence of serious abuse of human rights by police and by government welfare agencies, concern about invasions of privacy and misuse of personal information stored in computers – especially when contrasted with continuing government secrecy – all these things which are the substance of present worries about human rights became common currency in the media during this period.

As a result of these developments there was much greater awareness of human rights problems in the 1970's. Journalists, legislators, lawyers and judges frequently debated human rights issues. The question asked was this: If exist-

ing tools appear to be inadequate to the task of protecting human rights, and if we want our society to be as just and fair as possible, should we not use the most effective tool we can design to protect our freedoms, that is, a constitutionally entrenched bill of rights? The argument against entrenchment is based on the social cost: the creation of a legally dominated "*gouvernement des juges*," and the consequent loss of freedom for legislators to set new priorities and to implement new reforms unhindered by entrenched rights, rights which always seem to end up by protecting vested interests, is too great a price. Fewer people accept this rebuttal today because greater sensitivity to human rights has made more apparent the difficulties experienced by Canadian courts in employing the Constitution Act and the statutory federal Bill of Rights to protect those rights. Indeed, it is fair to say that the record on the whole is not enviable, as will become evident in the following discussion.

a) The Common Law Approach Under the Constitution Act

The first Canadian case on human rights to reach the Privy Council, in 1899, concerned a racially discriminatory statute in British Columbia, prohibiting the employment of Chinese workers below ground in mines. In *Union Colliery v. Bryden*[129] the appellant company argued that the discriminatory section of the statute was void "as being *ultra vires* of the legislature of the Province." Although in Britain it was unknown, in view of the doctrine of the supremacy of Parliament, to declare a statute void, we have noted earlier that colonial legislation had been so declared when it was in conflict with an Imperial statute. Canadian courts and the Privy Council were already familiar with the problems inherent in the distribution of legislative powers between coordinate regional and federal legislatures, from the experience in the United States and from early constitutional cases in Canada. A court would declare void a statute which it found to be outside the jurisdiction assigned to the legislature by the Constitution Act.[130] Accordingly the question for the Court in the *Union Colliery* case was framed in terms of whether the Province had jurisdiction, not in terms of whether there was a violation of civil liberties. Indeed, there appeared to be no basis either in English or Canadian law to attack a statute because it infringed a civil liberty. Lord Watson, in delivering the opinion of the Privy Council said:

> These clauses [sections 91 and 92 of the Constitution Act] distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. . . . In so far as they possess legislative jurisdiction, the discretion committed to . . . [all these legislatures] is unfettered. It is the proper function of

[129] [1899] A.C. 580 (P.C.).

[130] The first decision to hold a statute invalid occurred in 1868 in the New Brunswick Supreme Court: The Queen v. Chandler, (1868) 12 N.B.R. 556. Several other decisions followed before the Privy Council, in the fourth appeal under the Constitution Act to reach it, declared a statute invalid: Attorney-General for Quebec v. Queen Insurance Co., (1878) 3 App. Cas. 1090 (P.C.). *See also* B.L. Strayer, Judicial Review of Legislation in Canada (Toronto, U. Toronto P., 1968).

> the court to determine what are the limits of the jurisdiction committed to them; but, when that point is settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not.[131]

Lord Watson then proceeded to find that the legislation, in affecting "Chinamen," dealt with the rights of people who were immigrants and were either aliens or naturalized citizens, that section 91(24) of the Constitution Act gave exclusive legislative authority over "naturalization and aliens" to the Parliament of Canada, and accordingly it declared the British Columbia statute void.

On the reasoning in the *Union Colliery* case, it seemed possible for the courts to secure protection of human rights – at least from legislative incursions of the Provinces – by an expansive interpretation of federal powers in section 91 of the Constitution Act, such as those over immigration, criminal law, and trade and commerce, and by declaring provincial legislation in those areas void. However, the dangers in such an approach are evident: an expansive interpretation of exclusively federal powers would crowd out all provincial legislation in those areas, and not just those statutes that offended human rights; since the Constitution Act provides no basis for distinguishing between "good" (and therefore valid) provincial legislation and "bad" (and therefore void) attempts to enact provincial laws, Provinces might be prevented from carrying out those responsibilities which were intended under the Constitution Act. In any event, such an approach avoids dealing with the central issue of human rights, so that a finding that a Province has *not* acted in an area reserved exclusively for the Federal Parliament, would validate the most reprehensible discriminatory legislation. Subsequent decisions supported this concern.

In *Cunningham v. Tomey Homma*,[132] just four years after *Union Colliery*, a Japanese who was a naturalized Canadian citizen claimed the right to be placed on the British Columbia register of voters, contrary to a discriminatory prohibition in another British Columbia statute. The Earl of Halsbury, L.C., speaking for the Privy Council, distinguished the *Union Colliery* case on technical grounds that, certainly today, cannot be considered defensible: he labelled the subject matter in the *Union Colliery* case the "right" to work and hence essential to the attributes of naturalization; he labelled the subject matter in the case at bar the "privilege" to vote, and being a mere privilege it did not affect essential attributes of naturalization. Accordingly, he found the prohibition in the provincial legislation a valid exercise of provincial power. The Court seemed concerned primarily with protecting a Province's powers to regulate the franchise in its own elections. While the decision in the *Tomey Homma* case is regrettable, it serves to illustrate the difficulties inherent in trying to protect human rights through the use of limits on the distribution of powers between levels of government, but with no direct consideration of the importance of human rights in themselves.

[131] [1899] A.C. 580, 585 (P.C.).
[132] [1903] A.C. 151 (P.C.).

In the more than a half century that followed, the record of legal protection of human rights under the Constitution Act was very limited. One major exception was in the area of freedom of speech, where the value of the specific freedom was discussed by the court in relation to the Constitution. In the mid 1930's, in the depths of the Great Depression and the western drought, the people of Alberta elected as its Government a new populist Party, the "Social Credit," which proposed a radical program of financial and credit reform based on the Party's own theories. The new Government feared that fierce and unfair criticism from an unsympathetic press might undermine its program. Accordingly, along with its reform legislation it passed an act "to ensure the Publication of Accurate News and Information."[133] This Act interfered with the freedom of the press in several ways: it required newspapers to publish certain information about government activities when requested by the Government; it required disclosure of sources of information published in any newspaper when requested by the Government; it provided severe penalties for failure to comply, including indefinite suspension of publication of an offending newspaper and prohibitions against publishing any reports written by specified persons. Clearly it would have restricted the normal editorial freedom of newspapers.

The validity of this legislation was referred by the Federal Government to the Supreme Court of Canada in *Reference re Alberta Statutes* in 1938.[134] The Supreme Court unanimously found the act to be *ultra vires* of the Province and void. (Interestingly, the Province of Alberta did not appeal to the Privy Council.) Although in essence the question was treated as one of distribution of powers and the Court found that only the Federal Government, with exclusive jurisdiction over criminal law, could make laws concerning criminal libel and sedition, Chief Justice Duff and Mr. Justice Cannon discussed the importance of freedom of speech in a democracy. Both noted that the preamble of the Constitution Act states that the Canadian Provinces desired a "Constitution similar in principle to that of the United Kingdom," that is, a parliamentary democracy. Chief Justice Duff said:

> [S]uch institutions derive their efficacy from the free discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals .... [I]t is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions. ... Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the Legislatures of the Provinces. ...[135]

[133] Alberta Bill No. 9, 1937. It was never promulgated as a statute, but was reserved by the Lieutenant-Governor, and then referred to the Supreme Court of Canada.

[134] [1938] 2 D.L.R. 81.

[135] *Id.* at 107.

Mr. Justice Cannon used similar language about the essential role of freedom of speech for democratic institutions.

Generally speaking, Canadian courts have cited the *Alberta Press* case with approval and given support to freedom of speech. The Supreme Court itself went farthest in protecting this freedom in 1957, in *Switzman v. Elbling*,[136] where the impugned legislation was a Quebec statute respecting communist propaganda. The statute stated that it was illegal for an occupier of a house to allow it to be used to "propagate communism or bolshevism by any means whatsoever," and for anyone to "print, to publish... or distribute... any newspaper, periodical, pamphlet... or writing... propagating... communism or bolshevism."[137] The landlord sought to have a lease set aside on the grounds that the tenant had used the premises for illegal purposes under the Act. Not only did the Court strike down the Act as being *ultra vires* of the Province, because it was within the federal jurisdiction of criminal law, but two of the judges suggested that it might also be beyond the powers of the Federal Parliament to impose such wide restrictions on the freedom of speech – that is, that freedom of expression was in effect entrenched in the Constitution Act preamble. Mr. Justice Rand stated:

> *I am unable to agree that* in our federal organization *power absolute in such a sense* [that is, power over property that can be used as an instrument to effect any purpose] *resides in either Legislature*... The heads of ss. 91 and 92 are to be read and interpreted with each other and with the provisions of the statute as a whole, and what is then exhibited is a pattern of limitations, curtailments and modifications of legislative scope within a texture of interwoven and interacting powers.[138]

Mr. Justice Abbott was even more direct:

> Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, *Parliament itself could not abrogate this right of discussion and debate*.[139]

Although this reasoning provided powerful protection for freedom of speech, it did raise a paradox: a basic principle of English constitutional law itself is that Parliament may pass, amend or repeal any statute as it sees fit. Mr. Justice Abbott's logic suggested that the reference in the preamble to the Constitution Act to the principles of the parliamentary system entrenched those principles, except for the one that gives the U.K. Parliament legal freedom to change the basic principles themselves. Although these words have been referred to on a number of occasions, they were never tested by the Court in relation to federal legislation.

[136] (1957), 7 D.L.R. (2d) 337.

[137] An Act to Protect the Province against Communistic Propaganda, Rev. St. of Que. 1941 c. 52, ss. 3 & 12.

[138] (1957), 7 D.L.R. (2d) 337, 354–55 (emphasis added).

[139] *Id.* at 371 (emphasis added).

In other areas of human rights such as freedom of association and religion, and group rights in education and language, there was a diverse mixture of decisions. On occasion courts sought through their interpretation of statutes, or regulations made under them, to protect individual rights, but where they found it too difficult to construe the language in such a way, individuals affected were left without remedy.[140]

b) The Statutory Approach: The 1960 "Bill of Rights"

A particularly interesting development in the Canadian experience in human rights, was one that demonstrated strikingly the difference between constitutionally entrenched protection and protection found in "ordinary statutory law." In 1960, Prime Minister Diefenbaker, who had all his life as a practising lawyer championed human rights, shepherded through Parliament a statutory Bill of Rights.[141] His hopes for the Bill were that it would not only improve protection of human rights but would also inspire higher standards throughout the country. The Bill had obvious limitations from the outset. First of all, as a federal statute it applied only to areas of federal jurisdiction and left provincial law unaffected. Second, as an ordinary statute, it was subject to amendment or repeal by Parliament at any time. This second limitation was perhaps less serious; it would have been politically very difficult for any Government to set out deliberately to amend the Bill of Rights and cut down its protection. Third, and more important – but also arising from the Bill's legal status as an ordinary statute – was its relation to existing and subsequent federal legislation with which it could come into conflict. The problem was anticipated in section 2 of the Bill, which states:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared ...

The Bill of Rights took a surprisingly long time to come before the courts and in the 1960's there were few cases.[142] The first case to come before the Supreme Court was *Robertson and Rosetani v. The Queen*,[143] challenging the validity of a federal act, the "Lord's Day Act," which required most places of business to remain closed on Sundays. The owners of a bowling alley convicted of the offence of operating on a Sunday claimed that the Act was inoperative because it interfered with their religious freedom contrary to the Bill of Rights. The majority of the Court found that the Lord's Day Act did not af-

[140] For a striking example of the refusal to protect the right to peaceful assembly, *see* Attorney-General of Canada *et al.* v. Dupond *et al.* (1978), 84 D.L.R. (3d) 420, and comment by Swinton, 57 CAN. BAR. REV. 326 (1979).

[141] The Canadian Bill of Rights, St. of Can. 1960 c. 44.

[142] *See* W.S. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 14 (Toronto, McClelland & Stewart, 1975).

[143] (1963), 41 D.L.R. (2d) 485.

fect religious freedom and, accordingly, that the Bill of Rights did not apply. The reasoning is not clear: the Court suggested that the Bill was concerned to protect "'such rights and freedoms' as they existed in Canada immediately before the statute was enacted."[144] If so, it is difficult to see how the Bill could ever apply to prior legislation and in any event section 5(2) of the Bill expressly states that it applies to every "Act... enacted before or after the coming into force of this Act." A second and equally unsatisfactory basis was that the Lord's Day Act did not interfere with the religious observance of Jews or Moslems, or members of other religious faiths, who do not recognize Sunday as a day of rest and prayer. However, as Professor Tarnopolsky pointed out, "the Lord's Day Act is a major factor in inducing Jews and Moslems to work on their Sabbath because not to do so would mean closing their establishments for two days, and not just one as Christians may do."[145] Mr. Justice Cartwright, in dissenting, held that the Lord's Day Act did infringe religious freedom and that the Bill of Rights rendered it inoperative. However, the majority did not comment on what effect the Bill would have had if it had been applicable.

A further example of the courts evading the question of application of the Bill of Rights occurred in *Whitfield v. Canadian Marconi Co.*,[146] a decision of the Quebec Court of Appeal. There a clause in an employment contract between an employee and employer engaged in a military project in the Canadian far north prohibited fraternization between employees and Eskimos, pursuant to an international agreement between the United States and Canada. The employee was dismissed for breach of the term; he had become friendly with an Eskimo woman who could hardly be described as in the "primitive state" contemplated by the agreement. She was twenty-six years old, spoke four languages and had been an interpreter for the federal Department of Health and Welfare as well as a hostess for Air Canada. There was no evidence of employee misconduct apart from his breach of this clause in the contract. The Court simply concluded that the employee's rights had not been infringed, and refused to discuss whether the Bill of Rights applied to international agreements of the Federal Government or to contracts made pursuant to them. This decision was affirmed by the Supreme Court without giving further reasons.

The Supreme Court finally considered the question of application of the Bill of Rights in *Regina v. Drybones* in 1970.[147] In that case, the defendant was an Indian who was found intoxicated in a hotel, and was charged pursuant to section 94(b) of the Indian Act[148] with being unlawfully intoxicated "off a reserve," and subject to "a fine of not less than ten dollars and not more than

[144] *Id.* at 491.

[145] *See* W.S. TARNOPOLSKY, *supra* note 142, at 135. (Prof. Tarnopolsky is now Mr. Justice Tarnopolsky of the Ontario Court of Appeal.)

[146] (1968), 68 D.L.R. (2d) 251.

[147] (1970), 9 D.L.R. (3d) 473.

[148] Rev. St. of Can. 1952 c. 149.

fifty dollars or to imprisonment for a term not exceeding three months." The ordinary law of the Territory, applying to all other citizens, also prohibited drunkenness in a public place, but provided for no minimum fine, and the maximum term of imprisonment was thirty days. The argument on behalf of Drybones, then, was that section 94 of the Indian Act, by reason of his race, denied him "equality before the law" with his fellow citizens. The Court, in a six to three decision, found that the Indian Act did conflict with the guarantees of equality in the Bill of Rights. Accordingly, the majority was confronted directly with the effect to be given to the section 2 words "[e]very law ... shall ... be so construed and applied as not to abrogate" a freedom protected by the Bill. In a 1962 case in the British Columbia Court of Appeal, Mr. Justice Davey, in an opinion concurring with the majority, took the view that these words should be treated as merely providing a canon of construction for the interpretation of legislation, and stated, "If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning."[149] In commenting on this view in *Drybones*, Mr. Justice Ritchie, speaking for the majority, said:

> This proposition appears to me to strike at the very foundations of the Bill of Rights and to convert it from its apparent character as a statutory declaration of the fundamental rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes. ...[150]

He then quoted with approval Mr. Justice Cartwright's dissent in *Robertson and Rosetanni v. The Queen*, to the effect that any provision of a federal statute that conflicts with the Bill of Rights is rendered inoperative.

Mr. Justice Ritchie also disagreed with the suggestion in the *Robertson and Rosetanni* case that the Bill of Rights protected only such rights and freedoms as existed prior to the passage of the Bill, and he referred to the express terms of section 5(2), by which the Bill applies to prior enactments.

Finally, he dealt with the opinion of Mr. Justice Tysoe, who wrote the majority opinion in a 1962 British Columbia case,[151] that the Bill only protected a person from unequal treatment "with every other person to whom that particular law relates."[152] Mr. Justice Ritchie said:

> Like members of the court below, I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law," so long as all other members are being discriminated against in the same way.[153]

The majority decision in the *Drybones* case was regarded as a major step in elevating the Bill of Rights to a form of higher law. After all, it had rendered ineffective a long-standing section of the Indian Act, established clearly that the

[149] R. v. Gonzales (1962), 32 D.L.R. (2d) 290, 292.
[150] (1970), 9 D.L.R. (3d) 473, 481.
[151] R. v. Gonzales (1962), 32 D.L.R. (2d) 290, 296.
[152] *Id.* at 296.
[153] (1970), 9 D.L.R. (3d) 473, 484.

Bill of Rights was not confined to protecting rights as they existed at the time of enactment, and laid to rest the suggestion that the Bill was confined in its application to individuals who were treated differently from other members of a class who might collectively be treated in a way discriminatory from citizens generally.

Rather surprisingly, Chief Justice Cartwright, as he had then become, in dissenting, reversed the position he had taken in the *Robertson and Rosetanni* case. He stated:

> After a most anxious reconsideration of the whole question, in the light of the able arguments addressed to us by counsel, I have reached the conclusion that the view expressed by Davey J.A., as he then was, in the words quoted above is the better one.[154]

In essence, the Chief Justice was deeply worried by the power and responsibility given to judges at every level to declare legislation inoperative because it conflicted with the Bill of Rights. In reversing his position the Chief Justice was returning to what he considered to be the traditional English Common Law view that it is not the task of judges to invalidate acts of Parliament. The two other dissenting judges took a similar view. As Professor Tarnopolsky noted, the majority judgment was more consistent with the traditional Diceyan view of parliamentary supremacy, at least with respect to prior enactments.[155]

After the *Drybones* case there was a series of decisions both by the Supreme Court and lower courts, construing the Bill of Rights, but two are of particular interest because they seemed to cut down substantially the potential application of the principles in that case. In the first, *Attorney-General of Canada v. Lavell, Isaac et al. v. Bedard* in 1974,[156] two appeals were heard together on the same section of the Indian Act,[157] section 12(1)(b), which deprives an Indian woman of her status as an Indian – and the concommitant right to use and occupy land on a reserve – when she marries a non-Indian, but does not deprive an Indian man who marries a non-Indian of his status. In both cases, Indian women who had married non-Indians sought to have their names returned to the Indian Register on the basis that the section discriminated between Indian men and women contrary to the Bill of Rights. In a five to four decision, the Supreme Court allowed appeals from lower courts which had granted the women their claims. The Supreme Court upheld the contention of the Attorney-General that the impugned section was a valid exercise of Parliament's jurisdiction over Indians under section 91(24) of the Constitution Act, which gave the Federal Government jurisdiction to legislate with respect to "Indians, and Lands reserved for Indians."

In coming to this conclusion, Mr. Justice Ritchie, again writing for the majority, had to contend with the principles in the *Drybones* case. His reasons for distinguishing the two cases are confusing and rather inconsistent, but they

[154] *Id.* at 476.
[155] W.S. TARNOPOLSKY, *supra* note 142, at 141.
[156] (1974), 38 D.L.R. (3d) 481.
[157] Rev. St. of Can. 1970, c. I–6.

seem to amount to this: under the Constitution Act, Parliament was authorized to legislate with respect to Indians and implicitly to treat them differently from other citizens, at least with respect to Indian lands. Accordingly, it was necessary to define Indians for the purpose of deciding who was entitled to the special benefits and under what conditions. Section 12(1) (b) of the Indian Act dealt with the question of definition implicitly authorized by the Constitution Act and therefore was not inherently discriminatory but a necessary function. *Drybones* was distinguished from this situation because it dealt with Indians *off* the reservation, and concerned a penal clause that discriminated between Indians and other citizens, with no justification such as that required in defining Indians. Even if this distinction was defensible it still ignored a vital question: assuming that Parliament finds it necessary to define Indians for purposes of the Act, was the definition itself a fair and reasonable one, or was it discriminatory and unjustifiable in the light of the Bill of Rights? Simply because the definition was necessary, were the courts thereby ousted from judging the validity of the definition with respect to the Bill of Rights? The majority did not discuss whether discrimination between men and women was justifiable for the purposes of the Indian Act. Having found that the Constitution Act authorized Parliament to make the definition it held that the Bill of Rights did not apply.

In his dissenting reasons, Mr. Justice Laskin stated that the Bill of Rights prohibited discrimination between men and women, including discrimination between Indian men and women, and suggested further that this prohibition would prevail even against evidence showing that the distinction, on the basis of reasoning in the Supreme Court of the United States,[158] might be considered a reasonable classification for the legitimate purposes of the legislation. There appeared to be no middle ground, no consideration of what in fact might be in the best interests of the Indians themselves including their own wishes in this matter.

The *Lavell* decision appeared to cut down substantially on the vitality of the *Drybones* principles. Moreover Mr. Justice Ritchie's language displayed a reluctance to follow the implications of his earlier decision. While he did not directly reverse his position on the applicability of the Bill of Rights to prior enactments he said:

> In my view the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in the light of the law existing in Canada at that time.[159]

In the 1975 case of *Attorney-General for Canada v. Canard*,[160] Mr. Justice Beetz restated more systematically the reasoning in the *Lavell* case. *Canard* was concerned with sections 42 and 43 of the Indian Act, which gave exclusive power to the Federal Government to administer the estates of deceased Indi-

[158] (1974), 38 D.L.R. (3d) 481, 510.
[159] (1974), 38 D.L.R. (3d) 481, 494.
[160] (1976), 52 D.L.R. (3d) 548.

ans. In this case, the sections precluded a spouse of a deceased Indian from obtaining letters of administration from a provincial court for her husband's estate. Mr. Justice Beetz stated that since the Constitution Act authorized Parliament to develop a scheme for regulating Indian affairs, and since by simply using the word "Indians" it creates "a racial classification and refers to a racial group for whom it contemplates the possibility of special treatment," it was inevitable that the Indian Act should contain discriminatory sections.[161] He stated that the problem of devising an appropriate scheme was a difficult one and implied that Parliament's efforts should not be subject to review in this area because of another federal statute, the Bill of Rights. Once more in dissent, Chief Justice Laskin expressly disagreed with this view. He said, "It seems to me patent that no grant of federal legislative power [in this case, over Indians and Indian lands], as a mere vehicle for legislation, should be viewed as necessarily carrying with it a built-in exclusion of the mandates of the Bill of Rights."[162] However, the majority's rejection of the Chief Justice's approach clearly limited the application of the Bill of Rights in the face of a grant of power from a source of "higher law," the Constitution Act itself.

Finally, in the 1974 case of *Regina v. Burnshine*,[163] a further limit was placed on the application of the Bill of Rights. The Canadian Criminal Code takes into account the different facilities available in various Provinces for criminal corrections and rehabilitation of juveniles by setting broader sentencing limits in two Provinces (British Columbia and Ontario) than in the remaining eight. In particular, section 150 permits the use of indeterminate sentences in those two Provinces in ways not permitted in the others.[164] A juvenile sentenced to a longer indeterminate term in British Columbia appealed claiming that his right to equal treatment had been infringed. The British Columbia Court of Appeal upheld his claim, but in the Supreme Court Mr. Justice Martland, speaking for the majority, reversed the lower court and upheld the original sentence, finding that section 150 had been enacted pursuant to a valid legislative purpose. He went on to say:

> In my opinion in order to succeed in the present case it would be necessary for the respondent, at least, to satisfy this Court that in enacting s. 150, Parliament was not seeking to achieve a valid federal objective. This was not established or sought to be established.[165]

In other words, even when a legislative provision was found to be discriminatory, there was a presumption – indeed a strong presumption – in favor of it having a justifiable basis for being discriminatory. The burden was upon the affected person to satisfy the court that the purpose was not proper, a heavy onus to cast upon a person who has already shown that the provision discriminated against him. The Court's conclusion seemed closely related to its view

[161] *Id.* at 575.
[162] *Id.* at 558.
[163] (1974), 44 D.L.R. (3d) 584.
[164] Rev. St. of Can. 1970 c. P–21.
[165] (1974), 44 D.L.R. (3d) 584, 594.

that two competing pieces of ordinary legislation were involved – the impugned section of the Criminal Code and the Bill of Rights. Such an approach was not consistent with a view of the Bill of Rights having been elevated to a form of higher law, and having gone perhaps part of the way toward entrenchment, politically if not formally. We could see here a further erosion of some of the high hopes based on *Drybones*.

Although the Bill of Rights remains as an operating federal statute, it has been overtaken by a new constitutional Charter of Rights and Freedoms.

c) The Constitutional Approach: The Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms is contained in Part I of the Constitution Act, 1982.[166] Subject to certain reservations concerning Quebec,[167] the Act came into force in Canada on 17 April 1982.[168]

Section 52 of the Constitution Act, 1982 makes it clear that the Charter is "higher law" with the power to invalidate ordinary statutes and subordinate legislation; it states that the Constitution, including of course the Charter, "is the supreme law of Canada, and any law that is inconsistent . . . is, to the extent of the inconsistency, of no force or effect." These words echoing in part the words of article VI of the United States Constitution, place the Charter on a different plane from the statutory Bill of Rights discussed earlier. Indeed, these words import into Canadian constitutional theory, the principle of limited government – the antithesis of the principle of the supremacy of Parliament. Awareness of the implications embodied in this change has not yet become evident in Canadian literature.

The Charter is a lengthy, rambling document comprising thirty-four sections, and it raises some perplexing questions which the Supreme Court of Canada will be called upon to resolve. In the three years since the Charter came into force a number of cases have reached the highest court but only three have been decided. However, the Charter has been invoked on innumerable occasions (well over two thousand times – no-one is counting any longer), and there have already been several dozen intermediate court of appeal decisions, but the overwhelming majority have been concerned with "legal rights," such as lawful search and seizure in criminal prosecutions.[169] Since it is too early to review the Charter in detail, I shall confine my comments to two important aspects of the document.

The first section of the Charter expressly addresses a question that frequently arises in assertions of individual human rights: are they absolute, and if not,

[166] Enacted by s. 1 of the Canada Act, 1982, 30–31 Eliz. II c. 11 (UK). For further discussion of this Act and the events leading up to its enactment *see supra* § II.D.

[167] *See* Constitution Act, 1982, s. 59, which subjects the application of s. 23(1)(a) to Quebec to special conditions, discussed *infra* notes 176–78 and accompanying text.

[168] By virtue of a proclamation signed by the Queen of the same date under s. 58 of the Act.

[169] *See* J.E. MAGNET, CONSTITUTIONAL LAW OF CANADA, Part IV, 652–994 (Toronto, Carswell, 1983).

what limits may be placed on them? Section 1 states that "the rights and freedoms... [are guaranteed] subject only to such *reasonable limits* prescribed by law as can be *demonstrably justified* in a free and democratic society."[170] These words invite the courts to consider the reasonableness of legislative limits on basic rights. In one respect, the section seems fairly clear: if a complainant can show that a right guaranteed by the Charter has been infringed, then the onus shifts to the party infringing that right to establish to the court's satisfaction that the infringement is justified. However, we do not know the extent to which the courts will defer to legislatures and thus tend to conclude that when a democratically elected legislature chooses to place a limit on Charter rights it simply follows that the limit is demonstrably justified. There is also some unease that the section emphasizes concern with limits on rights and that this may result in less concern with the definition and protection of the rights themselves.

Secondly, two sets of rights in the Charter are specially related to maintaining the Canadian union – "mobility rights" and "minority language educational rights." Mobility rights were included partly in response to the restrictive practices described earlier.[171] Section 6(2) states that every person legally resident in Canada "has the right

(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province."

However, subsection (3)(b) makes these rights subject to "any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services. How long is a reasonable residency requirement for such things as schooling, welfare payments or health care? If it is more than a few weeks at most, it can become a serious barrier to free movement of workers, but there is not yet any indication that these provisions will affect existing or future provincial regulations. Section 6(4) is believed to allow significant preferences to be given to workers who are ordinarily resident within a Province; it permits any Province with a higher rate of unemployment than the national average to undertake affirmative action employment programs for "individuals... who are socially or economically disadvantaged."

It is true that to create a new freedom of movement within the European Community as a whole required the detailed setting out and staging of mobility rights found in articles 48 to 73 of the Treaty of Rome. By comparison, as a practical matter mobility within Canada has been relatively unhindered and more like internal mobility in each Member State of the European Community. The rights asserted in section 6 of the Canadian Charter are intended to preserve unhindered movement and perhaps to reverse some of the excesses which have developed in the past decade. Even so, we must wonder whether

[170] Emphasis added.
[171] *See supra* notes 109–13 and accompanying text.

lessons will be learned in Canada from the European experience. For example, will the right "to pursue the gaining of a livelihood" be used to break down provincial barriers in qualifications required to practice a craft or profession, as set out in article 60 of the Treaty of Rome?

Perhaps one truly Canadian contribution to freedom of movement within a union is found in section 23 setting out language-of-education rights. History has made language of education a Canadian problem; the harsh treatment of francophone minorities in Manitoba and Ontario has been referred to earlier.[172] By contrast, until the 1970's, the numerical minority of anglophones in Quebec were economically and socially dominant and their rights to English-language education were fully protected and enjoyed. Well before the election of a separatist government in Quebec, francophone Quebecers became worried about a proportional diminution in their numbers as large numbers of immigrants settled in the Province. With both English and French language schools available to them, immigrants whose mother tongue was a third language overwhelmingly chose English schooling for their children in order to provide them with greater mobility throughout North America. Fears were expressed that the French Canadian language and culture were dying.

In the early 1970's the Quebec Government tried to restrict immigrant entry to English schools by various schemes including language proficiency testing of children.[173] No attempts were made to restrict entry to these schools of anglophone immigrants. One of the first major undertakings of the *Parti Quebecois* after its election victory in 1976 was to enact a new *Charter of the French Language*, known generally as Bill 101.[174] The new Government set out to make French the only official language in Quebec, the language of work, the language of all public signs and advertisements and the dominant language of education. Its program has been very controversial both within Quebec and in the rest of Canada. Bill 101 has some features which offend many civil liberties supporters and it has provoked considerable litigation. For instance, under Bill 101 all public signs must be unilingual French;[175] it is an offence not only to have a sign solely in another language (not just English) but even to have a bilingual sign in French and a second language. Although there are some non-French signs visible in defiance of Bill 101, and litigation is underway testing the requirement, by and large compliance is very high. The campaign of "francization" of the workplace has also been largely successful, although at a price: a significant number of large enterprises carrying on business throughout Canada and internationally have moved their head offices out of Quebec. Statistics are uncertain, as is the information about the prime cause of moving. These firms have left Quebec sometimes for a combination of reasons – higher

[172] *See supra* notes 26–28 and accompanying text.

[173] *See* Official Language Act (Bill 22), St. of Que. 1974 c. 6, s. 43; *see also* D.V. SMILEY, *supra* note 24, at 238–42.

[174] Rev. St. of Que. 1977 c. C–11.

[175] *Id.* at s. 58.

rates of taxation than in Provinces to the west, a shift in economic activity generally to the west, difficulties and increased expense associated with the francization program, as well as hostility toward the elements of compulsion within it.

Probably the most controversial aspect of Bill 101 is its restrictions on entry into the English school system. Immigrants regardless of their mother tongue must send their children to French-language schools. So must anglophone Canadian citizens who received their own education in English elsewhere in Canada. Only children at least one of whose parents received an education in the Quebec English language school system may enter that school system.[176] Thus, as anglophones migrate *from Quebec* to other parts of Canada, they cannot be replaced in the school system by anglophones from other parts of Canada migrating *to Quebec*. These restrictions are thus viewed as leading to inevitable attrition of the English language school system in the Province. They have already become a disincentive for movement into Quebec: a Canadian family, let us say, with teenage children whose education has been in English language schools in another Province, would be required to send their children to French language schools should the family move to Quebec. For this reason, it appears that many parents balk at accepting an employer's request to transfer to Quebec.

Bill 101 has now come into conflict with the provisions of section 23 of the Canadian Charter. Section 23(1) states, in part,

> (b) [Citizens of Canada] who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in the province.

And section 23(2) provides:

> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

These two clauses were accepted by all Provinces except Quebec. Thus citizens who have received their education in French anywhere in Canada, or at least one of whose children has received education in French, have the right to have their children go to French schools in the nine predominantly English-speaking Provinces. But for anglophones to receive reciprocal rights in Quebec, section 23 must override the provisions of Bill 101. Although the Quebec Government has denied the validity of the Constitution Act, 1982, including the Charter, its challenge was rejected by the Supreme Court of Canada.[177] The Quebec Government developed an alternative approach and defended Bill 101 by

[176] *Id.* at s. 73(a).
[177] *See supra* note 87.

claiming the protection of section 1 of the Charter, that is, by asserting that the provisions relating to language of instruction amount to no more than "such reasonable limits... as can be demonstrably justified" as being necessary to protect the French language and culture of Quebec. However, the Supreme Court of Canada has ruled against the Quebec Government's position.[178] A greater equilibrium in mobility to and from Quebec may be claimed to have been restored.

Finally, section 23(1)(a) presents a special concession to Quebec, but one which was not sufficient to persuade its Government to accept the Constitution Act, 1982. It states that:

> [Citizens of Canada] whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside... have the right to have their children receive primary and secondary school instruction in that language in that provinces.

Although this subsection gives rights to both anglophone and francophone parents, it is more significant to the anglophone community in Canada since many more immigrants have traditionally come from Britain and other English-speaking countries than come from French-speaking parts of the world.

Anglophone and francophone immigrants, once they become citizens after three years' residence, may send their children to the school of their mother tongue, even though they did not receive their education in Canada. This provision has applied to all Provinces except Quebec since proclamation of the Constitution Act, 1982. However, by virtue of section 59 of that Act, section 23(1)(a) does not come into force in Quebec unless and until "authorized by the legislative assembly or government of Quebec." In other words, this provision has not been imposed on Quebec, as has the remainder of section 23. It seems almost certain that section 23(1)(a) will not be authorized by a *Parti Quebecois* Government. Its authorization by some future Government of Quebec awaits resolution of the larger issue of Quebec's acceptance of the Constitutional Accord of November 1981.

Much tough bargaining remains, and as long as the position of Quebec within the Canadian union remains politically unresolved, the future of Canada itself remains uncertain. As noted earlier, however, Canada has shown great resilience in the face of crisis. Constitutional bargaining is a complex, multifaceted process and there are bargaining chips held by the various parties. In a manner familiar to the Member States of the European Community, Quebec might trade its support for the Charter of Rights and Freedoms in return for formal recognition of a constitutional veto, at least for certain aspects of the Constitution which it deems vital to its interests.

[178] Attorney-General for Quebec v. Quebec Association of Protestant School Boards *et al.* (1984), 10 D.L.R.(4th) 321.

Integration and the Federal Experience in Germany and Switzerland

Jochen Abr. Frowein*

I. Introduction

In a general work dedicated primarily to European legal integration, it seems important not to overlook the fact that examples for specific federal institutions and their procedures are at hand not only in the United States but also in Germany and Switzerland. It is true, of course, that in both Germany and Switzerland integration and the federal development were products of each country's peculiar history and circumstances, and that each system is, in its own way, unique. The history of federalism in Germany ranges from a federation of a number of usually small monarchies with the Kingdom of Prussia, to the present day Federal Republic, which was founded in 1949 following the most tragic events in German history. The Swiss development is also for several reasons not easy to generalise. But notwithstanding the specific nature of these national developments and their peculiarities due to the vagaries of history, they do represent earlier examples of integration through federalism in Europe, and thus may give rise to some general reflections pertinent to current European developments and attempts at integration.

II. Integration and the Federal Development in Germany

Federalism in Germany[1] is an old tradition. The present West German federal system is based on the Constitution of 1949 (the *Grundgesetz*), but one could say that Germany has existed with something like a federal structure since the Middle Ages, since the so-called *"statutum in favorem principum"* of 1214

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[1] For the post-World War II period, the term "German" and "Germany" are used to refer to the Federal Republic of Germany.

granted the princes extensive rights vis-à-vis the King and Emperor. The fundamental position of the federal principle in present-day German society is expressed in article 79, paragraph 3 of the *Grundgesetz*, which provides that the federal system as such cannot be interfered with or abolished.[2] It is true that this provision did give rise to criticism shortly after the *Grundgesetz* came into force in 1949,[3] but today there is broad agreement among all political groups and the general population about the value of the federal system. The essential feature of the federal structure which constitutes its attraction for Germany is that it is a cooperative system which enables problems to be solved in a manner which does not necessarily involve recourse to central decision-making.[4] This flexibility could not be achieved in any other way, as comparison with centralised systems has shown, but is essential to Germany for certain historical and political reasons which we will now examine.

A. An Historical Overview of the Development of the Federal System and the Integrated National Economy

Our survey of the history of legal and economic integration in Germany begins, ironically, with the disintegration of the Holy Roman Empire of the German Nation in 1806. After the dissolution of the Holy Roman Empire the various German territories became independent sovereign states and they remained totally independent until 1815 when, at the conclusion of the Napoleonic wars in Europe, the German Confederation *(Deutscher Bund)* was founded.

The German Confederation, which existed for fifty years (until 1866), was a rather loose institutional framework grouping together thirty-four German monarchies and four free cities, many of them extremely small. Its main organ was the Diet in Frankfurt, a council of representatives of the various member states. The Confederation had only limited powers and a very circumscribed jurisdiction in economic matters. During the negotiations in Vienna for the treaty to establish the German Confederation, Prussia and Austria had in fact

[2] Art. 79(3) provides: "Amendment of this Basic Law affecting the division of the Federation into Länder, the participation on principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible." Art. 20(1) reads: "The Federal Republic of Germany is a democratic and social federal state." (All English translations of the *Grundgesetz* (Basic Law) (GG) are taken from 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds., Dobbs Ferry, Oceana Publications, 1983) [hereinafter cited as CONSTITUTIONS OF THE WORLD].

[3] *See, e.g.*, the chapter entitled *Fiktionen und Gefahren des westdeutschen Föderalismus* in W. WEBER, SPANNUNGEN UND KRÄFTE IM WESTDEUTSCHEN VERFASSUNGSSYSTEM 57 (3d ed., Berlin, Duncker & Humblot, 1970) (first published in 1951).

[4] For an excellent general study of the operation of German federalism in practice, *see* Feuchte, *Die bundesstaatliche Zusammenarbeit in der Verfassungswirklichkeit der Bundesrepublik Deutschland*, 98 AöR 473 (1973).

proposed a clause according to which the Federal Diet would have competence to adopt appropriate regulations for ensuring the liberty of trade and traffic among the German states, but this proposal was not accepted by Bavaria.[5] The parties could only agree that the matter of freedom of trade and traffic should be mentioned as one of the items to be discussed at the first meeting of the Diet.[6] The practical result of this compromise was that in this area the representatives of the member states in the Diet could not take any measures by a majority vote, since it was only when there was unanimity that resolutions on such items could be taken.[7] Notwithstanding this limitation, the Confederation nevertheless did manage to achieve a certain measure of unification in economic legislation. Two measures in particular deserve to be mentioned because they constituted important steps towards the achievement of economic integration through legal harmonisation; namely, the Common Regulation on Negotiable Instruments of 1848 *(Allgemeine Deutsche Wechselordnung)* and the Common Commercial Code of 1861 *(Allgemeines Deutsches Handelsgesetzbuch)*. To become law in the various member states, these important pieces of common legislation, once they had been adopted by the Diet of the Confederation, had still to be accepted by the state legislative assemblies and promulgated as laws in each of the states.

Although such common legislation was important and did have an impact on economic integration, of far greater importance for the development of economic unity in Germany was the creation of the Customs Union *(Deutscher Zollverein)*, which was founded in 1834 and flourished until it was replaced by a revised customs union in 1867. Inaugurated on 1 January 1834, the Union provided for the removal of customs barriers between member states, thereby establishing freedom of trade, and over a period of years was joined by all the member states of the German Confederation, with the important exception of Austria. The *Zollverein* was mainly the product of Prussian policy, which aimed at creating one free trade area and one national economy for the whole of Germany. Since the General Conference of the *Zollverein* was competent to adopt legislation on customs matters and to change tariffs, in practice the establishment of the *Zollverein* effectively neutralised the decision of 1815 to grant the Confederation no jurisdiction in economic matters.[8] Even in the General Conference of the *Zollverein*, however, unanimity was required for the adoption of measures and approved regulations still had to be promulgated by the member states. Notwithstanding such limitations, the *Zollverein* of 1834 is considered to be one very important step towards the unification of Germany,[9] a development with which Austria chose not to be associated.

[5] *See* 1 E.-R. Huber, Deutsche Verfassungsgeschichte seit 1789, at 792 ff (Stuttgart, Kohlhammer, vol. 1: 1957; vol. 2: 1960; vol. 3: 1963; vol. 4: 1969).

[6] Deutsche Bundesakte art. 19 (Constitution of the German Confederation of 1815).

[7] *See* 1 E.-R. Huber, *supra* note 5, at 793.

[8] *See id.* at 796 ff.

[9] *See* 2 E.-R. Huber, *supra* note 5, at 294 ff; 3 *id.* at 637.

The demise of the German Confederation, and incidentally of the *Zollverein*, came in 1867 when, following the Prussian-Austrian War, Prussia founded the North German Confederation *(Norddeutscher Bund)*. Under this 1867 Constitution, the Confederation had legislative jurisdiction over important matters in the economic sphere, including domains such as free movement of persons, industrial activities, commercial law and customs. Indeed the North German Confederation adopted important legislation in these fields between 1867 and 1871, notably the Law on the Free Movement of Persons of 1867, and the Law on the Freedom of Industrial Activities of 1869.

The Constitution of the North German Federation, with a few amendments only, was adopted in 1871 as the Federal Constitution of the *Reich*. The catalogue of matters subject to federal legislative competence was expanded in the 1871 Constitution and in 1873 an important constitutional amendment provided for civil law in general *(Bürgerliches Recht)* as well as judicial procedure to be included in the area of federal jurisdiction (article 4, paragraph 13). It was this change which enabled the eventual enactment of the German Civil Code *(Bürgerliches Gesetzbuch)* as federal legislation. The Code came into force on 1 January 1900 and can be seen as the last step of legal integration in an area of great importance for the national economy. Indeed, both the Federal Constitutions of 1919 *(Weimarer Reichsverfassung)* and 1949 *(Grundgesetz)* were based on the fact that by then there existed a single uniform economic system in Germany. Since 1919 the federal competence to legislate has been practically without limits insofar as economic matters are concerned, and article 74, paragraph 11 of the *Grundgesetz* of 1949 in fact specifically grants the Federal Government a general legislative jurisdiction in economic matters.[10]

Between 1867 and 1871 the North German Confederation and the southern German states were members of a revised customs union which is of specific interest in the context of this study as it constitutes one of the closest historical examples of a structure similar to that of the European Community. It was organised in a manner very similar to the North German Confederation and is generally described as "a federal state for the matter of customs" *(Zoll-Bundesstaat)*.[11] A Customs Federal Council and a Customs Parliament were set up and given legislative competence over all customs matters, and the Customs Union also had the power to conclude treaties concerning trade and navigation with foreign countries.[12] As soon as legislation was adopted, it became directly applicable in the member states and had priority over state law. The Par-

[10] Art. 74 provides: "Concurrent legislative powers shall extend to the following matters: ... (11). The law relating to economic matters (mining, industry, supply of power, crafts, trades, commerce, banking, stock exchanges and private insurance) ..."

[11] *See* 3 E.-R. Huber, *supra* note 5, at 635; G.A. Grotefend, Das Deutsche Staatsrecht der Gegenwart 807 (Berlin, Kortkampf, 1869).

[12] An important such treaty, in economic terms, was the treaty concluded by the Union with Austria in 1868, Nordd. Bund, BGBl. 1868, at 239 ff. *See also* 3 E.-R. Huber, *supra* note 5, at 636.

liament was directly elected and the presidency of the Union was held by the King of Prussia, who also acted as the President of the North German Confederation.

B. Early Steps Towards Integration

1. Integration Through Customs Union

The first real advances towards economic integration were the customs unions of the nineteenth century. The goal of economic unification through the introduction of a free trade area was systematically pursued by Prussia in the years following 1815. The process which led to the establishment of the *Zollverein* in 1834 was difficult, and the way had to be carefully prepared with the conclusion of numerous separate agreements master-minded by Prussia to create step by step an area of free trade within Germany.[13] Once the *Zollverein* was finally realised, however, it successfully brought about a single customs area for most of Germany (excluding Austria): import and export duties were levied only at the common external customs border of the area encompassing the member states. The Union was solely responsible for all legislation concerning customs and tariffs and for the procedures applied thereto, and there was also a monitoring system enabling the Union to control member state compliance with the customs legislation.[14] In addition to exercising its legislative competences, however, the *Zollverein* also in fact acted as a party to twenty-eight international agreements on commerce and navigation. These treaties were concluded by Prussia – most of them formally in the name of the *Zollverein*, but some by Prussia alone in its individual capacity, mentioning the possibility of application to the whole of the customs union. The treaties had to be ratified by each of the different members of the *Zollverein*.[15] This procedure of common or joint international agreements was important because it enabled external trade to become unified for the whole of the customs union, and for this reason in the revised customs union which replaced the *Zollverein* in 1867 (the *Zoll-Bundesstaat* 1867-1871), the union authority was given the power not only to legislate concerning customs and specific taxes, but also to conclude treaties on commerce and navigation in its own name. This revised union, which only lasted for four years, was a preparatory stage for the inclusion of the southern German states into the German *Reich* of 1871.

Since customs duties were by far the most important obstacle to free trade in the nineteenth century, these customs unions did much to create a free trade area within Germany. In fact during the period of the *Zollverein* (1834–1867) the German economy had its first important industrial boom, despite the interruption of several economic crises. At the same time the treaties concluded by or on behalf of the Union brought about equal conditions for trade with the

[13] *See* 1 E.-R. Huber, *supra* note 5, at 796 ff; 2 *id.* at 282 ff.
[14] *See* 2 *id.* at 297 ff.
[15] *See id.* at 296 ff.

most important export and import partners of the German states, at a time when the interdependence of the German economy with world economic developments was beginning to be rather clearly felt. The economic integration effect which these customs unions had in Germany is therefore comparable to the effect of the EEC in Europe since 1958.

2. Integration Through the Recognition of Economic Freedoms

The establishment of economic freedoms within the territory of the European Community is one of the main instruments of integration created by the European Community Treaties. A very similar development took place in Germany after 1867. The customs unions had already eliminated obstacles to the free movement of goods, but there remained barriers to the movement of persons and general restrictions on industrial activities. In 1806, some of the German states, notably Prussia, had introduced a regime recognising a general freedom of industrial activities *(Gewerbefreiheit)*,[16] but this freedom did not exist in the southern German states,[17] nor did it apply to "foreigners" from other German territories. This situation altered radically under the North German Confederation.

Article 3 of the Constitution of 1867 guaranteed to every citizen of a member state the right to be treated as a citizen in every other state. This right, it was expressly added, gave every citizen of one member state the right to take up residence, to engage in industrial activities, to acquire real estate and to exercise the rights of a citizen in any other member state. This provision later became article 3 of the Constitution of the *Reich* of 1871. The principles contained in article 3 (of both Constitutions) were elaborated in the Law on the Freedom of Movement of 1 November 1867 (a Law of the North German Confederation, but kept in force as a federal Law by the *Reich* of 1871).

Another important step towards integration through the establishment of economic freedoms was the Law on Industrial Activities and the Freedom of Coalition of 1869 (again a Law of the North German Confederation which was kept in force after 1871). This Law was based on the principle of freedom to pursue all types of industrial activities, and abolished the system of concessions which at that time was still being practised in many of the south German states. It also guaranteed the right to form coalitions to employers as well as to employees.

The abolition of economic restrictions through measures such as these in the late nineteenth and early twentieth centuries resulted in the creation of a relatively high degree of economic freedom in Germany, which no doubt con-

[16] *See id.* at 203 ff; Treue, *Wirtschafts- und Sozialgeschichte Deutschlands im 19. Jahrhundert*, in 3 GEBHARDT, HANDBUCH DER DEUTSCHEN GESCHICHTE 349 (H. Grundmann gen. ed., 8th ed., Stuttgart, Union Verlag, 1960).

[17] *See* 1 E.-R. HUBER, *supra* note 5, at 360.

tributed to the rapid development in German industry which occurred during the same period.[18]

3. Integration Through Harmonisation and Unification of Economic Legislation

It has already been mentioned that the German Confederation (1815–1866) introduced two reforms unifying economic legislation in important areas: the Common Regulation on Negotiable Instruments of 1848 and the Common Commercial Code of 1861. But it was the creation of the North German Confederation and a few years later of the German *Reich* which marked the real start of the period of exceptional activity in federal legislative intervention: in 1870 a Law on Corporations was adopted by the North German Confederation (which later became federal law of the *Reich*); in 1871 several federal laws establishing a common German currency were introduced and four years later the central bank was created; in 1874 legislation on commercial property was adopted, and various laws concerning the judiciary, laws on civil and criminal procedure and the Law on Bankruptcy were introduced in 1877; and finally in 1900 the Civil Code came into force. Although admittedly not all these legislative reforms concerned economic law in the proper sense, they nevertheless were of considerable importance for the creation of one national economic system in Germany.

In contrast to the United States, in Germany legislation played a far greater role in achieving harmonisation than jurisprudence and there is no case law of a German Supreme Court comparable to that of the United States Supreme Court. This may be due partly to the fact that under the Constitution of 1871 the *Reichsgericht*, the highest federal court, had no jurisdiction to declare federal legislation null and void. In this respect the German tradition was similar to the French, although its rationale was not based on democratic considerations, as in France, but on the idea that the princes represented in the Federal Concil were sovereign. Thus the process of federal legislation alone could finally decide whether the Federal Diet and the Federal Council were competent to legislate in a given matter. The *Reichsgericht* could, of course, control the compatibility of state legislation with the Federal Constitution and federal laws in general, but the cases decided were of rather minor importance for the process of legal integration in Germany.[19] The supervisory power of the Federal Government was more important than the control through the courts and many legal restrictions created by the states were in fact removed as a result of the exercise of the supervisory competence of the Federal Government.[20]

[18] *See* H.-U. Wehler, Das deutsche Kaiserreich 1871–1918, at 24 & 29 ff (Göttingen, Vandenhoeck & Ruprecht, 1973).

[19] *See* 3 E.-R. Huber, *supra* note 5, at 1063.

[20] *See* H. Triepel, Die Reichsaufsicht (1st ed., Berlin, 1917; *reprinted* Darmstadt, Wissenschaftliche Buchgesellschaft, 1964).

4. Integration Through the Protection of Fundamental Rights

During the German Revolution of 1848 the National Assembly meeting in Frankfurt *(Paulskirchenversammlung)* adopted a Bill of Rights which was intended to be the first important step towards legal integration. But the Bill of Rights failed together with the Revolution (1849). Although in 1867 and again in 1871 there was some discussion whether to include a Bill of Rights in the Federal Constitution, all proposals to this end were finally rejected. In fact, Bismarck – the Prussian Prime Minister from 1862 and the first Chancellor of the newly founded *Reich* – used his strong influence to prevent the adoption of a Bill of Rights exactly because of the possible integration effect such a Bill might have: he wanted to avoid difficulties with the member states caused by their fears that a Bill of Rights would have a strong unitary influence.[21] On the other hand, representatives from some of the less progressive states – in particular, representatives of the two Mecklenburgs – supported the proposal for a Bill of Rights as its effect would be to bring conditions in their own states into line with developments in most of the other German states, where constitutional guarantees of fundamental rights already existed, in some cases having been in force since around 1820.[22]

The rejection of a Bill of Rights, however, did not preclude several developments which came close to a federal constitutional guarantee of fundamental rights. One important element was the adoption of the principle that a citizen of one member state had the same rights as a citizen of any other state as soon as he moved to that other state. This principle of equality of treatment extended to economic matters and had a very important integrative effect. But the developments after 1867 went even further, with the federal legislature enacting not only several laws establishing economic freedoms but also several measures guaranteeing the individual rights of the citizen. Most important were the Law on Religion of 1869, which abolished discrimination on the basis of religion, and the Laws on the Press of 1874 and on Associations and Assemblies of 1908. These measures introduced a form of federal guarantee for freedom of religion, of the press, of association and assembly which was rather similar to a federal Bill of Rights: the federal statutes were binding on the states and on all federal organs except the legislature. Since no judicial review of federal legislation existed at that time, the difference in practice to a Bill of Rights was negligible. It is true, of course, that these guarantees were powerless to prevent the so-called *"Kulturkampf"* of 1871-1877, when the Catholic Church was subjected to severe legislative and other restrictions on its activities:[23] either the guarantees had not yet been adopted by then or they were

[21] *See* 3 E.-R. Huber, *supra* note 5, at 665 & 758.

[22] For the debates on the bill of rights *see* 3 Materialien der Deutschen Reichs-Verfassung 232 ff (E. Bezold & F. von Holtzendorff eds., 1873 ed., *reprinted* Vaduz, Topos Verlag, 1976). On the development of fundamental rights in the southern German states, *see* 1 E.-R. Huber, *supra* note 5, at 350 ff.

[23] *See* 4 E.-R. Huber, *supra* note 5, at 645 ff.

simply disregarded by the legislature. It is very doubtful, however, whether constitutional guarantees would have provided any better protection at that time.

C. The Development of the Present German Federation

1. The Decision to Adopt a Federal System in 1949

When the German Constitution was being drafted in 1949, the Parliamentary Council – the Constitutional Assembly elected by the Länder Parliaments – never even discussed whether the new Constitution should provide for a federal or a unitary system: this decision had already been taken by the three Western Allied Military Governors, and the terms of reference of the Parliamentary Council were to draft a Constitution for a *federal* state, giving special attention to the protection of the rights of the Länder.[24] There is no question that the fact that this fundamental decision was taken by the Western Allied Military Governors and not left to the Parliamentary Council was seen, during the first years after 1949, as discrediting the federal system created by the Constitution of 1949.[25] However, a closer investigation of the different positions at that time of parties, politicians and interest groups shows that in fact federalism was not forced upon the German people by the Allied Powers. When the National Socialist regime collapsed in 1945, political life in Germany resumed first on the level of local communities and fairly shortly thereafter on the level of the Länder. It was really this quite natural development which made it impossible to organise a centralised unitary system in 1949. Indeed, as Carlo Schmid – one of the leading figures throughout the constitutional debates – has shown, within the Parliamentary Council itself there was a broad consensus that the Constitution should be based on the German federal tradition which had merely been interrupted during the 1933-1945 period.[26]

It is not surprising that the "federal" decision taken in 1949 should have met with the ready approval of the state of Bavaria or the City of Hamburg, to take but two examples of German Länder which had existed for a very long

[24] "The constituent assembly will draft a democratic constitution, which will establish for the participating *Länder* a government structure of federal type, which is best adapted to the eventual re-establishment of German unity at present disrupted and which will protect the rights of the participating *Länder*, provide adequate authority, and contain guarantees of individual rights and freedoms." London Documents, Directives About the Future Political Organization of Germany, Frankfurt, 1 July 1948, in U.S. DEPARTMENT OF STATE, GERMANY, 1947–49: THE STORY OF DOCUMENTS 275–77 (Washington, D.C., US Gov't Printing Office, Office of Public Affairs pub. No. 3556, 1950) (reproduced in GERMAN CONSTITUTIONAL DOCUMENTS 9, 10 (L. Holborn, G. Carter & J. Herz eds., London, Pall Mall Press, 1970)). *See* H. VON MANGOLDT & F. KLEIN, DAS BONNER GRUNDGESETZ 4 (Munich, Franz Vahlen, 1953).

[25] *See supra* note 3 and accompanying text.

[26] C. SCHMID, ERINNERUNGEN 376 *et passim* (Munich, Scherz, 1979).

time as independent political entities in almost the same, identical, constitutional form. But even in the case of those German Länder which were created only after World War II, one should not overlook the fact that they were mostly composed of a collection of political entities each of which had its own clear historical identity. Thus, for example, Rhineland and Westphalia – the largest parts of the Prussian western provinces – formed the nucleus for the North Rhine-Westphalia Land, which with seventeen million inhabitants is the German state with the highest population. The southern German state of Baden-Württemberg is composed of the two old Länder of Württemberg and Baden, both of which have a very specific constitutional and political tradition in Germany.

The original idea behind the 1949 Constitution was, apparently, to create and organise the Länder in such a way that each would – in terms of size and resources – have the capacity to best fulfil its constitutional functions. Thus article 29 of the Constitution of 1949 required that the federal territory be reshaped, taking into account historical and cultural connections, economic needs and social background.[27] The fact that article 29 was eventually deleted from the Constitution by a 1976 amendment would seem to prove that there were settled traditions existing in the German Länder – even if some dated back no further than 1949 – which were sufficiently strong to defeat the attempt at the rather artificial reshaping of the federal territory. It is true, of course, that as a result the German Länder today vary greatly in size: Bremen has only about 700,000 inhabitants, whereas North Rhineland-Westphalia has 17 million. But, as the example of the United States shows, such differences in size of population need not be seen as a bar to the successful functioning of a federal system. It would seem to be much more important for the success of federalism that no single state be allowed to gain a dominant position – as was the case for a long time in Germany, with Prussia in the ascendancy, but which has not recurred after 1949.

2. The Development of Federalism in the Federal Republic of Germany Since 1949

After the Federal Republic came into existence in 1949, the Federal Government had slowly to establish its position. Several very important matters fell into the federal sphere of decision-making, and, in particular, the exclusive federal responsibility for the international relations of the Federal Republic conferred far-reaching powers. But no federal army existed and in general the federal administration was slow in developing. It was only in the area of legislation that the Federal Government – through the Federal Diet – could have any

[27] Art. 29 provided: "(1) The federal territory shall be reorganized by federal legislation with due regard to regional ties, historical and cultural connections, economic expediency and social structure. Such reorganization should create Länder which by their size and capacity are able effectively to fulfil the functions incumbent upon them."

immediate impact, since the need for unitary legislation was generally acknowledged, especially in those areas in which the various Länder had each individually amended former Imperial statutes in the post-World War II period.

The first important constitutional battles between the Federal Government and the Länder occurred only a few years after the Constitution came into force. They were resolved by the Federal Constitutional Court *(Bundesverfassungsgericht)* – the newly created supreme constitutional court, and the first court in German history to be given an extensive competence to decide constitutional issues, including the power of judicial review of federal legislation. Three such cases before the Federal Constitutional Court were of particular importance in the early history of the Federal Republic. The first battle between one of the Länder and the Federal Government concerned the question whether the *Reichskonkordat* concluded in 1933 between Hitler and the Vatican was still in force and, if so, whether it had to be respected by the legislatures of the Länder. The issue arose because the Diet of the Land of Lower Saxony had adopted a statute on public schools which did not comply with the religious clauses contained in the *Reichskonkordat.* The Federal Constitutional Court, in a difficult compromise decision, reached the conclusion, in effect, that, although the *Reichskonkordat* must be deemed to be still in force, the Federal Government could not control its implementation by the Länder.[28] The next battle of a similar kind concerned the possible use of atomic weapons by the recently established new German army. In several Länder controlled by the federal Opposition Party – the SPD – legislation had been adopted requiring referenda to be held on the issue. The Federal Government intervened and the Federal Constitutional Court ruled that this matter was outside the competence of the Länder.[29] The last of these major constitutional disputes concerned jurisdiction over radio and television, and arose from the Federal Government's attempt in 1960 to set up a private corporation through which it planned to establish a second national radio and television network in Germany. The Court held that the Federal Government had no competence whatsoever in this field, and that where the Federal Government was precluded through lack of competence from legislating or using its administrative powers in a particular area, it was equally precluded from engaging in private law activities which were aimed at achieving the same result.[30]

An additional source of tension in the German federal system has been the practice of federal financial incentives. From about 1960 onwards the financial influence which the Federal Government was able to exercise over the Länder came to be regarded as an increasingly serious problem. The Federal Government tried to use the well-known system of grants-in-aid to impose specific conditions on the Länder in areas where it was not empowered to intervene through legislation. Unlike the developments in the United States, however,

[28] Judgment of 26 Mar. 1957, 6 BVerfGE 309 (1957).
[29] Judgment of 30 July 1958, 8 BVerfGE 104, 122 (1958).
[30] Judgment of 28 Feb. 1961, 12 BVerfGE 205 (1961).

this practice was not allowed to develop freely and a constitutional amendment of 1969 limited the possibilities considerably.[31] The Federal Constitutional Court has had occasion to interpret this 1969 amendment in two important cases,[32] and it is clear from these cases that in the German federal system grants-in-aid must have a specific legal basis and may not be used to force conditions relating to other unconnected matters on the states. In fact many of the conditions associated with grants-in-aid in the United States would be considered unconstitutional in the Federal Republic.

Another important step in Federal-Länder relations was the 1969 constitutional amendment which introduced the concept of the so-called joint matters *(Gemeinschaftsaufgaben)* into the Federal Constitution.[33] This amendment required the Federal Government and the Länder to cooperate in specific important areas, namely, in the construction and expansion of universities and other institutions of higher education, in matters relating to the improvement of the regional economic structure, and for the advancement of agriculture and coastal preservation.[34]

D. The Present Status of Federalism and Legal Integration in Germany

1. Integration as a Goal or as a Procedure

Integration is not a very precise notion: the term may cover different stages to reach finally unification or uniformity; but it may also apply to developments whereby only some sort of minimum compatibility is secured. As a method integration may be seen primarily as a procedure to be applied. If one treats integration as a procedure, certainly the procedure should, when applied to a given problem, lead to a solution; but each problem solved through its application may be only specific, and after each specific solution the procedure may again have to be applied. We may use the term "integration" to describe the fact that the procedure exists and can be used whenever necessary.[35] This can be seen as a typical consequence of a federal structure.

[31] *See* now GG art. 104a, para. 4.

[32] Judgment of 4 Mar. 1975, 39 BVerfGE 96 (1975); Judgment of 10 Feb. 1976, 41 BVerfGE 291 (1976).

[33] *See* now GG arts. 91a & 91b.

[34] *See infra* notes 51–53 and accompanying text.

[35] On the general concept of integration, *see* H.-P. Ipsen, Europäisches Gemeinschaftsrecht 978 ff (Tübingen, Mohr (Siebek), 1972). On integration as process *see generally* Die Europäische Union als Prozess (with contributions by H. von der Groeben, R. Hrbek & H. Schneider, & H. Möller), volume 1 of Möglichkeiten und Grenzen einer Europäischen Union (H. von der Groeben & H. Möller eds., Baden-Baden, Nomos, 1980), *especially* Schneider & Hrbek, *"Integration" in dynamischer Perspektive*, in 1 *id.* at 401; and von der Groeben, *Die Auswirkungen des Beitritts der drei Länder auf den Integrationsprozeß*, in 1 *id.* at 501. *See also* Ziele und Me-

2. Unification versus Integration by Divided Responsibility: The Division of Competences as a Means of Integration

As we have seen, there is a much higher degree of unification in the German federal system than in the American.[36] Most areas of law which are of importance for the prosecution of economic activities have been federalised, with the federal legislature assuming responsibility for the vast amount of private law, commercial law, the law concerning industrial activities or labour law.[37] It would be a serious mistake, however, to conclude from this that the German Länder have no jurisdiction to legislate in any important matters.

The main areas where it is up to the Länder to legislate are: administrative organisation, local government, police, education in general (including schools and universities), cultural matters, and radio, television and the press.[38] This list shows that issues of central importance for the development of a modern society fall into the realm of the Land legislature. Indeed, recent discussions and preparations for Land legislation allowing private radio and television stations are proof of the importance which Land legislation may have.

But perhaps even more significant is the fact that the Länder participate in government in several ways even in those areas where federal legislative power exists. First, the Länder, through the Federal Council *(Bundesrat)*, actively participate in the federal legislative process. Second, federal legislation frequently needs additional legislation by the Länder to be implemented. Third, as in the European Community system but unlike the system in the United States, the execution of federal legislation is carried out through the administrative authorities of the different Länder.[39]

The participation of the Länder in the federal legislative process through representation in the Federal Council goes back to an old German tradition – the Federal Council was the most important organ in the constitutional system of the *Reich* of 1871.[40] Today Länder participation through the Federal

THODEN DER EUROPÄISCHEN INTEGRATION (H. von der Groeben & E.-J. Mestmäcker eds., Frankfurt, Athenäum, 1972).

[36] For a comparison of the German and American systems, *see* M. BOTHE, DIE KOMPETENZSTRUKTUR DES MODERNEN BUNDESSTAATES IN RECHTSVERGLEICHENDER SICHT 137 ff, *especially* at 143 ff & 214 ff (Berlin/Heidelberg/New York, Springer, 1977) (vol. 69 BaöRV).

[37] *See id.* at 220.

[38] *See id.* at 241; Bullinger, *Die Zuständigkeit der Länder zur Gesetzgebung*, 22 DöV 761, 797 ff (1970).

[39] *See* GG art. 83 "The Länder shall execute federal laws as matters of their own concern in so far as this Basic Law does not otherwise provide or permit."

[40] *See* 3 E.-R. HUBER, *supra* note 5, at 848 ff. For a more contemporary analysis of the 1871 Constitution, *see* G. MEYER & G. ANSCHÜTZ, LEHRBUCH DES DEUTSCHEN STAATSRECHTS 473 (7th ed., Munich/Leipzig, Duncker & Humblot, 1919) where the authors comment:

> Das oberste der drei Organe ist, nach dem ganzen Aufbau und nach der Absicht der Gründer des Reichs die Gesamtheit der Staaten. Bei dieser und der

Council in the legislative and administrative functions of the Federal Government is assured by article 50 of the *Grundgesetz*.[41] All federal legislation must pass through the Federal Council, which is composed of members of the governments of the various Länder. About half of the federal laws need the Council's formal consent, but for the rest the Council has only a power of veto which can be overridden by the Federal Diet *(Bundestag)* (article 77). Where formal consent is required a majority vote of the Council in favour of the federal legislation is needed, with each of the Länder having between three to five votes depending on size of population (article 51(2)). The cases where consent is needed are expressly stated in the Constitution,[42] and it is mainly where a regulation concerns the execution of a federal statute by the Land administration (article 84), or where tax or spending provisions are involved (for example, articles 104a to 109), that the necessity for formal consent arises.

An interesting situation arises if different parties control the majority in the Federal Diet and Council, since in practice this means that in matters requiring the Council's consent it is necessary to reach agreement among the majority factions. This was in fact the position from 1969 to 1982, when the coalition Federal Government (SPD/FDP) controlled the majority in the Diet, while in the Council CDU/CSU controlled Land Governments were in a position to cast the majority vote; thus it became necessary to obtain the agreement of all four major parties for important legislation. It would be a mistake to think, however, that the Federal Council's general policy was to obstruct federal legislation during this period; it was only where more important issues were at stake that the Council used its power to block unacceptable measures.[43]

The practice of shared responsibility – where federal legislation leaves room for state laws to fill in certain gaps – is also typical of the German federal system. This practice is even more important when federal legislation must be executed by Land administrative authorities. If one takes into account the important decisions which need to be taken at the level of execution, it becomes clear that this competence of the Länder is far from negligible. The notion of

> sie verkörpernden Versammlung, dem Bundesrat, ruht die höchste Gewalt im Reiche; sie hat im Zweifelsfalle die Vermutung der Zuständigkeit für sich, sie ist der Träger der Reichsgewalt.
>
> According to this statement the Federal Council represented all the Member States and therefore incorporated the sovereignty of the Empire.

[41] GG art. 50: "The Länder shall participate through the Bundesrat in the legislation and administration of the Federation."

[42] *See, e.g.*, GG arts. 84 para. 1; 85 para. 1; 87 para. 1; 87b para. 1; 87c; 87d para. 2; 91a para. 2; 96 para. 5; 104a paras. 3–5.

[43] *See generally* F. K. Fromme, Gesetzgebung im Widerstreit, Wer beherrscht den Bundesrat? Die Kontroverse ab 1969 (Stuttgart, Bonn Aktuell, 1980). On the role of the Federal Council in general, *see* 1 K. Stern, Das Staatsrecht der Bundesrepublik Deutschland 572 ff, 589 ff (Munich, C. H. Beck, 1977); *see also* Der Bundesrat als Verfassungsorgan und politische Kraft, Beiträge zum 25jährigen Bestehen des Bundesrates der Bundesrepublik Deutschland (Bundesrat ed., Bad Honnef, Neue Darmstadter Verlagsanstalt, 1974).

"*Vollzugsföderalismus*" (federalism in the execution of laws, etc.) describes this important phenomenon. Two articles in the Constitution (articles 84 and 85) do provide for (different degrees of) supervision of the Länder by federal organs, but in fact in all those areas where the Länder have the primary jurisdiction for executing federal legislation there is little supervision. Although the possibility of formal control and sanctions exists, this power has not been used in practice. This is due to the possibility of referring such matters to the Federal Constitutional Court for settlement. Problems of execution are discussed by federal and state authorities. A good indication of the real importance of this executory jurisdiction of the Länder is the fact that in most cases it is the Länder alone which are empowered to authorise the exceptions which are provided for under many rules contained in federal administrative legislation.[44]

3. Integration Through Cooperation

Cooperation is and has always been one of the main characteristics of a federal system, although admittedly this has not always been recognised. Thus, for instance, in the United States under the so-called "dual federalism" approach, the states and the Federal Government were conceived of as being in an almost continuous battle over competences, and it was a long time – not until the 1960's – before the "cooperative federalism" approach came to prominence. A very similar development took place in Germany.[45]

The Federal Constitution of the German *Reich* of 1871 contained specific regulations for cooperation between the Federal Government and the different states. In several important areas it had not been found feasible to introduce an exclusive federal jurisdiction and provision had to be made for some coordination to take place. A good example is provided by the railways: the railways remained under the jurisdiction of the states and were not federalised until after 1918, but under articles 41 to 47 of the 1871 Constitution the states and the Federal Government were under an obligation to operate them as one integrated system. Another example of cooperative federalism under the federal system of 1871 was the very complicated distribution of jurisdic-

[44] *See* Frowein, *Gemeinschaftsaufgaben im Bundesstaat*, 31 VVDStRL 13, 41 (1972).

[45] For the U.S. *see* Advisory Commission on Intergovernmental Relations Act, Publ. L. No. 86–380, § 2, 73 Stat. 703 (1959): "Because the complexity of modern life intensifies the need in a federal form of government for the fullest cooperation and coordination of activities between the levels of government, and because population and scientific developments portend an increasingly complex society in future years, it is essential that an appropriate agency be established to give continuing attention to intergovernmental problems." 42 U.S.C.A. 4272. *See* also J. L. Sundquist & D. W. Davis, Making Federalism Work (Washington, D.C., Brookings Inst., 1969); H. Ehringhaus, Der kooperative Föderalismus in den Vereinigten Staaten von Amerika (Frankfurt, Athenäum, 1971); U. Scheuner, *Kooperation und Konflikt. Das Verhältnis von Bund und Ländern im Wandel*, in Staatstheorie und Staatsrecht. Gesammelte Schriften 399 (J. Listl & W. Rüfner eds., Berlin, Duncker & Humblot, 1978).

tion concerning the armed forces.[46] "Unity in fact without unity in form" was the way one commentator described the distribution of military jurisdiction under the 1871 Constitution.[47]

The present German Federal Constitution has made provision for cooperation between the Federal Government and the Länder from the very beginning. In many areas compacts and administrative agreements have been concluded among Länder, and between the Federal Government and the Länder,[48] covering a wide spectrum of matters ranging from purely administrative issues to important constitutional questions. Thus, for instance, the procedure whereby the Federal Government concludes treaties in areas falling within the Länder's legislative jurisdiction was dealt with in such an agreement – the *Lindau Agreement* – which, despite its rather doubtful constitutional basis, in fact still regulates this important area of federal foreign policy;[49] and the second German television network is based on a treaty among the eleven German Länder.[50] Conferences between the Chancellor and the Prime Ministers of the Länder, as well as between the different Federal and Land ministers, take place regularly.

In 1969 the Federal Constitution was amended to provide for specific cooperation between the Federal Government and the Länder in areas where this was deemed to be necessary.[51] Cooperation between the two levels of government was formally introduced for the construction and expansion of universities and other institutions of higher education, for measures improving the economic structure in disadvantaged regions, and for the improvement of agriculture and coastal preservation.[52] The necessary measures are planned by a coordinating committee in which the Federal Government has eleven votes and each of the eleven Länder has one vote, with resolutions needing a three-fourths majority for adoption. Measures cannot be implemented if the state on whose territory they would have to be carried out does not give its consent. The costs of the measures are shared between the Federal Government and the states, with the Federal Government normally paying half.

The German experience with "*Gemeinschaftsaufgaben*" (joint matters) is

[46] *See* Frowein, *supra* note 44, at 14 ff.

[47] G. Meyer & G. Anschütz, *supra* note 40, at 841.

[48] *See* Schneider, *Verträge zwischen Gliedstaaten im Bundesstaat*, 19 VVDStRL 1 (1960); R. Grawert, Verwaltungsabkommen zwischen Bund und Ländern in der Bundesrepublik Deutschland (Berlin, Duncker & Humblot, 1967).

[49] For the text of the Agreement, *see, e.g.*, T. Maunz, G. Dürig & R. Herzog, Grundgesetz Loseblatt-Kommentar, at Article 32, No. 45, p. 18 (Looseleaf Service, 5th ed., Munich, C. H. Beck, 1981).

[50] Treaty of 6 June 1961. For the text of the Treaty, *see, e.g.*, E. von Hippel & H. Rehborn, Gesetze des Landes Nordrhein-Westfalen, at No. 74e (Looseleaf Service, 13th ed., Munich, C. H. Beck, 1982).

[51] *See supra* note 33 and accompanying text.

[52] *See* B. Tiemann, Gemeinschaftsaufgaben von Bund und Ländern in verfassungsrechtlicher Sicht (Berlin, Duncker & Humblot, 1970); Frowein, *supra* note 44.

not easy to evaluate. It is clear that through such cooperation the Federal Government has gained considerable influence. The Länder often complain that the planning system makes it impossible for them to choose their own priorities in the areas concerned, and it is not unlikely that the system of cooperation introduced by article 91a will be changed again.[53]

The principle of "*Bundestreue*" developed by the Federal Constitutional Court may also be seen as an expression of the cooperative nature of German federalism. This principle requires the Federal Government and the Länder to take into account and to respect each other's jurisdiction: decisions taken and competences exercised must not entail harmful effects for the other's sphere of jurisdiction.[54] The principle was early recognised by the Court and has been upheld in many decisions, although few violations have ever been held to have actually occurred. But the principle of *Bundestreue* was, for instance, held to have been violated by the Land of Hessen through its failure to use the power constitutionally available to it to prevent certain city councils from organising referenda over the possible atomic armament of the *Bundeswehr* (a matter which falls within federal jurisdiction).[55] Similarly the Federal Government was held to have violated the principle when, in trying to evade the constitutional restrictions on federal competence over radio and television, it entered into negotiations only with those Länder where the parties in power were the same as the parties in the Federal Government.[56] It has been pointed out correctly that in these two cases the finding of a violation of the principle of *Bundestreue* was not strictly necessary, since violations of other constitutional rules were or could have been found. However, the principle does provide the flexibility which is necessary for the federal and Länder competences to be exercised in a manner which will not harm the federal system, and its existence is certainly an important characteristic of the German federal sytem.[57]

4. The Role of Fundamental Human Rights in German Federalism

The case law of the Federal Constitutional Court interpreting and developing the fundamental rights guarantees of articles 1 to 19 of the *Grundgesetz* is of

[53] *See* Frowein, *supra* note 44, at 18 ff; Böckenförde, *Sozialer Bundesstaat und parlamentarische Demokratie*, in POLITIK ALS GELEBTE VERFASSUNG, FESTSCHRIFT FÜR FRIEDRICH SCHÄFER 182 (M. Melzer ed., Opladen, Westdeutscher Verlag, 1980); *see also Schlußbericht der Enquête-Kommission Verfassungsreform des deutschen Bundestages*, in 2 ZUR SACHE 2/77, BERATUNGEN UND EMPFEHLUNGEN ZUR VERFASSUNGSREFORM 95 (Bonn, Presse- und Informationszentrum des Deutschen Bundestages, 1977). *See generally* F. SCHARPF, B. REISSERT & F. SCHNABEL, POLITIKVERFLECHTUNG. THEORIE UND EMPIRIE DES KOOPERATIVEN FÖDERALISMUS IN DER BUNDESREPUBLIK (Kronberg, Scriptor, 1976).

[54] Judgment of 26 July 1972, 34 BVerfGE 9 (1972).

[55] Judgment of 30 July 1958, 8 BVerfGE 104 (1958).

[56] Judgment of 28 Feb. 1961, 12 BVerfGE 205 (1961).

[57] *See generally* K. HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 102 (13th ed., Heidelberg, C. F. Müller, Juristischer Verlag, 1982); 1 K. STERN, *supra* note 43, at 544.

great importance. Between 1949 and 1980 the Court declared 169 statutes unconstitutional; most of these statutes were federal laws; in only 58 instances has the Court come to the conclusion that a Land statute was unconstitutional.[58] If one examines the provisions which have been reviewed by the Federal Constitutional Court, one finds, for instance, that in a list of statutes and their different provisions prepared in 1975, 49 pages are dedicated to federal provisions while the Land statutes needed only 14 pages.[59] This disparity is of course due to the fact that most important legislation is federal legislation. One can hardly expect the federal Bill of Rights to have a very great harmonising influence in the Länder under such conditions.

Nevertheless there are some interesting examples of cases in which the interpretation of federal fundamental rights had had the effect of harmonising the legislation of the Länder. In all these cases the federal guarantees were used not so much to vindicate individual rights in the normal sense of the term, but rather to make institutions conform with what were perceived to be the consequences flowing from the individual rights. Examples relate to public education, universities and the church/state relationship.

Thus, in the field of education, the Federal Constitutional Court has held that the right of parents to determine the education of their children obliges the Länder to offer several forms of public education for children after the completion of elementary school: a comprehensive school system which provides no possibility to choose between different kinds of curricula would not be in line with the protection of the parents' rights. By the same token, religious influences in public schools must be based on tolerance for all religions, although this would not exclude religious education in classes for those belonging to a particular denomination.[60]

The organisation of universities has to respect the principle of freedom in research and university teaching guaranteed by article 5, paragraph 3 of the Constitution. The Court has held, for instance, that statutes regulating the universities must give to those who, as professors and university lecturers, have a specific qualification and responsibility the predominant position in the organisational structure. It would not be in conformity with the Constitution if other groups were able to vote down professors and lecturers in matters concerning research or teaching. Thus statutes introduced in Lower Saxony and Hamburg to reform the universities which did not fully comply with these min-

[58] These statistics were provided by the Constitutional Court.

[59] *See* G. Leibholz & H. J. Rinck, Grundgesetz für die Bundesrepublik Deutschland. Kommentar anhand der Rechtsprechung des Bundesverfassungsgerichts 1001 ff (Köln, Otto Schmidt, 1978).

[60] Judgment of 6 Dec. 1972, 34 BVerfGE 165, 182 ff (1972) (*Hessische Förderstufe*); Judgment of 16 Dec. 1975, 41 BVerfGE 29, 44 ff (1975) (*Badische Gemeinschaftsschule*); Judgment of 17 Dec. 1975, 41 BVerfGE 88, 107 ff (1975) (*Nordrhein-Westfälische Gemeinschaftsschule*).

imum standards were struck down by the Court.[61] The Länder are, of course, free to grant to professors and lecturers more influence than is constitutionally required under the minimum guarantees of article 5, paragraph 3.

The harmonising influence of fundamental rights under the Federal Constitution has also been felt to some extent in the area of church/state relations, and several legislative provisions of different Länder, some of them of quite ancient origin, have been held unconstitutional on this basis. Thus, for instance, the Federal Constitutional Court has held that juridical persons cannot be obliged to pay church-taxes;[62] that it is a violation of the principle of the religious neutrality of the state and of the individual freedom of religion to oblige a spouse to pay church-taxes for his partner when he himself does not belong to the religion in question;[63] and that it is equally unacceptable to simply divide the aggregate income of spouses belonging to two different churches exactly into two equal parts and oblige them to pay church-taxes accordingly.[64] The decision to leave a church or religious group is also protected by the freedom of religion and this freedom may not be restricted by time limits or by the imposition of an obligation to pay the church-tax for the full year regardless of the date on which a taxpayer left the church.[65]

These cases show that even today the Federal Constitutional Court exercises some harmonising influence on the legislative competence of the German Länder. As far as the administrative competence of the Länder is concerned, the basic rights protection does not seem to have given rise to particular problems in any specific Land; rather, it seems that on the administrative law level there is a "normal" or uniform rate of success or failure throughout the Länder in terms of respect for the federal Bill of Rights.[66]

E. "Unitary Federalism" or Diversity and Unity Combined: Some Concluding Reflections on Federalism in Germany

In 1962 Konrad Hesse published a well-known booklet entitled *The Unitary Federal State*,[67] in which he argues that the principal justification for the federal system in Germany is to be found not so much in the protection it affords to the diversity existing in the various German Länder but in the relationship of cooperation which it establishes among these Länder, that is, in the federal structure as such. A typical example of this cooperation would be the Länder

[61] Judgment of 29 May 1973, 35 BVerfGE 79 (1973) (*Niedersächsisches Vorschaltgesetz*); and Judgment of 8 Feb. 1977, 43 BVerfGE 242, 267 ff (1977) (*Universitätsgesetz Hamburg*).

[62] Judgment of 14 Dec. 1965, 19 BVerfGE 206 ff (1965).

[63] Judgment of 14 Dec. 1965, 19 BVerfGE 226, 236 ff (1965).

[64] Judgment of 14 Dec. 1965, 19 BVerfGE 268, 273 ff (1965).

[65] Judgment of 8 Feb. 1977, 44 BVerfGE 37, 49 ff (1977).

[66] The author is not aware of any statistics which could help to clarify this matter.

[67] K. Hesse, Der unitarische Bundesstaat (Karlsruhe, C. F. Müller, 1962).

involvement in the federal legislative process through the Federal Council. The system of checks and balances and the distribution of powers was considered by Hesse to be the central element of German federalism.[68]

It is of course true that the differences among the German Länder, still very important in 1871, are much less noticeable today. But one should not overlook the pervasive forces of history, tradition, ethnic identity and subjective emotions. Even today there are still clearly distinguishable feelings of identity, especially between Germans of the North and the South. In reality the attachment to local traditions goes extremely deep and there is a clear "federal feeling" in many German regions. Indeed, it is quite difficult to imagine the territory of the Federal Republic of Germany governed by a single central government – responsible for the internal administration of regions as different, let us say, as Bavaria and Schleswig-Holstein.[69]

On the other hand, in recent years there has been a noticeable tendency towards unification, especially in legislation. Compared with the United States or even Switzerland, Germany now relies very little on Länder legislation in important areas: the vast quantity of private law, criminal law, and commercial law is federal law. Moreover, there is a movement towards uniformity even where no federal legislative competence exists. Thus, for example, when after long preparations a federal statute on administrative procedure was finally promulgated in 1976, all the German Länder soon after adopted similar administrative procedure statutes which were in practice copies of the federal law.[70] But this tendency towards uniformity should not lead us to the wrong conclusion: the enactment of laws by a central government is not the same thing as the states in a federal system agreeing to draft uniform rules to which their legislatures may consent. The process of compromise and the need to respect the specific traditions of some of the states may lead to a result in the latter case vastly different to that which would be produced by a central machinery.

Another area in which one may detect a tendency towards uniformity is in the field of finance, as a result of the policy of financial equalisation between the weak and the strong Länder.[71] But again, one should not gain a false impression. The system of financial transfers to those Länder which are disadvantaged by low revenues is a distributional policy that has the effect of diffusing public discontent against the federal system in the poorer regions. But this does not imply that no differences in spending power exist among the Länder; it merely means that the differences are far less pronounced than they would otherwise be.

In fact federalism entails decentralisation in all areas of government and

[68] *Id.* at 26 ff.

[69] *Cf.* 1 K. Stern, *supra* note 43, at 492 ff.

[70] *See* Badura, *Das Verwaltungsverfahren*, in Allgemeines Verwaltungsrecht 301, 302 ff (5th ed., H. U. Erichsen & W. Martens eds., Berlin, de Gruyter, 1981).

[71] Under GG art. 107.

politics, not just in the institutional sphere. Since political parties are, at least in Western Europe, the most important political actors, it is of interest to note the clear decentralising influence which the federal system has had on party politics in Germany. Indeed, one of the advantages of the way in which the federal system has combined with the party structure in Germany has been that since 1949 all the major political parties have at all times had the chance to exercise governmental functions at one level or another. This had a great political impact during Konrad Adenauer's long period as Federal Chancellor (1949-1963), when difficult issues concerning the overall strategy of German politics confronted the nation. The then federal opposition, the SPD, was in government in several of the Länder – for instance, in Hessen, Hamburg and Bremen – and, because of the position which this gave to the SPD in the Federal Council, this meant that the Party could not be treated as a mere opposition party. Here, also, the differences between a federal and a centralised system are striking.

In conclusion, one may say that at least one of the most important aspects, if not *the* most important aspect, of present day German federalism is this combination of diversity and unity, which is of course at the basis of any federal structure. Where the German system differs most radically from other federal systems is probably in the provision which is made for the participation of the Länder, through their governments, in the federal legislative process. This participation is sometimes seen as a sort of compensation for the loss of state powers, for instance in the field of legislation.[72] Although this "compensation" certainly cannot by itself suffice to give the Länder a real constitutional weight in the federal system, yet one may agree that it can add to their position where they already have competences of their own.

III. Integration and the Federal Development in Switzerland

Unlike Germany, Switzerland is a nation the people of which have no unity of ethnic heritage nor common language and the territory of which is geographically splintered by barriers of rock and rivers. Yet Switzerland has managed to impose unity on the diverse races, religions and languages to become a nation that is unquestionably united and prosperous. Its success in achieving this result is undoubtedly attributable at least in part to the federal structure of its government.

[72] *See* Hesse, *Bundesstaatsreform und Grenzen der Verfassungsänderung*, 98 AöR 1 (1973).

A. An Historical Overview of the Development of the Federal System and the Integrated National Economy

Switzerland has an ancient federal tradition. The original confederation was inaugurated in 1291 and lasted for over five hundred years, finally collapsing in 1798 under the influence of the French Revolution. This first Confederation comprised a number (which fluctuated over the centuries) of small and quite different states – some having aristocratic systems of government, others being rural or mountainous communities.[73] No common system of legislation existed and only comparatively few matters fell within the competence of the Confederation. After a short disruption during which French influence prevailed (1798-1813), the Swiss Cantons concluded a new federal covenant in 1815.[74] Article 15 of the Federal Pact of 1815 guaranteed liberty of internal trade, but in reality all sorts of barriers, some of them introduced after 1815, separated the Cantons from each other and the goal of free internal trade was never in practice achieved.[75] The problem was frequently discussed in the Federal Diet without any solution being found. It is also interesting to note that, despite the complaints of the other Cantons, some Cantons persistently and on a long-term basis committed violations of the general rule with apparent impunity.[76] This situation led to an adverse reaction from foreign traders who tended to avoid Swiss territory as far as possible, and this was apparently one of the reasons why the system became increasingly untenable.[77] In 1848 a new Constitution was adopted and Switzerland became a federal state.

One of the major problems to be resolved in the new Constitution of 1848 was the abolition of internal customs duties.[78] This was not an easy problem to solve because several Cantons depended on the existing system for revenue. The solution finally adopted in the Constitution was to create a federal competence in customs matters while at the same time providing for a system of compensation:[79] Switzerland thus became a unified territory for customs purposes. At the same time, article 41 of the Constitution of 1848 introduced the right of freedom of settlement for every Swiss citizen throughout the federal territory. But it was not until the constitutional reform of 1874 that liberty of commerce and industry for every Swiss citizen in all the Cantons was proclaimed.[80] The right of the Federal Government to intervene generally in economic matters was far from being recognised, however, and it was not until

[73] *See generally* W. E. Rappard, Die Bundesverfassung der Schweizerischen Eidgenossenschaft, 1848-1948 (Zurich, Polygraphischer Verlag, 1948).
[74] F. Fleiner & Z. Giacometti, Schweizerisches Bundesstaatsrecht 6 (Zurich, Polygraphischer Verlag, 1949).
[75] W. E. Rappard, *supra* note 73, at 47 ff.
[76] *Id.* at 49.
[77] *Id.* at 52.
[78] *Id.* at 252.
[79] *Id.* at 259 ff.
[80] *Id.* at 325; *see also* F. Fleiner & Z. Giacometti, *supra* note 74, at 274 ff.

1908 that the Federal Government received the competence to adopt general legislation in the area of industry.[81]

B. Steps Towards Integration

1. Integration Through the Establishment of Economic Freedoms

Switzerland is a good example of a federal system in which economic unification was reached through the proclamation of an individual right to freedom of commerce and industry.

According to Swiss doctrine, the freedom of commerce and industry proclaimed in article 31 of the Constitution of 1874 comprises the following elements: free movement of persons engaged in industrial activities, an economic system based on free enterprise, non-discrimination amongst persons engaged in industry, and free access to all industrial and commercial activities.[82] The Federal Tribunal has developed an extensive jurisprudence on the meaning of this freedom[83] and on the restrictions which are possible under what may be called the Cantonal "police power."[84] In addition, the Cantons may adopt potentially restrictive social legislation, but a strict control on the proportionality of such measures is exercised by the Federal Tribunal.[85]

2. Integration Through Unification of Economic Legislation

As in Germany, in Switzerland there was a development towards the unification of economic legislation after 1874. A national bank with the exclusive right to issue bank notes was introduced in 1891. A federal statute concerning labour in factories was adopted in 1877. The Swiss Civil Code followed in 1910. Federal jurisdiction was created for navigation (1919), aviation (1921), road traffic (1921) and pipelines (1961), and federal competence was enlarged to include hydro-power plants (1908) and atomic energy (1957). In 1947 the Constitution was amended to give the Federal Government the competence to intervene to influence the economy by taking protectionist or other measures where necessary (article 31 *bis seq.*), and in 1952 the power to control prices was added (article 31 *septies*).[86] Thus today in Switzerland most of the important statutes concerning economic activities are federal.

[81] W. E. Rappard, *supra* note 73, at 363.

[82] *See* P. Saladin, Grundrechte im Wandel 216–20 (Bern, Stämpfli, 1970).

[83] *See id.* at 217, 229; *see also* F. Fleiner & Z. Giacometti, *supra* note 74, at 281 ff.

[84] P. Saladin, *supra* note 82, at 235; F. Fleiner & Z. Giacometti, *supra* note 74, at 303 ff.

[85] P. Saladin, *supra* note 82, at 236 ff.

[86] *See also* Complement to the Federal Constitution Concerning the Extension of Temporary Price Control Measures, 26 Sept. 1952 (accepted by referendum of 23 Nov. 1952 and renewed in 1956, 1960 & 1964). *See* 15 Constitutions of the World, *supra* note 2, Switzerland and Historic Constitutions (Switzerland). The development is described in 1 J.-F. Aubert, Traité de Droit Constitutionnel Suisse 53 ff (Neuchâtel, Ides et Calendes, 1967).

There is, however, one area in which Switzerland differs from Germany in not having a unified system, even though the matter is of considerable importance for economic activities. This is taxation where, notably in the matter of direct taxation (*i.e.*, mainly taxes on income), it is the Swiss Cantons which have full jurisdiction.[87] This leads to considerable differences between the Cantons.

3. Integration Through the Protection of Fundamental Rights

The Swiss Constitution only contains a few provisions expressly guaranteeing fundamental rights and freedoms. Those mentioned are: equality before the law (article 4), freedom of commerce and industry (article 31), freedom of establishment (article 45), freedom of religion (articles 49 and 50), freedom of the press (article 55), freedom of association (article 56), and today also the right to property (article 22 *ter*, introduced by amendment only in 1969). In the ongoing debates concerning a general revision of the Swiss Constitution, the lack of a comprehensive Bill of Rights is often referred to as one of the important failures of the present Constitution.[88] The Federal Tribunal has, however, in a long line of cases developed additional constitutional rights which are protected by Swiss law in the same manner as the fundamental rights which are expressly mentioned in the text of the Constitution. It was this procedure that allowed, for example, the right to property to be protected as a constitutional right long before its formal adoption into the Constitution.[89]

The history of the development of fundamental rights protection in the Swiss federal system is of interest because of the initial quite considerable reluctance to give the Federal Tribunal jurisdiction to interpret and apply fundamental rights. Under the Federal Constitution of 1848 (article 105) the Federal Assembly alone was competent to refer cases alleging violations of federal rights to the Federal Tribunal,[90] and by 1874 this procedure had been used only once.[91] Even under the Constitution of 1874, it was some considerable time before the protection of fundamental rights guaranteed in the Federal Constitution came under the direct jurisdiction of the Federal Tribunal, but eventually legislative acts of 1893 and 1911 abolished, at least in respect of most fundamental rights, the procedure giving the Federal Assembly the exclusive compe-

[87] *See id.* at 283 ff.

[88] Eichenberger, *Der Entwurf von 1977 für eine neue schweizerische Bundesverfassung*, 40 ZaöRV 477, 490 (1980).

[89] *See* 2 J.-F. Aubert, *supra* note 86, at 757; Huber, *Die Grundrechte in der Schweiz*, in I/1 Die Grundrechte 179 (K. Bettermann, F.L. Neumann & H. Nipperday eds., Berlin, Duncker & Humblot, 1966).

[90] Imboden, *Verfassungsgerichtsbarkeit in der Schweiz*, in Constitutional Review in the World Today 506, 507 ff (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, H. Mosler ed., Cologne/Berlin, Carl Heymans, 1962) (vol. 36 BaöRV).

[91] 2 J.-F. Aubert, *supra* note 86, at 589.

tence to refer cases, and henceforth the individual could make a direct application in person to the Federal Tribunal.[92]

Modern Swiss doctrine has pointed out that the procedure by which the Federal Assembly acted as an organ of constitutional review was quite appropriate in a period when the full integration of the young federal state was yet to be achieved.[93] The protection of the freedom of religion, the enforcement of the freedom of the press, or the recognition of the freedom of residence throughout the federal territory, were hot political issues at that time. Apparently it was felt that federal judicial enforcement of those rights might not be acceptable to the Cantons and the people: only a political organ representing the people on the one hand and the Cantons on the other was seen to be sufficiently trustworthy for this task. It is to be noted that at about the same period the German Constitution of 1871 was drafted omitting a Bill of Rights because of similar fears about interfering with the rights of the Länder.[94] The early jurisprudence of the United States Supreme Court excluding the states from any obligation under the Federal Bill of Rights to some extent may also be due to similar considerations.[95] Such experiences tend to suggest that the premature introduction of judical review for the protection of fundamental rights in a federal system may be counterproductive because the results will not be accepted.

Today the Swiss Federal Tribunal shows no reluctance in protecting fundamental rights, and indeed sometimes adopts a rather activist approach. The harmonising influence of its jurisprudence on the Swiss cantonal laws has been much stronger than that of the German Federal Constitutional Court in the German Länder. This is due largely to the fact that one can find a far greater variety and more marked differences among the legislative provisions of the various Cantons than can be found among the laws of the German Länder. A good example of the Federal Tribunal's approach to human rights protection is provided by a decision of 28 January 1981 concerning a cantonal practice of publishing in the Official Journal the names of debtors against whom execution had been to no avail.[96] The Tribunal declared that the unwritten fundamental right of personal liberty embraced a guarantee of personal dignity and honour and found the challenged practice to be a disproportionate interference with this right.[97] The Court stressed the fact that most Cantons had already abolished this once common procedure and reasoned that what was at

[92] *See* Müller, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, 39 VVDStRL 58–60 (1981).

[93] *See, e.g., id.* at 58 ff.

[94] *See supra* notes 21–22 and accompanying text.

[95] *See* Frowein, Schulhofer & Shapiro, *The Protection of Human Rights as a Vehicle of Integration, infra* this vol., Bk. 3, at § II.B.

[96] Bundesgericht (CH), Judgment of 28 January 1981, BGE 107 Ia, 52. *See* Leuenberger, *Veröffentlichung der Namen fruchtlos gepfändeter Schuldner*, 8 EuGRZ 400 (1981).

[97] *See* Leuenberger, *supra* note 96, at 401 ff.

stake here was only the final step of a development which had already been implemented at the cantonal level much earlier.[98] Indeed in an earlier decision the Federal Tribunal had explained that for an unwritten federal constitutional right to be recognised it was necessary to show that there already existed a widespread constitutional practice of the kind in the Cantons and that this practice was supported by a general consensus.[99]

It should also be mentioned in this context that the Swiss Federal Tribunal treats the European Convention on Human Rights as directly applicable federal law. This means that some harmonising influence on cantonal law may result from the application of this treaty guaranteeing fundamental human rights. In practice, however, it would seem that the Federal Tribunal prefers to interpret the Swiss fundamental rights in such a way as to include all the rights guaranteed by the Convention, rather than striking down cantonal laws on the sole basis of the Convention.[100]

The Swiss Federal Tribunal makes an interesting procedural distinction in determining the scope of its control in the judicial review of cantonal acts. It distinguishes between cases of "full control" and "restricted control" (*freie und beschränkte Kognition*): where there has been a serious interference with a fundamental right full control as to the legal merits is exercised. But where the interference is only slight, the Federal Tribunal will review cantonal law only for arbitrariness.[101] In general, one can say that the Federal Tribunal will subject cantonal law, including delegated legislation, to a more thorough scrutiny where the alleged interference with constitutional rights is substantial.[102]

These distinctions in the scope of review result mainly from the attempt to balance the interests of cantonal "sovereignty" and those of the individual: respect for the cantonal decision will prevail as long as there is no substantial interference with individual rights.[103] In the same way the Federal Tribunal recognises a cantonal margin of appreciation where such values as morals, good order and the like are at stake. Here the Court has stated that the cantonal authorities are better equipped to find the correct solution.[104]

[98] *See id.* at 402.

[99] BGE 104 Ia, 88, 96. For a criticism of these requirements, *see* Müller, *Die staatsrechtliche Rechtsprechung des Bundesgerichts im Jahre 1978*, 116 ZBJV 236 (1980).

[100] For a description of this interpretive posture of the Tribunal, *see* Wildhaber, *Erfahrungen mit der Europäischen Menschenrechtskonvention*, 93 SCHWEIZERISCHER JURISTENVEREIN 327 ff, 361 ff (1974).

[101] *See* H. MARTI, DIE STAATSRECHTLICHE BESCHWERDE 161 ff, 292 ff (4th ed., Basel, Helbing & Lichtenbahn, 1979); for case law *see, e.g.*, BGE 104 Ia, 196 & BGE 104 Ia, 473 (freedom of commerce and industry); BGE 104 Ia, 328 (right to property).

[102] H. MARTI, *supra* note 101, at 160.

[103] Hotz, *Zur Notwendigkeit und Verhältnismäßigkeit von Grundrechtseingriffen*, 510 ZÜRCHER BEITRÄGE ZUR RECHTSWISSENSCHAFT 105 ff (1977).

[104] *Id.* at 104. *See also* P. SALADIN, *supra* note 82, at 77 ff.

The Swiss system has experienced problems very similar to those experienced in the American context over striking the balance between cantonal freedom and individual rights. The Federal Tribunal addressed this problem in a case decided in 1975, in which the issue was whether the police could restrict the advertising of the showing of a film on abortion.[105] The Federal Tribunal held that its reluctance to interfere with the exercise of the cantonal discretion is justified where the public interest issue is related to local or personal conditions;[106] but where, as in the case before it, a problem of national politics is involved, a cantonal margin of appreciation cannot be accepted and the Federal Tribunal need feel no inhibitions.[107] It therefore quashed the order in question.

C. Some Concluding Remarks Concerning Current Developments in Swiss Federalism

In Switzerland, as in Germany, there have recently been extensive discussions concerning the future development of the federal system. An interesting proposal concerning cooperation between the different levels in the federal structure has come from the commission of experts working on a new Swiss constitution, who in 1977 suggested a provision which has no parallel in any existing federal constitution. According to this proposal, article 43, paragraphs 1 and 2 of the new Swiss Constitution should read:

(1) The Federal Government and the Cantons ... owe each other respect and assistance.

(2) They assist each other in the implementation of their tasks. They cooperate especially in common planning procedures.[108]

As for the distribution of competences between the Federal Government and the Cantons, the proposal suggests that the federal legislature should be given a new power of coordination. Article 51, paragraph 2 of the draft Constitution

[105] BGE 101 Ia, 252.

[106] *Id.* at 257.

[107] *Id.* at 258.

[108] Art. 43 Fidélité confédérale et coopération

[1] La Confédération et les cantons, de même que les cantons entre eux, se doivent mutuellement considération et assistance.

[2] Ils s'entraident dans l'accomplissement de leurs tâches. Ils coopèrent, notamment, en planifiant en commun.

[3] La Confédération peut, par une loi, régler la coopération entre cantons voisins.

COMMISSION D'EXPERTS POUR LA PRÉPARATION D'UNE RÉVISION TOTALE DE LA CONSTITUTION FÉDÉRALE, PROJET DE CONSTITUTION 10 (Berne, Office central fédéral des imprimés et du matériel, 1977) (author's translation). *See also* COMMISSION D'EXPERTS POUR LA PRÉPARATION D'UNE RÉVISION TOTALE DE LA CONSTITUTION FÉDÉRALE, RAPPORT 90 ff (Berne, Office central fédéral des imprimés et du matériel, 1977).

provides that federal laws may lay down minimum requirements for cantonal legislation and enforce coordination even in those areas which fall into the cantonal jurisdiction.[109] This proposal has been severely criticised because it attributes to the Federal Government the final decision as to the scope in what is really a cantonal responsibility.[110] It may well be that the commission of experts was too optimistic as to the willingness of the Swiss population to accept unification and coordination through Federal Government action in areas where traditionally the Cantons have jurisdiction.[111]

IV. In Conclusion

As we noted at the outset, it is difficult to draw any general conclusions from federal experiences which are as specific as those of Germany and Switzerland. But a brief overview of both developments does illustrate the interaction of legal and economic integration and the role which this plays in helping to forge the federation. The essential element of federalism – which typifies both systems and which should be of interest in relation to European Community developments – appears to be the continuous cooperation between the different levels of government. Much more than the formal unification of legislation in all areas, it is this continuous cooperation of partly independent entities which is responsible for the success of the federal structure, providing the much-needed flexibility. The distribution of responsibilities between the federal government and the member states in the Federal Republic of Germany and also in Switzerland has considerable similarities with the distribution of competences in the EC. This division of responsibilities extends not only to the sharing of legislative competences, but also to executive and implementing functions. By contrast to the United States, where jurisdiction to implement federal laws is, at least as a general rule, given to federal agencies, in Germany and Switzerland (and by analogy in the EC) most federal laws are executed by state administrative authorities and federal legislation even often needs to be "completed" by additional state legislation or regulation to be implemented. There is thus an organised sharing of responsibilities between the different levels of government in the federal system, and it is this partnership relationship which is the essence of federalism.

[109] Projet de Constitution art. 51(2): "Dans ces domaines, la Confédération peut:
(a) adopter des lois-cadres pour fixer des exigences minimales ou pour assurer la coordination entre les cantons,
(b) Créer des institutions dans des cas particuliers."

[110] *See* Eichenberger, *supra* note 88, at 540 ff.

[111] For a recent discussion of Swiss federalism *see* Saladin, *Bund und Kantone*, 118 Schweizerischer Juristenverein 439 (1984).

Part IV

Some Comparative Conclusions

Federalism and European Integration: A Commentary

Donald P. Kommers*

I. Introduction

One of the purposes of this volume is to explore the relevance of the American federal experience to the development of legal integration in Europe. Daniel Elazar and Ilan Greilsammer have accomplished this task in a grand manner. They seek to capture the meaning of the American experience in its totality and then to compare this experience with the effort to create in Europe a closer federal union. The United States, however, is only one of several more or less successful models of federalism in the modern world. Realizing this, the editors decided to include comparable papers on Australia and Canada, authored respectively by Gerard Rowe and Dan Soberman, together with a paper by Jochen Frowein comparing Germany and Switzerland. Each of the countries discussed in these papers represents a federation in which a high measure of legal integration has been attained and with which the experience of the European Community might fruitfully be compared. The papers approach their subjects in different ways and not always within the same comparative framework; but all are concerned with the general experience of federalism. The special merit of these studies, like that of Elazar and Greilsammer, is the attention they give to the interrelationship among various determinants of integration – or its absence – in federal systems. (Most of the chapters in this volume are detailed studies of a single technique of legal integration or a single policy area illustrating movement toward legal integration.) The purpose of this particular commentary is to take stock of these single-nation studies, to identify their common threads, and to underscore certain problems in the study of federalism as a legal and political phenomenon. The commentary concludes with a few observations about the comparative value of the federal experiences under study to the European Community.

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I wish to thank my colleague, Professor Kenneth Ripple, for his comments on an early draft of this commentary.

II. Comparative Federalism

The papers on Canada, Australia, Germany and Switzerland underscore vast differences, as well as certain similarities, in the origin and character of modern federalism. Adding the United States to this list of nations enriches the camparison even further: Elazar and Greilsammer's study of the American experience is therefore included in this commentary. Our consideration of their paper in tandem with the other three may help to brighten the light that the American experience – the Project's main benchmark for measuring the European Community – sheds on the problem of achieving a federal union in Europe. Each country under study is the subject of very long and detailed analysis. It will be helpful, therefore, to begin this commentary with a brief summary of each paper.

A. The United States

Elazar and Greilsammer's study turns up the hard ground of the American polity, exposing the deep roots of its federal character and the rich subsoil that accounts for the reality behind the Latin motto *e pluribus unum*. The American polity was federal at birth, they argue, long before the particular shape given to it by the Constitution. According to this interpretation, American federalism was not the mere contrivance of enterprising persons. It was also, very largely, the outgrowth of a common religious and philosophical inheritance, "a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English 'natural rights' school of the seventeenth and early eighteenth centuries."[1] Thus "federal democracy," as they characterize the American system, is a natural phenomenon, a living organism; the idea it represents literally runs through the blood of the American people, informing the theory and practice of their government. There is little in this genealogy, the authors conclude, that compares with the "organism" being created in Europe.

The authors then take the reader through a brief history of modern American federalism, underscoring its evolution from a federal system which stressed the formal division of powers between states and nation to one characterized by the notion of "total partnership." The partnership, they note, has been subject to stress and even endangered by the enormous growth of federal power in recent decades. Yet they argue that the system's basic thrust is toward partnership, indeed a special kind of partnership nurtured by a common political culture oriented toward the comprehensive goals of liberty and order. These goals, liberty and order, are in the authors' view the coagulants of American federalism and the ultimate explanation of its success.

[1] Elazar & Greilsammer, *Federal Democracy: The U.S.A. and Europe Compared – A Political Science Perspective, supra* this book, at p. 77–78.

Could the European Community evolve into this kind of partnership? The authors think not. Except for the European Court of Justice, they do not find significant European analogies to the main political and institutional characteristics of the American system. The diversity of political cultures in Europe and the corresponding lack of constitutional arrangements capable of fostering enduring transnational cooperation are likely in their view to transform the Community into a "restricted partnership" at best. Moreover, the centrifugal forces pulling Europe away from the American pattern, including a precipitous decline in popular support for European union, is undermining even the existing partnership. The authors concede that serious economic problems common to Europe may well reverse this trend. But they are inclined to believe that any further movement toward unity on the Continent is likely to reflect a distinctively European achievement markedly different from the American.

B. Canada

Soberman's paper confines itself mainly to a discussion of Canada, but the problems of Canadian federalism are ones that European federalists would surely wish to avoid. Much can therefore be learned from the Canadian experience. Integrative processes and techniques that appear to have worked in the United States seem to have foundered in Canada. For one thing, Canada's Supreme Court has not functioned as the unifying force that might have been expected of it, owing in some part to that tribunal's narrow conception of its role in the promotion of a national human rights policy under the Canadian Bill of Rights Statute, a subject to which Soberman devotes much attention in his paper. For another, the ideal of a common market informing all federal constitutions has not blossomed into reality. Provincial legislation interfering with the free movement of goods and favoring local businesses and occupations has begun seriously to "balkanize" the Canadian economy. By Professor Soberman's account, severe cleavages have occurred between the federation's energy-producing and energy-consuming regions. The National Government's economic and fiscal policies, particularly those relating to the distribution of benefits and resources among the Provinces, have apparently deepened the fissures.

The author links these problems, finally, to certain "institutional deficiencies" of Canadian government and politics. One such flaw, he argues, is the absence of a popularly based national representative institution capable of modulating the intensity of federal-provincial conflict. The appointment of Senators more loyal to party than region undermines the "Upper House's" role as a broker between competing national and provincial interests. Accentuating this deficiency is the absence in Canada of truly national political parties: organized along regional lines they tend to aggravate sectional struggle and diversity.

A more serious constitutional crisis overlays the economic conflicts of

Canadian federalism. The separatist movement in Quebec, born and weaned in that Province's distinctive linguistic and religious culture, is seen as the core of the crisis. But the emergence of seccessionist tendencies in certain western Provinces embittered by the policies of a national administration historically dominated by the populous Provinces of Quebec and Ontario, is also ripping the fabric of Canadian federalism. Finally, writes the author, the crisis was deepened by the failure of the original Constitution to prescribe any amendatory procedures, the result of which in practice has been to make constitutional change hostage to provincial unanimity.

Many of these difficulties have now been at least partially alleviated by the adoption of Canada's new Constitution in 1982.[2] The new Constitution includes a Bill of Rights, known as the Charter of Rights and Freedoms, which among other things accords equal status to the English and French languages.[3] It also includes new provisions on the equalization of regional disparities, on the control of nonrenewable natural resources, and on amending the Constitution. These changes are undoubtedly an improvement in the prospects for Canadian unity, although the new Constitution does not correct the faults identified in the nation's institutional structure.

C. Australia

Rowe focuses principally on anti-discrimination law as a vehicle for examining Australian federalism. In a detailed comparison of Australia's constitutional structure with that of the European Community, the latter, surprisingly, receives higher marks for its integrative capacity than Australia, owing mainly to strong judicial and executive control over the development of EC policy. Echoing one of Soberman's complaints about Canada, the author criticizes Australia's High Court for its failure adequately to protect minorities, a deficiency ascribed to the absence of a Bill of Rights in both Federal and State Constitutions. Thus, Australian judicial review turns out to be a very limited tool in the achievement of legal integration. The weakness of the executive as a tool of integration is attributed, on the other hand, to parliamentary predominance in the making of public policy.

[2] The new Constitution, which came into force on 17 Apr. 1982, contains detailed and flexible procedures for amending the Constitution. *See* Soberman, *The Canadian Federal Experience – Selected Issues, supra* this book, *esp.* at § II.D.1 & 2. For an excellent and more detailed discussion of the conflicts and procedures leading to the adoption of the Canda Act 1982 *see also* D. MILNE, THE NEW CANADIAN CONSTITUTION (Toronto, John Lorimer & Co., 1982); E. MCWHINNEY, CANADA AND THE CONSTITUTION 1979–1982 (Toronto, U. Toronto, P., 1982).

[3] Discussed in Soberman, *supra* note 2, at § III.B.2.c, nn. 166–78 and accompanying text. A good introduction to the Charter is THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (W. S. Tarnopolsky & G. A. Beaudoin eds., Toronto, Carswell Co. Ltd., 1982). *See also* D. C. MCDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto, Carswell Co. Ltd., 1982).

The author then seeks to relate these "weaknesses" of constitutional structure to the plight of the Aborigines, epitomized by *Koowarta v. Bjelke Petersson*,[4] a civil rights case generated by Queensland's refusal to allow an Aboriginal group to lease lands beyond those currently reserved to them. The Aborigines appeared to have no legal redress under state law: both statute and Common Law failed to secure their special claim to landed property. Again, the culprit is the Constitution, for the Federal Government lacks power to require the states to pass anti-discrimination laws.[5] At the same time, the validity of the federal civil rights statute under which the Aborigines sued was being attacked in *Koowarta* as a violation of states' rights, threatening to hurl minority people into a constitutional no-man's land. The absence of a Bill of Rights in the Australian Constitution, the author is suggesting, severely limits national control over state discrimination policies, just as state governments are unable to enforce their anti-discrimination statutes against the Commonwealth. There is anti-discrimination language in the Constitution on the basis of which the federal statute at issue in *Koowarta* might have been upheld, but the High Court chose instead to sustain the law on the ground of the Federal Government's exclusive control over "external affairs." Interestingly, the High Court supported its decision by reference to international treaties and covenants on human rights. At all events, the Achilles' heel of the Australian system, concludes Rowe, is that the Commonwealth, unlike the European Community, cannot "direct state governments to enact laws to cover certain aspects of discrimination (or anything else)."[6] This critical assessment of Australian federalism is clearly the product of the author's disenchantment with national civil rights policy. The extent to which the unity or integration of a federal system is dependent on the adoption of a uniform substantive policy outcome is a question to which we shall return later in this essay.

D. Germany and Switzerland

Frowein's paper is a general description of the historical and contemporary development of German and Swiss federalism. The German story is traced through successive stages of economic and political unity, beginning with the formation of the German Confederation in 1815 and concluding with an overview of federal-state relations in the Federal Republic. The desire for economic integration, argues Frowein, was the original driving force behind the development of German federalism. Customs unions, uniform economic legislation, and laws designed to protect industry against parochial pressures helped to create a common market as well as a common identity among a people historically fractured by a multiplicity of sovereign kingdoms and principalities.

[4] 39 A.L.R. 417 (High Ct. 1982).

[5] Rowe, *Aspects of Australian Federalism and the European Communities Compared*, *supra* this book, text accompanying nn. 48–49 & 495.

[6] *Id.* at p. 505.

We would add, however, that economic integration in Germany was achieved largely under the dominance of Prussia, leading to a higher measure of unity than that achieved in the other systems under study.

Contemporary German federalism, as Frowein points out, is built on previous German models. It concentrates most legislative authority in the Federal Government but places the administration of federal law in the hands of the states. Yet the states play a vital role in the making of federal law by virtue of their corporate representation in the Federal Council (*Bundesrat*), a role reinforced in 1969 by a constitutional amendment requiring the *Bundesrat*'s consent to laws involving grant-in-aid policy. This and other constitutional provisions governing the relationship between the states and the Federal Government have made cooperative federalism a practical necessity as well as a defining characteristic of the German system.

Finally, Professor Frowein discusses human rights as a tool of integration. In the Federal Republic he finds the results mixed. On the one hand, the Federal Constitutional Court has played an important harmonizing role among the states by requiring them to adopt federal standards in certain areas related to higher education and the administration of the church tax. On the other hand, he notes that the Court has invalidated numerous federal statutes impinging on basic rights, and finds that this result has had a limited harmonizing effect, although it is not clear whether the author regards the latter phenomenon as good or bad for German federalism.

The paper turns its attention next to Switzerland, briefly mentioning its evolution from a loose confederal union, beginning roughly in 1291, to a mature federal union in the nineteenth century. The stability and durability of Swiss federalism, lasting down to the present day, is in sharp contrast to the instability and discontinuity of Germany's constitutional tradition. Still, like Germany, integration in Switzerland was gradually achieved through the establishment of economic freedom, the unification of economic legislation, and the protection of fundamental rights. The paper concludes by noticing that Germany and Switzerland have developed similar institutions as well as a similar division of authority between local and national governments, which in turn have analogies in the European Community. Frowein is reluctant, however, to venture any comparative conclusions about the process of legal integration in light of the unique national experiences of the two countries studied, a difficulty owing in all probability to the paper's legal-institutional focus.

III. Federalism and Integration

The federations described in the four papers under consideration are the product of vast differences in historical origin. The recorded experiences show that federalism can and does survive, although in some instances precariously, under different constitutional forms and governmental systems. It is therefore not surprising to learn that the character of legal integration differs from one

federation to the next. Frowein rightly reminds us that we lack a precise definition of "integration."[7] This is not to say that the papers should have settled on such a definition or even that such a definition is needed. After all, the papers deal with living political systems and living systems cannot be reduced to a vapid formalism. Our concern is *federal* integration as much as federal *integration*. The emphasis on "federal" assumes some division of power between levels of government, either in the making or execution of policy, or both; we cannot intelligibly speak about federalism in the absence of such a division of power. The emphasis on "integration," on the other hand, assumes some measure of unity in diversity. But the remedy for diversity in a federal union is surely not uniformity in all things, although it may be required in some things. It certainly requires some level of interdependence between federal and state governments. Some such measure of interdependence is clearly characteristic of the five federations under study, although one may view the relationship between Canada and Quebec as something less than interdependence.

In any case, what leads to an enduring federal union characterized by maximum feasible integration? The papers present no clear-cut anwer to this query. But then the query may be misleading, for a federal union can endure under various degrees of integration. The Swiss federation has endured for centuries with far less legal integration than, say, Germany or even Australia. The papers show that it really is not possible to speak of maximum feasible integration in the abstract. Nor is it possible really to identify federalism with any particular formal division of power between nation and states. In fact, as the papers imply, the distribution of real power within each of the federal systems studied has changed over time, usually in the direction of greater control by the center, while constitutional forms, although differing from one system to the next, have remained relatively constant.

The diversity of federal systems around the world prompted Edward McWhinney, a well-known student of federalism, to classify federalism as monistic, pluralistic, or dualistic.[8] The first refers to a system in which policy-making in most fields is concentrated at the center; the second, far more centrifugal in emphasis, divides power fairly widely between center and periphery; the third, flowing from compact theories of the constitution, emphasizes "regional self-determination even at the expense of ultimate national interest."[9] McWhinney's triadic scheme applies very nicely to the experiences related in the papers. West Germany might be characterized as monistic; the United States, Switzerland, and Australia as pluralistic; and Canada as dualistic. But in an earlier historical period Canada was clearly monistic while the United States, Switzerland, and Germany were arguably dualistic.

[7] Frowein, *Integration and the Federal Experience in Germany and Switzerland, supra* this book, at n. 35 and accompanying text.

[8] E. McWHINNEY, COMPARATIVE FEDERALISM 16–17 (2nd ed., Toronto, U. Toronto P., 1965).

[9] *Id.* at 17.

Do these diverse federal systems share any common characteristics and do the contributors agree on what is required in federal systems to promote maximum feasible integration? With regard to the first inquiry it might be noticed that each system divides power in some fashion, administratively or legislatively (or both), between levels of government, a clear basis of any working *federal* system. Each system is also characterized by some form of bicameralism in which one house of the legislative branch is identified with the constituent units of the federation. As the Canadian experience shows, however, this representation is not always effective in resolving conflicts between center and periphery. The states do appear to be effectively represented in the national parliaments of the other federations. But what does *effective* representation in a federal system mean? Apparently two things: First, the "upper" house should have the capacity to veto or suspend legislation passed by the "lower" or more popular branch; second, the institution needs to be organized to encourage compromise among units and levels of government if a fair balance between diverse policy harmonization and the need for local differentiation is to be achieved.

Another common factor is that each federation has a rigid constitution; namely, one that can only be amended by super majorities, thus allowing particular regions of the country or a minority of states (or cantons) to block amendments to the constitution. In this sense, all five federations are what might be called "consensus democracies," to be distinguished from majoritarian democracies.[10] In the case of Canada, once again, rigidity was carried to the extreme requirement of unanimity, thus threatening maximum feasible integration. Still another factor reinforcing consensus democracy in each system under study is the institution of judicial review. Each system provides for judicial review of state legislation and each paper recognizes the critical importance of an institution to resolve constitutional disputes between central and local governments.

The contributors also agree on two other things. The first is the critical importance of the free movement of goods, services, and persons within federal systems. They point out that the desire and need for a common market of free sellers and free buyers has been a determining force in all five federations. Economic law as a force for unity is given particular emphasis in the description of German and Swiss federalism, underscoring the strong reciprocal relationship beween legal and economic history. The second common denominator of agreement is the accent each paper places on human rights as a factor in legal integration.

At this point, however, the discussion gets a bit murky. What precisely is the relationship between federalism, human rights, and economic freedom? It

[10] The distinction is drawn by Arend Lijphart in his study of the protections accorded to majority and minority rights under various democratic constitutions. *See* A. LIJPHART, COMPARATIVE DEMOCRATIC REGIMES ch. 11 (New Haven, Yale U.P., forthcoming).

might be suggested that the problem of this relationship is an aspect of the larger problem of the relationship between federalism and political culture. Elazar and Greilsammer's account of the American federal experience is relevant here. While not underestimating the significance of economic forces in their explanation of American legal integration, they place greater significance on the influence of political culture. Their argument is intriguing, and has interesting implications for the future of European federalism. If a federation is to endure in perpetuity its economy, no matter how unified, would seem to require, in their view, a mutually supportive political culture. In all five federations under study that culture could be described as "liberal democratic." Yet it is more than that. According to Elazar and Greilsammer, American federalism represents, historically, a covenantal relationship voluntarily supported by the popular masses. The same might be said of Canada and Australia, although in the case of the former the "covenant" – such as it is – appears to have eroded in recent years.

The relationship between economy, democracy, and federalism is of particular interest in Canada. There liberal democracy has always prevailed, but the economy has been seriously fractured. Actually, the core of the Canadian constitutional crisis, viewed historically, may not have been cultural, linguistic, or religious at all, as so often hypothesized, but rather economic. Could Quebec's increasing isolation be attributed to discrimination against that Province growing out of a powerful *Anglo*-Canadian-American economic alliance? If true, then that combine, when superimposed on the long presence in Canada of an Aglo-Saxon "colonial power," would at least partially explain the emergence of Quebec separatism. So here very possibly is an instance where lack of economic integration, owing to discrimination, has seriously impeded the growth of maximum feasible integration. The Canadian experience shows that economic integration is clearly important to the development of a healthy federal union; indeed it is a necessary, although perhaps not a sufficient, condition for the development of a lasting federal union.

The relationship between economy, democracy, and federalism is raised in acute form also by Frowein's account of German and Swiss federalism. The need for a common market was perhaps the major stimulus behind German federal union; yet the liberation of market forces and the need for economic growth were never enough to sustain German federalism over the long haul. Swiss federalism, on the other hand, has endured for centuries. Why? One possible answer is that Swiss federalism rests, historically, on a more solid or universally shared political consensus, capable of withstanding periods of economic crisis and of absorbing the shock effects of socio-economic change. In Germany, on the other hand, the fate of the constitutional order – one thinks immediately of the Weimar Republic – has been linked to the condition of the economy. Even today, the Bonn Republic's stability is often attributed as much to the strength of its economy as to any underlying commitment on the part of its people to political democracy, raising questions about the long-range durability of Germany's existing political order, although recent studies demonstrate that popular commitment to democracy has been increasing

significantly with the passage of time.[11] It would seem that economic integration needs to be framed by a supportive political culture.[12]

But we are still faced with the question of what makes a federal system of government workable. The papers are not always illuminating on this score. One source of difficulty in assessing the federal experiences under study is the general failure to distinguish between goals and procedures. Frowein happily alerts us to this concern in wondering whether integration should be seen primarily as "a goal" to be reached or rather be considered as "a procedure to be applied."[13] Here, I think, he means to underscore the importance of formal constitutional structure and its capacity to generate cooperative relationships.

In federal systems constitutional formality normally seeks to encourage – or should encourage – cooperative action, just as it may invite the pursuit of divergent aims or expand access to centers of official decision-making. Lon Fuller once spoke of two principles of human association: association by reciprocity and association for the achievement of common aims.[14] Both forms of association characterize federal systems of government. But can we say that one form is more important than another? In some contexts – for example, political cultures marked by severe religious or value cleavages – reciprocity may contribute more to political unity than the achievement of a common aim. Fro-

[11] *See* K. Baker, R. Dalton & K. Hildenbrandt, Germany Transformed: Political Culture and the New Politics (Cambridge, Harvard U.P., 1981). The authors marshall 30 years of public opinion and voting data to support their argument that the Federal Republic of Germany has been transformed from a social order based on traditional values into a democratic political culture.

[12] This is clearly implicit in the Soberman and Rowe papers and explicit in the Elazar and Greilsammer paper. A recent study by Professor James Willard Hurst, a well-known American legal historian, seeks to understand the operation of the American economy within the framework of a larger context of social and political values. His argument is close to that of Elazar and Greilsammer. He writes:

> In constituent acts those who prevailed demonstrated that what they wanted from life required substantial investment of calculated effort to deal with their social experience as a whole. Thus, they sought to bring into workable order a range of shared concerns embracing political, religious, social, and economic dimensions of living in common. This pattern appears in the Mayflower Compact, the Declaration of Independence, the several state constitutions, and the national Constitution. Social and individual values mingled in the determination that "[w]e, the people of the United States" would act "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

J. W. Hurst, Law and Markets in United States History 52 (Madison, U. Wis. P., 1982)

[13] *See* Frowein, *supra* note 7, at text accompanying n. 35.

[14] The Principles of Social Order 68–85 (K. Winston ed., Durham, Duke U.P., 1981).

wein seems to feel that reciprocity is critical to the success of German federalism. Rowe, on the other hand, stresses the importance of a common aim. But one may be prompted to ask whether an otherwise seemingly workable system should be condemned merely because of the absence of a common civil rights policy,[15] unless, of course, the absence of such a policy has blocked the formation of shared values essential to the survival of the system as a whole. Then, of course, there is Switzerland which like the United States may have achieved a rather congenial blend of both forms of association even though the distribution of power in the two systems is quite different, not to mention the fact that Switzerland, unlike the United States, is trilingual. But why have linguistic differences endangered federal integration in Canada and not in Switzerland? Is the difference in the two federal experiences related to differences in their respective forms of association? In the respective distribution of their peoples? These queries defy easy answer. But further research should try to specify the political, social, and economic conditions that favor one kind of association over another in federal systems.

Let us return, finally, to a consideration of constitutional formality. Of course, as all the papers show, legal structures do not always operate as their designers intended. Human beings and social interests intervene to shape the real character of institutions. Yet, as most of the papers recognize, legal structures also shape reality. Thus some courts of judicial review have become, as intended, central agencies in the implementation of constitutional policy favoring basic human rights. One surprising omission from the authors' list of formal structures contributing to legal integration is the electoral system. An election is a form of association by reciprocity; indeed the very legitimacy of a federation could be brought into question if its electoral laws and legislative institutions are not designed effectively to represent all major regions as well as major religious, ethnic, and social groups. Canada's system, for example, appears to have aggravated the fragmentation of the electorate, whereas Germany's system of qualified majority rule, when combined with the five percent rule governing the admission of minority parties into the national legislature, is associated with an increasingly unified electorate.[16] Doubtless these patterns are not entirely explainable by the presence or absence of particular legal or institutional factors; still they would seem to matter in any overall assessment of a federation's capacity for integration.

[15] Rowe is highly critical of the Australian system for this reason, comparing it unfavorably with the EC. A competing view of Australian federalism is advanced by Russell Mathews. He claims that because of the centralized influences in recent years, owing to the Commonwealth's use of the taxing and spending power, together with High Court decisions validating this power, "intergovernmental relations in Australia had [by 1975] virtually broken down." *See* Mathews, *The Changing Patterns of Australian Federalism*, in A. B. Akinyemi, P. O. Cole & W. Ofonagoro, Readings on Federalism 314 (Lagos, Nigerian Inst. Int'l Affs., 1979).

[16] With regard to West Germany, *see* Kriele, *Electoral Laws and Proceedings Under a Federal Constitution*, in Readings on Federalism, *supra* note 15, at 352.

It is interesting, too, to observe how particular institutions respond to the type of federation ordained by the constitution. In all of the countries under study judicial review is regarded in theory and in practice as an important tool of integration. Yet courts of judicial review have reinforced federal integration in different ways. In the United States and Australia, for example, where the original constitutional design is one largely of decentralized federalism, the Court has been a force for unity.[17] In Germany, on the other hand, where the original constitutional design centralizes the power of the national government, the Federal Constitutional Court, like the *Bundesrat*, has served as an important tool of "federalization" by defending the prerogatives of the *Länder*.[18] From this point of view the Court has been an important agency of *federal* integration, which in the German context may be needed to offset excessive political centralization. Frowein fears that the Court's role in furthering federal *integration* has been diminished by the frequency with which it has struck down national as opposed to state laws. Yet a federalist might reply that in doing so the Court has helped not only to promote the common value or ideology of federalism in the German public mind, but also to foster a practical federalism based on association by reciprocity. On the other hand, as Frowein notes, constitutional cases in the field of education are an illustration of the Court's role in promoting federal *integration*. The irony of this latter development is that the Court has imposed national uniform standards in educational areas – for example, on university governance and student admission procedures – once reserved exclusively to the states.[19]

However, in the final analysis, as all the papers recognize implicity, no institutional structure or constitutional form will make federalism work in the absence of the popular will or elite commitment to make it work. Federalism is at bottom a voluntary arrangement intended to create unity out of diversity without absorbing all diversity into a paralyzing uniformity. Federalism, as Carl Friedrich reminds us, is not a form frozen in time. It is rather a "dynamic relationship" requiring continuing adjustment in the relation between governments through the bargaining process.[20] In most of the nations under study, constitutional formality has been joined by unwritten constitutional practices

[17] Rowe employs the *Koowarta* case as a vehicle for underscoring the divisions within Australian federalism; yet, ironically, "[n]o prior decision of the High Court had gone so far as to enlarge . . . the scope of the [Commonwealth's] external affairs power." *See Current Topics*, 56 A.L.J. 382 (1982).

[18] The finest study in English of the Federal Constitutional Court's role in defending German federalism is P. M. Blair, Federalism and Judicial Review in West Germany (Oxford, Clarendon P., 1981).

[19] *See* Joyce Marie Mushaben, The State v. The University: Juridicalization and the Politics of Higher Education at the Free University of Berlin, 1969–1979 (Ph.D. thesis, Bloomington, Indiana Univ., 1981).

[20] *See* Friedrich, *The Political Theory of Federalism*, in Federalism and Supreme Courts and the Integration of Legal Systems 17, *esp.* at 31–35 (E. McWhinney & P. Pescatore eds., Heule/Brussels, UGA, 1973).

that have developed organically in response to pressures for stability and change. Working and workable federal systems seem to contain a resiliency for adaptation notwithstanding particular constitutional forms. The development of cooperative federalism in all the regimes under study is one manifestation of this resiliency.

IV. Concluding Remarks

One conclusion emerging from a reading of these papers is that federalism is an evolutionary process that defies universal definition. In this sense, federalism is as much historical process as formal design. Each of the federal systems under study is the product of a unique set of historical circumstances. Some of these circumstances may be resistant to the federal form; others may be compatible with it. Accidents of geography, language, culture, and politics often conspire to support or to thwart the original design. Thus, in Canada, a constitutional scheme originally more unitary than federal evolved into one almost confederal in operation. Australian federalism, despite heavy borrowing from the American model, differs significantly from American practice, particularly with respect to the integrative role of its High Court. Even the American design came tumbling down on the battlefields of civil war, a fact Elazar and Greilsammer seem to have minimized in their rather glowing account of American federalism.

All three federal systems, like those of Germany and Switzerland, had to negotiate and renegotiate, adjudicate and readjudicate, the federal-state relationship in the interest of the "more perfect union" that each aimed – and aims – to achieve. Despite variations in the formal division of power between levels of government, all the federations studied, including the Bonn Republic, have developed in the twentieth century into cooperative systems in which national and state powers are no longer clearly divisible. This common development has been accompanied in every case since 1945 by the increasing fiscal power of national governments, rendering state governments financially subordinate to the center. This historical tilt toward centralization and perhaps excessive aggregation seems to be generating new strains in federal structures and relationships, and may set in motion a process of disaggregation, leading in turn to new forms of integration and cooperation. Signs of such "revitalization" may currently be occurring in both West Germany and the United States, although to be sure the "new" federalism in both regimes is a matter of considerable controversy.

In the light of this evolutionary process the definition of federalism is really never complete. Or, to be more precise, the reality of federalism can really never be captured by its definition. Yet, for all that, federalism does not happen by accident. It is a governmental form arising out of a felt need for union among preexisting and independent units of government. Federalism is a deliberate decision and conscious product of a constitution approved and ratified, usually, by a people committed to common political as well as economic objec-

tives. It is a political invention calculated to overcome the fragmentation and particularism of a people otherwise bound together by geography or a common political culture. All four papers recount efforts to do no less than redirect political history toward common aims by means of the federal form.

In the light of these national experiences we should not rush to judgment about the future success or failure of the European Community. Like all the systems under study the EC contains the seeds of both aggregation and disaggregation. Whether the former prevails over the latter, which is our fond hope, depends in the last analysis on the will and determination of Member States and their leaders. But the success of the federal experiment in Europe also depends on adequate institutional structures and relationships. Europe has begun to create these structures and relationships. Many of them have analogues in all the federal systems considered in this commentary. They include a federal "constitution" or treaty looking toward a union of independent states, a scheme of divided authority between Member States, the direct applicability of Community law to each nation, the supremacy of Community law in those areas where the EC is empowered to legislate, and a central judicial institution that has aggressively defended and affirmed the supremacy of Community law.

On the other hand, the EC is mainly an economic union. It is a union of limited purpose. The experience of other federal states suggests that a *durable* and *lasting* economic union may require the creation of a still more perfect union oriented toward the achievement of domestic tranquillity, justice, the general welfare, and the blessings of liberty (to cite the goals of the Preamble to the United States Constitution). The institutions of the Council of Europe – notably the European Commission and Court of Human Rights – when combined with the creation by the Community of a popularly elected European Parliament may be regarded as the first plodding steps toward this more ambitious union. If the European Parliament develops into a genuine parliamentary body, elections to the Parliament are likely to assume increasing importance in the Member States, and that process, in turn, could conceivably lead to a developing European consciousness.

Today the Community is confederal at best. Tomorrow, if EC executive and legislative institutions develop and mature, it may emerge into a dualistic federal system. The day after tomorrow, as Europeans begin to think and feel "federal" and as the integration process begins to encompass areas of life beyond that of the economy, it could even rise to the level of a pluralistic federal regime. In any case, the Community will be uniquely European in the same sense that other federalisms are uniquely American, Canadian, Australian, German, or Swiss. But it will be no less a federal union for that uniqueness.

tives. It is a political invention calculated to overcome the fragmentation and particularism of a people otherwise bound together by geography or a common political culture. All four papers recount efforts to do no less than redirect political history toward common aims by means of the federal form.

In the light of these national experiences we should not rush to judgment about the future success or failure of the European Community. Like all the systems under study the EC contains the seeds of both aggregation and disaggregation. Whether the former prevails over the latter, which is our fond hope, depends in the last analysis on the will and determination of Member States and their leaders. But the success of the federal experiment in Europe also depends on adequate institutional structures and relationships. Europe has begun to create these structures and relationships. Many of them have analogues in all the federal systems considered in this commentary. They include a federal "constitution" or treaty looking toward a union of independent states, a scheme of divided authority between Member States, the direct applicability of Community law to each nation, the supremacy of Community law in those areas where the EC is empowered to legislate, and a central judicial institution that has aggressively defended and affirmed the supremacy of Community law.

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