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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 2

Political Organs, Integration Techniques and Judicial Process

edited by

Mauro Cappelletti · Monica Seccombe · Joseph Weiler

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Preface

The Florence Integration Through Law Series is the product of a research project centered in the Law Department of the European University Institute, and as such it reflects the research interests of the Department: it is a contextual examination of European legal developments in comparative perspective. In the general introduction to the Series (published in Book One of this volume), we explained fully the philosophy, methodology and scope of the Project. Here we wish merely to recapitulate some of the principal themes in this volume and to explain its relation to the entire Project.

The European Legal Integration Project set out to examine the role of law in, and the legal impact of, integration in Europe, using the United States federal system as a comparative point of reference. The Project was conceived and executed in two parts. In Part One (published in Volume I) a number of teams of American and European scholars examined a wide range of legal techniques and mechanisms for integration and undertook an overall general analysis of law and integration. The first book of Volume I ("A Political, Legal, and Economic Overview") establishes the comparative and interdisciplinary context, providing background studies on the political, legal and economic implications of integration in Europe and America and including studies on other federal systems (Australia, Canada, Germany and Switzerland) to add comparative perspective. In this second book the contributors analyze the pre- and post-normative stages of the legal process, examining the decision-making and implementation problems, and the role of political and judical organs therein, and describing the various forms of normative techniques available in a federal or supranational context.

The third and final book of Volume I ("Forces and Potential for a European Identity") focusses on how the law can be harnessed to promote the governmental or integrational objectives of union. It isolates for consideration some substantive goals (foreign policy, free movement of goods and persons, human rights protection and legal education), in order to elucidate the ways in which law has been or can be used to promote substantive objectives. This approach is more fully developed in the studies in Part Two of the Project which deals in greater detail with substantive areas of federal/transnational policy and is open-ended. To date monographs have been planned in the following five areas: environmental protection, consumer protection, harmonization of corporation law and capital markets, energy policy, and regional policy. It is hoped that further studies may be undertaken in the future.

Florence, December 1984 *M.C., M.S., J.W.*

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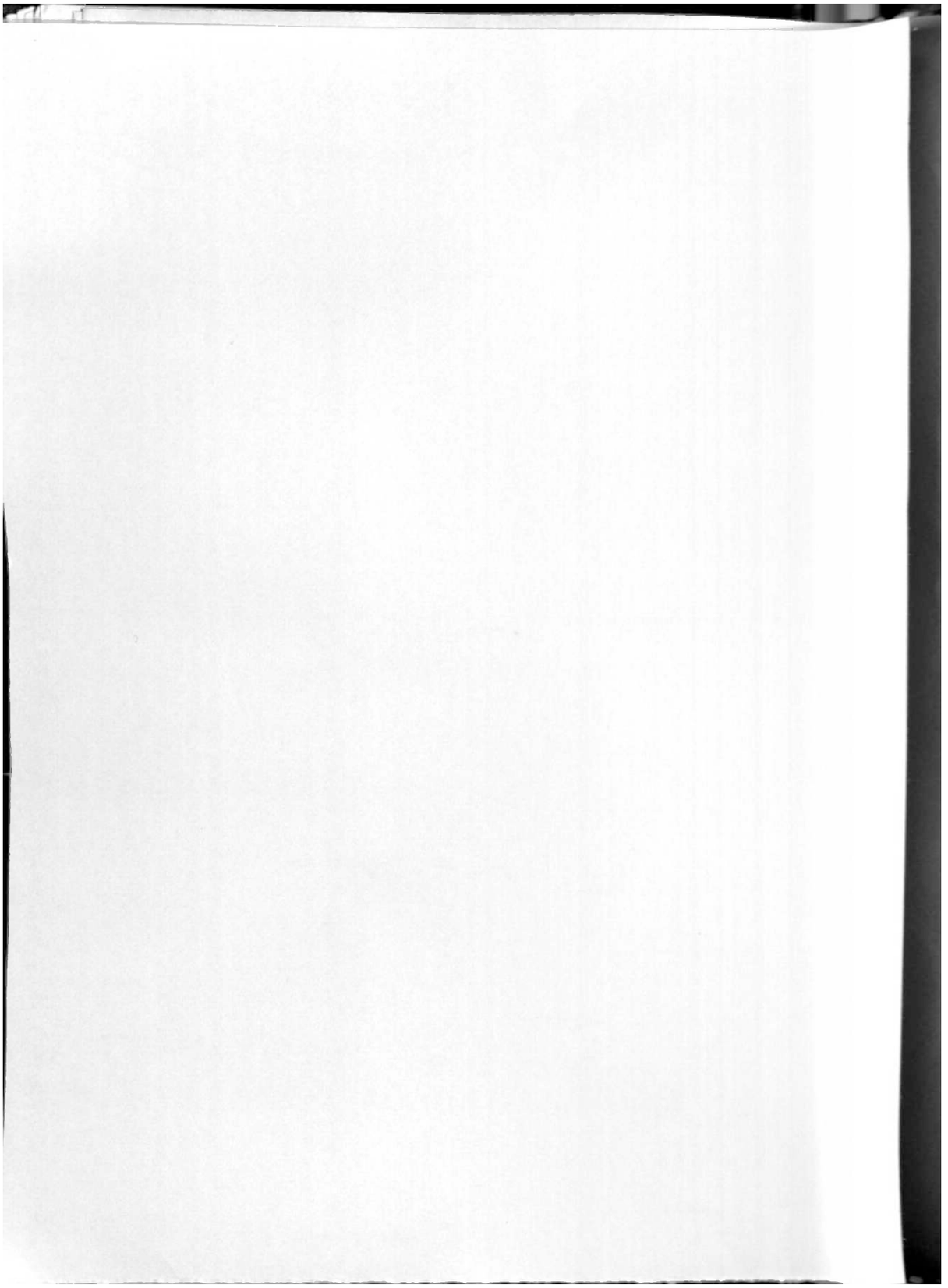

The Political Organs and the Decision-Making Process in the United States and the European Community

Samuel Krislov*
Claus-Dieter Ehlermann** and Joseph Weiler***

I. Introduction

Comparing the political systems and the decision-making processes of the European Community and the United States presents difficult conceptual and practical problems.

The conceptual problem is easily stated. Whereas since the mid-1960's legal developments in the EC have exhibited trends following those evolved in more sophisticated federal systems, in the forms of political institutions and decisional processes there remains a wide, seemingly unbridgeable gap between the two types of polities. To begin with, the EC was not conceived as, and is not in practice, a national government. Second, we are dealing with systems of institutions at widely divergent stages of their evolution: one, a mature and highly developed (though still evolving) entity; the other, still in the process of discovering, inventing or stumbling toward basic modes of dealing with characteristic problems. Finally, we must note that even insofar as political institutions resemble those elsewhere, or even are consciously borrowed from another system, the new setting in which they are placed makes and distorts them into something different. The U.S. Senate was never a House of Lords, and the European Court of Justice differs as much or more from the Supreme Court of the U.S. as it resembles it. Comparisons between the world of the 1780's

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and that of the 1980's are a specialized, though not negligible, aspect of this problem.

The practical-didactic problem is even more self-evident. Few political institutions and processes have attracted more scholarly attention than those of the American form of government; and no venture in transnational integration has been subjected to such close scrutiny as the European Community. It would indeed be all too easy to make of this study nothing more than a facile comparison between incomparables – a potted version of American and European political scholarship for European and American audiences respectively.

How then have we tried to overcome these two problems? It is easier to explain first what we have not done: we have not tried to develop a systematic, issue-by-issue comparison between the two sets of political institutions and decisional processes. Not only would this be futile, but it would probably be rather boring as well. Further, we have not even tried to present a single and evolving thesis deriving from the comparative analysis. If such a unified view exists, it has eluded us. Instead, we focus on a series of issues, methodological and substantive, the principal connection between them being in our view their centrality to an understanding of the political institutions and decisional processes. This study certainly takes its cue from the title of the Project: European Integration in Light of the American Federal Experience. The emphasis is on Europe. Thus, for example, we present for the first time the interim results of an empirical study of Community decision-making and analyze at some length problems of *implementation* of Community policy in relation to decision-making. The American experience is decidedly a background to these two components.

At the same time, we have tried to play the differences between the two systems to our advantage. We imbed our analysis in both a theoretical and historical discussion in which we deal as best we can with the problems of trans-historical and trans-cultural comparison, and in which we also recognize, at very least, the dynamics of system change. Moreover, not only has the American model provoked us to ask many questions about Europe, but we frequently found ourselves questioning accepted wisdom about federations in general and the U.S. in particular in the light of the European analysis. We sincerely hope that both Europeans and Americans will find at least some modest new insight into their respective systems.

Our discussion begins with a survey of the present state of so-called "integration theories" and concludes that, although the theories may have proven to be inadequate, outdated, or just plain wrong, this fact may not only be in some sense liberating but also may have little to do with the continuing integration process itself – although it may still not be clear just what *is* the nature of the process set in motion by the creation of the European Communities.

In the second major component, we offer some comparative reflections on the various institutions of governance in the two systems. In the interests of keeping an already long text within a non-outrageous (or barely tolerable) length, we have not attempted an exposition or flow chart of basic processes, which are already obtainable in American government texts such as Burns and

Peltason's *Government by the People*[1] or EC manuals such as Roy Pryce's *The Politics of the European Community;*[2] furthermore, in reliance on other studies in these volumes,[3] we have omitted a discussion of the court systems.

Following this conceptual reflection we include extensive and detailed, albeit preliminary, findings of an empirical study on Community decisional output. The Community malaise has been encapsulated in the notion of *lourdeur* – an alleged general slowdown in the Community decision-making processes. Our investigations reveal the dangers of generalization. A Community malaise no doubt exists, but its source may not be that most commonly indicated. The empirical study leads us to reassess more positively not only the role of the Commission but also of COREPER – for many, the true "culprit" responsible for the alleged European weakness.

Although most political analysis of intra-Community processes has tended to focus on policy-making, we feel that the post-decisional phase has been unjustifiably neglected. We would suggest that the question of implementation and application of policy, once adopted, is no less important, and that any erosion of the *acquis* through non-implementation or wrongful application is as dangerous to the Community as the failures of the decision-making process itself. We therefore devote considerable attention to the implementation problem. We try to give some indication of ways of identifying the problem, its magnitude and some suggestions for tackling it. Naturally our contribution can be considered as no more than a pilot study. We have not attempted to present anything of similar scope for the U.S. since that material is both more generally available,[4] and, in any event, original studies in that system would go beyond the scope of the present effort.

Our study does not have conclusions in the classic sense of the word. Instead, we end with some general reflections on the two systems. We have not solved the problem of comparing systems at different stages of development. To our knowledge at least, political studies generally have not developed any notion of political dynamics that would aid us in that venture. The least we can

[1] J.M. Burns & J.W. Peltason, Government by the People (11th ed., New York, Prentice-Hall, 1981).

[2] R. Pryce, The Politics of the European Community (London, Butterworths, 1973).

[3] *See* Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective, supra* this vol., Bk. 1; Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration, infra* this book.

[4] *See, e.g.*, S. Krislov, *et al.*, Compliance and the Law: A Multi-Disciplinary Approach (Beverly Hills, Sage Publications, 1972); A. Wildavsky & J.L. Pressman, Implementation: How Great Expectations in Washington Are Dashed in Oakland; Or Why It's Amazing that Federal Programs Work at All, This Being the Saga of the Economic Development Administration as Told to by Two Sympathetic Observers Who Seek to Build Morals on Ruined Hopes (2nd ed., Berkeley, U. Cal. P., 1979).

claim for the exercise in comparison is that it forced us to ask questions other scholars have not typically asked and, therefore, we hope it led us to some atypical answers as well.

II. The Disintegration of Integration Theory

Sometimes even clichés prove false. The evolution of the European Community is a case in point. It has developed along lines quite independent of theories, predictions or extrapolations, and is at the same time both an enormous success and a palpable failure. Its future growth is problematic, and its contraction is possible. After two decades of dizzying economic achievements, at present the most promising growth areas are political, where its record has been much less impressive. While all its basic headquarters are housed in officially temporary – or even peripatetically rotating – locations, sentiment for its permanence extends to the proposed establishment of an ineffable symbol of sovereignty, the European passport. As Stuart Scheingold writes:

> It is now clear that the original integrative goals are beyond the reach of the European Community .... It does not seem to make much sense to continue asking whether, and in what measure, each new development furthers the integrative process. But if we turn away from what is, after all, the defining issue of integration studies, what questions *are* we to pursue?[5]

In the light of these deviations from theory, skeptics today question even more than earlier the relevance of analogies based on the American experience. Of course, in the 1950's Max Beloff questioned any applicability of the U.S. experience at all. Such a case is arguable, certainly, and to some even convincing. But we shall try to indicate the existence of some precedent even in the fitful and uneven development in the American chronology. To this end, we shall examine in rather great detail the contradictory development of American federalism, with its own unequal progress and more than occasional retreats. Rather than blindly assume parallels or superciliously reject them, we shall explore the differences and analogies in some detail and with considerable dispassion.

The major intellectual disillusion concerning EC development is hardly tied to the question of historical parallelism. Rather, it is disquiet with the failure of theoretical constructs to predict, outline, or in any way to resemble the evolution that has occurred, and the thwarting of the earlier confident expectations of experienced men of affairs. It is the failure-in-success, the completeness of the cycle, the fact that form has not followed function, that puzzles, perplexes and almost paralyzes the Community's well-wishers.

The dominant approach, foreseeing a gradual unfolding of cooperation, was set by visionary statesmen and down-to-earth theorists. The former saw

[5] Scheingold, *The Community in Perspective*, 440 ANNALS 156–57 (1978).

step-by-step economic integration as a slow but sure road to more complete European integration. Just as the Coal and Steel Community had led to the more open-ended, integrative and governmental structures of the EEC, the future would see new stages and new growth.

The academic theorists were equally sanguine, but in many ways restrained by what they thought of as hard-headed appreciation of difficulties. They saw their guru in David Mitrany, the international relations expert and world integration visionary, who had argued against wild expectations, but instead advocated concentration on specific international tasks. By isolating those responsibilities that could be best carried out internationally, and building upon them, progress toward integration would be continuous with ultimate transmutation into new dynamic types of governmental forms. The name he gave to this approach was, appropriately enough, functionalism.[6]

The academic students of – and generally cheerleaders for – the EC accepted the general notions of functionalism, but even they found this approach to society-building naive. Writers like Haas, Lindberg and Scheingold[7] suggested that government was not just a coral reef, built of little accretions of tasks and requirements. Calling themselves neo-functionalists, they suggested that it was necessary to isolate crucial functions and to secure the loyalties of strategic elites in order to transcend old boundaries and build new loyalties. Still their approach was vulgar-Marxist – as they seemed to follow the old adage, "get them by the pocketbook and their hearts and minds will follow."

The integrationist critics of the functionalist approach saw all this as the fallacy of the farmer who, having been able to lift a growing calf over several weeks, was convinced he could ultimately lift a cow. Such writers as Alexandre Marc, the French authority on federalism, suggested precisely because of the *lack* of analogy to the American experience, that partial steps toward integration – analogous to the Articles of Confederation stage in America (1781 to 1789) – were inappropriate. He called for immediate federalism, a true new sovereignty.[8] This purist conception is, of course, not limited to Marc. A thin stratum of intellectuals hold to such a dream. Even among them, however, few believe the conditions for such a strong development have existed in Europe or that the EEC pre-empted a greater unification. Rather, they would prefer to avoid half-measures, which they see as inevitable failures, to preserve the opportunity, when it should come, for a pristine and potent effort. Yet though they may feel comfortable in their original criticism – and they certainly have not become converts to neo-functionalism, which has to the contrary sus-

[6] *See* D. Mitrany, A Working Peace System: An Argument for the Functional Development of International Organisation (London, Royal Inst. of Int'l Aff., 1943).

[7] *See, e.g.*, E. B. Haas, The Uniting of Europe (London, Stevens, 1958); L. N. Lindberg, The Political Dynamics of European Economic Integration (Stanford, Stanford U.P., 1963); S. Scheingold, The Rule of Law in European Integration – The Path of the Schuman Plan (New Haven, Yale U.P., 1965).

[8] A. Marc, L'Europe dans le monde (Paris, Payot, 1965).

tained significant losses – phenomena such as the vigor of intra-European economic trade must surely excite their imaginations and fire their hopes.

The fact that economic success exceeded, in Emile Noël's words, the EEC Founders' fondest hopes without concomitant political gains, while political cooperation has flourished almost precisely when economic gain has faltered, has been the source of bemusement.[9] It has done more; it has removed any confidence in basic strategies and left European integration an uncharted area with all the confusion and disconcertedness that such a task implies.

There are parallels, indeed, in American efforts to advance minorities, especially Blacks, into mainstream society. Analysts in the 1960's had rather quick and sovereign theories, extrapolations of simple notions of societal evolution. The cure was related to the diagnosis of the malady, and hopes were placed upon protection of voting rights, progress in education, protected entry into key positions in the job market, assertive protection of legal rights, development of a stronger minority sub-community, or the buttressing of the family social structure, to name only the most prominent of the proffered solutions. It is clear that considerable social progress was made in the ensuing decades, but none of the strategies that have led to progress has shown itself to be seminal or singly able to provide the solutions for other problem areas. Concerted, but rather uncoordinated – and even random – efforts on all fronts have proven necessary.

The puzzlement caused by failure of a model that anticipated a monotonic relation between economic and political growth leads either to provocative thinking or to a return to simple formulas. So, for example, Andrew Shonfield has suggested that integration of societies into a single government has never taken place except in the aftermath of war.[10] Again, such pro-corporation writers as Peter Drucker or critical figures of corporate development such as Thorstein Veblen or James Burnham, who have anticipated the subsuming of political units by economic structures, have proven bad prophets, apparently because political will and power are linked to economic potential, but are not identical to it, and are sometimes remote from it. Political actualization and remobilization seem to require acts of will and strokes of accomplishment, even when times are ripe. (It is difficult to explain why the Depression produced Hitler in Germany, Roosevelt in the U.S., Leon Blum in France and Stanley Baldwin in Great Britain.) It is striking that Robert Nozick,[11] attempting to account for the accretion of government in a simple philosophic sense, finds it possible to build upon the notion of "the protective association," which formed to protect the rights of its members, must assert primacy of its rules on others, and trades this need for extension of its services. That is to say, he develops a political explanation of the emergence of the state without recourse

[9] *Cf.* E. Noel, Working Together: The Institutions of the European Community (Luxembourg, Office for Off. Pubs. of the EC, 1979).

[10] A. Shonfield, Europe: Journey to an Unknown Destination (London, Lane, 1973).

[11] *See* R. Nozick, Anarchy, State and Utopia (Oxford, Blackwell, 1974).

to elaborate notions of economic or sociological causes or progressions. (No doubt the proto-government protective association had to find resources, and therefore economic and social conditions had to be ripe to permit developments, but they constitute the fertilization of the growth, not its seed.)

Historically it is clear that governmental units have developed as security communities providing, above all, a shield from external threats. In that context the generalization of Shonfield looms as telling. Governments do not generally fail, as Peters and Rose have recently reminded us,[12] even when the money is exhausted and they are insolvent; even political regimes can survive fiscal disaster. The clear and usually decisive failure is on the battlefield, and the disintegration of nations, as well as their integration into empires or classic states, have been decided there more often even than in coups or revolutions. Obviously the great opportunity for the emergence of Europe as a security community ended with De Gaulle's surgical strike at Euratom; it is, in any event, difficult to believe that the other nation-states involved would not have moved to curtail Euratom's power if De Gaulle had not.

The paradox of functionalist or neo-functionalist aspirations is, with this example of Euratom, laid bare. The shell of the new order is gradually extended and hardened while the compartments and walls of the old nation-states remain intact. The process of self-dissolution by old polities on a continuous gradual basis requires an improbably fortuitous set of successes by the enveloping community and considerable – and equally improbable – abnegation by the old. Of course, the likelihood of governments surrendering sovereignty in one gesture is even less probable, and this explains Shonfield's essentially correct formulation.

History is not encouraging, though not totally devastating, to the functionalist theory. There are instances of governmental institutions being subverted and supplanted by economic structures, though in general these events occurred in late Medieval or early Modern times. More recently, instances of economic unification – *e.g.*, the German *Zollverein* – have been halfway houses in the absorption of small units into larger. It is a long time since such developments have occurred, and involving much smaller, less resourceful units than, say, nineteenth century Prussia.[13] It may well be that the era has passed when such transmutations are possible.

Probably the most recent case of formation of a Union in which the primary vehicle of integration was economic was Australia in 1897–1898. It came about in the aftermath of the international financial crisis of 1892, and it was financial conditions that convinced New South Wales, the colony reluctant to join the federation, to agree. However, in the background were two failed at-

[12] *See* G. Peters & R. Rose, Can Government Go Bankrupt? (New York, Basic Books, 1978).

[13] *See generally* Frowein, *Integration and the Federal Experience in Germany and Switzerland, supra* this vol., Bk. 1, at § II.A; *see also* Keeton, *The Zollverein and the Common Market*, in English Law and the Common Market (Keeton & Schwarzenberger eds., London, Stevens, 1963).

tempts at union based upon military threats, and a new threat posed by Japanese successes in the area. Like the early U.S., the Australians had proto-institutions in place, especially the Federal Council, which coordinated foreign policy. Many of the distinct advantages to be discussed in Part III as advantages enjoyed by the U.S. could be applied to this Union as well.

Most striking is that Australia and the U.S. provide examples of something like a true Union rather rare in the history of integration. European history, as Deutsch has noted,[14] is the history of core-units (Prussia, White Russia, Sardinia), which promote and achieve unification with different admixtures of hegemony. The U.S. and Australia had no clear-cut core areas and the larger units in the system were not identifiably promoters of the Union. In fact, larger units may even have opposed the creation of a Union, as a threat to their own hegemony.[15]

In short, if those federations do not provide a clear model for integration – and we shall, in the next section, provide ample evidence they do not – then neither does any other. If, in the absence of demonstrable theory (and theory has failed to impress even the theorists), history is ignored too, then one travels without light or strategy. Indeed, few see a charted course or an evolutionary line clearly before them; Shonfield's evocative title is of a *Journey to An Unknown Destination.* Certainly the integrative processes which culminated in the European nation-states seem much less apposite.

The decline of confident assertions about the proper model for integration has, all the same, some curiously liberating consequences, not all of them discouraging. The absence of a clear model, for one thing, makes ad hoc analogies more appropriate and justifiable. If one may not specify what are clear analogies, less clear ones may be appropriate. To argue against the appropriateness of a model is to suggest that a crucial variable is present in the model from which the lesson is being drawn and not in the example to which it is applied, or vice versa. If, however, one does not know what is crucial, loose comparisons cannot be easily impeached. The American analogy has more, not less, to say in historical, rather than in theoretical, comparisons. These suggest themselves, together with caveats.

The tendency of many scholars to project the present day, highly sophisticated American federalism upon the fragile structure of 1789 is a case in point. The acceptance of textbook federalism as stated in theory is another. Without

[14] *See* K. Deutsch, Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience (Princeton, Princeton U.P., 1968).

[15] Clearly New South Wales was the Australian holdout. Some historians suggest New York and Virginia acted analogously. But it is hard to project driving force to a delegation seldom in attendance at the Convention. And Crosskey and Jeffrey present interesting evidence that Virginia was a reluctant reformer, and that its Annapolis Convention call was intended to preclude stronger national moves and was outwitted in having it lead to the Philadelphia call. *See* W. Crosskey & W. Jeffrey, Politics and the Constitution in the History of the United States (Chicago, U. Chi. P., 1981).

a realization both that barely disguised and ingenious levies on interstate commerce persist, and that evasions of such decisions as those against school segregation or against public support of religious education are quite common, one projects a dream legal order rather than the imperfect one which exists, and which ironically enough may well have better chances of meeting its citizens' needs precisely *because of* its inability to implement all of its policies with precision.

Above all, we must realize that even the nominal, legally-defined relations may vary over time, and even in the same time in differing geographic areas or legal domains. Marshall's powerfully flowing decision in *Gibbons v. Ogden*[16] sustained an expansive national power to regulate interstate commerce. Yet the same hand wrote *Willson v. The Black-Bird Creek Marsh Co.*,[17] a murky and unclear opinion which permitted ill-defined incursions by the states precisely on interstate commerce.

The variety of behavior these decisions encompass also is parallelled by change in official doctrine and actual operations reflecting political realities of different eras. Would reasonable people have projected the governmental structure of the U.S. in 1985 from its arrangements in 1830? And an even more difficult question, cast in the same mold: What can one project from the EC of 1985 to the future?

III. Divergence and Its Lessons

Before we focus more carefully on the specific institutions and processes which characterize the European Community and the American Union, it is wise that we first signal some of the impressive differences in the relationships between the constituent members of the two systems. These differences are so obvious that it might appear that restatement of them is not necessary. Nevertheless, a sketch of those differences may provide a sound background for further exploration even of their similarities.

A. Pre-Formation: Unity v. Competition

A striking difference is that the American Union pre-dates the Constitution and the formalities of coordination. The ultimate expression of this truth is the Sutherland doctrine, developed by Justice Sutherland while still a United States Senator.[18] The essence of the argument – which goes well beyond anything Webster may have said in debates prior to the Civil War, or Marshall in any of his opinions – is that the foreign policy and defense policy aspects of

[16] 22 U.S. (9 Wheat.) 1 (1824).
[17] 27 U.S. (2 Pet.) 245 (1829).
[18] *See* Lofgren, United States v. Curtiss-Wright Corporation: *An Historical Reassessment*, 83 YALE L. J. 1 (1973).

the American system were not conferred by the Constitution, but pre-existed in the relationships between the colonies. Sutherland distinguished between domestic authority (which was clearly exercised by the individual entities during the colonial period and under the Articles of Confederation, and then was transferred to the national government partly by the Articles and partly by the Constitution), as opposed to foreign policy and defense authority which was never exercised by the colonies individually or by the separate states. Rather, both aspects of policy in British North America were exercised first by the Crown and then by the Continental Congress. Thus they were inherently functions of the government set up by the Articles of Confederation and its successor regime, the United States as we now know it. The thesis then asserts that it is not the Constitution but the continuity in the exercise of powers that defines the domain of national foreign policy and defense policy.

At this point we need not be concerned with the validity of this view as a legal argument. The courts have never quite accepted it, and it exaggerates the empirical facts although certainly capturing the essence of them. Certainly during both the Revolutionary period and during the years of the Articles the colonies and the states ventured into domains that clearly required exercises in both foreign and defense policy. It is very clear from the text of the Constitution that such separatist ventures were frowned upon and therefore the document is replete with prohibitions against international agreements, and denying states the right to grant letters of marque and reprisal, to secure a monopoly for the Federal Government in a domain that all conceded was essentially its primary, and some thought its exclusive task.[19] Such recognition is slightly different from the Sutherland argument in that it also implies that some state activity in the defense area already existed. Indeed, it appears that next to the large number of prohibitions against exercise of interstate discrimination, and the emission of currency, the Founding Fathers were most concerned about state exercise of security measures. If such exercises did not exist it would not have been necessary to prohibit them, and history shows that this deductive logic is legitimate. Nevertheless actual exercises of a security power were relatively minor ones and Sutherland's contention that the colonies and/or states had never operated as individual autonomous entities is a correct one. Some degree of union was co-extensive with any independence of the colonies.

In contrast, it is not too much to argue that the greatest efforts for unity in the European context occurred only in response to a challenge from one of the present constituent members. Not only did all of the ten members individually exercise all of the "sovereign" powers of defense and foreign policy, but historically it was against the Germans or the French that they were to pool major efforts. The legacy of peaceful cooperation and joint pursuit of commercial ventures is a relatively brief one, post-World War II, propelled by

[19] *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 § II. B, n. 35.

American emphasis in a time of emergency, and of limited scope. Thus, while there is a history of progression and success in the European Union, this is not only detracted from by the failure of proposals for the European Defence Community and the European Political Community but is for all its great success rather less than an effort to exercise truly governmental powers of a wide and ranging scope. Euratom, a remnant of the earlier more ambitious plans, could have come much closer in concept to creating a security community and this program was not only largely scuttled but has remained almost moribund to this day.

B. Constitution v. Treaty Between States

We may also note significant differences in the documents creating the two communities. In a superficial sense the Treaty of Rome represents a second stage of development, just as the U.S. Constitution represents an improvement on the Articles of Confederation. But these similarities are most limited. By and large the Treaty of Rome evokes the European Coal and Steel Community structure and is, despite being a *traité cadre*, a painstakingly detailed, profusely hammered-out international pact. The Constitution of 1789, on the other hand, is very clearly a more flexible and adaptive instrument, and quite strikingly different from its predecessor. We may note several very significant differences between the two American documents that illustrate that these did not just mark incremental stages in the development of the Union but signalled transformation of the institutions being created. For example, the removal of the Articles of Confederation single-state veto of legislation was a great step forward in the structuring of the central government, as was elimination of the wording used in the Articles that the central government could only take action that was "absolutely necessary" to carry out its powers. Even the Bill of Rights provision that limited national power to matters *delegated* to the national authority – the tenth amendment – deliberately omitted the term "expressly delegated" used in the Articles, after continuous debate and with obvious understanding on the part of the drafters. Thus while opponents of the Constitution were able to force some return to the earlier attitudes of exposition there is clear and overwhelming evidence that Marshall was correct when he suggested that what was being created by the Founders was "a constitution intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs."[20] There were unmistakable efforts to make it what has been called a "living document," destined to evolve as its institutions developed. A new *type* of union was being invented.

In contrast, the treaty creating the European Economic Community was just that – a treaty. We must not, of course, be too finicky on this point. As has been suggested, what was created by the Treaty is unmistakably also something more than a *Zollverein*. There is some movement in the joints of

[20] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

the Treaty, permitting interpretation and institutional evolution. As in the U.S., agencies not provided for in so many words by the founding document have been added to the governmental operation, and few would argue that this practice raises serious questions of legality. The emergence of the European Council does not create any constitutional crisis, though one might understandably prefer to articulate more fully its purpose and bring it within the orbit of other institutional patterns. But clearly it represents an evolutionary movement of the sort represented by the emergence of the Cabinet in Britain or party government in the North American system.

Nevertheless, there are sharp differences in the potential for amendment and evolution in the two documents. The very length and specificity of the European document compounds the fact that it is a treaty requiring unanimous approval for change. These factors make it quite different from a document that allows changes to be made in it only with the support of a large majority of its constituent members, and that offers many more possibilities for its interpretation not only by the courts but also by the political institutions involved.

If one examines the amendments made to the U.S. Constitution in the decade-and-a-half immediately following its adoption – the great Bill of Rights, the reformation of presidential elections, and restriction of judicial power – one sees the capacity for swift adjustment built into the document. (A second glance, to be sure, will also reveal a restriction of nationalist impulses.)

Similarly, if one looks at the political evolution and institutional development of both the United States and the Community in the formative years of each system the same pattern emerges. Much of the great legislation passed by the first Congress, evocatively labelled "a second Federalist" by Charles Hyneman and George Carey, remains in force today.[21] One reading of White's great histories[22] demonstrates that the pattern of federal courts that emerged was a development foreseen by the Framers in Philadelphia, and that much of the structure of current administrative units was forged two hundred years ago.

In the European Community such creativity took place, but necessarily in more circumscribed and less decisive ways. We must be cautious; what might seem like limited implementation at this point in time might emerge as more salient in two centuries. Still it is hard to believe that the verdict will be much different. The most dramatic events that have occurred in the Community have been regressive rather than evolutionary.

This in turn exacerbates tension over the interpretative role of the Court in the European system. While the tradition of written constitutions was unknown in modern political systems until the time of the American and French Revolutions, Europeans quickly developed an antipathy to judicial review, re-

[21] *See* C. Hyneman & G. Carey, A Second Federalist: Congress Creates a Government (Columbia, U. S. Car. P., 1970).

[22] L. White, The Federalists (New York, MacMillan, 1948); *id.*, The Jeffersonians (New York, MacMillan, 1951); *id.*, The Jacksonians (New York, MacMillan, 1954).

laxing their attitude only moderately after World War II. Even then, their change of heart was at least welcomed by the Americans, who were at the same time pushing for a new kind of order in Europe, an order justified by their own experience. Still, the traditional Continental position – espoused in particular by the French – has continued to view "government by the judiciary" as an infringement upon the rights of parliaments and the free will of the majority. Where Marshall was able to create a tradition as he went along, the European Court found itself constrained not only by the appearance of being a classic international structure with rules derived from construction of international treaties and standard international conventions, but also by this basic rejection of legal control over political constitutional developments. This was somewhat modified by the reluctant acceptance of the utility of the American device of judicial control in the wake of Hitlerism. Constitutional courts, of course, were instituted in Germany, Italy and – with much less power – France, with the thought that they might be brakes on Caesarism and adventurism, though in all instances they are constrained in complex ways. The Germans have been in the vanguard of this movement, appropriately in the light of their own federal history and structure, which has within it some of the constraints that promoted the American institution of judicial review.

The Continent has maintained at least the fiction that judges can be, or ought to be, narrowly confined to technical tasks. If, in fact, the judge under code law has been, as perceptive evaluators more or less agree, actually *more* creative than his counterpart in Great Britain, judicial theory runs in the other direction, and all European legal systems continue to profess negative attitudes toward judicial creativity. Against this background, the European Court's efforts to use the original document to further the cause of integration have seemed strange and strained to jurists in different countries – even to those who applaud the result. The strain was exacerbated by the accession of Great Britain, for the efforts of the European Court seem especially presumptuous to English legalists. Whether an earlier accession would have been deleterious to legal development is an interesting, but fortunately moot, issue.

Nowhere is this phenomenon more evident than in the areas where experience has demonstrated a constitutional gap. The early implementers of the U.S. Constitution of 1789 moved through constitutional amendment to correct the faults in the electoral system demonstrated by the deadlock that developed between candidates Burr and Jefferson in 1800. The dilemma involved was itself a product of the evolution of the party system which had not been foreseen by the Framers. Emerging within a decade of the original document, the anomaly was not allowed to fester or create problems in future elections. If the solution has been less than perfect, the problem was quickly addressed. In contrast, demonstration of ineffectual arrangements in the Community system are not routinely followed by efforts to remedy the problems via changes in the Treaty. On the contrary, most of those who want to strengthen and buttress the system are the most reluctant to go the route of amendment of the document itself. They have always feared that, if anything, the type of problems and the drift toward a "standard international organization" would be

exacerbated if conscious efforts to tinker with the Treaty were set in motion. The *Crocodile* effort led by Altiero Spinelli, MEP, represents an interesting departure from this point of view.[23]

A factor of considerable importance in evaluating the viability of reform is the different sense of urgency in, and dependency upon, the two different Unions with which we deal. It was the threat of a breakdown of the Articles of Confederation government and of the states' mutual abandonment of one another that was the motive power in effecting constitutional reform in the U.S. The threat of dissolution and fragmentation of the U.S. into irrelevant and economically unviable political units was consciously employed as a means of coercion by virtually all elements involved in the process of promoting the Constitution, each at different stages of deadlock, and each usually with some subtlety. That dissolution was a genuine danger contributed to the verisimilitude of the threat. Confidence in mutual dependence permitted the American Framers to provide that the new government would go into effect upon approval of only nine states, and to provide for a difficult, but far from impossible amendment procedure, requiring the support of two-thirds of the states rather than unanimity.

While the survival of the EC is hardly a matter of indifference to the states concerned, the urgency of its existence in 1965 was rather less. Mutual and individual Treaty accessions by new Member States are accompanied by an obvious retention of individual veto over basic documentary changes. This is not just an arithmetical difference but a basic psychological one. It indicates some measure of reluctance to agree, and acquiescence in the need for a union as opposed to an acceptance of union as the only viable hope for the future. If today, in 1985, the very survival of the EC is at issue, as argued by the *Crocodile* Group, the pressure for ***fundamental*** mutation may appear in Europe just as it appeared in the early U.S.

The closing off of easy routes to formal change in the basic structure of the EC does not ease the process of informal change. In many ways it has been easier to secure decisive changes in the American system through court interpretation and usage. But both the European Court and the more political organs of the EC have introduced, modified, or discarded practices, policies, and even institutions to a degree quite remarkable in a transnational structure.

IV. The Basic Institutional Modalities: Patterns Emerging from Comparison

Not only the founding documents, but the institutional modalities they prescribe exhibit significant differences and similarities. And as was noted in our

[23] This initiative has now matured in the draft treaty for a European Union voted by the European Parliament on 14 Feb. 1984 by a vote of 237 to 31 (43 abstentions). *See* EUROPEAN PARLIAMENT, DRAFT TREATY ESTABLISHING THE EUROPEAN UNION (Luxembourg, Eur. Parl., D.-G. Information and Public Relations, 1984).

brief discussion of the documents themselves, the traits that emerge to characterize the two systems are often contrary to what one would expect from a superficial overview of their organizational plan. Some explanation of these traits may of course be traced to the inception of each system. The American Constitution on one hand was hammered out over a long series of meetings and compromises. It was based upon previous models of government, which the Framers nevertheless misunderstood. The Treaty of Rome on the other hand is a clear adaptation of the ECSC Treaty, and presents unmistakably a clear, logical structure with fewer inconsistencies and gaps than its American counterpart. It is fundamentally flawed however by its technocratic effort to insulate the Community from national political power, and by its overestimation of the power of rationalistic initiative and bureaucratic drive. This is easier to say with authority today, for the Treaty was also clearly motivated by a shrewd appreciation of what strong national political power might do to a budding supranational regime. Its failure to avoid in practice what it tried most to avoid at its conception should not also diminish its much-deserved credit for the anticipation of problems between the Community and the Member States.

A. The Central Institutions

As they conceived the institutional form of their new government, the American Founders assumed they were creating a parliamentary system in imitation of what they thought existed in Great Britain. It is clear today that their theoretical model had already decisively evolved toward de facto Cabinet supremacy, with subsequent tendencies toward control by the Prime Minister. Without conscious intent, the American system hastened the development toward a strong executive, by strengthening the Presidency and by making it eventually not only the most powerful but even the characteristic unit of American government. The expectation that George Washington would occupy the office helped lead the Founders to utilize the "strong governor" model of New York in defining the details of its duties and responsibilities, and to resonate to Locke's vigorous endorsement of executive authority as the mode for dealing with crisis.

The role of Congress was nonetheless seen as most significant, and therefore is the most carefully defined. The House of Representatives, elected directly by the people in approximate proportion to population, was to embody both the democratic impulse and *in toto* to be one source of aggregated national views. Senators, chosen by the state legislatures, were to represent the view of the states. Hence not only were there two Senators for each state, but an "entrenching clause" was added to the Constitution to prevent any state from losing equal suffrage in the Senate without the state's consent. Size and convenience rather than theory seems to have been behind the allocation to the Senate of the power to confirm officers, to serve as the federal court of im-

peachment, and to ratify treaties – the so-called "executive powers" of the Senate. It was assumed that the unique House power of initiating appropriations bills would be much more significant than these executive powers. In fact the House and Senate have been co-equal in the appropriations domain.

The method used to select the President was also strongly influenced by this desire for a mixed mode of allocating power. The Electoral College was structured to allocate voting power as if the President were elected by a joint session of Congress. The peculiar machinery was, however, designed to prevent control by the Congress over selection of the President, and thus to avoid dominance of the Executive by the legislature.

A clear role for Executive initiative in legislation – an instrument of varying potency in the hands of different Executives – and a power of veto confirm the intent of the Founders to have Executive policy leadership. The lack of specificity over administrative structure contrasts sharply with its central role in the EEC Treaty, reflecting in part the relatively simple nature of bureaucracy as known in the eighteenth century.

In short, the American effort came to imbed the characteristic predicaments of the American situation directly in its institutional foundations. Because, however, of the clear commitment to major goals of policy integration – foreign affairs, commerce etc. – a compromise based upon political power allocation was directly addressable.

The Treaty of Rome conceptually seeks to avoid such realities by minimizing popular participation. The Commission is conceived of as a Platonic embodiment of Communitarian spirit, with Gallic élan, self-confidence and expertise. The insulation of the Commission resulted from serious doubts as to the essential commitment of the nation-states involved to the European idea. However realistically based, these doubts could not be erased in the real world of manipulation. The Council was however clearly expected to embody the governmental-executive position, which by definition excludes popular participation.

Odder still though than the intentional isolation of these two organs is the actual institutional place of "interest groups," the general public, or the European citizenry generally in the formation of European policy. The functions originally assigned to the Parliament and the Social and Economic Committee are closer to those of Eastern European mass representatives than those of the national parliaments familiar to Western Europe. Indeed, the nominal powers of the former are rather greater.

The Economic and Social Committee of the Coal and Steel Community was legitimately an advisory committee of somewhat erratically chosen experts designated in overly formalized ways. An advisory function to a governmentally sponsored cartel is appropriate, and the means of selection need not be fastidious nor overly elaborate. The concern is for broad expression, and not public participation. But if the Coal and Steel Community was to become concerned with political efficacy and the symbols of legitimacy at that point in history, it should have transmuted the Economic and Social Committee, probably incorporating it into a more effective Parliamentary structure. In a sense

the EEC Treaty only created rival and badly crippled organs of general community expression.

Like the Economic and Social Committee, the Parliament's function as originally constituted, was to comment and criticize. The lack of real power served only to invite the Commission and the Council to go through empty motions of consultation. An exceptionally cogent analysis on behalf of the Parliament – if it secured the attention of the higher decision-makers – might well influence Community policy; but so have such studies of Community issues made by the British House of Lords, which does not have any Community standing.

The conclusion is inescapable that these organs were left powerless by design, and that they were regarded as largely, though not totally, ornamental. The most important function of Parliament was a derivative one: where dual parliamentary membership was permitted to function as a bridge between the Community and the national parliaments.[24] It does have many other substantive responsibilities, especially in the budgetary field, necessary to the functioning of the Community. It also enjoys the power to dismiss the Commission – a power which in practice is more illusory than real.[25] The structures of both the Parliament and the Economic and Social Committee nevertheless require involvement of individuals of influence – drawn from different strata and possessing varying skills – in Community life. Indeed, the structures of these two bodies reflect an intent to co-opt these influential individuals rather than any desire to consult them on matters of policy.

Only in the field of court structure is the EEC constituent document more robust and positive than that of the U.S. The American federal court structure is vaguely, even indifferently, defined. Article III merely provides for "one Supreme Court," leaving it to Congress to deal with creation of such "inferior courts," if any, at will. There are strong indications that the original expectation was that existing state courts would be the vehicles for enforcement of federal law, and that the court system would be quite similar to Community structures today. The first Congress chose, however, to create federal district courts, creating a genuinely dual court system. The jurisdiction of these federal courts has nevertheless also been vague. In certain instances the Supreme Court is granted original jurisdiction – which can be subtracted from but apparently not added to. The federal judicial power can, however, be meted out by Congress virtually at will, subject to requirements of due process, and, as Hart and Wechsler first pointed out, bearing in mind the primacy of the Supreme Court.

The European court system is much more effectively and carefully prescribed, with its jurisdictional rules defined in detail. However it is also the

[24] *Cf.* Coombes, *The Problem of Legitimacy and the Role of the Parliament*, in C. Sasse, E. Poullet, D. Coombes & D. De Prez, Decision-Making in the European Community chs. 7 & 8, pp. 262–332 (New York, Praeger, 1977).

[25] *See* J. Weiler, The European Parliament and Its Foreign Affairs Committees 24–25 (Padua/New York, Cedam/Oceana, 1982).

clear intention of the Treaty that national courts will serve as fora for resolution of most claims based on Community law. The creation of a single European Court of Justice with limited first-instance jurisdiction helped to insure that this balance would be maintained, at very least for obvious reasons of judicial economy.

B. Relations Between the Center and the States

It is in their relations with their constituent members that the two systems diverge most sharply. The latitude and ambiguity reflected in the American system gives it resilience and pliability. This was a luxury the subscribing nations were not willing to afford the EEC, and of which the grand designers of the Treaty were suspicious, albeit from the complementary point of view.

Certain matters are by the U.S. Constitution interdicted and closed off from state action. States are forbidden to grant titles of nobility, letters of marque and reprisal, emit currency, or enter into agreements with foreign countries.[26] Other matters are specifically entrusted to the Federal Government. Although it was seen as somewhat redundant, the tenth amendment was added to "state but a truism" and provide a basic rule for construction of national powers: essentially, the Federal Government operates only within zones of power created by specific delegations of the Constitution or reasonably construable from it, while the states are given residual powers.[27] The efficiency of this system involves both a generous understanding of the implications arising from each positive grant of power, and a generous use of the enumerated power of Congress to legislate those means "necessary and proper" to carry out the other enumerated powers. For example, the mere existence of a court system was held to imply the right of a President to provide a guard for a judge, in travelling to and from his place of work, and to have the guard, when charged with a fatal shooting, judged under federal and not local law.[28] Marshall's use of the "necessary and proper" clause to justify establishment of a National Bank as an exercise of the taxing power, and of the power to spend for the national defense, is too well known to justify elaboration.[29] Since 1936 the Supreme Court has also officially accepted the Hamilton-Story view that the power to tax and spend is not limited to its areas of enumerated power, so that individuals and governmental units may be given bounties for performance in areas where direct regulation by the Federal Government would not be permitted.[30]

[26] U. S. CONST. art. I, § 10.

[27] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. amend. X.

[28] *In re* Neagle, 135 U.S. 1 (1890).

[29] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[30] United States v. Butler, 297 U.S. 1 (1936). So, for example, a federal requirement that all buildings have ramps for the handicapped would be of doubtful validity, while a federal grant for re-doing buildings would be legal. (Requirements that all

The view that the tenth amendment severely channels national power – often labelled the "States' Rights" position – is easily refuted by its legislative history but often vindicated in its application. The Articles of Confederation had a clear provision limiting the exercise of central powers to those "specifically" granted by the document. Madison, the draftsman and floor leader for the Bill of Rights to the Constitution, deliberately omitted this highly significant qualifier. And the Congress rejected its inclusion on separate occasions.

Still, the tenth amendment provides a rallying point for the denial of federal powers to this day. At various times in history this has permitted claims that powers such as the commerce clause grant are delimited by the "reserved" or local powers of the state, and that the Federal Government was consequently prevented from using its clearly granted authority to regulate commerce. It was to avoid such dilemmas that Canada overtly (as did Australia, to a degree) structured its federalism in the opposite form, giving the Provinces enumerated powers and Ottawa all residual authority.

But this solution at least partially misconceives the nature of the problem. As a matter of conceptual logic, reserved powers, residuals, cannot control primary grants of authority. As Marshall, Holmes and Stone have most cogently demonstrated,[31] that which is *granted* is defined first; a *residual* power is precisely that. Without any desire to psychoanalyze "States' Rights" Justices, we can still be confident that the basic and controlling element in their decisions against strong national powers was an ideological attitude as to what would contribute to the health of the country, rather than a painful construing of inadequate or misleading texts. Dennis Brogan tells the story[32] of a conference of constitutional experts called at the height of the New Deal crisis over Supreme Court invalidation of most of the economic program of Franklin Roosevelt on essentially States' Rights grounds. Asked to draft a Constitutional amendment which would sustain such massive federal legislative efforts, they painstakingly agreed upon the words, "Congress shall have the power to regulate commerce among the states," and embarrassedly adjourned on realizing they had reproduced the existing constitutional language. (Brogan gives no specific dates, leading to some suspicion about the tale. However, the point emerges intact.) Tides of opinion, not draftsmanship, were the key to finding in favor of a broad national power to regulate commerce. And there was just that degree of play in the constitutional joints to support the plausibility of the expanded view of national power.

By contrast, the extent of Community authority and competence seems

recipients of any federal funds conform to various federal standards have also been sustained, but their status is much more tenuous and complex.)

[31] *Compare* Marshall's opinions in *McCulloch* and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) *with* Holmes' dissent in Hammer v. Dagenhart, 247 U.S. 251 (1918) and Stone's opinion in United States v. Darby, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*).

[32] D. Brogan, An Introduction to American Politics 406 (London, Hamish Hamilton, 1954).

fixed and not easily amenable to change. There is, to be sure, great latitude in any fact situation as to the applicable subject matter so that the articulation of, for example, a "common commercial policy" may involve the exercise of a wide range of activities, some of them with diplomatic or political as well as strictly commercial ends. But the Treaty itself, in article 235, provides a further flexibility beyond even the broadest of the affirmative grants of competence to the EEC, in permitting the use of powers *not specifically provided for by the Treaty* as long as these are wielded *in furtherance of* one of the "objectives" of the Community, "in the course of the operation of the common market." Although perhaps more circumscribed than the more numerous competences of the U.S. Federal Government, the competences of the EEC are nevertheless – at least in theory – amenable to considerable expansion *via* interpretation.

The dependence upon national authorities for enforcement of Community rules is perhaps most striking. The development of Community law so as to create conditions of direct obligation for both individual Member State officers and citizens has been courageous and clarifying. But it enforces these obligations through national administrations and national courts whose concern, attention and commitment to the Community are inevitably most variable.

Given these basic conditions, relationships between policy-making and enforcement of policy in the Community have a hazy aspect that allows fogging of issues and surprising degrees of ambiguity. Since its arms and its eyes are not under its control – enforcement and fact-finding are all controlled elsewhere – pragmatism creeps in not through doctrine, but through selective awareness. Readiness to accept murky or even distorted fact-statements is not unknown to other systems, but it is built into Community relationships. The dependence upon Member State courts for fact-finding is, in this analysis, more than a casual problem, since the issue of Community versus national authority will often hinge upon the particulars of the fact situation as presented to the Community Court.

The original structure distinguishes sharply between Community regulations and directives which must be implemented by Member States. The Court has wisely and constructively narrowed that distinction by holding that whenever the provisions of a directive appear to be "unconditional" and "sufficiently precise" these provisions may also be given direct effect. Direct effect has been judicially attributed to directives most pointedly in those cases where national authorities have failed to implement a directive within the prescribed legal time limit. The doctrine of direct effect as related to directives has thus become a potent – but, since largely ad hoc, also flexible – weapon in the judicial arsenal for controlling national recalcitrance in implementing Community legislation.

[33] A. Hamilton, Report on Manufactures (6th ed., Philadelphia, Wm. Brown, 1827).

C. Development of Institutions Through Praxis

In practice, institutions deviate from their legal linguistic formulas as much or more than movies from the novels on which they were based. Both the European and the American Unions have developed practices, "conventions of the Constitution" in the British sense, which are as significant for each as their original founding documents themselves. The requirement that the President make executive and judicial appointments only with the "advice and consent" of the Senate was given definitive meaning when President Washington was made to cool his heels in a waiting room by a Senate that did not wish to be turned into a forum for expounding the Executive will. When Washington stalked off muttering that "he would be damned if he would be found in that place again" he only confirmed the basic, somewhat antagonistic, arms-length relationship of the future between Congress and the Executive. Similarly, political parties, nowhere sanctioned in the Constitution, evolved over time and continue to change the actual workings of governmental structures.

The Community's institutions have not been static, as even the most cursory observer of its history must be aware. The Luxembourg Accords, nominally a compromise and actually a rout, have drastically changed not so much the *practice* as the *stance* of the various organs. The creation of the European Council, and, more subtly, the creation of COREPER, have had, together with the Luxembourg Accords and the waning of the Communitarian ethos, a paralyzing effect on Community initiative, inventiveness and morale. It is important to remember in this context that the American experience was never one of continuous drift to national control, and that cycles and counter-cycles are characteristic not just of Europe but of all governments. Presidential administrations count on "honeymoon periods" where their initiatives move quickly and without resistance, expecting, perhaps, 100 days of such success. Regimes and ideological programs have analogous histories.

As we shall show, it is even illusory to assume a monotonic development of constitutional law. On a political level, the Democratic-Republicans, as the Jeffersonians were known, remained Anti-Federalists and continued to distrust national power. (Indeed, like their leader, who was heavily influenced by the Physiocrats, they had more than a streak of anarchism in their make-up.) The debates over such matters as the propriety of tariffs as a regulatory device or the constitutionality of a National Bank contrast sharply with Hamilton's easy assumption of such an economic role for the national government in his famous "Report on Manufactures."[33]

As the Jacksonians subtly shaded off into still more local orientations, public resistance to national economic policy occurred to the point of a need for armed intervention of significant proportions, generally over tariff policy, which was seen by the raw-material producing and exporting South as favoring the nascent manufacturing industries of the North. This became entangled with the slave issue as Southern resistance to economic policy was bought off by regulations strengthening federal protection of slavery – the prohibition of mailing "incendiary materials" as defined by states, and the Fugitive Slave

Acts designed to return runaways who made their way to free states. This, in its turn, engendered strong resistance by Northerners who invoked state power and "interposition" in the 1850's, much as the South had in the 1830's and 1840's. Thus, the Civil War was anticipated and preceded by a series of rather protracted instances of resistance.

As we shall also detail in the next section, it is as misleading to assume that constitutional nationalism was continuously nurtured by the Supreme Court. The Taney Court was to the Marshall Court in many ways similar to what the Burger Court is to the Warren Court – a more cautious, less creative user of previous doctrine, sometimes advancing the earlier line of thought (*e.g.*, in the *Cooley* case), but much more often retreating from strong views (the *Charles River Bridge* case, or *New York v. Miln*).[34] This is all generally well-known, and need not be over-elaborated here.

But it is not well observed that the greatest disaster of the Taney Court, the *Dred Scott* decision,[35] is a curiously "nationalistic" decision. Purporting to base itself on basic constitutional grounds, the decision suggests that the definitions of freemen and citizenry were fixed in racial terms at the inception of the Republic. The black slave thus was not a citizen and had no standing in federal court; it also strongly suggested that no territory, perhaps no state, could prevent an owner from bringing in slaves as a matter of the rights of due process and property. It is only a slight exaggeration to suggest that the decision precipitated the Civil War, but its import was "reversed" by Congress only after the Civil War had been fought, by the Civil Rights Act of 1866 and the opening clause of the fourteenth amendment. Clearly *Dred Scott* was an unnecessary and unwise decision, one of what Chief Justice Hughes characterized as "self-inflicted wounds." As the dissent pointed out, no such uniformity of attitude prevailed among the states in 1789. Fully five of the thirteen colonies permitted citizenship of free blacks. By adopting a less national and monolithic stand, and even by suggesting that "in the absence of Congressional legislation" state definitions of citizenship could prevail, the issue could have been localized and limited. (Whether, in the long run, the welfare of the country would have been better served we shall never know. Presumably, it would have been salutary to avoid what was the bloodiest war to its time in history.)

It is important to bear these points in mind as we approach the historical evolution and the concrete use of power and institutions. Realism is a multi-edged sword: while the extrapolation of trends is still the most powerful tool of analysis known to the study of mankind, its use at many points of U.S. history would have been totally misleading. Long-range views of historical trend lines should not obscure the backing-and-filling that characterize human events. Centralization is not always synonymous with progress, even if we are measuring the development of a trans-parochial institution. And, as we shall develop in the next sections, it is possible that flexible administrative reciproci-

[34] Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

[35] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

ties may contribute more to integrative solutions than formalistic legalism. It is instructive that so significant a contributor to a strong Community as Judge Pescatore has, in his elegant and poetic little book,[36] suggested that the European Community is presently at the stage of evolving real, not rudimentary formal, relationships of power-sharing. Implicit in his discussion is the notion that legal authority is a necessary but hardly sufficient condition for achieving viable Community relations. Explicit is Pescatore's somewhat puzzled acknowledgement that virtually all commentators who see the Community need in terms similar to his own search for flexible accommodations are Anglo-Saxon, and even American. This is, in our view, not unpredictable, for the lessons – if any – of the American experience emerge most clearly in pragmatic adaptation. As Dicey has suggested, federalism generates legalism, and this legalism creates predictability and continuity of relationships.[37] This phenomenon – which saves time and creates artificial, acceptable and even face-saving solutions for points in dispute – should not be mistaken for the essence which lies in positive and inventive cooperation on matters of common need and general consensus.

V. Executive-Legislative Relations in the Two Systems (or the Lack Thereof)

Institutions of government do not operate in a vacuum, and indeed in practice institutional evolution may be shaped as much or more by extrinsic forces as by organizational patterns and trends developing from within the institutions themselves. Relations between the American Executive and the Congress have been affected by a number of forces both extrinsic and internal – in particular, as the Executive has assumed policy leadership in a number of areas, and as an Executive administrative bureaucracy has acquired more authority to legislate *on behalf of* the Congress. We will first discuss some of these American trends, in comparative context with the Community when appropriate; and then turn our attention to a detailed statistical analysis of executive-legislative relations in the Community in an attempt to interpret – albeit in a severely limited time-frame – evolving patterns in the relationship between the European Community's executive and legislative components, perceived against the backdrop of over twenty years of Community political history.

[36] P. Pescatore, The Law of Integration – Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities (Leiden, Sijthoff, 1974).

[37] *See* A. Dicey, An Introduction to the Study of the Law of the Constitution 175–80 (10th ed., London, MacMillan, 1959).

A. The Evolution of Executive-Legislative Relations in the United States

1. The President and the Congress

In the American practice, the Executive has gained as the dominant institution in the central government. The party system which has evolved is a President-centered phenomenon. As originally constructed by Jefferson, it was, like British parties of the time, a loose congeries of local factions centered in Congress.[38] Andrew Jackson's seizure of initiative from the Congressional Caucus as a means of controlling presidential nominations, and his institution of party nominating conventions, is generally acknowledged to have transformed political history, creating the first (and model) bourgeois mass party. (Only the Socialist membership party and the Communist cadre party supplement this major social invention.) From the standpoint of political effectiveness it totally changed the nature of political leverage and allowed presidential dominance over Congress, as opposed to the obvious and disastrous control of Congress over Madison and Monroe, so extreme that one presidential writer suggests the Presidency could just as effectively have remained vacant during the former's term. This electoral transformation came gradually to be realized in Great Britain, perhaps a half-century later, so that the British system has somewhat more slowly transmuted into a Prime Minister – rather than a Cabinet – centered government, approximating the U.S. and Gaullist systems of presidential predominance. The waning of U.S. party effectiveness in the past two decades in the face of media political dominance is closely connected with the decline of their influence in presidential politics.

From a constitutional standpoint, these factors have not produced much change. Indeed, the two-term limit on presidential service, of recent vintage, might suggest restrictiveness rather than expansion of presidential power. A false inference might also be drawn from the atrophy of the presidential veto for constitutional reasons, a favorite Whig device on which that party placed great emphasis.

Coupled with increased presidential political leadership was the growing emphasis on coordination of the national economy, which Theodore Roosevelt stretched to the utmost on the basis of asserted constitutional power and the twentieth-century pre-eminence of foreign and defense policy. The development of national regulatory policies nominally under Congressional authority contributed to the wider scope of presidential discretion.

Thus the turn of events imbued existing presidential powers with new im-

[38] Operating as an oppositionist, though within Washington's Cabinet, Jefferson put together whatever he could. The Federalists, basking in the successful development of the Constitution, had already achieved their own network. A falling out between Adams Federalists and the Hamiltonian wing of the party and disastrous decisions, such as those in favor of the Alien and Sedition Acts and opposing the War of 1812, as well as the party's general snobbish aura, dissipated its strengths and led to its demise.

portance and an increasing range of responsibility. And presidential political leadership supplied the means of calling for regulatory schemes that widened presidential discretion even further. Although the courts have attempted in small ways to stem this tide, their efforts have been limited to a brief and unheroic (even unconvincing) stand against highly questionable New Deal legislation, and various ad hoc technical decisions of little sustained moment.

Congress has been forced to yield powers pragmatically in the fields of foreign affairs and defense policy; indeed the pressure of day-to-day events and the mystique, if not the fact, of the need for instantaneous control, have forced decision-making largely out of the hands of the executive agencies and into the White House itself. Congress has retained its constitutional authority, of course, and has asserted itself through such measures as the War Powers Act. But these assertions were responses to the provocative executive machinations of the Johnson and Nixon regimes, and they have not maintained full support within Congress nor proven much of a restraint on the Executive.

Inasmuch as there is little, if any, parallelism between the competence of the EC and the U.S. on this point, we shall not embellish our bare outline of foreign and defense issues. Political Cooperation as it has developed in recent years alongside the EC remains a cooperative venture of sovereign states legally and morally free to choose to cooperate or to take separate roads. This is quite different from the position of law or policy in its core functions. The relationships between branches in a system where these concerns are constitutionally monopolies of the central authority are not at all parallel to the EC situation, and while – as we shall suggest – Political Cooperation adds an important and promising dimension to the Community, it must seek its lessons from alliance politics, or perhaps from such governments as that of Switzerland rather than from the U.S. The latter is for foreign and defense policies almost a unitary state, and its tendency toward Executive control a rather familiar scene to students of parliamentary government, where it is taken for granted that such policies require cabinet control subject to occasional revolts, and whose cycle is measured in decades rather than months or years. The efforts of Congress to influence foreign and defense policy must be viewed as a quixotic and interesting experiment, much as the Danish Committee on the Community attracts attention (and in both instances on much the same basis as Dr Johnson's example of the dog walking solely on its hind legs – not done well, but the wonder of it is that it is done at all).

Control over domestic policy, the bureaucracy, and over the budget remain the areas in which Congress has continued to stake out a significant area of policy control. Its attempt to do so marks it as the most significant legislature in the world. Unlike the question of external policy, the issues and outcomes are very much in doubt, and the Congress has been able to be assertive in many areas and over long periods of time. The competitive advantage enjoyed by the Executive is at a minimum here. Influence gained from longevity of service in Congress and on subject-matter committees, or especially on the significant appropriations sub-committee, may outweigh the more direct link of the Presidency to the appropriate bureaucratic policy.

2. Low-Level Decision-Making: The Executive Bureaucracy and the Congress

Low-level decision-making has not escaped the attention of either active politicians or political analysts. The most convenient method of dealing with substantive policy is for interest group lobbyists, appropriate permanent Civil Service regulators, and Congressional leaders to form mutually supportive links. These relationships can endure over many administrations, with interest group lobbyists supplying technical and political information, as well as political and financial support to the legislators and political support for agency budgets, while the legislator and bureaucrat find mutual understanding convenient and useful. Such relationships require only minimal White House blessing, and are known by various names. The most current expression, "Iron Triangles," rather exaggerates the power involved. As the Reagan Administration has shown, determined attention and ruthless political attitudes can destroy most of these relationships almost as easily as one would brush aside a spider's web. A less popular term, "Cozy Triangles," therefore, better captures the essence of this relationship.

American social science has always suffered from a strong populist bias, making it difficult to judge the true extent of the phenomenon. But the ubiquity of the relation rests upon its unobtrusiveness; so long as little attention is paid to the policy area, real policy can continue to be made by only faintly legitimized authorities.

These observations are most significant in their possible application to the Community experience. The critique is sufficiently analogous to critiques of the Commission's processes as to be virtually on all fours. As Community regulations and directives often and increasingly deal with highly specific, low-visibility matters in ways which have great cumulative weight, and as Community procedures become even more prosaic, non-eventful and Chinese-torture-like, the actual shaping of policy is left to a small band of persons who themselves have relatively invisible standing. The advent of COREPER has brought national habits of secrecy to the Community process, and accentuated rather than diminished the phenomenon. The various national representational groups are in effect composed of very similarly situated persons, usually with similar points of view. There is a considerable degree of protection of diverse interests in a process involving representatives from ten nations, though perhaps that expectation is overcome all too often by the functional overlapping the scheme of operations necessitates. We shall return to this issue later in more detail in a Community context. At this point it is enough to raise the basic similarities of the problems, although complexities and differences will also emerge.

In spite of these islands of executive oversight where some Congressmen (not the Congress) succeed in controlling policy formation, the general drift has been toward clear executive aggrandizement. Creative delegation of authority, whether directly to the President or to an administrator, has been permitted under the fiction that the discretion employed is under legislative guidance, utilizing the old Latin maxim, "*Potestas delegata non potest delegari.*"

It is held that unfettered delegation would be unconstitutional, but that with proper standards delegation involves merely leaving details of policy implementation to the Executive. Only the *National Industrial Recovery Act* (NIRA), which permitted private groups – joint management-labor committees, for example – to set industry standards, and the parallel *Guffey Bill* for the coal industry, have been held to exceed the Congressional authority to delegate.[39] Even in this latter case Justice Cardozo dissented on grounds that similar delegations of power had already been upheld. Cardozo's more generous standards of delegation certainly predominate today.[40]

Indeed, the phenomenon was carried to the point where Congress perhaps too freely, and almost without standards, delegated to the Executive subject only to recall of the power by Congress acting through Concurrent (or even one-house) Resolution, without the possibility of a Presidential veto. Obviously, the presence of this "short leash" made the question of standards less significant. Presidents invariably accepted additional power afforded to them, while expressly refusing to concede that Congress could exclude the President from vetoing a repeal.

Arrangements of this type were finally dealt a serious blow by *Immigration and Naturalization Service v. Chadha*,[41] in which the Supreme Court – after dodging the issue for decades – finally held the so-called "legislative veto"[42] to be unconstitutional. But given the extensiveness of its use and the need for some kind of legislative check on delegations of authority to the Executive Branch, it is not clear what the effect of this decision will be. What is clear is that the Supreme Court felt that the situation that had developed – where in effect the Executive had acquired (via Congressional delegation) the authority to legislate, while the legislature had granted itself the power to veto – was clearly inconsistent with the system of checks and balances built into the Constitution.

Pragmatically speaking, the importance of Executive initiative and power in legislating has perhaps waned a bit from its high point under Presidents Roosevelt, Truman and Johnson. But President Reagan has demonstrated its continued significance so dramatically that we need not detail the fact here.

[39] Provisions of the NIRA were struck down in Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); the Guffey Bill, enacted as the Bituminous Coal Conservation Act of 1935, was fatally wounded in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[40] *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

[41] 103 S. Ct. 2764 (1983).

[42] The Court noted that in strict constitutional terms the power of "veto" is specifically the President's power under art. I, § 7. "Legislative veto" is merely the common term for Congressional control devices of the sort at issue in *Chadha*. *Chadha* at 2771. This distinction, made in the first few pages of a fairly lengthy decision, set the tone for the entire majority opinion.

3. Congress and the President: A Summary

The striking pattern that has emerged in relations between the Congress and the President is the erosion of traditional boundary lines and theoretical notions of the domain of the Executive or of the legislature. While some of these changes involve continuous encroachments by the Executive in which the Congress has only reluctantly acquiesced, in other areas Congress has actively promoted greater Presidential authority as an instrument of maintaining control over processes – such as budget, or bureaucratic regulation – which have been moving totally out of their control. *Ceding* authority to the President has been used, paradoxically, to maintain some important supervisory powers – usually considered more executive by the Congress.

The more recent trend has been for a legislature conscious of the erosion of its powers to attempt also to discipline itself, such as in the budgetary process or in requiring a Congressional stand on Presidential commitment of military power. The verdict is not in on such self-improvement admonitions, though the budget process is clearly more effective than the foreign policy efforts.

B. Institutional Relations in the Community: The Council, Commission and Parliament

1. The Nature of the Community Legislative Process

Compared to the American system, in many respects the Community emerges as most modern and free of eighteenth-century preconceptions. It is difficult to speak of an executive branch at all; however, clearly, the bulk of those functions that are carried out by Community functionaries are performed by the Commission, while the vast bulk of the Community's operations are carried out by employees of national executive branches of constituent members. The Council is the major legislative power, although it can act only on the basis of Commission proposals, and must share some legislative power with the Parliament, which it does only grudgingly. Conceptually, the Commission's important legislative roles of initiative and regulation-making (where authorized by the Council) can still be regarded as subsidiary delegations in the latter case, and merely a proposing power in the former. The exclusive Commission power of initiative was in the initial stages of the Community (and in theory remains) an important independent power of considerable significance. The Luxembourg Accords compromised the Commission's power of initiative to some degree by requiring Commission consultation with COREPER in the drafting of certain proposals; and indeed, in practice, it is often argued that COREPER has by virtue of this extra-Treaty right of consultation robbed much of the real significance of the Commission's power of initiative. Hopes that the popular election of Parliament and its new authority over the budget would restore some of the old balance between Council and Commission have become muted, though it is quite premature to pass judgment on the new institutional pattern. A large, amorphously organized body like the Parliament nec-

essarily takes time to evolve style and structure to meet new responsibilities and fulfil its potential. It has proven more adroit in using its powers to command attention for its views than in coming up with impressive policy stands, but that does not mean it cannot move in the future to a stage of actual effectiveness.

The lack of a clear-cut model for relationships within the policy-making units of the Community does give those units a protean form. Within both the explicit legal constrictions of the Treaty and intra-Community bureaucratic politics, considerable evolution can occur and has in fact occurred. The lack of an equilibrium or adjustment implied by the Treaty's efforts to insulate the EC institutions may ultimately be overcome by adjustments in power and responsibility permissible by constructive interpretation.

For some the crisis of 1965 and the resulting Luxembourg Accords marked a clear turning point in the actual operation of the Community; but on the surface at least, the Luxembourg Accords did very little. Community politics have always been consensus politics. In a system heavily dependent on good-faith and day-to-day compliance by governments, it is impractical and even foolish not to seek compromises that avoid policies offensive to one of the constituents. Voting, and particularly voting by the weighted scheme provided for in the Treaty, was not the most promising mode of operations for the effective resolution of disputes among Member States. Rather, it was significant as a means for inducing reasonableness among the parties. It meant there were limits to placating recalcitrants with extreme intransigence carrying the obvious risk of being ignored and overridden. The possibility of a qualified majority vote could have had great effect, then, on the style of bargaining and the pressure it might have put on the most reluctant State to seek a liveable solution, rather than drive a hard bargain.

Removal of this incentive makes the power of initiative less viable as a tool of policy and even less practical in operation. If voting was an option, the Commission could draft a range of solutions acceptable to it and thereby pressure reluctant States to define their priorities and choose the most acceptable of solutions within that range. No doubt trade-offs with respect to other policies would be involved. Under the Luxembourg rules such trade-offs are almost the sole mode of negotiations. As this is largely a political and back-chamber type of process, the Commission is not the best vehicle for such interchange. If a bargain is struck, too, the Commission is not likely to fail to produce the appropriate initiative. All power, as we have noted, gravitates to the negativist under conditions of absolute veto. The Commission's power of initiative, whether viewed as a constitutional weapon or a motive instrument, has been sapped of its value. The need for its workers to witness and achieve results is in fact rendered a cost, since it will, almost by definition and almost invariably, have a greater stake in new proposals than the most reluctant Member State.

The institutionalization of COREPER is both a symptom and aggravation of this factor. Since actions of the Commission are supranational in approach, it is inevitable that national scrutiny will be injected into the process prior to

action by the Council. As the Council has only a floating membership – the appropriate Minister or Deputy for a particular matter is always sent by each country – continuity is afforded primarily by the permanent delegations. The process is complex, and can be impeded as well as aided by the series of consultations which are often highly redundant as well as prolix. Invariably the Commission staff formulates proposals carefully after consultation with appropriate experts from the Member States. This early process is generally coordinated by the permanent delegations. Once the Commission is considering proposals, comments and reservations are subject to negotiation, both informally and in the context of Commission proceedings. The process is repeated at the COREPER level before going to the Council. Thus at least two complete cycles of consultation take place.

There are quite different opinions as to the technical competence of what emerges from this process as opposed to that of the earlier, simpler days. Although the Community now deals with more and more technical details, the dominant tone of the *"Maison"* is part diplomatic, and part high bureaucratic-technocratic, based on rational principles and on insistence on precise detail. But the differences between countries are sometimes papered over by verbal formalities, sometimes having no empirical reality behind them, serving to disguise an ultimate failure to reach an agreement. Complaints of lack of drafting skill or that the process is so weighed down and compromised that coherence and comprehensibility are inevitably sacrificed, are more and more frequently heard. No serious study has even attempted to show this, and many of the criticisms are contradictory. At the Commission itself there is some feeling that with lowered morale and commitment some deterioration in the quality of legislative proposals has occurred, but probably not a significant one. The criticism is seen as partly a reflection of the greater skills now required by a more complex Community effort, partly the result of the less friendly political environment in which the Community now operates, and perhaps partly attributable to marginal changes in personnel, to an erosion in commitment, and to the more piecemeal process which currently predominates.

Whether this process is viewed as legislative or bureaucratic in nature, as supranational policy-making or international consensus-building, is a matter of perspective. The legal form is one of decision-making; the practical form is, in fact, consensual bargaining. The result has often been characterized as a process plagued by *lourdeur.*

2. The Problem of *Lourdeur* in the Community Process

Second in importance only to questions relating to the utility or wisdom of actually having common European policies, or to the impact of such policies, are questions relating to the efficiency of the process of decision-making. In the formative years, both in the 1950's and early 1960's, the structural and functional elements of the Community drew most attention. The very existence of the High Authority (and later of the Commission) with its unprecedented competences and powers represented a break with earlier traditions of internation-

al organizations. As we saw, the initial, seemingly successful period of rapid achievements suggested not only a vindication of neo-functionalist theories which assigned technocratic organs a central role in policy-making, but also suggested an equally successful *decisional* process measured in terms of efficiency and content.

The mid-1960's provided some sort of turning point. Although the murky story of the two Fouchet plans[43] could have provided some early warning, the 1965–66 crisis was a traumatic experience not only to the Community but also to its observers. In terms of day-to-day *operational* impact the consequences of the Luxembourg Accords have been misjudged and exaggerated but the psychological impact of the crisis was undeniable. It is to that period that one can trace back, as with so many other things, the change in interpretation and description as regards the Community's decisional process.

The new interpretation, which under one guise or another persists till this day, may be encapsulated in the concept of *lourdeur*. The decisional process has been described as slowing down, as suffering from increased blockages, and characterized by a dilution in the substantive content of proposals. The Commission is said to be increasingly bogged down by bureaucratic fat; and the Council, with its sub-organs, is said to be suffering from a paralysis conditioned by nationalism.[44]

a) Lourdeur: *A Definition of the Concept*

The actual existence of *lourdeur* has often been taken for granted on the basis of no more than an instinctive or impressionistic feeling. What is more, the term – representing the Community's alleged decisional malaise – has rarely been subjected to analysis with respect to its possible components, and hence its real significance. It has come to suggest different things to different people, with various implicit assumptions living together in an unelucidated and thus happy confusion.

In an attempt to clarify the possible meaning of this concept and to extrapolate from the various shades which have been attributed to it by different observers – most prominently by the Community's own Three Wise Men – it may be useful to draw a distinction between *mechanical* and *substantive lourdeur*. These two categories are, as one may expect, not watertight; one, indeed, influences the other. The distinction becomes useful, however, if the decisional process is to be analyzed in greater detail and perhaps, with more finesse.

[43] *See* EUR. PARL. COMM. on INST'L AFF., SELECTION OF TEXTS CONCERNING INSTITUTIONAL MATTERS OF THE COMMUNITY FROM 1950 TO 1982, at 109–26 (Luxembourg, Eur. Parl. Pubs., 1982).

[44] COUNCIL OF THE EC, REPORT ON EUROPEAN INSTITUTIONS, PRESENTED BY THE COMMITTEE OF THREE TO THE EUROPEAN COUNCIL 11–12 (Luxembourg, Office for Off. Pubs. of the EC, 1980) (The Report of the Three Wise Men) ("The general phenomenon of an excessive load of business aggravated by slow and confused handling may be summed up in the one French word *lourdeur*. . . .").

i) Mechanical *lourdeur*

Although the causes of this phenomenon might well be rooted in political as well as technical reasons, the outward signs of mechanical *lourdeur* are relatively tangible:

(a) Decline in Commission quantitative output. It is often suggested that over the years – for bureaucratic and political reasons – the Commission's ability to maintain what is one of its primary functions – as "legislation-proposer" – has run into difficulties and even shown signs of decline.

(b) Decline in Council quantitative output. Likewise it is suggested (and this has become one of the explanations for the alleged decline in the Commission's quantitative output discussed in (*a*) above) that the Council is unable to cope with the Commission's legislative output.

(c) Slowness. Perhaps the most common suggestion is that the process of decision-making – especially as regards the lapse of time between Commission proposals and Council adoptions – has become inordinately long. The reasons suggested for this usually relate to the growing importance (and interference) of COREPER and other Member State agents in the Community process, the inefficiency of the Council as a decision-making forum and the diminution in the proverbial political will by which delay and time-consuming amendments are often employed by the Member States as tactical weapons.

ii) Substantive *lourdeur*

The elements which characterize this phenomenon are, as the name suggests, not merely procedural but go to the very heart and substance of Community legislation. Its major characteristics are:

(a) The diminution in the content of both Commission proposals and Council adoptions, with a trend toward legislation which satisfies the lowest common denominator of Member State positions.

(b) An increase in the willingness of the Council to reject or substantially to amend Commission proposals.

(c) The failure of the Community to develop significantly some of the common policies – for example, transport – provided for in the Treaty.

(d) The failure of the Community to make significant advances in the qualitative sense beyond the boundaries set out in the Treaties.

b) Measuring the Lourdeur *Phenomenon in the Community Process*

The foregoing are primarily impressions; in this section we shall attempt to supply a more concrete descriptive basis for examining the concept and phenomenon of *lourdeur*. The focus has been primarily on the mechanical dimension although some of the findings have some bearing on substantive *lourdeur* as well. In trying to concretize the descriptive element in the analysis of decision-making we have surveyed – indeed counted and measured – certain elements in the legislative input and output of the Community organs. Our find-

ings are based on a Pilot Study which is still in progress.[45] The early results, however, are sufficiently indicative to merit preliminary analysis. Sufficient for present purposes will be an outline of the essential elements of the Pilot Study. The full results will be published in due course. We must, however, emphasize not only the preliminary and limited character of the data but also the exploratory nature of our use of this data.

i) The questionnaire

A basic survey was conducted via a questionnaire sent to the Directorates-General (DGs) of several of the legislative-policy making services of the Commission. We excluded DGs such as information and personnel, whose work is essentially internal and not legislative. We also excluded DGs I and VIII, which deal with, respectively, external relations, and cooperation and development. These two essentially active and successful DGs demand different techniques for assessing their output.

Each DG was requested to provide a list of all "policy proposals" made by that DG since inception. By the term "policy proposal" we attempted to exclude technical measures the proposal and adoption of which are essentially automatic. The DGs were left to make this assessment themselves; no control was exercised over their choice. It is thus of great importance to note that our survey focusses on *mainstream policy management.* Technical executory measures are deliberately excluded. Equally, highly political policy decisions are not lost but disappear in the general statistics. We are thus essentially concerned with the management of policies the general acceptability of which has already been manifested.

In relation to each proposal (a "case") the DG was requested to furnish the following information: the date of the proposal; the date of adoption (or rejection) if any by the Council; and the date of the opinion of the European Parliament. This data is verifiable through the Official Journal of the Community. Thus we were able to compute jointly and severally the legislative history (in temporal terms) of the Commission and Council output.

In addition, DGs were asked to classify each proposal on a scale ranging from "important" through "very important" to "fundamental." The criteria for choice of category were to be subjective although we supplied a set of well-known examples of actual Community output in the agricultural field which corresponded in our eyes to these three categories. Note that our interest in *process over time* meant that it was less important for us to have an absolute value for any given measure but rather an assessment by the policy-maker himself of the *relative* importance of any one measure as against other measures.

ii) The response

In the Pilot Project we had a positive response from seven DGs. Other DGs will feature in the full survey when it is completed. The data covers the period up to and including the first half of 1981.

[45] *See* the *Annex* to this paper, *infra.*

Table 1
Distribution of Cases

Name of DG		Number of Cases	
DG III	– Internal Market and Industrial Affairs	239	
DG V	– Employment, Social Affairs, Education	26	
DG VI	– Agriculture	109	
DG VII	– Transport	16	
DG XIV	– Fisheries	7	
DG XV	– Financial Institutions and Taxation	61	
DG XVI	– Regional Policy	14	
		472	total

iii) Distribution of cases

As *Table 1* shows, the number of cases is not distributed evenly among DGs. It will thus be seen that DGs III, VI and XV dominate the data. Despite this fact, in this Pilot Study we propose to aggregate all the data available to us in its entirety, extrapolating conclusions therefrom for the entire legislative and policy-making activity of the Community. Two obvious dangers are inherent in this approach: (a) the reliance on a relatively small sample of DGs; and (b) the dominance of DG III. In future refinements of the analysis we intend to isolate DG III to see whether overall trends are maintained. Other statistical qualifications of the data (number of cases; missing values; single variables, etc.) are explained in an annex to this study and will be elaborated upon when the full results are available.

iv) Data analysis

(a) Section I: Commission output

In our first set of data we examine the *output of the Commission* as manifested in the number of "policy proposals" made. The data is analyzed on a *year-by-year* basis in *Table 1 a* and *Graph 1 a.*

It is tempting to search in this rather erratic year-by-year graph for links to possible political explanations. Thus:

(i) The rather steady increase in proposals made up to 1965 might represent early Commission build-up in the formative years.

(ii) The drop in proposals made in 1966–67 might have been caused by the decisional difficulties in the period leading up to the Luxembourg Accords, which might have affected the Commission as well. That the 1965–66 crisis would be felt in 1966–67 is easily explainable: it takes time to prepare proposals within the Commission. Thus the results of a crisis in 1965–66 may be

Table 1 a
Number of Policy Proposals, by Years

Year	No. of Policy proposals	%	Accumulated % (excluding missing values)
58	2	0.4	0.7
59	1	0.2	1.0
60	1	0.2	1.3
61	9	1.9	4.3
62	13	2.8	8.7
63	10	2.1	12.0
64	13	2.8	16.4
65	19	4.0	22.7
66	8	1.7	25.4
67	6	1.3	27.4
68	23	4.9	35.1
69	23	4.9	42.8
70	19	4.0	49.2
71	14	3.0	53.8
72	14	3.0	58.5
73	13	2.8	62.9
74	18	3.8	68.9
75	14	3.0	73.6
76	21	4.4	80.6
77	19	4.0	87.0
78	9	1.9	90.0
79	11	2.3	93.6
80	16	3.4	99.0
81*	3	0.6	100.0
Year unknown	173	36.7	–
Total	472	(100)	(100)

* 1st 6 months only

felt in the output of 1966–67. The period 1966–67 will also correspond to the years in which significant internal reconstruction following the Merger Treaty will have been taking place. This might also explain the decline.

(iii) The peaking in 1968–69 might represent the build-up, indeed catch-up, after the Luxembourg Accords with the new decisional structures.

(iv) The decline in the late 1970's might be linked to the Jenkins Presidency during which the Commission instituted a policy of frugal output.

Of course, interpretation is a risky enterprise and thus this view must be considered as suggestive rather than definitive. Ad hoc, and especially post hoc explanations are an easy game. The relatively small size of the sample and the

Graph 1 a
Number of Policy Proposals, by Years

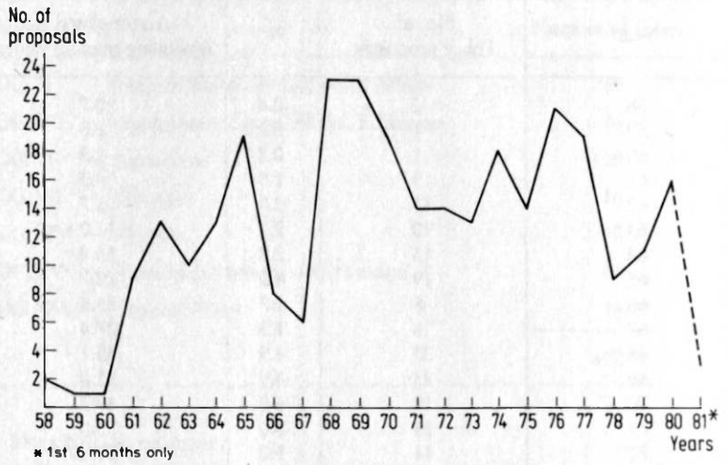


Table 1 b
Number of Policy Proposals, by Four-Year Intervals

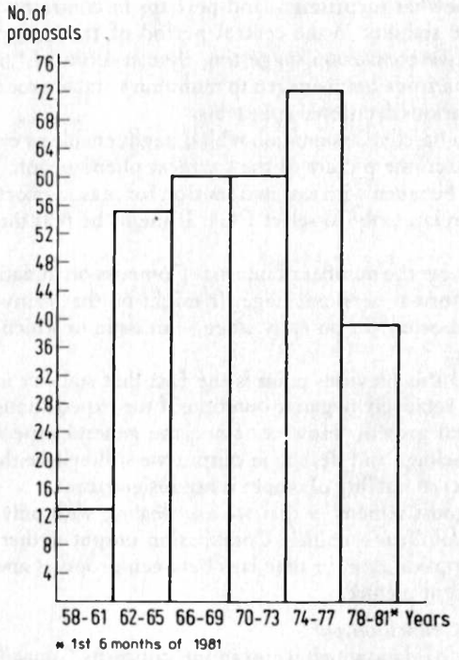
Group of years	No. of Policy proposals	Relative frequency (%)	Adjusted frequency (%)	Cumulative frequency (%)
58–61	13	2.8	4.3	4.3
62–65	55	11.7	18.4	22.7
66–69	60	12.7	20.1	42.8
70–73	60	12.7	20.1	62.9
74–77	72	15.3	24.1	87.0
78–81*	39	8.3	13.0	100.0
Year unknown	173	36.7	–	–
Total	472	(100)	(100)	(100)

* 1st 6 months of 1981

predominance of a few DGs create the risk of "freak years" showing up on the graph, in relation to which any explanation may be only a rationalization of a statistical deviancy.

Be this as it may, in order to achieve a more consistent result in a statistically more satisfactory manner, we may divide the period of survey into groups of years. This technique tends to eliminate the divergent years and highlight the longer-term trends. We have used six periods of four years each. The "policy proposal" output distribution is illustrated in *Table 1 b* and *Graph 1 b.*

Graph 1 b
Number of Policy Proposals, by Four-Year Intervals



It would seem from this presentation of data that, after a not unexpected gradual build-up in Commission proposal output, a relatively *high measure of stability has been maintained throughout the various periods of political crises,* with a decline ("backlash") appearing only in the final period.

The phenomenon of a slow build-up in policy proposals and approvals is natural. Not only did the first years of the Community not permit major developments, but this was also the period during which the bureaucracy itself was being built up. Also, it was only in the early 1960's that the political deci-

sions on the Common Agricultural Policy were taken, which in turn gave the Commission (DG VI) the mandate to engage in policy proposals in that important area. Finally since the *preparation of proposals* takes time, we can always expect a certain start-up time lag phenomenon to be present in the tables.

The reduction of the number of proposals in the final period is also not altogether surprising. The figures for 1981 are, of course, not entirely complete, which alone would influence the totals. In addition, 1981 was particularly affected by the British budget contribution problem and the Commission mandate which acted as an overall restrictive element on Commission output. Additionally, this period corresponds to the Jenkins Presidency in which there was a definite policy of legislative restraint, encapsulated in the principle of subsidiarity.[46]

What is somewhat surprising – and perhaps in contrast with expectations – is the relative stability in the central period of the survey. We may here hazard a tentative conclusion suggesting that in terms of "policy proposal" output the *Commission* has managed to maintain a stable process not drastically affected by various decisional upheavals.

This then is a baseline assumption which might enable us eventually to construct a more accurate picture of the *lourdeur* phenomenon. This conclusion must, however, be taken with extreme caution for reasons worth repeating:

- Our figures relate only to select DGs. It might be that the total picture is different.
- We do not know the number of internal Commission initiatives which never reached the formal proposal stage. It might be that many initiatives were politically "aborted" at an early stage – an issue to which we shall return in due course.
- Connected to this previous point is the fact that stability in itself might be considered a relatively negative outcome if the expectations were of steady or exponential growth. However since the general expectation is one of dominant blockage and decline in output we still believe that simply establishing the fact of stability of output is not insignificant.

Finally, we must remember that we are dealing with only one element of "mechanical" *lourdeur* – namely Commission output. Other factors such as the Council adoption rate, or time lags between proposal and decision might present a different picture.

(b) Section II: Council output

The second set of data which we examine concerns Council output relating to Commission proposals. The adoptions and rejections (decisions) relate to the same set of cases, namely to the same "policy proposals" referred to in *Sec-*

[46] The principle of subsidiarity rejects a dogmatic division of competences and establishes instead that functions should be allocated to that level of government which may best perform them. With regard to the Community, this has been said to operate in the negative sense: The Community should not have competences unless it can be demonstrated that exercise of them at the Community level will be somehow better than exercise at the national level.

tion I. Later we shall see that, on the whole, most proposals were adopted. There have been few outright rejections. What we do not examine here, however, is the extent to which the Council may have diluted the proposals (substantive *lourdeur*), or the frequency of Council or sub-organ action which might have killed initiatives at the pre-proposal stage. In the tables and graphs in this Section we are merely looking at the number of proposals processed by the Council on a year-by-year and periodic basis. (In subsequent Sections we will look at the relationship between Commission input and Council output, *i.e.*, the ability of the Council to deal with a growing backlog.) The data here is thus concerned more with the performance of the Council as a decision-making organ.

Table 2 a
Number of Decisions, by Year

Year	No. of decisions†	Relative frequency (%)	Adjusted frequency (%)	Cumulative frequency (%)
58	0	0	0	0
59	0	0	0	0
60	1	0.2	0.2	0.2
61	0	0	0	0.2
62	10	2.1	2.3	2.6
63	4	0.8	0.9	3.5
64	16	3.4	3.7	7.2
65	5	1.1	1.2	8.4
66	10	2.1	2.3	10.7
67	17	3.6	4.0	14.7
68	23	4.9	5.4	20.0
69	16	3.4	3.7	23.8
70	27	5.7	6.3	30.1
71	21	4.4	4.9	35.0
72	16	3.4	3.7	38.7
73	22	4.7	5.1	43.8
74	25	5.3	5.8	49.7
75	30	6.4	7.0	56.6
76	34	7.2	7.9	64.6
77	34	7.2	7.9	72.5
78	33	7.0	7.7	80.2
79	34	7.2	7.9	88.1
80	37	7.8	8.6	96.7
81*	14	3.0	3.3	100.0
Total	429	(100)	(100)	(100)

† Excluding cases for which decision is pending
* 1st 6 months only

Graph 2 a
Number of Decisions, by Year

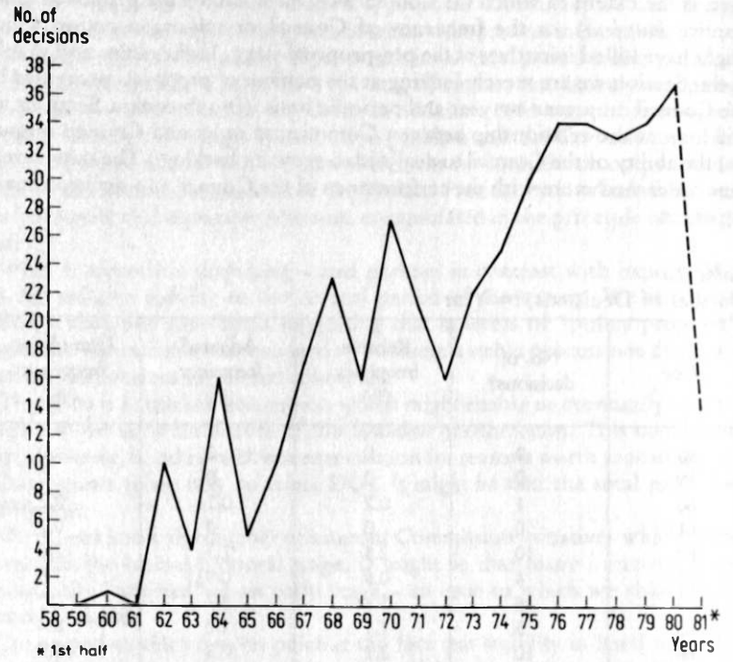


Table 2 b
Number of Decisions, by Four-Year Intervals

Group of years	No. of decisions	Relative frequency (%)	Adjusted frequency (%)	Cumulative frequency (%)
58–61	1	0.2	0.2	0.2
62–65	35	7.4	8.2	8.4
66–69	66	14.0	15.4	23.8
70–73	86	18.2	20.0	43.8
74–77	123	26.1	28.7	72.5
78–81*	118	25.0	27.6	100.0
Total	429	(100)	(100)	(100)

* 1st 6 months of 1981

Graph 2 b
Number of Decisions, by Four-Year Intervals

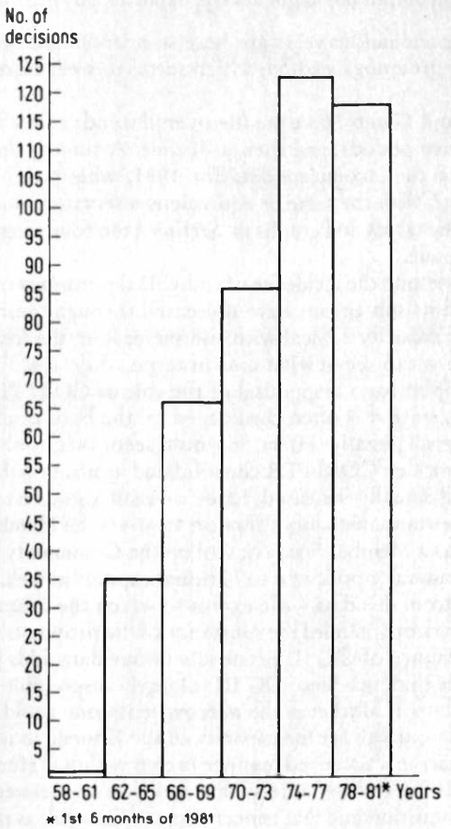


Table 2 a and *Graph 2 a* are even less linear than *Table 1 a* and *Graph 1 a.* Thus the caution about interpretation must be emphasized twofold.

In some respects the data here parallels that of *Section I:*

(i) In the first years one can understand clearly the slow build up in output – dependent of course on Commission activity and the inevitable time lag between proposal and decision.

(ii) We see a drop in 1965–66, which is only to be expected considering the political events of that period. But on the other hand we do not find the same decline we saw earlier in relation to Commission activity in the final years. This is perhaps explicable since the Council in that period would still

be concerned with proposals made before the policy of subsidiarity was instituted. The figures for 1981 might reflect a catching-up with the decline in Commission output but might also be explicable by incomplete data.

In any event the anomalous years are here so pronounced that we turn again to the four-year groupings method, which seems to yield more consistent conclusions.

In *Table 2 b* and *Graph 2 b* we see the overall trend: a slow but steady build-up in the first five periods, and then a decline. Assuming that this decline is not due solely to the incomplete data for 1981, what possible interpretation may one suggest? With the same or equivalent reservations made in respect of the analysis of the tables and graphs in *Section I* the following tentative speculations may be made.

Overall, and despite the incidence of individual notorious cases of blockage, the Council and its sub-organs have increased through the central period of the survey their capacity to deal with the increase in the legislative load, although we have yet to see at what cost in terms of delays. This already gives some partial support for a reappraisal of the role of COREPER in the policy-making process, since it is often considered on the basis of efficiency criteria as having an overall negative effect. It would seem that, to the contrary, during the period in which COREPER consolidated its position the output capacity of the Council actually increased. Later we shall argue that COREPER also provides an important mediatory function vis-à-vis the Member States, that it serves not only as a Member State control on the Community process, but as a conduit for Community policies into national capitals as well. Once again, we do not know – from this data – the extent to which the Council affected pre-proposal initiatives or amended the substance of the proposals made.

The predominance of DG III proposals in our data adds perhaps another dimension to our findings. Since DG III is largely responsible for the management of the Common Market in the narrow sense one could perhaps suggest that in that arena one can see the capacity of the Council to increase its workload over the years in a sustained manner (again without reference to the issue of time lag). It is interesting to note here a difference between the data concerning the Commission and that concerning the Council: as regards the Commission, we noted that there was a large increase from period one to period two after which the output remained stable; but as regards the Council, we see that the increase was more gradual, stretching progressively over the first five periods. Two possible explanations for this result may come to mind: (1) Council output depended on an increase in or build-up (even a backlog) of Commission output; (2) the Commission bureaucratic build-up was faster.

(c) Section III: The "success rate" of proposals

We have indicated above that, on the whole, most proposals that have been openly processed have been adopted. In the tables of *Section II* we examined the operations of the Council – specifically, the ability simply to take decisions, whether accepting or rejecting Commission proposals. In this section instead we propose to examine with greater precision the relationship of proposal-

Table 3 a
Acceptance and Rejection Rates of Proposals (1958–1981)

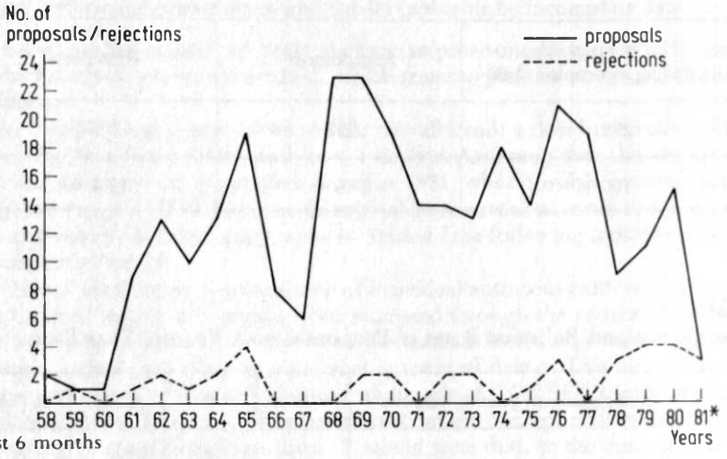
No. of Proposals (excluding incomplete data)	Acceptances	Rejections
298	261	37
100 %	87.6 %	12.4 %

Table 3 b
Acceptance and Rejection Rates of Proposals, on a Year-by-Year Basis

No. of Proposals made on year-by-year basis*		A	R	A (%)	R (%)
58	2	2	0	100	0
59	1	0	1	0	100
60	1	1	0	100	0
61	9	8	1	88.9	11.1
62	13	11	2	84.6	15.4
63	10	9	1	90.0	10.0
64	13	11	2	84.6	15.4
65	19	15	4	78.9	21.1
66	8	8	0	100	0
67	6	6	0	100	0
68	23	23	0	100	0
69	23	21	2	91.3	8.7
70	19	17	2	89.5	10.5
71	14	14	0	100	0
72	14	12	2	85.7	14.3
73	13	11	2	84.6	15.4
74	18	18	0	100	0
75	14	13	1	92.9	7.1
76	21	18	3	85.7	14.3
77	19	19	0	100	0
78	9	6	3	66.7	33.3
79	11	7	4	63.6	36.4
80	15	11	4	73.3	26.7
(81)**	3	0	3	0	100
Total	298	261	37	87.6	12.4

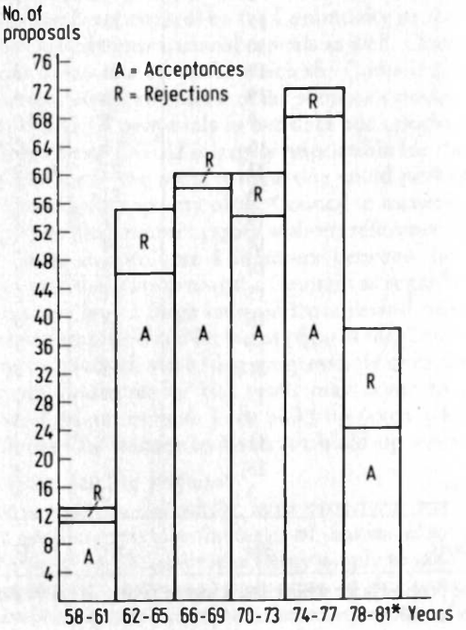
* Excluding proposals for which data is incomplete A = Accepted, R = Rejected
** 1st 6 months only

Graph 3 b
Proposals and Rejections, 1958–1981



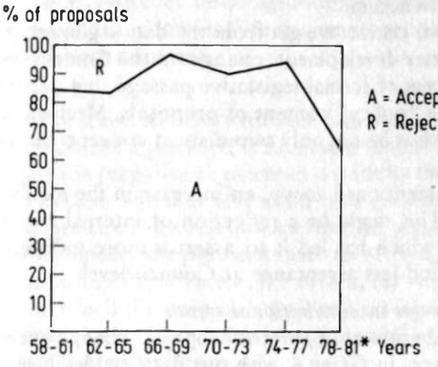
*1st 6 months

Graph 3 c
Proposals, Acceptances and Rejections, by Four-Year Intervals (1958–1981)



*1st 6 months of 1981

Graph 3 d
Rate of Acceptances and Rejections



*1st 6 months of 1981

acceptance-rejection. Once again the figures must be viewed with caution since the possibility of drastic amendment by the Council is *not* considered in our data.

Table 3 a gives the overall figures for the survey. In this context we consider only those proposals for which a decision has been taken and for which complete data was available.

Our question is always as follows: How many of the proposals made in year X were eventually accepted (with whatever delay)?

Overall *Table 3 a* shows there is an acceptance rate of 87.6%. On a year-by-year basis the figures are as presented in *Table 3 b* and *Graph 3 b.*

The picture is presented in four-year groupings in *Graph 3 c* and expressed in percentage terms in *Graph 3 d.*

We see from this data that the rate of *rejection* of proposals made in the first period (in any event, until 1965) is somewhat higher than during immediately subsequent years. We also see that in the last period (from 1977 onwards) the rate of rejection increases again. In the middle years we have a high, steady rate of acceptance. We propose the following possible interpretation for these results:

This in an area where we can perhaps leap from "mechanical" to "substantive" *lourdeur.* At first sight it might seem that the results concerning the central period of the survey suggest – in terms of rate of acceptance of proposals – a fairly smooth working relationship between Council and Commission.

However the data also gives, at least on a corroborative level, support to the notion that the Commission might have adapted its behavior and internal mechanisms – especially in the post-Luxembourg Accords period – *to avoid presenting proposals which it thought would not gain approval.* Perhaps this ties in then with the suggestion of a reduction in the *policy-making* role of the

Commission. And indeed this might be precisely where the Commission's internal process has become affected by the proliferation of national working groups and other such bodies.

If this hypothesis is correct we get from the data a glimpse of the difficulty of *evaluating* this latter development: changes in the Commission process may have eased the process of formal legislative passage, but perhaps at the price of a reduction in the "policy" content of proposals. Mechanical and substantive *lourdeur* might thus be not only two distinct concepts but perhaps *at odds with each other.*

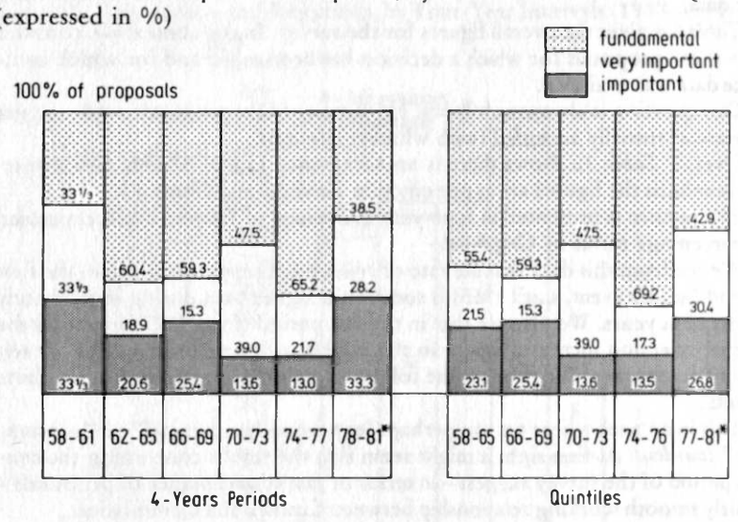
There is also, as mentioned above, an increase in the number of rejections in the last period. This might be a reflection of internal reassessment of the Commission's role which has led it to assert a more independent role, and which would thus find less acceptance at Council level.

(d) Section IV: Changes in distributional trends

How does the distribution of important proposals change over the years? We illustrate these changes in *Graph 4*, with our data divided both into four-year periods and into quintiles (the period in which 20 % of the total proposals were made).

Graph 4

Distribution of "Important" Proposals, by Four-Year Periods and Quintiles (expressed in %)



*1st 6 months of 1981

No clear pattern seems to emerge from the Graph hence no significant general conclusions can be drawn from the figures. (We must also remember that all cases in the survey pertain to proposals which are above the range of

technical measures.) It would seem that in the periods 1970–73 and 1977–81 there is a reduction of "fundamental" proposals but no reasonable explanation comes to mind. It may, however, be of significance that no general decline over time in the number of "fundamental" management proposals (as perceived by the DGs) seems to have occurred.

(e) Section V: Time lags

In this section we propose to deal with time lags – essentially, with the time it takes from the moment a proposal is submitted to the Council by the Commission until a decision (negative or positive) is made by the Council.

The temporal element will thus add to the pure quantitative dimension discussed so far. The principal element missing from our data is the time lag within the Commission, namely the period it takes the Commission to prepare the proposals. This is an important factor, for even if, for example, we perceive a trend according to which the proposal-decision time lag seems to be shortening (*i.e.* less *lourdeur*), it may be that this is accompanied by a larger and "heavier" process at the pre-proposal stage.

Table 5a
Mean Time Lag from Date of Proposal

Year of proposal	Mean time lag (in years)	No. of cases
58	9	2
59	–	–
60	13	1
61	1	7
62	3	11
63	2.8	9
64	4.0	11
65	5.4	15
66	5.7	8
67	2.8	6
68	3.5	23
69	4.9	21
70	5.1	18
71	1.9	14
72	4.2	12
73	2.4	11
74	2.7	18
75	1.5	13
76	2.0	18
77	1.5	19
78	1.1	6
79	0.8	7
80	0.4	11

There are different methods which we can use to compute the data over time. One principal distinction will be *the time lag from the date of a proposal* (namely, looking forward and measuring the time it took from the moment a proposal was made to the date of its adoption) and *the time lag to the date of a decision* (namely, looking backward to measure the time that elapsed up to the point of a Council decision). The first will indicate how long the Commission was forced to wait to have its proposals either accepted or rejected; the second, the time the Council has spent "considering" a particular proposal on which it has made a decision. This is a particularly important distinction when we examine Commission and Council practices in recent years. There might be many proposals still in the pipeline and thus a concentration on decisions – the end result of the process – may be useful in determining the actual extent of *lourdeur.*

Here as well we shall give the data on a year-by-year basis but then, in order to delimit trends, we shall present the data divided into periods of four years and into quintiles of cases.

Table 5 b
Mean Time Lag to Date of Decision

Year decision taken	Mean time lag before decision (in years)	No. of cases
58	–	–
59	–	–
60	–	–
61	–	–
62	1	7
63	0.7	4
64	1.5	10
65	1.5	4
66	1	1
67	4.4	7
68	3.5	12
69	2.5	9
70	1.9	17
71	3.2	13
72	3.3	9
73	4.6	15
74	4.0	15
75	4.5	20
76	3.6	26
77	2.8	21
78	4.0	21
79	2.4	22
80	3	24

In *Table 5 a* the mean time lag *from a proposal* on a year-by-year basis is given. In *Table 5 b* the time lag *to a decision* is given.

As we can see, this computation is unsatisfactory because: (a) the means are often based on a small number of cases; and (b) at the extremes – toward the bottom of the table in the case of proposals, and at the top of the table in the case of decisions – there is an artificial shortening of the mean. Finally, the year-by-year approach has the same tendency to produce freak results noted in our other data, made more acute by the very small numbers dealt with here.

Table 5 c
Mean Time Lag of Proposals Grouped in Four-Year Periods

Period	Mean time lag in years
58–61	3.8
62–65	4.0
66–69	4.2
70–73	3.6
74–77	2.0
78–81	0.7

Table 5 d
Mean Time Lag of Proposals Divided by Quintiles

Period	Mean time lag in years
58–65	4
66–69	4.2
70–73	3.6
74–76	2.1
77–81	1.1

Table 5 e
Mean Time Lag to Decisions in Four-Year Periods

Period	Mean time lag in years
58–61	No case
62–65	1.2
66–69	3.3
70–73	3.2
74–77	3.7
78–81	3.0

In order to overcome these problems somewhat we present in *Tables 5c–5f* the data distributed in groups of four years and in quintiles. The final period should be treated with care since it excludes all long time lags. The data for 1981 refers to the first six months only.

Our conclusion is as simple as it is dramatic: on the basis of the data available in the Pilot Study we do not find in the formal Commission proposal/Council decision legislative process either the long time lags or the increase in delays which one might have expected.

Table 5f
Mean Time Lag to Decisions in Quintiles

Period	Mean time lag in years
60–68	2.3
69–72	2.6
73–75	4.4
76–78	3.5
79–81	2.6

(f) Section VI: Correlation of quantitative output and time lags

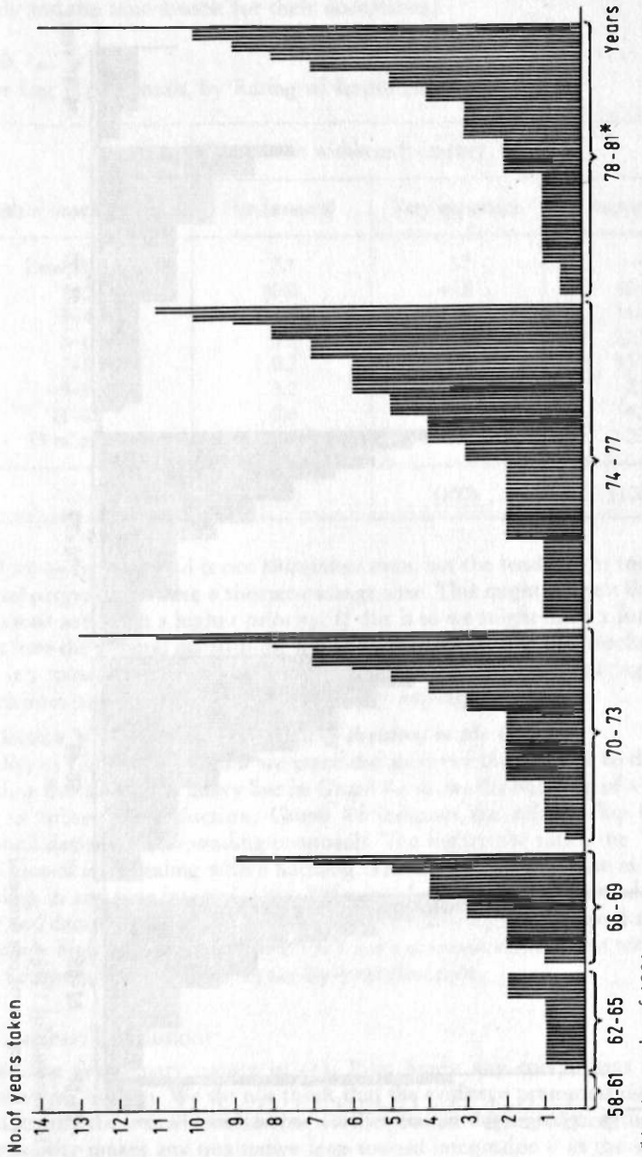
As a final element in our temporal analysis, in *Graphs 6a* and *6b* we shall try to correlate the data on time lags with the number of cases. In other words, we shall try to present in one graph the combined effect of Community legislative activity based on the number of proposals/decisions *together* with the time lag related to each case. This will potentially be the most revealing presentation for the mechanical measurement of output.

In *Graph 6a* each line represents a proposal in respect of which a decision has been taken and its length marks the time elapsed before adoption. *Graph 6b* is constructed the same way using time elapsed through the time of decision. These complementary charts are useful in dealing with a minor problem: the distortion created by recent and past time. In *Graph 6a* there is a marked distortion in the final group of four years, in that by definition proposals in that group will be so recent that many will not have completed their cycle of adoption and rejection. Those accepted by the time of our computations will necessarily have had only a brief period for adoption, and only the future will determine the full shape of the distribution.

What is striking in *Graph 6a* is that the 1974–77 group which by the *lourdeur* hypothesis should have had a narrow base and a steeper pattern than the earlier periods exhibits the opposite pattern. Conversely, in *Graph 6b* the distortion problem is in the period 1962–65. Again the later periods show a larger base and smaller time values, *contra* the *lourdeur* hypothesis.

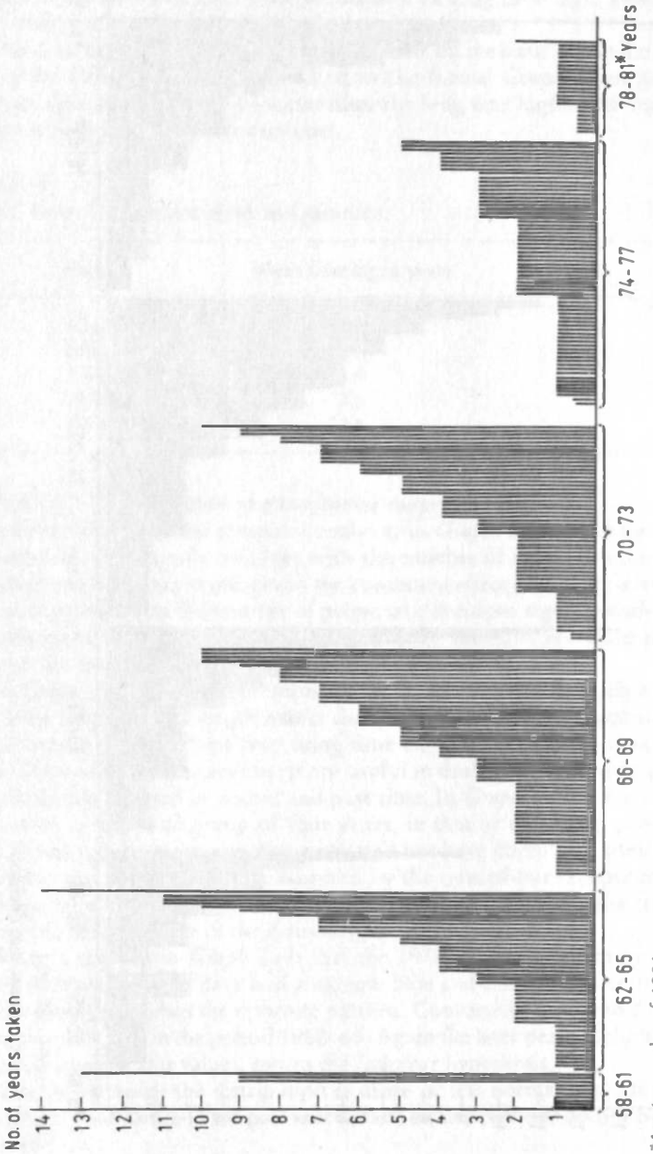
In both instances the distribution is more or less normal and this gives us additional confidence in the previous tables; clearly outlyers do not have inordinate effect.

Graph 6 a
Time Elapsed Before Date of Decision on a Proposal



*1st 6 months of 1981
Each line represents one decision

Graph 6 b
Time Elapsed from Date of Proposal to Decision



*1st 6 months of 1981
Each line represents one proposal

(g) Section VII: Correlation between importance and time lags
In *Table 7a* we try to examine the correlation between the importance of proposals and the time it took for their acceptance.

Table 7a
Time Lag of Proposals, by Rating of Importance

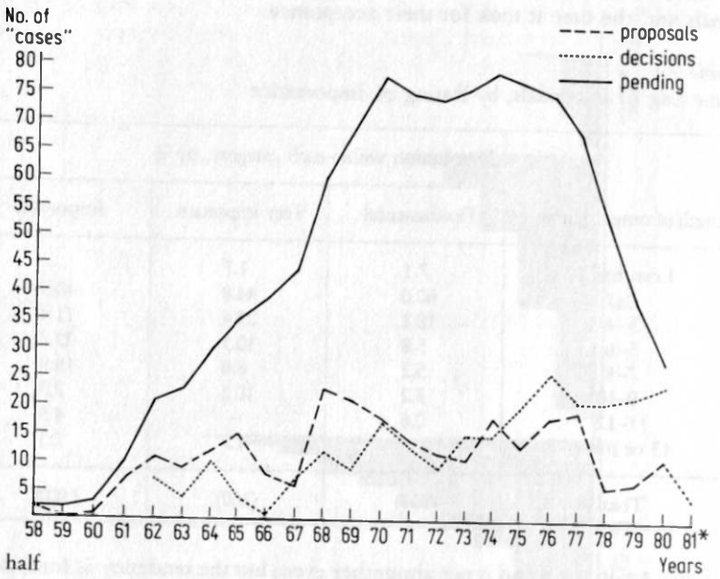
Length of time lag in years	Distribution within each category, by %		
	Fundamental	Very important	Important
Less than 1	7.1	1.7	–
1–2	60.0	44.8	40.9
3–4	18.1	22.4	11.4
5–6	5.8	10.3	22.7
7–8	5.2	8.6	15.9
9–10	3.2	10.3	2.3
11–12	0.6	–	4.5
13 or more	–	1.7	2.3
Total	(100)	(100)	(100)

Once again the trend is not altogether even, but the tendency is for fundamental proposals to have a shorter passage time. This might suggest that these proposals are given a higher priority. If this is so we might have a further insight into the general question of *lourdeur.* It might be that the blockage is in fact felt most strongly in the "lower," more technical range of legislating, which does not have much political or policy-making significance.

(h) Section VIII: Backlogs and pending decisions in the Council
Finally, in *Graphs 8a* and *8b* we trace the ability of the Council to deal with pending decisions. The heavy line in *Graph 8a* shows the build-up of a backlog and its subsequent reduction. *Graph 8b* indicates the relationship between Council decisions and pending proposals. The higher the ratio, the "better" the Council is in dealing with a backlog. The increase or decrease in backlog pending in any time interval is the difference between proposals made in that time and decisions taken. The combination of relatively low proposal rates and relatively high decision rates since 1978 has a dramatic effect upon total backlog, a consequence of which is year-by-year clearance.

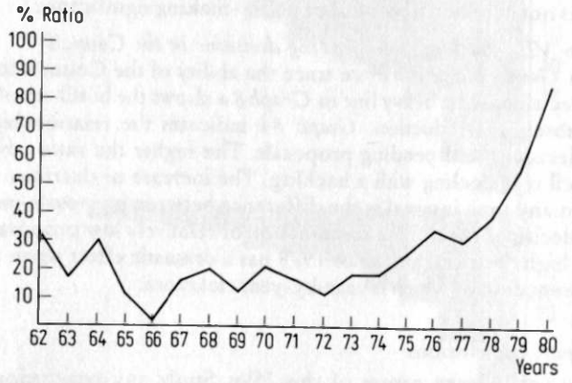
v) Lourdeur: Conclusions
Given the preliminary nature of this Pilot Study any conclusions must be drawn with caution. We do not think that the evidence presented diminishes significantly the overall assessment that the peculiar decisional structure of the Community makes any qualitative leap toward integration – in the sense ex-

Graph 8 a
Backlogs and Pending Decisions in the Council



*1st half

Graph 8 b
Ratio of Decisions to Pending Proposals



plained, for example, by Pelkmans[47] – extremely difficult. Policy-*making* remains a highly complex and frustrating exercise in Europe's system of integration. However at the level of *management* of existing Community policies, despite the fact that this activity engages the full Community apparatus, burdened by the well-known Member State controls, the emerging picture is not what one would have expected at the commencement of the study.

In quantitative terms, the Commission proposal rate has been steady and the capacity of the Council and COREPER to deal with Commission output does not seem to be overly handicapped. Time lags between Commission proposal and Council decision seem to be shortening (though this might be a product of a more extensive pre-proposal phase in which Member State mediation will have already occurred), and backlogs in the types of proposals examined here seem also to have diminished rather than increased. Mechanical *lourdeur* at least is less of a problem than might have been expected. Indeed, the results are not altogether surprising. The Commission remains, despite its growth and increased internal bureaucratization, a relatively small political organ. Likewise, the permanence of COREPER and, above all, its relative insulation from certain political constraints which would influence a purely Member State bureaucracy make possible the development of an adjunct Community institution which in effect permits a tolerable level of decision-making efficiency.

3. The Role of the European Parliament in the Legislative Process

In this section on decision-making and institutional relations in the Community we mention the European Parliament last (almost as an afterthought) due not to a lack of democratic sentiment but rather to a realistic evaluation of its decisional weight in the legislative process. For indeed, despite the implementation of direct elections, and as might have been predicted,[48] there is no substantial evidence to suggest that a reappraisal is due of the traditional assessments of the role of the European Parliament. To be sure, it has recently utilized more deftly its budgetary powers[49] and has been more assertive in claiming a revision of its institutional role. To some extent this has met with success,[50] but overall the old devices such as question time and the potential censure motion have retained their well known weaknesses[51] and new instruments, such as concertation, have proved disappointing.

[47] *See* Heller & Pelkmans, *The Federal Economy: Law and Economic Integration and the Positive State – The U.S.A. and Europe Compared in an Economic Perspective, supra* this vol., Bk. 1, at § III (Pelkmans).

[48] *See* Delorme, Hull, Rose, Thygesen & Wallace, *The Policy Implications of Direct Elections*, 17 J. C. M. Stud. 281, 349 (1979).

[49] The European Parliament rejected the 1980 budget *in toto* and, in a more subtle fashion, voted for an increased supplementary budget in 1980 deliberately so as to use unspent surplusses in 1981 (*see* European Parliament – EP News, No. 16, 15–19 Dec. 1980, p. 1, col. 1).

[50] *See supra* text accompanying note 23.

[51] *See supra* § IV.A.

Parliamentary strategy for institutional change has taken two distinct avenues. On the one hand, there has been a series of Reports and Resolutions[52] which have called for changes, most of which could be implemented within the present institutional structure of the Community. These however have met with only limited success. On the other hand the *Crocodile* initiative has evolved into a major movement, with a specially-created Institutional Committee of Parliament having prepared what is no less than a new Draft Treaty, which would radically change the institutional character of the Community and bring it, in institutional terms, very close to a federal state. One can of course be skeptical of the prospects for success of this strategy but in hindsight it can be said that those who argued that only a step-by-step process of increasing Community power would likely yield results have not been borne out by events. It would seem that the other Community institutions – including the Commission – are not willing to sanction any real reassessment of Parliamentary powers.

As regards the role of the Parliament in the legislative process, two other observations may be made. In the first place, it is clear that the old Commission-Parliament alliance is not what it used to be. Although the Commission has treated the directly-elected chamber with all due ceremonious respect, it clearly perceives Parliament as an emerging rival institution bent on cutting even further into the Commission's already shrinking role.[53] For its part, Parliament has perhaps out of political frustration become much more aggressive in its attitude toward the Commission. The fact that it is only against the Commission that it has any real political authority may be one explanation for this development. It might also signal an attempt by the Parliament to insulate itself, in the eyes of the electorate (to the extent that the latter is concerned at all with the EC in general and Parliament in particular) from the Euro-bureaucracy image. It would not be surprising if, sooner or later, a vote to censure the Commission were finally to be passed.

The second development has been the realization that the lack of effective legislative or control powers has probably been instrumental in leading Parliament to a rather mediocre performance of the tasks it currently has. Not only does it not utilize fully its existing potential but it often, when practicing its day-to-day routine, is found lacking in internal coordination and efficiency.[54] The entire history of the European Parliament may serve perhaps as an affir-

[52] European Parliament Resolutions of 9 July 1981, on Relations between Parliament and the Council, the National Parliaments, and the Economic and Social Committee; on the Parliament and the Community legislative process; on Parliament and Political Cooperation; and setting up a Committee on Institutional Affairs, OJ No. C 234, 14 Sept. 1981, pp. 48–69.

[53] *Cf.* European Parliament Resolution of 18 Feb. 1982 on the role of the European Parliament in the negotiation and ratification of treaties, OJ No. C 66, 15 March 1982, pp. 68–70.

[54] *See* J. WEILER, *supra* note 25, especially chs. 3, 7.

mation that responsibility and power are inseparable concepts, both key to the proper functioning of political institutions.

C. A Brief Comparative Comment: Institutional Relations in the Two Systems

Comparisons between the processes of legislative decision-making in the two systems are difficult, fundamentally because of the diverse nature of the particular institutions involved in the legislative process. From an extremely broad perspective, though, it is possible to view both the accretion of influence in decision-making to the American executive and the supremacy of the Council over the Commission in the same terms: that is, as a natural accretion in the direction of the institution with the most real power to act decisively. But any view of a natural tendency favoring the concentration of influence and *authority* where there is also decisional *power* should not underestimate the role of technical bureaucracies in the decision-making process, for their influence is in fact great and their ability to turn broad policy goals into specific, tangible results in practice transfers a great deal of top decision-making power directly to them, effectively by-passing other institutions whose role is merely consultative. Thus we saw that the means to influence much policy-making in the U.S. may be through manipulation of the lower-level bureaucracies – of both Congressional Committees and Executive regulatory agencies – a game which both Congressmen and the President must play, with neither side holding all the important cards. In the Community, COREPER has provided a valuable service to the Council, even though by so doing it may also have diminished further the importance of the Commission's power of initiative; but perhaps the evolution of COREPER is simply an indication that its policy-making base is somewhat more realistic than that of the theoretically isolated Commission, and that – as we have perhaps seen reflected in our study of *lourdeur* – the real value of COREPER is that, despite all else, it helps keep the Community decision-making process functional.

VI. Compliance (and Non-Compliance) with and Enforcement of Transnational Law[55]

A. Introduction

Our interest in the issues of compliance with, and enforcement of transnational law derives in part from two conceptual convictions. The first is the access-to-justice philosophy of this Project: the conviction that correct and faithful

[55] This section draws heavily, and sometimes literally, from portions of a forthcoming book by J. Weiler, The European Community System: Legal Structure and Political Process. For earlier studies of the general problem of enforcement of

implementation of the law is as important as its normative content if the legal order is to be effective. The second is our belief that, both conceptually and pragmatically, implementation of and compliance with Community law are issues which must be analyzed in the context of decision-making; in other words, that the process of decision-making does not end with the formal emergence of a Community norm. In some cases – *e.g.*, that of the directive – there is a legal requirement for further Member State activity. But even as regards other measures, national administrations and national decisional processes will have an important impact on their realization. Careful analysis will emphasize the dominance – albeit not total – of Member States in this phase of Community politics as well.

One linchpin in any system of compliance is the structure of courts and the scope of judicial review. This element is being dealt with extensively later in this book, by Cappelletti and Golay. It is our intention here merely to examine the link or, indeed links, between the *political* process of decision-making and the problems of compliance and enforcement. Although compliance may be examined both as regards individuals and governmental units, we propose to focus primarily on the latter. It is in relation to states rather than individuals that the *political* rather than the *judicial* element assumes its utmost importance. Likewise, in this section we shall concentrate more extensively on the EC than on the American federal experience. As we shall see, in the EC the lower level of integration in general and the virtual absence of Community federal/central enforcement agencies and federal/central enforcement powers in particular,[56] coupled with the much shorter European integrational history, render the problem of compliance far more acute. Still, even very recent American experiences in the area of state compliance with federal authority suggest that the issues involved remain serious ones, despite the longer history of the American federal system; and indeed, it is the very nature of this continuing tension between center and periphery in the U.S. which we will examine more carefully in our concluding sections, in an attempt to evaluate the future of the EC on the basis of what we have learned about its functioning political processes.

Community law, *see* H. A. Audretsch, Supervision in European Community Law – Observation by the Member States of their Treaty Obligations (Amsterdam, North Holland, 1978); Ehlermann, *Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten durch die Kommission*, in Europäische Gerichtsbarkeit und Nationale Verfassungsgerichtsbarkeit: Festschrift zum 70. Geburtstag von Hans Kutscher 135 (W. Grewe, H. Rupp & H. Schneider eds., Baden-Baden, Nomos, 1981); L.-J. Constantinesco, Das Recht der Europäischen Gemeinschaften: Das Institutionelle Recht (Baden-Baden, Nomos, 1977); Kutscher, *Über den Gerichtshof der Europäischen Gemeinschaft*, [1981] EuR 392–413; Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 Eur. L. Rev. 442–56 (1979); H. Schmitt von Sydow, Organe der Erweiterten Europäischen Gemeinschaften – Die Kommission (Baden-Baden, Nomos, 1980).

[56] The most notable exception is, if course, anti-trust policy, where the Commission's powers are fairly broad.

B. Compliance and Decision-Making as Macro and Micro Phenomena

Examination of the Community non-compliance problem suggests two orders of analysis. The first relates to the overall – macro – link between political decision-making and faithful or non-faithful implementation of Community law. At the center of this macro-analysis we identify what has been called the "Paradox of Non-Compliance."[57] This paradox is explicable by reference to our earlier analysis of the decision-making process. We had earlier suggested that Community policy- and law-making has become characterized by an increased and institutionalized dominance by the Member States in all phases of the decisional process: political initiative (European Council), technical elaboration (Working Groups), political mediation (COREPER), formal adoption (the practice of consensus in the Council) and implementation (management committees, the absence of a Community administration). In this extended and laborious process ample opportunity is given to each Member State to weigh carefully the consequences of any policy or law to be adopted, to foresee eventual problems of implementation or application – be they political or technical – and to amend or even block unacceptable proposals. With all this protracted "foreplay" one would then expect that the "consummation" within the Member States would not pose difficulties. Indeed, the deliberate dismantling by the Member States of many of the supranational facets of the decisional process was aimed at this very objective: to prevent a Member State from having to enforce or comply with a normatively binding measure the making of which it could not control. Why then – and this is the essence of the *non-compliance paradox*, as we shall document below – is the Community facing a growing and acute problem of non-implementation and enforcement?

The second order of analysis relates to the more specific – micro – connection between political decision-making on the one hand and non-compliance and enforcement on the other. Here we shall be concerned with explaining the process by which Community political organs (principally the Commission) are seized of non-compliance problems (especially non-implementation of directives), the options available to them in dealing with the issue and the political process by which these options are chosen.

Finally, with a view to our conclusions in this section, and seeing that we have already raised in the Community context one paradox, we may suggest an apparent compounding of this paradox in the comparative perspective. Would not the theoretical separateness of federal and state governmental tiers in the U.S. – as opposed to their fusion in the EC – lead us to expect a far greater problem in America than in Europe? We shall return to this issue below.

C. Community Non-Compliance: An Empirical Evaluation

To what extent has non-compliance by Member States become a problem in the twenty-five-year-old Community? In this section we propose to give the

[57] *See* J. WEILER, *supra* note 55.

data available about the problem. Their evaluation, a far more delicate and subjective exercise, will be attempted later.

1. The Categories of Non-Compliance

In order to understand better the problem of non-compliance it may be useful to recall briefly the relationship between the Member States and the promulgation of Community norms. This relationship may be broken down into four general phases of adoption, implementation, application and enforcement. Non-compliance, and hence Community "policing," may take place in all three final phases – implementation, application and enforcement. We may thus define the four phases:

a) Adoption

This phase concerns the process whereby the Community institutions in cooperation with the Member States come to adopt the legal measure or policy. We have discussed this process at some length in preceding sections, and from it emerged the so-called non-compliance paradox.

b) Implementation (Incorporation)

Here we are concerned with those norms – such as the directive – which require the Member States to introduce the Community measure into their municipal legal order. This is the first potential point for non-compliance with Community law.

c) Application

Here we are concerned with the correct administration of and compliance with Community law, deriving either from direct sources, such as Treaty provisions, or regulations which have direct effect, or from implemented measures.

d) Enforcement

The correct and effective application of Community law requires that violation of the law at the Member State level will be met with adequate remedies. Correct enforcement must be attained both by positive governmental action and by making, where relevant, adequate remedies available to the individual. It will also depend on national *judicial* compliance with Community law and processes. This is important since in case of infraction, enforcement involves the policing not only of national administrations but also of "independent" judicial organs.

This taxonomy of implementation, application and enforcement gives, however, only the first elements for understanding the problem of compliance. It is necessary to develop three further categories of analysis:

e) Pre- and Post-Litigation Non-Compliance

In analyzing the problem and examining the practice of Member State compliance, a distinction can be drawn between those infractions taking place at any

one of the phases *before* an action is brought before the courts – and especially the Court of Justice – and those involving a failure to *execute* a judgment of the Court of Justice either given directly, or indirectly through a judgment in a case whose facts are similar to the alleged infraction. The distinction is important since while pre-litigation infractions involve problems of monitoring, supervising and detecting non-compliance, post-litigation non-compliance – a much more transparent infraction – involves a more profound challenge to the system. Apart from bringing a second action for failure to fulfil an obligation (namely the obligation under EEC Treaty article 171 to obey the Court) there is not much that can be done on the judicial level to remedy this latter type of infraction. In this sense as well as symbolically, post-litigation infractions are more serious.

f) Legislative, Executive and Judicial Non-Compliance

Non-compliance may occur at the instance of national legislatures, or executives or judicial organs. Legislators may fail to implement Community law, or may enact laws in violation of Community law. Executives with their wide administrative discretion might equally engage in wrongful application or even non-implementation, and courts might disregard or misapply the procedures and/or the substance of Community law. Dealing with non-compliance by each of these organs may involve quite different considerations.

g) Defiance, Evasion and Benign Non-Compliance

The last element which may be useful in the analysis of non-compliance is probably the most subjective and thus the most difficult to apply with accuracy. Here we are concerned with differentiating the openness of, and motivation for, Member State non-compliance.

At the two extremes we may distinguish between defiance and benign non-compliance. Defiance occurs when a Member State through one of its organs decides deliberately and openly not to comply with Community law. In the pre-litigation situation this might take the form of a deliberate failure to implement Community law (especially directives); a decision not to apply Community law in force;[58] or a failure – especially by courts – to enforce Community law.[59] It might occur in the post-litigation phase when either a Government defies a European Court decision[60] or when a national court challenges the European Court.[61]

[58] *See* European Parliament Resolution of 18 Feb. 1982, on the Blockage of Italian Wines in France, OJ No. C 66, 15 Mar. 1982, pp. 61–62.

[59] *See, e.g.* the *Cohn-Bendit* case, C.E. (France), Judgment of 22 Dec. 1978, [1978] Rec. Leb. 524, [1980] 1 C.M.L.R. 543.

[60] *See* Case 232/78, Commission v. France, [1979] ECR 2729.

[61] This was done indirectly by the Italian Constitutional Court in the *Comavicola* case, where it failed to follow the ECJ ruling in *Simmenthal*. C.C. (Italy), S.p.A Comavicola v. Amministrazione delle Finanze dello Stato, Dec. No. 176 of 26 Oct. 1981; annotation by Gaja at 19 C.M.L. Rev. 455 (1982). The same Court has, however, very recently made a full about-face on the same issue: *see* C.C. (Italy), Dec. No. 170 of 8 June 1984, 109 Foro It. I, 2062 (1984).

By contrast, benign non-compliance occurs when there is no deliberate decision not to comply and the infraction is the result of neglect, disinterest, administrative or legislative difficulty, or simple misconception. The number of cases of pre-litigation benign non-compliance is probably quite large. But once the attention of the Member State is attracted the infraction is generally remedied – usually without recourse to the full article 169 procedure. Perhaps surprisingly, we would suggest that benign non-compliance might occur even in post-litigation cases, in the form of benign failure to comply with a judgment of the Court. As is known, there have in recent years been several cases where Italy has failed to comply with judgments of the Court condemning her for failure to implement directives. We regard at least some of these cases as benign since they do not result from an Italian decision to defy the Court and the Community, but are due to objective parliamentary and administrative difficulties in the legislative process in that country.

A more complex situation is the intermediary case, which for reasons of convenience we shall call *evasion*. Here we are concerned with a deliberate infraction which does not emerge as open defiance. In the case of evasion the Member State, or an agency thereof, does seek to avoid an obligation under Community law, but will not defy an open challenge by the Commission – or eventually the Court – if discovered. Many of the infractions under EEC Treaty articles 30 and 36 probably come under this rubric. Likewise after a condemnation by the Court there may be evasive compliance, either by the state itself[62] or even by the national courts.[63]

2. The Dimensions of the Quantitative Challenge

We may now approach the actual manifestation of these issues of non-compliance in the Community. First, we shall try to set out the scope of the quantitative growth in Community legislation. This is an important factor for several reasons. First it is clear that the growth in Community obligations is itself instrumental in raising the problem of non-compliance. Second, it will highlight the difficulties involved in finding solutions to the problem of non-compliance. Finally, and perhaps most importantly, it introduces a useful evaluative factor into our consideration of the phenomenon. Our inclination is to believe that the perceived increase in Community non-compliance is more a product of this objective legislative growth than of an overall reduction in the Member

[62] *See*, e.g. Case 128/78, Commission v. United Kingdom, [1979] ECR 419. Britain has only partly complied with the decision. The decision in Case 171/78, Commission v. Denmark, [1980] ECR 447, prompted an amendment of the offensive Danish legislation that some considered to be equally evasive. But apparently the Commission did not think so. *See* Rasmussen, *The Aftermath of the* Akvavit Case, 9 Eur. L. Rev. 66 (1984).

[63] *See, e.g.*, R. v. Secretary of State for Home Affairs, *ex parte* Santillo, [1981] 2 All ER 917, in which the British Court of Appeal paid lip service to the preliminary ruling made by the European Court (Case 131/79, [1980] ECR 1585) but rendered a judgment inconsistent with that ruling.

States' political commitment to observe the law, although this second element is beginning to grow in importance. We shall then try to trace, through an examination of the available statistics,[64] the extent to which the growth in Community activity is matched by a similar increase in non-compliance, with the attendant problems of monitoring and supervision.

So far we have refrained from discussing directly the well-known legislative tools and sources of law existing in the Community. Using the terminology of the EEC, the Treaty distinguished among three principal binding tools. These are the regulation, which is generally binding and directly applicable; the decision, which is binding only on its addressee; and the directive, which is binding as to the result to be achieved upon the Member State to whom it is addressed, but leaves national authorities the choice as to the form and methods of implementation and introduction into the municipal legal order. As is well known, all measures, if they conform with certain prescribed requirements, may have direct effect. It is clearly regulations and directives which are the main *general* legislative instruments in the Community. To be sure, the doctrine of direct effect as applied to directives has blurred some of the conceptual distinctions between the two. But in practice, the direct effect of directives remains exceptional[65] and the instruments maintain their substantive distinction. The choice of instruments used may be determined by explicit provisions in the Treaty. In some cases the Treaty is neutral, speaking of "measures"[66] to be adopted; in others it is more specific, giving the Council and the Commission a choice between regulations, directives [67] and decisions.[68] In other instances, it prescribes the use of a directive, notably in dealing with the general Treaty provision on the approximation and harmonization of laws, one of the principal instruments for effective integration.[69]

The directive was intended to be a more subtle tool than the regulation: it

[64] The sources are Ehlermann, *supra* note 55; and EUR. PARL. WORKING DOCS., Sess. 1982–83, No. 1–1052/82, 10 Jan. 1983, *Report on the Responsibility of Member States for the Application of Community Law* (*Rapporteur*: Mr H. Sieglerschmidt) [hereinafter *Sieglerschmidt Report*].

[65] As Advocate-General Reischl stated in Case 148/78, Pubblico Ministero v. Ratti, [1979] ECR 1629, 1650,

> under no circumstances can one say ... that directives may also have the content and effects of a regulation; at most directives may produce *similar* effects.... The essence of such effects is that in certain cases, which however constitute the exception to the rule, Member-States which do not comply with their obligations under the directive are unable to rely on provisions of the internal legal order which are illegal from the point of view of Community law, so that individuals become entitled to rely on the directive as against the defaulting state and acquire rights thereunder which the national courts must protect.

[66] EEC Treaty art. 121.

[67] *Id.* art. 87.

[68] *Id.* art. 43(2).

[69] *Id.* art. 100.

is mindful of the social and political fabric to which laws belong and the intricate relationships which frequently operate between apparently disparate rules. By imposing on the Member States a requirement as to the result to be achieved, but allowing them to adopt the best methods of internal implementation, the Framers of the Treaty were presumably making allowances for the disadvantages of fully centralized legislation which, although being generally binding and directly applicable (and thus more likely to produce direct effect) could produce disruptions in national systems.

The price to be paid for the choice of the directive as a tool lies in the efficacy of its translation into binding law. For unlike the regulation, which can come into effect immediately, the directive, by definition, grants a measure of time for Member State adjustment and – apart from the exceptional cases where directives will produce direct effect – its implementation depends on Member State compliance. It is this last link which exposes the main quantitative problem. To be sure, the several systems of judicial review provide for legal remedies in case of Member State failure to implement a directive. But before the Commission – which, along with other tasks, is charged to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied"[70] – can take legal action against a recalcitrant or dilatory Member State, it has to be aware of the non-compliance. To be aware of non-compliance it must have effective monitoring mechanisms.

Individuals may, of course, function as "guardians" of the Treaty by pursuing their private interests and seeking remedies in the Community's judicial system. But the individual party only has standing to pursue claims based on measures which produce direct effect; in relation to directives, there often is no such direct effect, or else the directive has already been incorporated into national law – thus mooting the claim based directly on the directive. Therefore the Commission itself remains the main guardian of the implementation of directives.

The magnitude of this problem can be gauged by reference to the numerical explosion in the number of directives. In 1970, 28 directives were in force.[71] Ten years later it would appear that within the legal order of the Community there were no less than 700 directives in force.[72] We would add in parentheses that although the increase itself is significant, the actual number of 700 is not high considering the vast range of subjects over which the Community has competence. In fact, at its policy-making level the Commission is, in our opinion, actually understaffed and thus in many policy areas – even those where a clear mandate from the Council exists – the Commission has been unable to maximize its authority simply because of this lack of staff. Even assuming that only one national measure was required to implement each directive, in a Com-

[70] *Id.* art. 155.

[71] *See* R. Pryce, *supra* note 2, at 59.

[72] *See* OJ (Annex) Eur. Parl. Deb., Sess. 1979–80, No. 1–252, 10 Mar. 1980, p. 24 (Response of Mr Jenkins, President of the Commission, to Question No. H–453/79 of Mr Van Aerssen (DK)).

munity of ten this would mean that the Commission would have to monitor the introduction of 7000 implementing measures. Admittedly these have been spread over a number of years, but so, too, will be the introduction of new directives, so that the trend is likely to continue into the future. The Commission has introduced data processing equipment in an attempt to meet this task. It has also introduced, in most directives, a duty of the Member States to report on their implementation measures, the failure of which could trigger enforcement proceedings under EEC Treaty article 169. But even if the Commission should eventually be able to track adequately all implementing measures, three further problems immediately arise.

First, the sanction for non-compliance depends on direct judicial adjudication before the European Court of Justice – albeit after a conciliatory phase in which the Member State is given time to put its house in order. The prospect of a flood of actions which may congest and even choke the Court is no less alarming than the actual non-implementation, especially since the Court is already working under a heavy case-load. A substantial increase in this case-load would not only threaten the Court's efficiency, but also dilute its normative constitutional role as a supreme court.

Second, even working on the optimistic assumption that the Commission would indeed be able to monitor the introduction of implementing measures, the act of legislation alone would not in itself be sufficient to ensure effective application and enforcement of the directive. The national legislative act might misconstrue the enabling directive. Admittedly, the implementing measure can be reviewed judicially for its conformity with the enabling directive at the instance of individuals affected by it.[73] But often in order to test the validity or legality of an implementing act, the individual would first have to violate it so that the validity may be contested, a risky course of action which many individuals would be loath to take. In addition, the Community origin of the implementing act may not be clear, so that the individual may not be aware of the possible ground for judicial review. Thus the correct monitoring of implementation does not only involve ensuring that internal legislation has been enacted but also that it actually implemented the directive correctly. The magnitude of this substantive task – for it does not merely involve *counting* laws, but substantively checking them – cannot be exaggerated. We would suggest that the Commission simply does not have the necessary technical staff to engage in this exercise on a *systematic* basis.

In certain classes of directives – for instance, in the agricultural field – the Member States are required to submit the draft of their implementing measure to the Commission for commentary. In some instances questionnaires are sent out. But even this cannot completely solve the third and final problem, since even a well-drafted national implementing measure must, as we saw above, also be applied and then enforced. In the Community system this is done entire-

[73] *See* Case 51/76, Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen, [1977] ECR 113.

ly by national administrative authorities, thus creating a whole new potential for misapplication which in turn would require Community supervision.

Monitoring the implementation of directives in national law, controlling the conformity of the national measure with the directive itself and supervising execution are problems which are also inevitable consequences of the system. The Council and Commission are primarily legislative organs, the execution of their positive policies being entrusted in large measure to the Member States. Indeed the quantitative explosion of Community measures may be in part the consequence of a system in which the central legislative authority is not fully responsible for the execution of its own policies.

3. The Emergence of the Compliance Problem

a) The Broad Spectrum

In *Table 9* we have consolidated all publicly available data for the seven-year period 1975–1981 regarding the use of the infringement procedure under EEC Treaty article 169. Despite the selectiveness and inherent limitations of this data, which we shall explain below, we believe this compilation to be a useful indicator of the growing problem of compliance. Apart from the basic figures we have tried to distinguish between cases involving non-implementation and cases involving wrongful application; further, we have tried to indicate, very tentatively, cases involving benign, evasive and defiant non-compliance. On the basis of this table we shall attempt, through a closer analysis of certain detached elements in the table, to draw conclusions as to the general trend of non-compliance, the efficacy of the monitoring and supervisory machinery, and finally concerning some of the legal and political consequences of these trends.

The most noticeable trend is a rather dramatic growth in the number of infringement proceedings in all procedural phases, including final judgments by the Court. This is illustrated in *Graphs 10a* and *10b* which cover the period from 1959 to 1981.

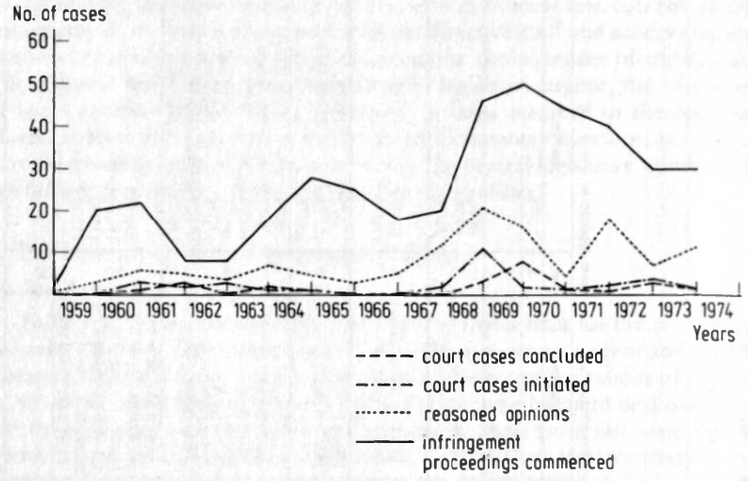
We must treat these graphic presentations with the caution that all statistical analysis demands. First, they do not reflect the full picture of non-compliance. The basic figures in *Table 9* refer only to infringement proceedings brought under article 169. Through the jurisprudence of the Court under article 177 we know that many cases of non-compliance occur which are not caught by the article 169 procedure. In addition, the apparent growth might represent not simply an increase in the number of instances of non-compliance, but either a better monitoring system by the Commission or a more aggressive policy of enforcement or both. But even subject to these qualifications, it is clear that the problem of faithful compliance with Community rules and of the supervisory capability of the Commission is growing *or at least has become more visible and hence politically more significant.* If the figures simply reflect the activity of a more aggressive Commission this must be at least partially explicable by a perception by that organ of increasing non-compliance. We would suggest that the problem is attributable to a combination of both an objective

Table 9 Non-Compliance and the Article 169 Procedure – General Data

	Infringement Proceedings			Reasoned Opinions			Court cases			Court decisions (up to April 1981)				
											non-implementation		non-application	
Year	no. of infringement proceedings initiated	non-implementation	non-application	no. of reasoned opinions	non-implementation	non-application	no. of court cases initiated	non-implementation	non-application	no. of court cases decided	no.	case nos.	no.	case nos.
1975	60	55%	45%	23	nd	nd	2	1	1	1			1	12/74
1976	90	33%	66%	38	nd	nd	6	4	2	2	2	52/75 10/76		
1977	68	nd	nd	28	nd	nd	8	nd	nd	4	1	123/76	3	68/76 89/76+ 31/77
1978	100	40%	60%	46	nd	nd	15	4	11	6	4	69/77 100/77 B (nc) 95/77 147/77	2	61/77 156/77
1979	200	75%	25%	79	50%	50%	18	5	13	7	2	128/78 E (nc) 163/78 B (nc)	5	2/78+ 231/78 153/78 232/78 D (nc) 159/78
1980	240	75%	25%	82	75%	25%	28	21	7	19	5	91/79 B (nc) 92/79 B (nc) 102/79 42/80 B (nc) 43/80 B (nc)	14	55/79 73/79 E (nc) 21/79 E (nc) 152/78 E (nc) 168/78 E (nc) 32/79 169/78 150/79 (nc) 171/78 140/78 (nc) 72/79 D (nc) 267/78+ 149/79 I 170/78 I
1981	243	75%	25%	150	75%	25%	50	35	15	17	12	44/80 B (nc) 30/81 B (nc) 45/80 B (nc) 31/81 B (nc) 133/80 32/81 B (nc) 171/80 B (nc) 33/81 B (nc) 252/80 B (nc) 34/81 B (nc) 28/81 B (nc) 29/81 B (nc)	5	804/79 90/79+ 137/80 B (nc) 113/80 193/80 D (nc)
Totals for 7-year period	1001	66%	34%*	446	69%**	31%**	127	70	49	56	26		30	

Key: * Excluding 1977; ** 3 years only; + Case dismissed; B – Benign; E – Evasive; D – Definant; I – Interlocutory; (nc) – non-compliance with decision; nd – no data

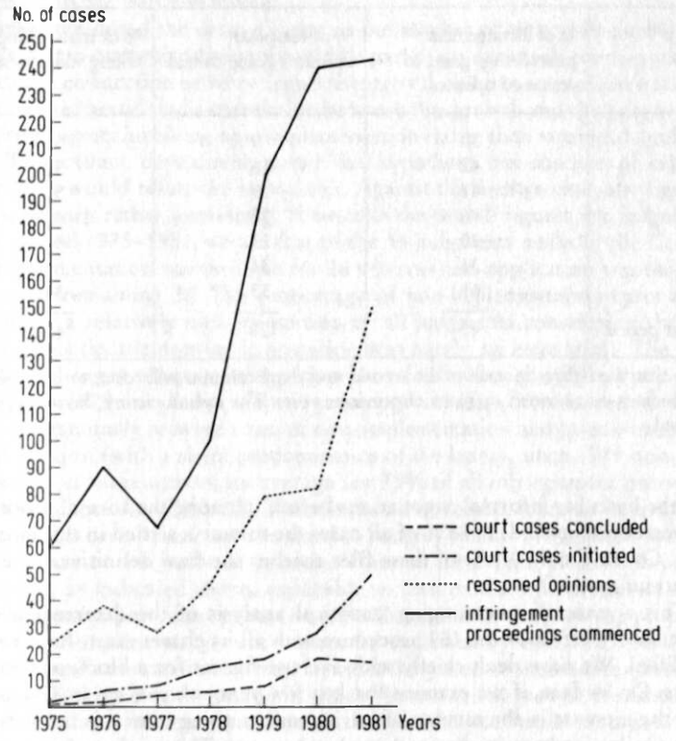
Graph 10a
Infringement Proceedings, 1959–1974



increase in the number of cases of non-compliance and a more rigorous enforcement policy.

That there should be more instances of activity at all three phases in the infringement procedure (warning letter, reasoned opinion and initiation of action) is understandable, since the procedure is graduated. (Note, however, that the statistics on the number of reasoned opinions and court cases will generally relate to actions initiated in previous years.) We further note that only a percentage of infringement proceedings commenced actually result in a reasoned opinion; that only a percentage of reasoned opinions go to trial; and that only a percentage of cases brought to trial result in judgment, if they are not withdrawn earlier should the Member State correct the infringement during the course of the trial. This means that the mere commencement of the infringement procedure is enough to bring a significant number of infringements to an end; that, of those which remain, the reasoned opinion reduces the incidence of infringement further; and that once the Commission actually brings a case to Court this drastic action is in itself sufficient to terminate the infringement in yet a further substantial number of cases. Thus, as *Table 11* shows, in the period 1975–1981 only 43% of all infringement proceedings commenced required a reasoned opinion, meaning that the initiation of infringement proceedings was sufficient to induce termination of the infringement without the necessity of a reasoned opinion in 57% of the cases. Of the reasoned opinions, on average only 25% of cases had to go to trial and for those cases brought to court the Member States remedied the situation before the proceedings had run full course in 55% of all cases.

Graph 10b
Infringement Proceedings, 1975–1981



These figures are interesting since they suggest the relative effectiveness of the 169 procedure. After the first phase of the proceedings there is a large drop in the number of cases going to the second stage of reasoned opinion (well over 50%). An even larger drop is registered in the number of cases moving from reasoned opinion to legal action (72%). A similarly impressive percentage of cases (56%) is settled after the bringing of the case so that no judgment is needed. The success record of the Commission is extremely high in this type of litigation so the odds of "acquittal" for the Member States are marginal. Of the 80 or so judgments delivered between 1960 and 1981 under 169 proceedings, the Commission "lost" in only 8 instances. The mere threat of a condemnation by the Court thus seems a real enough sanction. The figures are even more dramatic if we include the pre-article 169 procedure. The Commission opens a file in every instance in which it suspects an infringement or when a complaint is received and a *prima facie* case is established. These files

Table 11
Termination of Infringements by the Article 169 Procedure

Year	% of infringement proceedings going to reasoned opinion	% of reasoned opinions going to trial	% of trials taking taking full course
1975	38	9	50
1976	42	16	33
1977	41	29	50
1978	46	33	40
1979	40	23	44
1980	34	34	64
1981	61	33	34
7-year period	43	25	45

Note that the figures in each of the second and third columns will relate to infringement proceedings or reasoned opinions of previous years. The overall picture, however, is not affected.

are the basis for informal negotiations before initiating the formal procedure is even contemplated. In 86% of all cases the matter is settled in this informal way. Overall, only 0.1 % of these files reaches the final definitive stage of a Court judgment.[74]

This apparently encouraging statistical analysis of the deterrent and/or conciliatory effect of the 169 procedure with all its phases must, however, be qualified. We have dealt chiefly with average figures for a block period of 7 years. On its face, if we examine the last few years we can see in *Graph 10b* that the increase in the number of infringements going to trial is not matched by a similar increase in the number of judgments. This might even suggest a growing efficacy in the deterrent effect of judgments.

In fact the statistical data is misleading. The reason the number of judgments appears not to have increased in proportion to the increased number of cases initiated is that the Court's case-load has burgeoned and the waiting lists have grown. In fact it has been suggested that, in percentage terms, *fewer rather than more* cases are being remedied by the Member States before judgment.[75] In other words, the Member States appear to be less concerned with the possibility of a condemnation by the Court. Here then we have an indicator that the problems of faithful compliance are being exacerbated not only by the quantitative increase of Community law, but possibly also because of a deterioration in the attitude of the Member States – in this instance of a rather subtle nature – toward the rule of law in general and the sacrosanct character of judicial de-

[74] *See Sieglerschmidt Report, supra* note 64, at 12.
[75] *Id.* at 13, § 18.

cisions in particular. In fact we shall be arguing below that these two phenomena of a quantitative increase in law and a decline in respect for judicial adjudication are partially linked.

Earlier we noted the dramatic rise in the number of directives during the 1970's, and in particular during the middle part of the decade. If our hypothesis of a causal connection between legislative growth and non-compliance is correct then we should find a correlation between that growth and the proportion of infringements involving non-implementation rather than wrongful application. This cannot conclusively prove the hypothesis but absence of such a correlation would refute the hypothesis. Against this background, the figures themselves are rather interesting. If we take the overall figures for *judgments* in the period 1975–1981, we see that of the 56 judgments made by the Court, non-implementation was the basis for 26 whereas non-application was the basis for the remaining 30. The percentage of non-implementation cases thus constitutes a relatively high proportion of all judgments considering that in the previous decade non-implementation was hardly an issue at all. The figures for infringement proceedings provide a further insight. Whereas in the years 1975–1978 the number of infringement proceedings commenced were divided about equally between cases of non-implementation and cases of wrongful application (with a slight predominance of the latter), since 1979 non-implementation cases account on average for 75% of all infringement proceedings commenced *(see Table 12)*. There is then a noticeable increase in non-implementation cases which is maintained in roughly similar proportions for the second phase of the reasoned opinion. Whereas the overall increase in cases pursued is, as indicated above, explicable at least partially as the result of a more aggressive prosecutory stance by the Commission, the growing proportion of non-implementation cases must be explained by other factors. First and foremost is the simple objective fact that the period of increase in question corresponds largely to the period in which the numerical growth of directives will have had an influence on the system and dates for implementation will have fallen due. Second, and far more problematically, is the fact that the visibility of instances of *non-implementation* (as distinct from non-application or wrongful application) is far higher. The Commission's ASMODEE data base can trace most cases of non-implementation especially since many directives contain a reporting requirement. In cases of wrongful application the Commission must depend on the relatively haphazard system of acting on complaints from third parties and on a far from perfect internal supervisory system. The upshot of this is that while we can safely conclude that non-implementation is a growing problem, we cannot conclude that instances of non-application are declining. The dimensions of the non-application remain much like those of an iceberg, the tip of which we have seen but the bulk of which is so far undetectable.

The statistical data may also be useful in evaluating the significance of infringements in accordance with the taxonomy of benign, evasive and defiant non-compliance. More than ever must we be careful in this exercise; a correct evaluation is possible, if at all, only on the basis of a case-by-case analysis,

Table 12
Percentage of Cases of Non-Implementation and Non-Application Among Warning Letters Sent out by Commission (Phase 1, Article 169 Procedure)

Year	Distribution of cases in %	
	non-implementation	non-application
1975	55	45
1976	33	66
1977	–	–
1978	40	60
1979	75	25
1980	75	25
1981	75	25

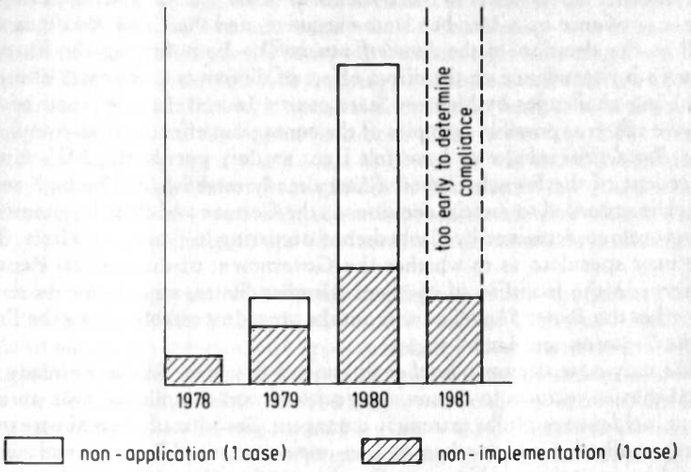
which is beyond the scope of this work. A first general indicator may, however, be desirable even in the statistical data. Whereas the cases of non-implementation predominated in the first stages of the infringement procedure, when one examines the actual cases which have resulted in judgment this predominance disappears; indeed *on average, a higher number of judgments concern cases of non-application than non-implementation.* This may therefore suggest the benign, or at worst evasive, character of non-implementation and a greater willingness of the Member States to rectify non-implementation when alerted to their delict by the Commission. Wrongful application could probably be more easily inserted into the evasive and defiant categories.

b) Defying the Court: Post-Litigation Non-Compliance

So far we have examined primarily instances of non-compliance in the pre-litigation phase where the judgment of the Court was considered to be the ultimate sanction. We have underlined several times the fact that the quantitative growth of the problem was partially objective, but partially an unmasking of a pre-existing problem. As regards *post-litigation* non-compliance, at least in relation to cases within the direct jurisdiction of the Court, we are definitely confronting a relatively new phenomenon. In the past the high measure of obedience accorded to the European Court of Justice has always been one of the distinguishing features of the Community system. The celebrated *Art Treasures Cases* have been usually cited as an exception proving a general custom of observance. After 1978, however, we begin to detect what may be regarded as the first cracks in this edifice of obedience. Here as well we have a problem linked to a process of growth. We should immediately emphasize that the problem is far from dramatic, but unlike cases of infringements, defiance of the Court can be very damaging even if it occurs in only a limited number of instances.

Of all the infringement cases in which judgment has been given since the first enlargement in 1973 up to mid-1981, in 28 instances Member States

Graph 13
The Proportion of Non-Implementation and Non-Application Among Instances of Non-Compliance with Judgments Rendered by the European Court



have failed fully or partially to comply with the judgments. (We should note here that many of these cases involve Italy, but the national breakdown will be discussed in more detail later.) Of these 28 cases over half involved non-implementation issues – *i.e.*, Member States failing to implement a directive even after a judgment against them for failure to fulfil an obligation. Of those 18 cases we would suggest that at least 17 could be classified as ***benign***, in other words, not involving a political decision to disobey the Court, but rather *the same factors of political and administrative paralysis which caused non-implementation in the first place probably caused non-compliance with the subsequent judgment.* If we are correct in this explanation it might appear that the problem of non-compliance with judgments is less acute than the figures at first suggest. This however would be a dangerous conclusion for three principal reasons.

First, of the 10 cases of non-compliance with a judgment involving the *wrongful application* of Community law, only 3 could probably be classified as benign, the rest remaining cases of evasion or defiance.

Second, we must consider the negative symbolic effect and the erosive consequences to the authority and credibility of the Court which any act of non-compliance – from whatever origin – may have. Indeed, from this point of view benign non-compliance is no less dangerous since if even a *Court decision* cannot bring about the faithful implementation of Community law a wide lacuna opens in the legal order. This problem is especially acute when one considers the contagious effect of non-compliance: non-compliance by one Member State may well invite non-compliance by another.

Finally, in the category of post-litigation non-compliance, some of the most clamorous instances have occurred in the context of cases coming under actual or potential preliminary ruling procedures. The recent defiant declaration of the German Government in the *Butter Ships Case*[76] is one glaring example of non-compliance by a Member State executive, and the *Cohn-Bendit* case[77] as well as the decision of the *Bundesfinanzhof*[78] – both defying the European Court's jurisprudence on the direct effect of directives – are cases of equally troubling challenges by Member State courts. Indeed these two sets of cases may be taken as possible examples of the contagious effect of non-compliance. The *Bundesfinanzhof* may have felt freer to defy openly the ECJ with the precedent of the French *Conseil d'Etat* already established. The high respect which is accorded to judicial decisions in the German and British systems must be severely undermined by disobedience occurring in France and Italy. Thus, one may speculate as to whether the Government of the Federal Republic, hitherto in the frontline of obedient Member States, would have broken its record in the *Butter Ships Case* without the precedent established by the French in the "mutton and lamb" saga.

We may now attempt a brief evaluation of this data. We have already indicated that in relation to certain categories of non-compliance even an infrequent incidence might be extremely damaging. But what of the mainstream data, especially that which relates to non-implementation? Two general remarks would be in order at this stage. On the one hand in our view the absolute numbers are still very small considering the overall magnitude of the normative operation of the Community. One could even go so far as to suggest that they are encouraging. We often tend to forget that non-compliance with the law, undetected "crime" and the difficulties of legal supervision and prosecution, are not unique to international and transnational organizations. It is a problem which causes great anxiety in fully developed states; it is enough to mention as an example the problem of income tax evasion. More specifically, the problems facing the Community system are not in principle dissimilar from those facing any national legal order in Western democracies. In these states we find developed legal and judicial structures, a system of sanctions and effective means of enforcement. And yet we know that these structures and sanctions cannot eliminate law-breaking by the subjects of the law. Nor can they ensure that all offenders will be detected and punished. Equally, and of greater interest to us, the enormous rise in administrative law litigation in our epoch indicates a similar problem in all areas where the state has delegated its executive and administrative function to administrative organs which are entrusted with applying the law. The general increase in administrative law litigation is particularly pertinent since, for the purposes of our analysis, we may

[76] Case 158/80, Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel, [1981] ECR 1805.

[77] *See supra* note 59.

[78] Bundesfinanzhof, Decision of 16 July 1981, 16 EuR 442 (1981); [1982] 1 C.M.L.R. 527.

regard the Member States (when charged with executing Community law) as agents of the Community. It should not therefore come as a surprise if in the Community as well there will be large room for the "misapplication" of the law and policy in the charge of the Member States. This danger of "misapplication" might be rendered even more acute in the Community system since the actual administrators are usually removed from the legislative sources of the law which they are entrusted with applying, and since often this law can be considered to be in conflict with national priorities, at least as seen from the perspective of the national administration. Even more crucially, states charged with applying the law are often its objects. It will thus be reasonable to expect a correlation between any growth in Community law – and consequent increase in Community obligations imposed on Member States – and the degree of non-compliance and the increase in concomitant problems of Community supervision.

But even more important than the absolute figures on non-compliance is the rate of increase. Our fear is that the Community and its Commission will not be able to match this increase with appropriate supervisory mechanisms, thus leaving a large number of violations to the haphazardness of accidental detection and enforcement. Finally – and this might well be the most troubling factor – there remains the "iceberg" issue. In relation to substantive implementation (*i.e.*, the content of the national implementing measures) and application, we simply do not know how deep the problem of non-compliance runs. If nothing else, more systematic research in this direction should be conducted. Be that as it may it is at least clear that non-compliance has, in the light of the above empirical data, become an issue high on the Community agenda. We may, then, return to our analysis of its link to the process of decision-making.

4. The Non-Compliance Paradox - and Its Explanation

How then can we explain what we have termed the non-compliance paradox – namely, the growing incidence of non-compliance despite the overall control which the Member States exercise over the decision-making process?

Our reply must be divided in several parts. First we shall take a look at Community law itself: not all of it is as consensual as it would at first appear. Second, examination of the decisional process itself will reveal that despite the existence of general mechanisms for Member State control over decision-making there remain pressures which inevitably lead to the adoption of measures which are not necessarily examined at the individual, internal Member State level. Further, the internal, *national* procedures for decision-making might not necessarily ensure that a measure supported at the Community level enjoys in fact sufficient national consensus or political backing to ensure its smooth implementation by the national administration. All these factors, to be elaborated upon below, will contribute to the aforementioned paradox.

a) Judicial Activism: Law Without Political Consensus

A first step toward solving the paradox of non-compliance may be made if we return to the distinction drawn in the empirical analysis between implementa-

tion and application. If we isolate the cases of wrongful application – the number of which, at the stage of judicial adjudication, is equal or even superior to non-implementation – we see that the great majority of them are traceable back to breaches of positive laws in the making of which – or at least in a process of refinement of which – the Member States did not participate. We are referring to decisions of the Court of Justice as a source of law and obligation. As will be seen in the contribution of Professors Kommers and Waelbroeck,[79] the European Court's dynamism has not been confined to general definitions of "federal" structures. In treating the substantive obligations contained in the Treaty, the Court has frequently been motivated by a particular vision of the evolution of the Common Market, the purity of which, although perhaps traceable to the Treaty, has not been shared by the Member States years later. Thus Member States have found themselves faced with an increasing number of substantive Treaty obligations whose scope has been judicially widened by interpretatively assigning them direct effect. By contrast, derogation measures – principally those granting exceptions to the four fundamental freedoms – have been given a restrictive interpretation by the same Court. Leaving aside the question of the legitimacy of the interpretative techniques adopted by the Court in this process, this substantive corpus of obligations represents a source of positive obligations in the elaboration of which the Member States did not participate fully. The fact of "acceptability" of common policies – a natural product of the process of consensus decision-making – does not characterize the process of judicial law-making. (To be sure, they all accepted the Treaty, but – to put it in the most neutral terms – their understanding of the nature of the obligations imposed by the Treaty may have been different from the constantly evolving (especially post–1963) conceptions of the Court.) Prominent among areas of judicial activism has been the field of free movement of goods through the interpretation of articles 30 and 36. The concept of a measure having an effect equivalent to a quantitative restriction on imports (or exports) has been completely remolded by the Court. Derogations permitted by article 36 have in borderline sensitive cases been given a restrictive interpretation. Furthermore, these interpretations have been held to be inherent in the original Treaty, an interpretation which shocked many current office-holders and was hardly consensual. It is particularly noteworthy that, unlike the area of free movement of persons, where the Court has been equally creative, rules on the free movement of goods frequently come into conflict with Member State economic or commercial interests. Thus in relation to obligations deriving from this source we might not be surprised to learn that most non-application cases relate to this subject matter. The non-compliance paradox does not thus arise in this context.

[79] *See generally* Kommers & Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience*, *infra* this vol., Bk. 3.

b) National Pre- and Post-Adoption Processes - Problems of Non-Compliance

What then of the growing area of non-compliance – namely, the non-implementation of directives? Here, after all, the Member States do participate closely in the process of adoption. We must therefore return to the decisional process itself with a view possibly to identifying those elements which might explain how, despite consensus decision-making and national technical and political control, non-compliance can remain a problem.

The national preparatory phase in which Commission proposals are formulated and then negotiated is not much researched, at least not by legal scholars – partly because of the difficulty of penetrating bureaucratic practices, partly because of lack of research interest, and partly because it has not been perceived as having any legal dimension. We may consider two ranges of problems in the process of national preparation that might have subsequent negative effects on faithful compliance.

At the level of administrative preparation, much will depend on lateral coordination between different governmetal departments some of which might be eventually affected by a proposed Community directive. In other words, it will not be sufficient for the department immediately concerned alone to consider the ramifications of a proposal with a view to identifying potential national obstacles to implementation, and feeding these into the Community decision-making process. Other national departments must be equally involved since it is rare that a measure, in whatever field, will not have consequences going beyond its primary subject matter. Typically in relation to almost any proposal there will be an interest by the departments of foreign affairs, finance and justice, apart from the principal department concerned with the subject matter. If subsequent compliance problems are to be avoided, a high measure of lateral coordination will thus be necessary.

Member States differ sharply with regard to how much lateral coordination they are capable of supplying. A recent study on the French administration[80] reveals a highly coordinated and relatively efficient preparatory system organized within the framework of a special interministerial governmental organ directly answerable to the Prime Minister's office. Denmark has an equally efficient if less formal structure.[81] By contrast, in Italy this coordinating function is as yet embryonic. In the Italian governmental structure, where ministerial files are distributed among a host of different coalition partners, there is a tendency – felt in the national administrations as well – toward lateral fragmentation. The absence of a proper Prime Minister's office only exacerbates this fragmentation. As a result we would suggest that despite the possibility of a check by Italy of the Community decision-making process at this stage, she may simply be unable to identify with precision those problems which might

[80] *See* Nathalie Vavasseur, Les administrations françaises face à l'intégration européene (Unpublished paper on file at the Law Dpt. of the EUI, Florence, Oct. 1981).

[81] *See generally* Karsten Hagel-Sørensen & Hjalte Rasmussen, National Administrations and Their Interaction with the Community Administration: A Danish Report (Unpublished paper presented at a Seminar at the EUI, Florence, Nov. 1983).

later occur. Other Member States – say, Belgium – may find themselves somewhere in between this Franco-Italian dichotomy. As Sasse has shown, most European governments have come to accept the French model, but have applied it with varying degrees of commitment.[82]

A second dimension of the national preparation concerns the measure of political control. Here it may be useful to compare Denmark with Italy. Denmark[83] offers perhaps the most advanced model of direct parliamentary control of the national input into the Community decision-making process. Although the system is far from perfect it does yield two benefits. First, the Danish ministries will have an internal incentive to prepare their brief thoroughly because of this additional layer of public scrutiny. The typical question of the Danish Parliamentarian will be addressed to the possible impact Commission proposals might have on and within the country. This preparation will help highlight potential problems of implementation which may then be raised in the Community process. Second, the Danish Parliament having participated in this scrutiny, will be less hesitant or suspicious toward the output of the Community organs and more willing to implement Community policy in accordance with their obligations. The much weaker Italian Parliamentary involvement[84] and control will naturally yield opposite results. The Italian Parliament simply will not have the political incentive or confidence to accord priority to Community directives.

If we focus then on the situation in the implementation (*i.e.* post-adoption) stage once again we will find differences among the Member States which will help explain the paradox of non-compliance. The most important element is probably the constitutional position regarding implementation. Here it may be useful to compare the U.K., Italy and France. In Italy, constitutionally, Parliament itself must enact every implementing measure. Considering the short life of Italian legislatures, the increase in the number of directives and, as a result of the pre-adoption elements, the lack of interest toward Community output, we have a sure recipe for long-term delays. By contrast, in the U.K. the initial constitutional arrangement on British accession enables the Government to adopt many implementing measures by statutory instruments, with Parliament having only an infrequently exercised veto power.

Clearly the whole range of problems which full-fledged Parliamentary adoption involve is avoided here. France, with its mixed allocation of legislative competences, stands somewhere in between.

[82] *See* C. Sasse *et al.*, *supra* note 24, *passim. See also, generally,* Giuseppe Ciavarini Azzi, L'application du droit communautaire par les Etats Membres (paper presented at the XIIth World Congress of the I.P.S.A., Rio de Janeiro, 9–14 Aug. 1982).

[83] *See* Mendel, *The Role of Parliament in Foreign Affairs in Denmark*, in Parliamentary Control Over Foreign Policy 53 (A. Cassese ed., Alphen a/d Rijn, Sijthoff & Noordhoff, 1980).

[84] *See* Sasse, *The Control of the National Parliaments of the Nine Over European Affairs*, in Parliamentary Control Over Foreign Policy, *supra* note 81, at 137, 139–40.

We have found therefore within the national systems varieties of imbalances, inertial forces and communication disorders which might help explain, despite the system of consensus decision-making, the non-compliance paradox. But even within the Community process itself, certain elements might contribute to subsequent implementation problems.

c) The Community Decisional Process - Problems of Non-Compliance

Consensus decision-making is undoubtedly one prevailing characteristic of the Community process. The potential for control by the Member States which flows from this is, as we saw, at the core of the non-compliance paradox. It is, however, possible to identify several factors in the Community decisional process iteself which may help explain why, despite the consensus, compliance problems might arise. These factors, ranging from the general to the specific, can represent no more than an overall check list. In relation to each individual case a more specific analysis would become necessary.

i) The Commission does not implement Community policy

Clearly one fundamental aspect of the decisional process which might well have a basic influence, albeit indirect, on subsequent compliance, is the fact that the Commission as initiator and proponent of legislation is not, except in few areas, substantially responsible for implementation and application. It is true that in relation to municipal legislation, national parliaments, at least in the formal sense, also do not have such responsibility. But we are well aware that for the most part national legislation almost invariably emanates from governmental departments and the civil service with the backing of the elected executive, and that the parliaments initiate legislation only rarely.

National legislators are, so to speak, sandwiched by the executive/administration which first propose and then apply the law. This is particularly true for much of the detailed economic and commercial legislation which is similar to the bulk of Community activity. This asymmetry in the function of the Commission (when contrasted with national administrations) may explain a certain insensitivity to the entire problem of implementation and application. This is evidenced for example in a certain overemphasis on numerical output and far less concern with effective compliance. Certainly this problem is mitigated by the pervasive presence of national administrations which can contribute that realistic dimension to this otherwise asymmetrical process. But this mitigating effect is neutralized by two factors. First, it is the Commission which often determines the legislative agenda: a numerical escalation might overwhelm the national representatives who are required, by the rules of the system, to deal with all items on this agenda. Second, the national representation at the Brussels level is frequently fragmented, each national department dealing with the specific subject matter allocated to it. The overview, the perception of size and quantity, remains essentially in the Commission's hands. Although the trend of legislative fever was checked during the Jenkins Presidency, it remains a possible explanation for some of the excesses of the mid–1970's.

ii) Directives have become too detailed

There has been a tendency by the Commission at least in some fields to draft extremely detailed directives – directives which thus resemble final legislation, such as a regulation, rather than simply determine legislative ends as envisaged by the Treaty.

In itself, this phenomenon highlights once again the dialectics of the decisional process and the issue of compliance. A vague and open-ended directive gives a Member State wide latitude for wrongful application. In addition it prevents the possibility of invoking it by an individual before a national court, a possibility which is central to the system of judicial review. The tendency toward the detailed directive becomes thus at least partially explicable. On the other hand this tendency may produce two negative effects. First, it may prolong the actual decision-making process within the Community as a simple consequence of the greater detail of the measure. But even in terms of compliance the detailed directive might create problems: whereas it is true that the increased detail reduces the latitude for wrongful application, it also increases the potential for non-implementation. A detailed directive which is poorly drafted may itself constitute an obstacle to implementation.

iii) The role of experts

A closer look at the functioning of the groups of experts involved at the formulation stage of a Commission proposal and even during formal adoption of the proposal may add another possible explanation to the paradox. Clearly one of the functions of these national experts is to highlight and then iron out those elements in a proposal which will render its implementation or application in the Member States difficult. For the most part the experts are concerned with technical and legal aspects. On the whole their contribution, despite the alleged drag it has placed on the decisional process, has significantly improved the quality of proposals and has also improved the potential for faithful compliance. But there remains a weakness or limitation on their potential utility which derives from the inevitable distinction between the technical and the political dimensions of proposals. The experts will be able to iron out most if not all of the technical problems. At the end of their work they might remain with unsolved *technical problems* which however represent genuine political or policy differences. These problems might be precisely those which later could cause difficulties in compliance. But, the solution to these issues will be taken away from the experts and handed to the political fora (and this includes the upper echelons of COREPER) which will be less sensitive to the technical-policy nuances. It is widely alleged that the result appears often in diplomatic language which has no technical referent. Moreover, the solution or compromise eventually adopted might also be influenced by external considerations, thereby leaving the differences intact. Strangely the most difficult issues might thus be those which remain unsolved when the proposal is adopted.

iv) The costs of compromise

This last point leads us to another set of factors which might help explain the paradox. Although a Member State can theoretically veto any proposal, it is wrong to believe that no political price attaches to such national obstructionism. As we saw in the analysis of the decisional process, "package dealing" (horse trading) has become a common feature of the Community game. A Member State will have "to give" on issue X in order "to take" on issue Y. Failure to observe this etiquette may create political stagnation and precipitate crises. The freedom to veto is thus curtailed by political pressure. It is possible then that within this process of decision-making by horse trading, proposals will be accepted by Member States despite objections from their internal bureaucracies and despite foreseeable implementation/compliance problems, as part of a deal whose stakes they consider to be more important. Later, however, distanced in time and place from such political exigencies, the implementing and enforcing bureaucracy – often different from the "compromising bureaucracy" – may seek ways to "derail" the difficult legislation. One should add in this context briefly that much of the general secondary legislation is passed within the Committee structure by majority or quasi-majority voting. In these decisional structures the element of acceptability is not present and therefore the paradox does not arise in its acute form.

v) The costs of secrecy

As we have noted, one consequence of the trend toward intergovernmental decisional structures has been the increase of secrecy surrounding Community activity in its preparatory phases. (This secrecy also affects the very issue of compliance. The Commission is increasingly cautious in releasing figures regarding non-compliance precisely because of the diplomatic sensitivity of these data.) The possibility of public debate and societal impact by groups which are not formally incorporated into the decisional structure is thus limited. The European Parliament can remedy this problem only to an extremely limited extent, not only because of its lack of decisional influence but also because its consultative function is severely impaired by the Community process. At the point in time when Parliament is able to give its opinions, diplomatic bargains will already have been struck which will not be easily undone. Consequently, pressure groups and social forces unable to exert direct influence at the Brussels level may be instrumental in lobbying at the national level for the non-implementation and non-application of Community policies.

vi) Defects of directives

Last but not least, objective technical deficiencies in directives might impede implementation. Directives may be vague, they may be technically imperfect, and the time for implementation might be too short. Even a well-wishing national administration might find difficulties in faithfully implementing the output of the Community decisional process.

d) The Non-Compliance Paradox – Conclusions

It is now possible to attempt a reconstruction of all these elements into a whole. The implicit differentiation of the decisional process into three stages – the national preparation, the Community decisional process and the national implementation and application stages – enabled us to isolate possible elements which affect faithful compliance, but it is clear that all three form part of one single, if complex, process. Indeed what is striking is the interconnectedness of all the elements. Some factors of course remain constant: this is particularly true as regards the constitutional arrangements (*e.g.*, whether the Executive can implement directives without a formal and full-fledged Parliamentary process), and the general efficiency of the national administration. But as regards other elements, we saw how, for example, political involvement in the preparatory phases, or the measure of lateral coordination within the national administration, could affect the likelihood of the output of the decisional process being subjected to resistance at the implementation stage. We also noted an even more interesting relationship in which all three elements combine in an apparent contradiction which so often characterizes the Community system, and which may be expressed as follows: the greater the national preparatory input, the more professional the preliminary scrutiny by the national administration and political organs and the wider the involvement of interest groups, so that the initial decisional process will be difficult and the passage of a proposal through the Community process will be slow and tortuous. More objections may come to light, more interests will have to be squared. And yet these very same factors which might contribute to a *frustration of consensus-building*, and consequently to frustration in the adoption of Community policy and the attainment of Community objectives, will, if agreement is eventually reached, subsequently contribute to the full and faithful realization of those measures which manage to pass such a mill. By contrast, a "positive" and less insistent national preparation input will ease the decisional process, facilitating the attainment of Community objectives as reflected in its legislative program, but will potentially create a danger of non-implementation and hence frustration of the actual realization of the program. If we may use the Danish-Italian example once again, we see that Denmark has perfected interesting structures for dealing with Community proposals and is a tough and detail-minded negotiator – verging almost on the obstructionist – but also has a very faithful record of compliance. Italy by contrast has a reputation as one of the most *communautaire* Member States, instrumental in many a political compromise, but has a record of non-compliance (even if mostly benign) second to none *(see Table 14)*. Within the Community apparatus itself a greater emphasis on technical professionalism, a strong drive to have *genuine consensus* rather than package dealing, and longer time given for implementation all represent elements which might contribute to a feeling of a less dynamic Community but which at the same time might further true realization of Communitarian ideals and goals.

Table 14
Distribution of Condemnations by the Court and Instances of Non-Compliance with the Court's Judgments in Article 169 Proceedings, by Member State*

Member States	No. of condemnations	No. of instances of non-compliance
Italy	46	14
France	7	2
Belgium	7	1
U.K.	5	1
Ireland	4	
Germany	2	
Denmark	1	1
The Netherlands	1	
Greece	0	

* Up to mid-1981

D. Conclusion: Implementation and Enforcement – Future Perspectives

The above analysis has illustrated that in a certain sense the increased activity of the Community has brought about an inevitable corresponding quantitative increase in problems of implementation and enforcement. Indeed, if one considers the number of infringements in relation to the legislative output discussed in an earlier section of this paper, this relationship might not appear too discouraging. And one should always be careful not to set a higher standard of legal compliance for the Community than one would set for other non-unitary or even unitary states. As we shall discuss in more detail in our concluding sections, non-compliance is a perpetual problem even in the United States, with individual states often going to great lengths to circumvent national policies with which they disagree.

But be these explanations as they may, the seriousness of the problem is not reduced and the quantitative deterioration in compliance evidenced in the instances of judicial and administrative defiance of the European Court itself give even greater cause for concern.

It is our purpose then, in conclusion, to examine some actual and potential remedies which may be useful to counter the trend. Naturally, these remedies will be linked to our causal diagnosis of the problem; we propose then to take up some of the principal diagnostic elements as possible keys for prognosis and remedy.

1. The Decisional Phase

One of our central points was to argue that a linkage exists between decision-making and compliance. If this is correct, it would suggest that more attention could be given to potential compliance problems at the policy-making stage. Potential Member State compliance difficulties must be consciously considered and dealt with frankly in the decisional phases. The different constitutional requirements for incorporation of directives, the varying national procedures for lateral consultation and the availability of administrative infrastructures for correct administration are only some of the elements we identified as relevant factors. Naturally there will always be a trade-off between the desire to "get a measure through" the Community labyrinth, and the need to ensure that Community policy and law do not have a merely formal existence. Awareness of the growing problem and its linkage to decision-making may, however, be in itself part of the cure.

2. Judicial Policy

We noted that a large number of non-application problems could be traced back to judge-made law, especially in the context of the provisions of the Treaty relating to the intra-Community free movement of goods. It is an extremely delicate question whether courts should take into account, as one element of judicial policy, the prospect of compliance with their decisions. There is little doubt that the European Court of Justice has been sensitive to the political reality of the Community – which it has helped shape – without overstepping the legitimate line of judicial discretion. The famous *Cassis de Dijon* decision[85] could in part be seen as the Court's contribution to bypassing the decisional difficulties of the EC's harmonization policy. Here again, mere awareness by the Court of the growing problem – which could not have escaped judicial attention – will probably have its effect in future decisions.

3. Problems of Monitoring

One of the major problems identified above has been that of monitoring non-compliance. We are convinced that the Commission, considerably understaffed in relation to the magnitude of the problem, cannot but scratch the surface of things. This is particularly the case if we wish to go beyond the formal issue of, for example, incorporation of directives. In one sense, this is a problem which faces every legal system. There is no reason to believe that in full-fledged federal states, there is no parallel problem of monitoring the implementation of central policy in the constituent units. A variety of tactics could be adopted here to remedy the situation. These might range from better "feed back" procedures in Community law itself, to cooperation with national pub-

[85] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] ECR 649.

lic and semi-public institutions concerned with the field of application, to officially commissioned and financed implementation studies.

There is also an access-to-justice dimension here. Ever since the adoption by the Court of Justice of the doctrine of direct effect, individuals have played a key role in the monitoring and implementation of Community law and policy. This function owes its efficacy to the diffuse and fragmentary nature of the individual constituency. It also owes some of its weaknesses to these same diffuse and fragmentary characteristics. The effort should be increased – and specific policies developed in this connection – to widen public knowledge of Community-based rights and to remove all barriers to their vindication.

4. Specific Compliance Problems

We have already mentioned intra-Community free movement of goods as a particularly thorny problem. Part of the difficulty occurs no doubt as an expression of explicit national policies of "defiance." In most instances the cases indicate a measure of "evasion," and one may even speculate about an almost automatic measure of national protectionist reflex emanating from the administrations of the Member States. Our proposal in this context is not meant in an operational sense but as an indication of a direction to follow: We would suggest that the national customs services be transferred to the control of the Community. Given the scope of Community law, it is in any event anomalous to maintain the traditional Member State services in place, when their "national" function has been considerably reduced. We are not suggesting that they be eliminated, but rather that they become part of a centralized Community service. Our belief is that a whole range of shifts – in knowledge of Community rules, loyalty, and efficiency to mention but a few – would be triggered by such a change. The national administrative reaction against open borders would lose one of its main sources of support.

We are not so naive as to believe that such a suggestion could be presented as an operational idea without significant further study, nor that it would be met, initially at least, with great enthusiasm by the Member States. We propose it to underline one of the causes of compliance problems – the need to rely on national administrations for implementation of Community policy – and a possible, albeit radical solution.

5. The Legal Apparatus

Here, as well, our proposal is non-operational and designed to encourage further discussion rather than to become a blueprint for action. We believe that, given the growing compliance problem, the time may have come to consider creating a new entity which would be independent of direct Commission authority and which would be principally responsible for ensuring legal observance. The rationale for this suggestion is threefold. First, if we are correct in identifying compliance as an important item on the future Community agenda, it may be useful to have a specific authority to deal with the issue. Second, there is a potential conflict of interest between the Commission as a party re-

sponsible for legal compliance, and the Commission as a major actor and administrator of Community law. Finally, there is a potential conflict between the Commission as an actor in the legislative process, faced with certain political exigencies, and its quasi-judicial role as a prosecutory authority. It is very likely that even now inappropriate pressures are brought to bear on the Commission, and in any event it is best if justice is not only done, but also "seen to be done." As problems of compliance grow, these conflicts of interest may otherwise become more acute.

VII. Federalism as a Functioning System: Final Thoughts on Community Process in Light of the American Federal Experience

A. Introduction

If we were to adhere to the classical center-periphery model of political organization – which basically envisions a strong central institution surrounded by subordinate political units – it would become clear that while an entire range of institutional arrangements will determine the efficiency, the élan and the policy of any non-unitary system, at the bottom line, the effectiveness, the penetration and the strength of the system will be determined by the ability of the central authority to work its will on the constituent units. Within the context of this center-periphery model, political and legal integration is all about strengthening the center and consolidating its effective hold over the periphery. On this premise – despite our critique of the unqualified factual acceptance of the *lourdeur* phenomenon – the Community system, at least as regards its decision-making processes, appears in all its weaknesses. Rather than the center having a hold on the periphery the converse is true, with ten divided Member States seeming to call most of the shots; it is this very fact that has led to the continually negative and pessimistic appraisals of the Community as a system of integration.

While we would not wish to contradict radically the thesis of basic, inbuilt weaknesses of the Community we believe it should be qualified in three principal respects. First, we would challenge the validity of the classical center-periphery model itself: it is indeed possible that the crucial measure of the strength of any federal-type arrangement is the measure of the strength of the structure *as a whole*, and not simply of the degree of leverage the center can exercise over the periphery. Second, we would argue that, in fact, the Community today exhibits some traits of an already existing "cooperative," rather than purely hierarchical arrangement between center and periphery, with an increased sensitivity to the virtues of *shared powers* between Community and Member States. And finally, we shall return to our discussion of American federalism for some insights into the practical functioning of that system which we hope will cast further light on the future prospects of the EC.

B. The Validity of the Center-Periphery Model

It is possible to challenge the center-periphery model first on a theoretical level as an appropriate basis for analyzing both federalism and integration. As Elazar points out

> The essence of [federalism] is conveyed both in the original meaning of the term: a womb which frames and embraces in contrast with a focal point, or center, which concentrates and – in its contemporary meaning – a communications network which establishes the linkages that create the whole.[86]

The consequences for our understanding of integration thus change dramatically:

> The measure of political 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.[87]

On the basis of this interpretation the integration experiences of both Europe and the United States call for a different appraisal. The recurring crises of the Community – many of which are rooted in decisional difficulties – coupled with its apparent *resilience* to crisis are both evidence of a robust framework in which the linkages which create the whole are apparently strong enough to resist the continuous centrifugal forces. Moreover, if we seriously consider the U.S. – where there can be no question as to the cohesiveness of the framework – one may doubt if the American experience really reflects a situation where the whole and the parts have gained in strength simultaneously, and on an interdependent basis. Would it be altogether perverse then to suggest that as a *working federalism* the EC is more faithful not only to the original meaning of the concept but also to its underlying ideology?

C. Shared Power in the Community: Pre-Emption – Theory and Praxis[88]

On a more pragmatic level it is not only a close examination of *lourdeur* which calls into question current dogma doubting the ability of the Community to legislate in light of the numerous forces working against it – particularly in light of the veto power vested *de jure* or *de facto* in the Member States. There is in particular one aspect of consensus decision-making where legal structures and rules – and judicial policy – play an important role in shaping the contours of Community-Member State relations, to such an extent that reality, again, often (though not too often) differs from doctrine. We refer to the doctrine

[86] Elazar, *Introduction: Why Federalism?*, in FEDERALISM AND POLITICAL INTEGRATION 1 (D. Elazar ed., Ramat Gan, Turtledove Pub., 1979).

[87] *Id.*

[88] This section draws heavily on an earlier article by Joseph Weiler: Weiler, *Community, Member States and European Integration: Is the Law Relevant?*, 21 J.C.M. STUD. 39, 47–51 (1982).

of *pre-emption* which despite a few pioneering treatments remains one of the as yet obscure areas of Community law, neglected by lawyers and political analysts alike. It is not necessary here to explain the details of the doctrine of pre-emption and its evolution. Our sole purpose will be to outline its underlying principle and to indicate what we believe to be its pertinence to the political process.

1. The Doctrine of Pre-Emption in Community Law

Pre-emption and supremacy represent, in a sense, two sides of the same coin. Both doctrines are designed to ensure the primacy of the Community over the Member States. They differ however as regards their operation, both in time and in legal space. Supremacy, as we know, provides that once a positive Community measure already exists any conflicting national norm becomes inapplicable. Pre-emption precedes this situation in the temporal and (legal) spatial sense. We are concerned here with a situation where there may not exist a specific Community measure, but where the entire policy area – the legal space – has become "occupied," or even potentially occupied, by the Community in the sense that it is the duty of the Community to fill and regulate that area. When pre-emption operates, Member States will be prevented from introducing measures – and hence the temporal dimension – even in the absence of, or before the adoption of, a specific Community rule.

The obscurity of the doctrine relates to the fact that there are no clear criteria as to the conditions under which a legal or policy space will become occupied. There may be an explicit provision in the Treaty, such as article 102 of the Act of Accession relating to fisheries, or EEC Treaty article 113, which the Court interpreted as bestowing the same effect. It may depend on the actual adoption of some measure in an area where a common policy is envisaged. In the famous *ERTA* case the Court said in response to a challenge to the implied competence of the EEC to conclude international agreements in the field of transport that

> each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, *whatever form these may take, the Member States no longer have the right acting individually or even collectively, to undertake obligations with third countries which affect those rules.*[89]

In subsequent cases the Court has not always insisted on an absolutist preemptory principle[90] and this, we suspect, not only for purely legal reasons but also out of sensitivity to the delicate political ramifications of the absolutist principle. Be the operational aspects as they may, let us now examine briefly the implications of this emerging doctrine to Community decision-making.

[89] Case 22/70, Commission v. Council, [1971] ECR 263 (emphasis added).

[90] *See generally* Waelbroeck, *The Emergent Doctrine of Community Pre-Emption – Consent and Re-Delegation*, in 2 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 548 (T. Sandalow & E. Stein eds., Oxford, Clarendon Press, 1982).

2. Pre-Emption and Community Decision-Making

It is a commonplace that most important Community policies or rules implementing policies, are adopted by consensus. It is important to realize however that consensus decision-making is not a homogeneous practice. Not only is majority voting still practiced in the adoption of the Budget and in, for example, the various Committees set up to "assist" the Commission in the implementation of Community policy, but also in the decision-making process itself we can distinguish between several situations in which the specific constellations of law and fact create different categories of consensus-reaching. The differentiation of these categories depends on the existence of incentives to consensus. We shall see that these might exist either as a matter of law enshrined in the doctrine of pre-emption; as a matter of fact where "factual pre-emption" may exist; or as a result of contingent political and diplomatic factors.

a) When There is No Legal Pre-Emption and Minimal or No Factual Pre-Emption

In a field such as consumer protection the Community competence derives essentially from the voluntary agreement of the Member States, *ex* EEC Treaty articles 100 and 235. There is no positive obligation to operate in the field and, crucially, in the event of failure to adopt rules the Member States are free to pursue national policies provided these do not illegally constitute a barrier to intra-Community trade. No legal pre-emption exists. Also, the level of market integration in the Community has not reached the stage where the "regulatory gap" factor, evidenced in, say, the U.S., provides a strong economic-political incentive to create factual pre-emption: namely, there is no situation where the national policy option is not a factually viable alternative in the absence of agreement at the Community level.[91]

As a result, each Member State is given great leeway and the pressure to arrive at Community consensus is low. The potential for delaying tactics and insistence on national priorities is high and, above all, the penalty (be it in law or in fact) for failure to arrive at a decision is largely absent. The process within this category is indeed very close to that of an international diplomatic treaty-making conference.

b) Where Consensus Decision-Making Occurs in the Context of Legal and Factual Pre-Emption

To illustrate this category we may utilize the area of the annual farm price fixing within the Common Agricultural Policy. We can hardly imagine a more controversial and nationalistic area of Community policy. In recent times this annual event has become almost an institutionalized crisis. There is all the potential for lack of consensus. And yet there is the crucial pre-emptory factor: whereas the Member States might fail to reach agreement, they are not legally

[91] Heller & Pelkmans, *supra* note 47, at § I.

permitted to adopt unilateral national measures in the absence of a Community decision. To be sure, *in extremis,* there have been threats by some of the Member States to break the pre-emptory obligation. On one of two occasions slight breaches have occurred, but the political damage to the entire structure of the Community would be so great if the legal rule were otherwise that the legal pre-emption has held firm. As a result, each year we observe a quasi-ritual of lengthy negotiations, marathon meetings, delays and threats. But consensus invariably emerges despite the power of veto. Naturally, above the legal obligation there is an ultimate political desire to preserve the policy and even the framework of interdependence which it represents. In the absence of this ultimate political *desideratum* no legal rule could uphold the edifice. But given that broad political acceptance, it is the legal context which influences the conditions for decision-making. The majority decision in the 1982 farm price fixing exercise was according to this reading an extreme consequence of the pre-emptory principle.[92] The 1984 crisis will have tested this analysis in its most extreme application.

Between these two categories we may of course find many variations on the same theme. The budget procedure is an interesting example. Here the Member States, once again in a contentious area, have no complete freedom to disagree. The European Parliament may step in under certain circumstances, and a total budget failure will be damaging to virtually all Member States. As a result, the Governments have agreed that in the budget procedure they will follow majority voting. Finally, as we have pointed out in our analysis of both *lourdeur* and non-compliance, in the mainstream of policy management, despite the burden of its complex decisional apparatus the Community is suffering in certain cases if anything from "overproduction" rather than the opposite.

D. The Politics of Central-Constituent Relations: The Heart of the Matter

We return in this concluding section to our discussion of American federalism, focussing our attention this time on the practical realities of a federalist arrangement – nation-state interfaces at bureaucratic and political levels – and comparing the situation as found in America to the more practical side of legislating and decision-making in Europe. Again, although we look here primarily into contentious areas of federal-state relations, we should never lose sight of our dominant theme, that it is precisely the existence of and tolerance for these continuing tensions – and the availability of means to make adjustments in the federal framework to accommodate them – that best characterizes a federal arrangement; indeed it is the characteristic which best guarantees the vitality of the whole system.

[92] *See* Editorial Comments, *The Vote on Agricultural Prices: A New Departure?*, 19 C.M.L. Rev. 371 (1982).

1. Who Threatens Whom? State Recalcitrance and Federal Superiority

Non-compliance is by no means an affliction solely of the European Community. Even in a highly integrated society such as the United States, the incidence of non-compliance may bring into question the ability of the Federal Government to enforce its policies in the face of state reluctance or even hostility.

Historically there have been a series of major and systematic challenges to federal authority in the United States, of which the desegregation controversy of the 1960's is merely the latest. Three Governors of Southern states, refusing to obey federal orders, yielded only to actual military force and others held out almost to that point. Governor Barnett of Mississippi went further and was actually cited for contempt of court and threatened with a fine and jail term. But these are only dramatic eruptions in a generally non-dramatic, regular process of challenge and response. States continuously pursue their parochial advantage through taxation and burdening of inter-state commerce by ingeniously sly as well as more direct means. States seek to regulate abortion when constrained in the matter by a Supreme Court decision or seek to maintain higher environmental standards when federal control of the process has shifted to the hands of those who believe – particularly in the Reagan years – such restrictions are needlessly crippling industrial growth. Defiance and non-compliance are characteristics of everyday relations even in a system of "cooperative federalism."

But great as inefficiencies of national enforcement may be, and threatening as sporadic state defiance has sometimes been, the chief threat to federalism in the United States lies in the opposite direction. It is not merely a conservative shibboleth or a common theme of Reaganite ideologies that the legal enshrinement of national supremacy threatens to engulf any real "distribution" of powers. While constitutional reorientation has been advocated recently by liberal-moderates such as Jesse Choper and John Ely in the name of restraining and rechannelling a judiciary that has largely destroyed its old retaining banks, such views also evince a secondary fear for the federal system in general. A rethinking of the political emphasis on national power was a major objective of both the Eugene McCarthy and Robert Kennedy Presidential candidacies. Perhaps understandably, then, Ronald Reagan's efforts to reformulate federal relations have been met with a patience and lack of rancor out of all proportion to their quality. It is clear that such concerns for the federal "balance of power" are widespread, and that there is a recognition that solutions are not easily come by.

At first blush such fears that the states are in danger seem as remote as concern for the Community. The fiscal growth of state government since World War II has exceeded the rate of growth of the Federal Government. In recent decades federal employment has remained essentially stagnant while state employment has burgeoned. Students of national administration have generally acknowledged the failure of a nationalized administration, and hence regionalization of even nationalized programs grows apace. In a sense, this acknowl-

edges that if the states did not exist something similar would have to be invented.

But like the Community's impressive statistical growth, that of the states conceals deep-seated problems. Much of its fiscal and employment augmentation is fed by "flow-through" money from federal programs, where the Federal Government's extensive requirements dominate and the states serve as little more than administrative conveniencies. (Indeed as we note below, some of this is bureaucratic and congressional slight-of-hand to disguise real federal growth, which has remained politically unpopular.) Even the state role as transmission agent of federal funds has in recent years been threatened, as the Federal Government has found it convenient to deal directly with city governments, thereby eliminating the middle-man. In any event, there would be scant consolation in a "federal" system based solely upon a need for some degree of local administration and the need for states to function as clearing houses for federal paychecks. This specter haunts American federalism, but has no reality in European terms.

The U.S. Supreme Court under Chief Justice Burger has tried to slow down the legal transfer of power to the federal authority by refusing to establish tight federal constitutional standards for welfare programs and for school authorities, just as it has encouraged other developments in local community autonomy. But fearful of any repetition of their 1930's anti-New Deal fiasco, the Justices have so far refused to follow the lead of Justice Rehnquist, who would place limits on federal power by invoking a constitutional jurisprudence based upon the tenth amendment and traditional notions of states' rights. The Supreme Court decision in *National League of Cities v. Usery*, Justice Rehnquist's only triumph in this area, did serve to remind Congress (and the Justices themselves) that there exists a constitutional protection of states, to be used if needed. The opinion seemed more like the annual ritual of blocking an access point to prevent establishment of a right of way, than a manifestation of a desire to use the property, and it came as no great surprise when the case was overruled on 19 February 1985 in *Garcia v. San Antonio Metropolitan Transit Authority et al.*, No. 82–1913.

Thus, the real protection of federalism has been in a perception of its utility and an appreciation of its potential against an excessive concentration of power in one level of government. This battle is fought in the political arena, against the claims of specific interests which often desire the nationalization of policies for many reasons – access to the more ample national coffers, the greater ease of pressing one's case in one rather than fifty-one arenas, or the desire to control states whose viewpoint is at variance with the national majority. In this political battle there is often a struggle between specific, organized interests and the federalist impulse much as in the Community. But localism in the United States is nowhere as strong as European nationalism, and identification with the U.S. Government cuts much deeper and wider than existing Community loyalties. The odds are thus greatly in favor of the Federal Government, with state victories resulting as much – or more so – from national acquiescence than from state assertiveness.

2. The Advantages of Power-Sharing: Federalism and Efficient Government

The *inefficiencies* of a federal-type solution are generally evident. Conflicts of policy, the requirement of an elaborate machinery for reconciliation, and the ability of mobile manipulators to profit from diversity within the system by patronizing the state with the conditions most favorable to them are some of these. This latter factor means, too, that a state cannot wholly control its social policy. The threat of capital or other resources fleeing to other states means public policy is, in a sense, competitive and cannot easily veer decisively from what other governments do. In general, economists – especially of course, Chicago-School economists – regard this as a highly desirable condition, providing limits upon coercive power based on practical needs of society, and even on needs of genuine majorities. Political scientists and sociologists are more skeptical, suggesting that limits to legal diversity are more often a consequence of habit or myth than of true economic restraints.

Delaware's use as a haven for corporations is hardly a product of some genuine social need for easier regulation, but rather a case of a state enriching itself by selling indulgences and exemptions from other state laws. This is also visible in states which function as divorce, marriage and abortion "mills." Such legal havens will emerge in any system in which local variation is permitted, though they may even occur in nominally centralized systems. But federalism legally sanctions the practice of policy diversity, and also strongly protects the mobility needed to take advantage of it. Federalism is, in this respect, like marriage, which, we are told, combines the maximum of temptation with the maximum of opportunity.

Federal practice also permits a single state to set a standard that all states must then follow, and the circumstances underlying this phenomenon should be more carefully studied than they are. Where a market is basically indivisible or a particular unit is vital, one state may be able to dominate policy on the stringent side. Food products in the U.S. made for interstate shipment generally meet Pennsylvania's standards – regarded by most legislators as irrelevantly strict – simply because accommodating avoids problems and adds marginal customers. In a sense Pennsylvania acts almost as a national law-maker because of the nature of the commodity regulated and the structure of its market.

But while the costs of federalism are well understood, the advantages are great. Riker, Neumann and others have challenged the political claims that federalism insures freedom and diversity made by such different theorists as Dicey and Rockefeller, suggesting that federalism is neither a bulwark against dictatorship nor a guarantee of progressive experimentation.[93] Oddly, they neglect the legitimating and psychic advantages that accrue when people believe they have such leeway, regardless of the "true facts" the scholars believe

[93] *Cf.* W. Riker, Federalism: Origin, Operation, Significance (Boston, Little, Brown, 1964); N. Rockefeller, The Future of Federalism (Cambridge, Harv. U.P., 1964).

they have demonstrated. The comparative Yugoslav satisfaction with devolution-within-a-dictatorship illustrates the point, regardless of whether one views the freedom granted as maximal or minimal.

In any event, Polanyi, as well as Meckstroth, have demonstrated through communication theory that centralized systems develop an incredible overload.[94] In practice, they devolve decisions without legitimation to short circuit their own crises. Thus the visible inefficiencies of federalism can be over-interpreted, as the true price may simply be to blink at improper or illegal practices. Still, it is clear that in many instances centralization remains an expensive process, and in some areas, *e.g.*, agriculture, a disastrously expensive one. Furthermore, those East European countries which have attained a reasonable level of efficiency have done so by relaxing some of the stringencies of orthodox central control Marxism and developing notions of social federalism. The test here is not of the degree of formal political devolution – in that now-disgraced sense the U.S.S.R. is federal. Rather the crucial distinction is the degree to which, in practice, real economic autonomy in decision-making is exercised at the enterprise level, thus including say, economic systems of Yugoslavia, and perhaps even Hungary.

The EC is at the opposite end of this cluster of federalized structures – namely one of the few structures whose formalized centralism is stronger than its actual operation. We have already noted that the formal ingredients of power – in respect to legal finality – make the EC a virtually complete federal system indeed. It is in reaction to, and in fear of the extent of this completeness (once a subject-matter competence is absorbed by the Community), that the nation-state components exercise such caution at the initial stage of legislation. It is in the pre-legislative area that the actual, not-even-quite-confederal reality of the Community is manifest. The painstaking process involves at least two sets of consultations with concerned representatives of the various home governmental units – one at the pre-Commission action stage and a repeat, usually with the same participation, after a proposal goes forward for Council action – as well as Member State control in the Council through the de facto *liberum* veto.

Working groups are peculiar structures indeed. Most Governments permit any ministry expressing a strong concern to have a representative at the Brussels negotiations and as Sasse and others suggest, only the French have a good reputation for coordinating and resolving disagreements with this largely self-selected type of delegation.[95] The Germans have the added problem of *Länder* authority and now permit a representative of this different type of "expertise" to join their large delegations. In short, these groups are neither quite coordinated advocates of a nation-state principle nor in any sense disinterested proponents of a European point of view. In general, their influence is character-

[94] *See* the paper by Michael Polanyi in WORLD TECHNOLOGY AND HUMAN DESTINY (R. Aron ed., Ann Arbor, U. Mich. P., 1963), on which Theodore Meckstroth's paper (unpublished) is based.

[95] C. SASSE *et al.*, *supra* note 24.

ized as most parochial; to the extent that ministries with different constituencies and purposes in the same country maintain different views, they become additional bargaining partners in a curiously non-rationalized (and not easily structured) decision-making process. For some legal purposes delegations must act as a unit, and there is considerable pressure for a country to somehow synthesize a position. Ultimately, after all, a yes or no is required. Often that "unity" is a façade which breaks down. Particularly now that the decision-making process is so slow-moving, the high-level internal resolution is likely to break down even as the process proceeds.

Resolution within a country takes place through bargaining or through a decision in favor of one of the positions. The multi-competence ministries – such as Finance and Foreign Affairs – often have influence beyond their primary area of concern in a matter and therefore win their share or more of such disputes. But changes in their leadership may well result in shifts of position or in relative cabinet influence. The subject matter ministry's posture is more likely to be persistent. In any event, this sifting is a peculiar way of arriving at "national" views and has virtually no relation to a Community position, which basically falls to the Commission staff to try to develop. The temptation, especially at upper levels, to find compromise language drafted by diplomats may result in technically weak or even inappropriate proposals.

There is one consummate sense in which some of this process is justified – if one looks to the demands of enforcement. Whatever it may be in other domains, the Community is a weak confederation (if that) in terms of its complete reliance upon local enforcement and the governmental machinery of the Member States. Close consultation and involvement of the individual bureaucracies is thus a logical concomitant of this situation. Indeed, it is only recently that even rudimentary monitoring of enforcement has begun to be used by the Community, which in the past has operated in reliance upon honor and the expectation that judicial proceedings will eliminate abuses. Indeed, while it is easy to suggest improvements in the legislative process, it is clear that if the process were streamlined there would be a need for compensatory arrangements with local authorities. As we have previously indicated, there are many tradeoffs here. Without the conscious effort to achieve some slowdown in the number of new regulations, monitoring of compliance would long since have become a hopeless task. Without the existing depth of consultation, non-compliance would have been decidedly more common.

3. Policy Coordination at Multiple Levels: Inter-Bureaucratic Contacts

It is usual to contrast this complex and discordant situation with the practice of current American federalism. As we have emphasized, that pattern is the culmination of two centuries of evolution. Even legal doctrine has altered during that period. The sense of the national nature of problems that pervades most federal and state bureaucracies was not necessarily present in earlier years. The New Deal in fact nationalized the bureaucracies by providing direct federal subvention of salaries, of course, but more importantly by defining social

problems in national terms and leaving only details of solution to the states and localities. The phenomenon of coincidence of views of welfare workers or highway experts, whether employed in Washington or Pennsylvania or Montana, has been noted by Weidner and by Beer over several decades now.[96] But this federalization, Beer suggests most emphatically, is a recent and sharp departure from earlier practice, a new development of our own times.

The Federal Reserve System is a prototypical example of the imperfect but evolving coordination of policy in an evolving federalism. Early efforts at a centralized National Bank were both politically and judicially controversial and ultimately failures. Not until Wilson and Brandeis contrived an intricate balance between centralism and localism, professionalism and public control, was the system promulgated in 1913. Not until the 1930's, it fairly can be said, was there centralized policy. Similar patterns with respect to federal regulation of the insurance industry and concepts of improper competition and positive regulation of agricultural products underscore the remarkable weakness of the Federal Government prior to the twentieth century, and even well into its second quarter-century. The Canadians, Australians and New Zealanders, all in different ways, wrote their constitutions to try to avoid what they saw as a basic enfeeblement of the American system.

Much of that concern persists. In practice it is difficult to control local encroachments, however neat the legal theory. Areas such as local taxation present new and intricate constitutional problems in the age of aviation and multiply other opportunities for non-visible preference for the locality. Zoning and other housing regulations have almost completely kept the housing industry confined to small geographic – really governmental – areas. By and large, housing regulation is not even state-wide or county-wide but is enacted in every city and town. The competition among states and other taxing units operates as a deterrent to raise taxes, and may well help account for the United States' distinctly lower tax burden compared to other Western societies.

During the 1930's it was fashionable to speak of a "twilight zone" in U.S. constitutional law, the area where the Federal Government was not able to legislate (limited by virtue of its specific granted powers) and where the states were forbidden to act as well under restrictions of the fourteenth amendment's due process clause. The chief constitutional result of the constitutional redefinition and cleansing of the 1940's was to construe the national power – especially the commerce clause – broadly enough to eliminate most of this forbidden zone.

In practical terms, however, such problems persist. The Bell Telephone Company, for example, extended its virtual monopoly through most of the U.S., undercharging for local service (to encourage everyone to subscribe) and

[96] *See e.g.*, E. Weidner, Intergovernmental Relations as Seen by Public Officials (Minneapolis, U. Minn. P., 1960); S. Beer *et al.*, Democracy in the Mid-20th Century: Problems and Prospects (W. Chambers & R. Salisbury eds., Freeport, N.Y., Books for Libraries Press, 1971).

overcharging for long distance. Local regulators were traditionally more zealous than the Federal Communications Commission (FCC) which, in any event, wished to encourage advances in long-distance calling. As modern methods of direct dialing drastically reduced the justification for the discrepancy, however, the FCC and Congress moved to require closer approximation of charges and cost. But the elimination of the long distance subsidy has not been (and is not likely to be) accompanied by a similar or uniform local authorization to raise charges. Many experts predict severe deterioration of the U.S. telephone service. It is seemingly inevitable that states with zealous regulators will be able to force other states' subscribers to subsidize local service.

The practical imperfections of having two levels of regulators has also been demonstrated in the complex battles over environmental control and even in such emergency situations as the battle against the fruit fly in California. The rival domains of nation and state in the U.S. are not nearly as neat as pretended, mainly because Congress for many reasons – political, fiscal, efficiency considerations, ideological commitment – has no desire to "occupy all fields" or take over all responsibilities. In point of fact, practical enhancement of national authority has usually been a product of creeping, rather than comprehensive, transfer – often as not originally at the behest of the localities.

The pattern of duality and encroachment usually begins with a sense that state funds are inadequate for a felt local need; federal funding for programs of a generic type are therefore sought by local specialists in that area. Once the funding is in place Congress has found it irresistible to add to existing regulations, establishing minimum performance requirements, requiring accounting and audit procedures, and finally steadily moving to control even minutia. The only important initiative to evaluate the need for federal controls – the Kestenbaum Commission, set up by the Eisenhower Administration – found those controls on the whole necessary, though it found federal procedure even then was a drag upon the top few state governments. Since that time – three decades ago – the growth of state governments has clearly outstripped federal advances, while federal requirements habe become much more onerous and nit-picking.

It was on this basis that the Reagan Administration has found it easy to dismantle a good deal of the machinery of national-state involvement without study or verification of their ideological claims for a need for a greater devolution of authority. Even their opponents concede much of the case; former Vice-President Mondale has said, "we were making too many people jump through too many hoops." The particulars of Reagan federalism – a trade-off of a 25% or so reduction of federal funds sent to the states in return for greater flexibility in their use – need not concern us. The important point is that a return of authority to the localities is taking place, and that such reassessments of federal-state relations and optimum flows of authority are not merely events of the past. Even the extreme likelihood that Congress will shortly begin reimposing controls and conditions on the states does not diminish the significance of the central government's recognition that it had tried to control more than it efficiently could or should control.

There are other facts of U.S. intergovernmental life that bear upon EC evolution. We have already referred to Samuel Beer's important re-examination of bureaucratic state-federal interaction. He finds that subject-matter specialists – welfare, highway, medical experts – whether employed by the Federal Government or localities, share dominant values shaped by their professions, and feel little rivalry based upon their point of employment. Indeed, particularistic interests were inadequately represented in the 1960's and 1970's; highway officials, for example, who might well have been constrained by considering the "best interests" of their state's financial picture, could effectively get their way by bringing into play the power of their colleagues and counterparts in Washington, who could insist on new highway X going ahead, if vital repair money or approval of highway Y was to be forthcoming. Consequently, the political authorities – governors, legislative leaders, the "topocracy" – have been forced to organize as lobbies in their own right, in Beer's view, largely as a defensive move.[97]

It is beginning to appear that the same process might be taking place in the Community. Working Groups, Member State experts and COREPER itself are usually considered to be the national Trojan Horse in the Community fortress. And yet there are two elements which might lead one to believe that Beer's suggestion – that the professionalism of experts may breed a higher loyalty which transcends their lower-level government role – may also be applicable to the Community.

The first element concerns the role of Working Groups and specialists. As Rehbinder and Stewart have demonstrated,[98] decision-making does not, even in a sensitive field such as environmental protection, always come down to the lowest common denominator. Compromises – even when outside larger package deals – are frequently determined on the basis of subject-matter merit which goes beyond the political requisites of one or more of the Member States. There may be several explanations for this phenomenon connected even to the peculiar traits of the field, particularly the fact that environmental protection does not have a long national legal or political heritage. But whatever may be the explanation it would seem extremely plausible that the specialists, even if working in a "national" capacity, will often not let the national factor override their more objective professional assessment of a Commission proposal or negotiated compromise thereof.

The second element concerns more directly COREPER. We have already referred to the rapid growth of harmonization directives. This has been the subject of criticism, some of it vehement, from parties such as the British

[97] *See* S. Beer, *supra* note 96. Beer is a former national chairman of Americans for Democratic Action (ADA), and a fine objective scholar, but in any event not hostile to social programs.

[98] *See* E. Rehbinder & R. Stewart, Environmental Protection Policy, ch. 10 §C.1 (2 Integration Through Law Series, 1985).

House of Lords.[99] And yet as we recognized in our analysis of the non-compliance paradox, Britain could, at least in theory, have blocked any of the individual offending measures, or even the entire thrust of the harmonization program at the Council stage. Given the present profile it is clear that with this type of measure – which will normally be approved at COREPER level – the Community outlook will prevail over a strict Member State view even among the members of the permanent national representation itself. COREPER and its various outgrowths have become permeated by "moles" to a degree which might defy even the skills of John Le Carré to detect. These spies and infiltrators may be observing the rules of the game, but can it be stated with certainty in "whose interests" they are really working?

It is a crucial difference, that, unlike the EC, the U.S. Federal Government has many effective advocates working *within* the local bureaucracy. In many instances local government salaries are clearly, directly and unequivocally paid in whole or part by federal funds. This practice may have sound reasons behind it; it is also part of the game played by Congress on the public and the bureaucracy upon Congress to disguise real federal employment figures.[100] Other programs, such as internships, exchanges, or other inter-governmental loans of officials, guarantee a wide sharing of perspectives between bureaucrats at federal and local levels of government.

4. When States Collide: Federalism and the Problem of Divergent State Interests

A centripetal factor – with important implications for the EC – is the curiously irrational nature of political support patterns generated by welfare policies. For reasons not adequately analyzed and, indeed, only superficially commented upon, the U.S. Northeast continues to support policies which, by any obvious measures, disadvantage the region, while the "Sun Belt" – the Southeast and Southwest generally – and the Plains areas, which seem to benefit enormously from federal programs, remain the conservative voting bulwark.

It is easy to conjure up explanations for this tendency, but a major inquiry would be necessary even to begin to sort out the merely plausible from the probable explanations. The persistence of old attitudes, hidden advantages or disadvantages, the difference between *individual* advantage and regional gain, or misperception of advantages and costs by voters, or differential turnout in voting by different groups are five obvious possible theories. Only one, however, is in accord with rationalistic notions of a tight support-benefit relationship.

[99] *See* Close, *Harmonisation of Laws: Use or Abuse of the Powers Under the EEC Treaty?*, 3 Eur. L. Rev. 461 (1978).

[100] Joseph Califano, when Secretary of Health, Education and Welfare, released data suggesting that the number of people whose salary was fully paid by the Federal Government but not on its payrolls exceeded the number of official federal employees.

This certainly is the experience of the Community. While Benelux countries have, for example recognized their clear benefits from the EC, the advantages enjoyed by Denmark have yet to engender wide-spread public support for the Community. In general, public perceptions of national advantages of membership throughout the Community are not closely related to the actual patterns of benefits. Mass opinion finds such complex economic arrangements difficult to analyze, and part of the explanation of the Community's lack of political clout lies in the difficulty of disentangling international economic trends from national policies *and* the net costs or benefits of the EC. These benefits, of course, may well be greater in bad times than in good; it is difficult to convince doubting Danes of that, however.[101]

This disjunction between perceived and received national benefits may also be linked to the non-compliance paradox. Key decision-makers may be convinced, rightly or wrongly, of the desirability of a measure from a Europeanist, nationalist or personal view and yet be incapable of finally convincing the national populace of its merit. Often the *adoption* of a measure after deliberation within a limited group of concerned individuals, however diverse in nationality, will prove much easier than actual enforcement of the measure. Collision with entrenched interests and deep-seated attitudes may make otherwise seemingly desirable programs politically impossible at the national level.

The American system – which features national officials in all but name on state payrolls, and state officers who often have national political ambitions, national memberships and national affiliations – has certain advantages in promoting national causes which would be locally unpopular. Yet, as we have noted, the same system is not free of coordination difficulties, for as a practical matter, neither at the political nor the bureaucratic level is American federalism fixed or centrally controlled. Even at the constitutional level, occasionally decisions impose national restraint in favor of local autonomy. On the practical level, a continuous flux of new interest alignments of even the most basic nature takes place. The proper balance of centralism v. local control is so controversial that sharp differences of ideology are deeply interwoven into partisan catechisms. Since the 1930's it is the Republicans who have espoused localism and the Democrats who advocate nationally-directed programs. In the seventy or so years preceding, the party positions were completely reversed. A good deal of the time, and on many issues, there is no real disagreement between the two Parties, yet at any given moment some issues do divide American national politics, in general precisely on this matter of central-peripheral relations. The ebb and flow of this conflict is to a large extent the history of U.S. politics. What is at issue is all too often stated in absolute terms, but often is about specific details or aspects of particular programs. The usual issues focus on gradation and the complexity of governmental mechanisms rather than on the simple question of federal control or its absence.

[101] *See* Slater, *Elites, Indifference and Community Building*, in THE EUROPEAN COMMUNITY: PAST, PRESENT AND FUTURE 69 (L. Tsoukalis, ed., Oxford, Basil Blackwell, 1983).

Perhaps most interesting is the flexibility of political lineups and the ingenuity of issues and combinations of federalist solutions. States' Rights advocates like Senator Jesse Helms still manage to rationalize federal price support for tobacco, as they are representatives of North Carolina or similar tobacco-producing localities. No more consistency of positions has been found in the positions of other politicians, or in the ideological positions of entire regions.

In comparing key aspects of center-state relations, it is striking how much and how jealously the EC is confined, and the degree to which the national principle predominates on substantive issues of power. Of course that must be so, for this relationship of center to periphery is the key to the degree of real federalism.

The monies of the EC are fixed by formula in an almost medieval tax-understanding that would require complex renegotiation to alter. Whatever legal powers of enforcement and supremacy are otherwise involved, this seminal fact of life is obvious to all. A government on a fixed allocation in the modern world comes to know its place. This system of allocation, to be sure, meant great internal changes in Member States by requiring their conversion to VAT where it did not already prevail. In the initial stages, however, Puchala has shown that even this requirement coincided fortuitously with internal political needs in West Germany.[102] By now, however, this requirement of uniformity of tax base (not rate) must be exacted from new members, or some great departure from Community practice would be required. The new candidates have sufficiently weak economies that expected benefits far outweigh the cost of introducing VAT, which is an effective revenue-producing tax in its own right as the basic domestic sales tax for all purposes. The price paid for a uniformity requirement on tax base has been to permit wide diversity in rates (subject to interdiction of obvious manipulations for purposes of competitive advantage, enforced by Commission, Court or even Council action if needed). The recognition of diversity was a necessity here in some shape or form – and even this has required periods of grace to be negotiated, so as to minimize dislocation of economies. As the new partners come in, it is suggested that even more accommodation of differences will be required.

To an American observer the rigidities of harmonization appear almost monomaniacal. Accustomed to the principles that diversity should be permitted where no overwhelming need for uniformity is required, and that intrusion of levels of government should be minimized, the U.S. has established a burden-of-proof notion that localism is right unless a burden on interstate commerce is proved.[103] The luxury that federal regulations has grown almost hand-in-hand with long-term growth of a national economy has, of course, not been permitted the EC. While U.S. federal governmental (including Court) restraints have been able to strike down the most grievous state obstacles to com-

[102] *See* Puchala, *Worm Cans and Worth Taxes: Fiscal Harmonization and the European Policy Process*, in POLICY-MAKING IN THE EUROPEAN COMMUNITIES 249, 258–60 (H. Wallace, W. Wallace & C. Webb eds., London, John Wiley & Sons, 1977).

[103] *See* Kommers & Waelbroeck, *supra* note 79, at § II.B.

merce, or to establish or foster regulatory regimes[104] where competition is deemed desirable, the EC has had to work with highly-developed, sophisticated, and perhaps even internalized arrangements. The U.S. has over the centuries developed sophisticated and federalized regulatory mechanisms, while the EC must seek out and control such accretions with little experience or practice in the art. What is done in the U.S. through complex combinations of volunteerism and functional cooperation is minutely regulated because the informal mechanisms for control in the past have been developed at the local level and are integrated into autarchic and other parochial systems of regulation.

This lack of easy access to individualized commercial actors is a second sharp and basic difference in the two systems. The degree of access is nevertheless hardly uniform. The EC is much more an immediate and direct controller of events where there exists a well-developed regime, as in coal and steel, than in areas such as airlines, where the commercial actors are generally the national governments wearing private uniforms. But the effort to foster creation of trans-European bureaus for standardization in industry, and the development of peak industry organizations or trade organizations, suffers from the competition of similar, but long-established nationwide structures of proven success, which generally maintain a close and symbiotic relationship with their home governments. Those are partnerships that no side is eager to dissolve.

There is a third striking difference between the two systems in the lack of a fundamental resolution of the question of relative power in the EC system and the comparable role of each individualized state. Again, this is not quite a tautological statement given the unresolved question of the nature of the EC.

The American Founders cut the Gordian Knot with the equal-vote requirement in the Senate and allocation of seats in the House on the basis of the decennial Census required by the Constitution. Rejecting any Lebanese-type[105] resolution, a rather straightforward decision rule has controlled the allocation of power for the key components. To a minor degree, of course, there have been problems and changes. The North-South compromise on counting the U.S. population – a slave was to be considered three-fifths of a normal person – disappeared with the end of slavery. The actual formula for allocating repre-

[104] So, for example, citrus regulation is simplified by laws that, in effect, exempt privatized cooperatives of growers from anti-trust laws where state laws regulate this type of control over production and distribution, but within sharp limits which are established under U.S. laws and Department of Agriculture supervision. Many, but by no means all, of these not easily schematized arrangements were evolved during the Depression. In many instances these devices operate as ideological screens that permit the beneficiaries to enjoy the benefits of federal governmental power while they extol localism and rugged individualism.

[105] The Lebanese negotiated a sect-based settlement in 1943 in accordance with their 1932 Census, but continuously refused to take a new census so as not to have to renegotiate their complex arrangements. By the 1970's the allocations were generally assumed to be quite unfair, helping to precipitate the present crisis.

sentatives was a subject of dispute, but has long since been resolved with the advice of statisticians. An automatic formula resolves all representational allocations in most years and requires Congressional choice of one allocation (of 435) only under extremely rare circumstances.

Equally important was the decision to admit new states to the Union on an equal footing. The constitutional basis for this resolution is not impeccable, but the pattern now seems irreversible.

The EC, on the other hand, is much in flux on this issue. The Founders thought they had largely resolved the problem of relative weights by allocation of votes in the Council. Once this was unhinged other allocations of power have assumed both less and greater importance. The lack of resolution was apparent in the apportionment of the European Parliament in its new directly-elected guise. The final choice by the Council was an allocation different from any proposed by the old Parliament, with identical voting power for the four large Member States. This minor reinforcement of nationalism reflects the lack of an allocative policy and the overwhelming power of inertia.

On the question of equality of membership the EC is also somewhat ambiguous. There is a sense of recognition that some nations are less equal than others, and, above all, that some economies are more fragile than others. However, to date no clearly morganatic admissions have been made and certainly in formal status no distinctions of law or control have been made between the Member States.

Yet, paradoxically, it is the knowledge that weaker states have been made members, or are contemplated as new partners, that some find promising. The need to recognize these realities, to become creatively discriminating, is a challenge that some who have found current practices over-rigid and over-centralized believe will revitalize the Community. Whether regional or national discretion or product or sector differentiation will evolve, some greater recognition of national diversity seems to be desired and required.

This optimistic view of enlargement is, however, a minority one. The political and external arguments for enlargement are recognized by most observers as overwhelming. Expectations are, though, that the fragility of Community-state relations will be further weakened and strained in an enlarged Community. The diversity of interests and concerns might make for a greater desire to maintain the system, but history and logic point generally in a different direction. That diversification might lead in turn to integration is possible, but not probable. That it might provide some mitigation of rigidity and lead to a wiser understanding of interrelations remains a possibility.

There are antinomic trends in the United States as well. The vast, growing homogenization of American society, aided by the technical wonders of communication and transportation, undermines such little remaining logic as may originally have been possessed by the patchwork of states. The current glorification of ethnic diversity should not conceal the fact of its rapid disappearance, with only the emergence of an Hispanic culture providing a contrary trend at present. The mobility of Americans makes politics and policies nation-wide, and television creates instant majorities and over-night constituen-

cies all over America. The call for national solution to nationally-discussed problems is well-nigh universal.

Against this trend work two general forces: (1) the romantic, nostalgic, deep-seated concern for localism; and (2) the practical difficulties of effectively administering a vast geographic nation and a huge population. Arrayed with these forces are those specific interests on a given issue that will not want a national solution to their problem. This force may be strong enough to protect a federalism which is, basically speaking, crumbling, but which dialectically is also operatively expanding. And yet, the desire to create an invulnerable *legal* protection for the states may well prove to be romantic nonsense. As a world power with a complex economy, the United States may not be willing to afford the luxury of extending a right of veto on necessary policies to a very small number of states which possibly constitute only a tiny fraction of the population, simply to preserve a form of governance which is said (but not demonstrated) to be a guardian of liberty and diversity. There may be no logical choice other than between a system in which the national legislature may move to deal with problems as they become national in scope, and a system where states can systematically thwart even a dominant and durable national majority. If that is so then the protection of federalism in the U.S. will be solely political and subject to gradual dissolution. Ultimately, as Hegel among others has pointed out, such changes in degree lead to changes in kind.

But federalism is not so much a logical idea as a practical accommodation, and American jurisprudence in this area has been particularly characterized by concern for pragmatic balance rather than conceptual clarity. The quest for better but not decisive protection against the erosion of states' rights is likely to produce some palliative by which a hobbled, yet real practice of shared responsibilities is kept alive. American federalism has been alleged to be on its death-bed for a century but its actual demise does not seem upon us yet.

VIII. Concluding Remarks

We have stressed repeatedly that a comparison of two such diverse political systems as the United States and the European Communities is a risky business, and more likely to produce infinite series of qualifications than real conclusions. With this warning in mind there are nevertheless some observations which we might make more particularly concerning the causes of the success or failure of each individual system to meet certain basic integrationist goals.

As a first observation, we might note that the political organs of the United States have proved, in the long term, to be much more adaptable and suited to the task of coordinating an increasingly integrated economy than has been true of the political organs of the EC. It is particularly the technocratic attempt to shield the expected protectors of the Community spirit – the Commission and the Court of Justice – that emerges as misguided in a long-term perspective. Though this protection may have been functional – and perhaps even in-

dispensable – in early years, such artifices ultimately cannot provide legitimacy or accountability for a modern democratic system. Moreover, the cramped legislative space accorded the European Parliament seems to be an inadequate solution to the problem of responsible decision-making. The dominant EC political organ – the Council – is also one institution that not only reflects the national impulse, but quite frankly is simply a form of it, and is therefore antithetical to genuine integration.

Nevertheless, even given this basic failure of the established EC political organs to carry out their expected functions, the Community has evolved certain practices – most notably related to the role of COREPER and technical working groups – that manage to keep the Community regulatory out-put at a numerically fairly stable – and also surprisingly Communitarian – level, thus putting to rest all notions that *lourdeur* in the Community decision-making process is inevitably bound to bring the whole to a halt. So despite the considerable disappointments, the Community has, like the U.S., also managed to demonstrate an impressive flexibility in the re-ordering of its political processes to better fit the reality of power.

What clearly emerges from comparison is, in a sense, not at all surprising: an image of an increasingly stronger U.S. central government, and of an increasingly weaker Community – or at least, of a Community under increasing attacks from its Member States via their non-compliance, intentional and unintentional, with its policies. What is surprising, however, is the great lengths to which the U.S. Federal Government has gone in attempts to disguise the real growth of its power, to the degree of protecting the integrity of the states as sovereign units even when the states, for their part, might welcome even more federal assistance. The key difference in this area between the U.S. and the EC is the question of resources: the U.S. Federal Government represents, to the states, a virtually unlimited source of support, while it is the EC which must rely on the support and participation of the Member States for its continuity, no matter how deserving or valuable the coordination and regulation efforts of the EC may actually be. In light of this inherent weakness in the EC system, the institutional defenders of the Communitarian ideal – most notably the Court of Justice – have been moved to invoke sometimes surprisingly strict principles of "normative supranationality" in an attempt to buttress the Community edifice; the result has been the creation of an admirable, sturdy constitutional order built of abstract legal norms with increasingly less relation to the cold political reality.

Against this background, mutual problems of non-compliance emerge in diametrically opposing perspectives. While problems of non-compliance in the U.S. federal system are little more than continuing reflections of an intentionally preserved (and increasingly contrived) local diversity, in the Community such problems emerge as direct challenges to the continued viability of the whole system. In the face of increasing national non-compliance, continued assertion of a rigid Communitarian principle by the Court and Commission could serve more to push national authorities to greater extremes of illegality than to encourage compliance.

Rigidity and dogmatism in defense of Community policy is therefore not likely to be fruitful. Moreover, such an attitude has no place in a political system that is truly federal. It is the central lesson of the American federal experience that the strength of the system lies in flexibility and mutual support of one level of government by the other – particularly, support of the weaker level by the stronger – in recognition that both are necessary for an effective government administration. As we have noted, in cases involving questions of pre-emption the European Court of Justice has, particularly in recent times, taken a more flexible view of the ability of regulations emanating from two governmental authorities to cohabit in peace, thus permitting continued national regulatory diversity (relative to continuing diverse national economic conditions) within a framework of more general Community-wide regulation. A practice of issuing less detailed directives would also, we expect, tend more to protect both Community and Member State interests without greatly compromising either. Adherence to one principle does not necessarily require abandonment of another.

But the solution to the non-compliance problem in the Community cannot only come from the Community itself: it must come, first and foremost, from the Member States, for it is the Member States who retain most of the power in the Community decision-making process. Indeed, even though we have pointed to the various inadequacies of the Community enforcement mechanisms, it is axiomatic that the increased efficiency and thoroughness of such a mechanism will have a salutary effect on Member State compliance only if the Member States modify their behavior more in support of the Community as a result of it. What the Member States have continually failed to recognize, however, is that an increase of their support for the Community does not necessarily imply an erosion of their independence or diversity. Indeed, it may be that – particularly with regard to the weaker of the Member States – the Community in the long term may serve as the most able defender of their national and cultural integrity. This has indeed been one of the great ironies of the American federal system, that the increasingly more powerful central government would – primarily, by cleverly manipulating its vast resources – strive to maintain the states as independent governmental units, if for nothing more than administrative efficiency.

The European Communities have for their part made great advances in a comparatively short period, and despite various setbacks and constraints have managed to continue to operate often in a surprisingly efficient fashion with considerable success in promoting Communitarian policies. Thus while we may point to all the frailties of the EC system, we would not give up on it quite yet. There is much development yet to come, and many changes that should be made, but basically – after only some thirty years of evolution – we feel confident in asserting, finally, that, like American federalism, while the EC may be considered by some to be on its deathbed, in our view the patient is still quite sound and perhaps even evolving toward a higher state of functional health.

ANNEX

SIEGLINDE SCHREINER*

This is a brief description of data and methods used for this article. For the aims of the present research it was not necessary to apply advanced statistical methods; very often it seems more adequate to try to display inherent trends of the data in a clear and easily understandable way than to use complex methods, the results of which are meaningful only to those familiar with statistical analysis. So the data presented can be understood without statistical or mathematical knowledge. This, of course, does not deny the relevance of further analysis or the use of other methods either for the researchers already involved in this work or others, who might find this approach interesting.

As already mentioned the Directorates-General were asked to provide information on all policy proposals in their realm. This information consisted of:

- date of proposal
- date of presentation to the European Parliament
- date of decision
- final decision (acceptance or refusal)
- rating of importance of the policy proposal on a three point scale (important, very important, fundamental).

The first four of these are "objective" data. The major problem they raised was how to deal with alterations of a proposal during the decision-making process. Here we had to apply a formal rule. A proposal was treated as a single element, even if altered, as long as the Directorate-General concerned did not formally initiate a new proposal. On the basis of the data given, time-spans (in months) were calculated between proposal and presentation to the Parliament, proposal and decision, and between presentation to Parliament and decision.

Rating the importance of a proposal is a subjective evaluation. Still, we feel that the evaluation by the people most directly involved in the preparation and formulation of the proposal is the best expert judgment available. In any event what was significant for us was the *relative importance* of measures amongst themselves. The subjectivity of the respondents would not affect that relativity. As the scale used is also rather short and clear in the distinction of its categories, we assume no major problems of comparability in the use of the scale by different persons.

Unfortunately we did not receive responses from all Directors General. So, strictly speaking, all of our results are only true for the decision-making in those fields that are actually covered by our data. They are certainly not "representative" in the statistical sense of the word. But our data does cover not only a numerically great field of proposals and decisions, but also some of the politically most important ones and so – even if not representative – are certainly relevant for the description of the decision-making processes involved. It is still planned to complete the dataset, if the data are provided, and to repeat and extend the analysis on this base.

The coding of the data was done at the European University Institute, data-handling

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and analysis at the Computer Center of this Institute. The analysis was done using SPSS (Statistical Package for the Social Sciences).[1]

"Missing data" were coded in a way that allows a distinction between a real lack of data (*e.g.*, information on the date of proposal is no longer available) and cases where no coding is possible (*e.g.*, a decision has not yet been taken). The variable with the highest occurrence of missing data was – not unexpectedly – the date of proposal. Out of the total number of 472 cases 173 unfortunately lack this information. All interpretation of results based on this variable (year-by-year distribution of proposals, time lags, decisions pending) have to take this into account. The response-rates for all other variables were rather high.

Some remarks on terms used in the tables might be useful. Some of the tables give different kinds of frequencies. All of them are percentages, but based on different totalities. "Relative frequencies" are based on all cases, including missing values, taking into account the scope of valid data. "Adjusted frequency" excludes missing values, allowing for comparisons of distributions independently of the number of valid cases. The third percentage, "cumulative frequency" is particularly useful for displays of data over time. For every category it gives the respective value, including all prior ones, displaying, for example, the percentage of all proposals made up to a certain year.

Grouping of data over time was used in two different fashions. A division in periods of equal length tries to demonstrate changes over time. The selection of intervals had to be somewhat arbitrary, but four-year intervals have the advantage of avoiding a longer or shorter time-span at the beginning or the end and they seem to be intuitively reasonable – they are long enough to smooth the distribution, but not too long to hide changes. Nevertheless, the number of cases in the different year-groups varies strongly (from 13 to 72 for proposals and from 1 to 123 for decisions). To take this into account a second grouping was based on the distribution of proposals and decisions over time forming equally sized groups (each about a fifth) spanning different numbers of years. Please note, that these divisions are not the same for proposals and for decisions.

[1] N. H. Nie, C. H. Hull, J. G. Jenkins, *et al.*, SPSS: Statistical Package for the Social Sciences (2nd ed., New York, McGraw-Hill, 1975).

Part II

Legal Techniques for Integration

Instruments for Legal Integration in the European Community – A Review

Giorgio Gaja*
Peter Hay** and Ronald D. Rotunda***

I. Introduction

Like Europe before the European Community, the American states prior to the Constitution of 1787 had many local differences, only a few common purposes, and no central unifying force. And just as the American Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division,"[1] so also similar concerns lie at the basis of the Treaties of Paris and Rome. Moreover, as the process of federalism in the United States has advanced far beyond the tentative beginnings of two centuries ago, so also in the European Community the integration process has gone far beyond the common market which was its initial reason for being.

Although the European Community, unlike the United States, has not achieved political union, some elements of political union do exist: the Council and the Commission have enacted a fair amount of important legislation, which generally pre-empts Member States' legislation; the Court of Justice has exercised extensive federal jurisdiction;[2] the European Parliament, albeit still with limited powers, is now directly elected; the Community has its own

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[1] Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935).

[2] *See* Hay, *Federal Jurisdiction of the Common Market Court*, 12 Am. J. Comp. L. 21 (1963); P. Hay, Federalism and Supranational Organizations. Patterns for New Legal Structures 201 ff (Urbana, U. Ill. P., 1966). For a recent survey of the Court's "major opinions in which 'constitutional law was made,'" *see* Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AJIL 1 (1981).

revenues; and Member States actively cooperate also in matters lying beyond Community competence, especially with regard to foreign policy, although outside the framework of Community institutions.

The European process of integration raises questions that have direct parallels in the community-building federal experience in the United States. The American federal system has, over the course of the last two hundred years, worked out solutions to the complex relationships between the Federal Government and the individual states and developed means for accommodating the conflicting interests of the individual states among themselves. The United States provides a fruitful contrast to the European Community because the United States has moved further along the continuum of federalism. Although approaches and solutions that work well in one system do not necessarily lend themselves to adoption by another, the lessons that can be drawn from the American experience should prove useful to federal experiments in Europe. It would not be possible to attempt here a comprehensive analysis of the American techniques of federalism,[3] nor would it be useful because they do not all lend themselves to comparison with the European Community. Some of the American tools of legal integration could not be applied in Europe – supposing one thought it desirable to do so – unless the Treaties of Paris and Rome were first drastically amended. Any such attempt would encounter major political difficulties. Consequently this chapter focuses on those aspects of the American federal system which are more relevant in a critical analysis of the instruments for legal integration operating in Europe.

This chapter first deals with problems of Community competence, in order to briefly state the background of our analysis. In both the United States and the European Community, the central authorities have limited powers and the courts have played an important role in defining them. Both the Federal Government and the Community have not yet made use of a substantial part of their existing or prospective powers. When they have used them, the States' legislation has often been pre-empted, although one may find a different attitude towards pre-emption in the American and Community courts. Moreover, the Federal Government in the United States may authorize state activity otherwise not within the state's competence, whereas in the Community transfer of power from the Member States to the Community is generally deemed to be irreversible.

The next portion of this chapter deals with integrated legislation, both uniform and nonuniform. The discussion is centered on the scope for improvement of Community regulations and directives as instruments for legal integration. Although the American Constitution makes no specific provision for instruments like directives, there exist statutes quite analogous to directives. A similar result may also be achieved in the United States by the use of financial

[3] For a more complete analysis of the techniques of legal integration in the United States, *see* P. Hay & R. D. Rotunda, The United States Federal System: Legal Integration in the American Experience (Milan, Giuffrè, 1982). This book was written for the European perspective.

incentives, which promotes integration with a minimum of federal intrusion because the states, in theory at least, may reject the financial incentives if they choose. In addition, the Federal Government can promote nonuniform legislation (when nonuniformity is considered desirable) by granting the states authority, within limits, to modify federal law. At the same time, the use of compacts (made with the consent of Congress) between two or more of the states allows for needed diversity, and generally adds to federal law, whereas agreements between two or more Member States of the Community do not pertain to Community law (although arguably when the interpretation of a convention is entrusted to the Court of Justice, that convention is put into a functional relationship with Community law).

The last portion of this chapter analyzes types of parallel developments in the legislation of Member States of the Community or of the several states, including the use of uniform and model acts in the United States – that is, efforts by the individual states to promote uniformity without incentive from the central government – and the use of restatements and other unenacted codifications.

The European Community, like the United States, is engaged in a process of community building using the tools of legal integration discussed in this chapter. The process continues. Uniformity is often desirable, but there are instances in which diversity adequately controlled may be more beneficial. The search must be for instruments which are sufficiently flexible in order to accommodate the variable needs and which allow for the development of a more constructive cooperation.

II. Community Competence

A. Defining the Powers of the Central Authority

Community competence mainly consists of a lengthy series of enumerated powers attributed to Community institutions by the Treaties. Article 3 of the EEC Treaty provides a brief summary of the powers given under that Treaty,[4] while article 2 describes the general purposes of the Community for which those powers are given; the ultimate goals are stated in the preamble.

Community institutions have resorted on many occasions – particularly during the transitional period – to the theory of implied powers, a theory which has been extensively developed with reference to the "necessary and proper" clause of the U.S. Constitution.[5] The European Court has accepted this theory in general terms. In *Fédération Charbonnière de Belgique v. The*

[4] "[T]he activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: [the matters listed in paras. (a)–(k)]."

[5] U.S. CONST. art. I, § 8, cl. 18, which grants Congress the power: "To make all laws which shall be necessary and proper for carrying into execution the foregoing

High Authority,[6] notwithstanding the lack of any express power conferred upon the High Authority to fix prices for Belgian coal under section 26 of the Convention on the Transitional Provisions, the Court upheld the High Authority's power by stating that, according to a "rule of interpretation generally accepted in both international and national law," "the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."[7] In recent case law the Court has tended to reach similar results more through an extensive interpretation of the enumerated powers than through an assertion that some powers had been implicitly conferred because they were considered to be a necessary instrument for exerting a power which was specifically given. The most significant use of the theory of implied powers made recently by the Court was in the field of external relations. The following passage contained in the decision of the *Kramer* case provides an apt example: the Community's "authority to enter into commitments ... arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted, within the framework of these provisions, by the Community institutions."[8]

powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof."

The leading American case is McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), in which Marshall, C. J., upheld the power of Congress to charter the second Bank of the U.S., even though the Constitutional Convention had rejected a motion to empower Congress to "grant charters of incorporation," a fact not mentioned by Marshall. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 115 n. 18 (St. Paul, West Pub. Co., 1978). Where the Federal Government is pursuing a legitimate goal relating to one of its enumerated powers, it has incidental, implied powers to accomplish its ends. These implied powers included powers of sufficient magnitude to deal with national problems. Marshall carefully noted that the fact that a power is "implied" or "incidental" does not entail that it is "inferior"; an implied power could also be very important. 17 U.S. (4 Wheat.) 316, 413–16 (1819).

Marshall derived the doctrine of implied powers from the principle that every legislature must have the appropriate means to carry out its powers and from the necessary and proper clause. Marshall gave what has become the classic test for the existence of a federal power: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 316, 421 (1819). Under this test a federal act is valid so long as it bears a reasonable relationship to an enumerated power. Hence the Court upheld the legislation providing for the second Bank of the U.S. because there was a connection between it and the powers granted to "lay and collect taxes; to borrow money; to regulate commerce; and to raise and support armies and navies." 17 U.S. (4 Wheat.) 316, 407 (1819).

[6] Case 8/55, [1954–56] ECR 245.

[7] *Id.* at 299.

[8] Joined Cases 3, 4 and 6/76, Cornelis Kramer and Others, [1976] ECR 1279, 1308. Again in the field of external relations, in Opinion 1/76, given pursuant to Art.

Up to the time when the Community started to pursue policies not regulated in the Treaties,[9] the extensive interpretation of enumerated powers and the assertion of the existence of implied powers made it hardly necessary for Community institutions to act on the basis of article 235 of the EEC Treaty and of the analogous provisions in the other Treaties.[10] Article 235 provides:

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

While article 235 is designed to allow Community institutions to exert powers which are not given, either explicitly or implicitly, by other provisions in the Treaty, it is intended to do so only within the limits of what is "necessary to attain ... one of the objectives of the Community."[11] Thus, a different concept

228 (1) EEC (Draft Agreement establishing a European laying-up fund for inland waterway vessels), [1977] ECR 741, 755, the Court said that "the power to bind the Community *vis-à-vis* third countries ... flows by implication from the provisions of the Treaty creating the internal power." Another application of the theory of implied powers in the same field was made in Ruling 1/78, delivered pursuant to Art. 103 EAEC (Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports), [1978] ECR 2151, 2172.

[9] The turning point is generally indicated in a resolution taken by the Summit Meeting of 19–20 Oct. 1972. In the Declaration approved at the Conference, the Heads of State or Government of the nine Members and future Members (the latter being the three Member States which entered the Community in 1973) stated that: "They agreed that in order to accomplish the tasks laid out in the different action programmes, it was advisable to use as widely as possible all the provisions of the Treaties including Article 235 of the EEC Treaty." *The First Summit Conference of the Enlarged Community*, BULL. EC 10–1972, p. 9, at p. 23.

[10] ECSC Treaty, art. 95, para. 1, substantially corresponds to EEC Treaty art. 235, while para. 2 concerns the possibility of inflicting "penalties." Paras. 3 & 4 provide for the so-called "little revision," *i.e.*, the adoption of "appropriate amendments" in order "to adapt the rules for the High Authority's exercise of its powers." The latter paragraphs could have been invoked in order to give para. 1 a restrictive interpretation. However, the Court has barred this possibility, finding that "the Treaty patently intended to exclude the use of the third paragraph of Article 95 as a means of conferring new powers on the High Authority." Opinion of 17 Dec. 1959, [1959] ECR 266, 270. The Court has also maintained that "that provision cannot be invoked in order to amend the relationship between the powers of the Community and of the Member States as established by the Treaty." Opinion of 4 March 1960, [1960] ECR 46, 50.

[11] As the Court said in Case 38/69, Commission v. Italian Republic, [1970] ECR 47, 56: "Although the effect of the measures taken in this manner by the Council is in some respects to supplement the Treaty, they were adopted within the context of the objectives of the Treaty."

of Community competence emerges, one that encompasses the area in which the Community may act, although its institutions may not yet have acquired the necessary powers.

If the reference to the "objectives of the Community" were taken as implying the existence of Community competence to pursue all the purposes set out in the preamble, Community activity could concern virtually anything that would bring the "peoples of Europe" into a "closer union."[12] This interpretation could hardly have been the intention of the Member States when concluding the EEC Treaty. It is more reasonable to read article 235 as referring to other provisions in the Treaty, especially article 2.[13] If the latter provision is not interpreted in conjunction with article 3, which enumerates Community activities "for the purposes set out in Article 2," Community competence appears to be very wide and it clearly would be impossible to define it in precise terms.[14]

Since unanimity is required for the Council to act on the basis of article 235, no Member State is likely to challenge, or indeed can be in the position to challenge – as acquiescence is implied – the assertion of Community competence which is a prerequisite for an act to be taken. The Danish Government, which currently is the most critical about use of Community powers under article 235 over areas not yet covered by Community law, could not refrain from expressing its support for the use of this provision made by the Council in ap-

[12] Some authors have expressed the opinion that the preamble could be used to justify the allocation of powers to Community institutions under EEC Treaty art. 235. *See, e.g.*, Trabucchi, *Preambolo*, in 1 TRATTATO ISTITUTIVO DELLA COMUNITÀ ECONOMICA EUROPEA: COMMENTARIO 17, 22 & 25 (R. Quadri, R. Monaco & A. Trabucchi eds., Milan, Giuffrè, 1965) [hereinafter COMMENTARIO CEE]; Vignes, *Préambule*, in 1 LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE 1, 9–10 (J. Mégret, J.-V. Louis, D. Vignes & M. Waelbroeck eds. & co-authors, Brussels, Eds. de l'Univ. de Bruxelles, 1973); Schepers, *The Legal Force of the Preamble to the EEC Treaty*, 6 EUR. L. REV. 356 (1981). *But see, e.g.*, Lauwaars, *Art. 235 als Grundlage für die flankierenden Politiken im Rahmen der Wirtschafts- und Währungsunion*, 11 EuR 100, 102 (1976), for a critical appraisal of this view. Tizzano, *Lo sviluppo delle competenze materiali delle Comunità europee*, 21 RIV. DIR. EUR. 139, 167–68 (1981), notes that no Community act based on art. 235 has ever referred to the preamble.

[13] Tizzano, *supra* note 12, at 167–72, observes that Community acts based on art. 235 have mainly referred to art. 2 and sometimes have invoked art. 3 or other provisions in the Treaty, but that this often amounted to mere lip service: according to practice, Community secondary legislation may cover anything that concerns economic relations.

[14] The Court's case law has not yet been developed on this question. When considering Council Regulation (EEC) No. 803/68 of 27 June 1968, on the valuation of goods for customs purposes, JO No. L 148, 28 June 1968, p. 6 ([1968] I OJ (spec. Eng. ed.) at 170), the Court asserted that the use of powers under art. 235 was justified in this case with reference to art. 3. The Court noted that "the establishment of a customs union between the Member States is one of the objectives of the Community under Article 3(a) and (b) of the Treaty." Case 8/73, Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH, [1973] ECR 897, 907.

proximately 150 cases in the period 1973–1979.[15] Moreover, if a question of validity of an act taken on the basis of article 235 were ever to be referred to the Court of Justice by a Member State court, it would be unlikely for the Court to reverse the Member States' acknowledgement of the existence of Community competence under the Treaty. An indication of the Court's attitude can be taken from the Court's failure to comment on the Community's competence with regard to the protection of the environment under article 235, although in two cases involving the non-fulfilment of two directives concerning biodegradability of detergents and the sulphur content of some liquid fuels, the Italian Government had suggested in its defence that these directives were enacted "on the fringe" of Community competence.[16]

All this does not make the question of defining Community competence a merely theoretical problem. Whenever such competence exists and no express or implied powers are allocated to the Community, an objection on the part of a Member State to the use of powers by the Council under article 235 prevents an act from being taken; however, a systematic objection to the use of Community powers in matters lying within the Community's competence may well constitute a breach of the Member States' obligation, under article 5 of the EEC Treaty, to "facilitate the achievement of the Community's tasks." Moreover, since, under that same article, Member States "shall abstain from any measure which could jeopardise the attainment of the objectives" of the Treaty, individual Member State action in areas pertaining to Community competence may represent a breach of an obligation under the same provision of the Treaty; this would depend on the character of the action involved and of the objective of the Treaty.

[15] The text of the *pour-mémoire* presented by the Danish Secretary of State, N. Ersboll, at the Council meeting of 18 March 1980 is reproduced in Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty*, 18 C.M.L. Rev. 447 (1981).

[16] The two cases concerned Council Directive (EEC) No. 73/404 of 22 Nov. 1973, OJ No. L 347, 17 Dec. 1973, p. 51, and Council Directive (EEC) No. 75/716 of 24 Nov. 1975, OJ No. L 307, 27 Nov. 1975, p. 22. Both had been taken on the basis of EEC Treaty art. 100 and the Court merely said that "provisions on the environment may be based upon Article 100 of the Treaty." Case 91/79, Commission v. Italian Republic, [1980] ECR 1099, 1106; Case 92/79, Commission v. Italian Republic, [1980] ECR 1115, 1122. The position of the Italian Government was summarized in both cases by the Court in the following words: "the Italian Government states that it does not intend to raise the question whether the directive is valid in the light of the fact that combating pollution is not one of the tasks entrusted to the Community by the Treaty. Nevertheless it feels that the matter lies 'on the fringe' of Community powers and that this is actually a convention drawn up in the form of a directive." [1980] ECR 1099, 1103; [1980] ECR 1115, 1119. A totally critical view of the existence of Community competence with regard to environmental questions had been expressed especially by E. Grabitz & C. Sasse, Umweltkompetenz der Europäischen Gemeinschaften. Vorschlag zur Ergänzung des EWG-Vertrages (A59 Beiträge zur Umweltgestaltung) (Berlin, Erich Schmidt, 1977).

On the other hand, if some Community action is desired in an area which lies outside Community competence, an international agreement among the Member States would be required. This agreement need not be a formal amending treaty. Politically, an informal agreement may raise less problems, although even this type of agreement would not be easily forthcoming. Some Member States are likely to object on principle, and the Danish Government would no doubt recall article 20 of the Danish Constitution, under which to adopt a bill for the transfer of sovereign powers to an international organisation the approval of "a majority of five-sixths of the members of the Folketing shall be required."[17]

B. The Relationship Between the Powers of the Community and of the Member States: The Problems of Pre-Emption and of Restoring Member States' Powers

Powers given to the Community were originally Member States' powers. The conclusion of the Treaties establishing the Community did not create a legal vacuum in the areas in which competence was given to the Community institutions. In the absence of Community measures, Member States' legislation continues to apply, nor are States prevented from altering their own legislation.[18] Pre-emption of Community law over Member States' legislation has taken place only gradually, with the development of Community secondary legislation. This has greatly varied according to subject matter; there are still various matters for which Community institutions were given powers explicitly but which are substantially covered by Member States' legislation. As an example, one could take protection of fisheries, over which the Court recognized on several occasions the provisional existence of a concurrent competence on the part of Member States.[19]

[17] If only the majority required for the passing of ordinary bills is obtained, and the Government maintains the bill, this will have to be submitted to a referendum. *See* Lachmann, *supra* note 15, at 450.

[18] One of the decisions in which the Court made it particularly clear that there is an area where Community and Member States have a concurrent competence was Case 22/70, Commission v. Council, [1971] ECR 263 (*re* the European Road Transport Agreement (ERTA)). With regard to the area of competence in which powers could be exerted by Community institutions only on the basis of art. 235, the Court said: "Although Article 235 empowers the Council to take any 'appropriate measures' equally in the sphere of external relations; it does not create an obligation, but confers on the Council an option." *Id.* at 268.

[19] Joined Cases 3, 4, and 6/76, *Kramer*, [1976] ECR 1279, 1310; Case 61/77, Commission v. Ireland, [1978] ECR 417, 447–49; Joined Cases 185 to 204/78, Criminal proceedings against Firma J. van Dam en Zonen and Others, [1979] ECR 2345, 2360. In Case 804/79, Commission v. United Kingdom, [1981] ECR 1045, 1075–76, the Court thus qualified the Member States' right to take conservation measures:

> As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest,

A parallel could be traced between the expansion of Community law and the way in which in the United States federal legislation came to regulate exclusively matters over which the several states originally had concurrent powers. In both cases centralized legislation not only overrides conflicting state legislation,[20] but is also potentially exclusive of state legislation; again in both cases the area of exclusive competence varies with time. In the United States as well as in the Community, several difficulties are involved in practice in dividing the area of exclusive centralized competence from the one in which states enjoy concurrent powers.

In the United States, federal legislation does not necessarily pre-empt parallel state legislation which is otherwise validly enacted. Recent Supreme Court case law requires that Congress "manifest its intention clearly."[21] However, Congress need not manifest its intention by explicitly providing that the federal statute pre-empts the state law. Rather, the Court seeks to find the intent of Congress. If this intent is not clear from the language of the statute – that is, if Congress did not explicitly provide that the federal law does, or does not, pre-

> a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155, in conjunction, in this case, with the Decision of 25 June 1979 and the parallel decisions, gives to the Commission.

The Member States' obligations in this and similar circumstances will be discussed *infra* at § III.A.

[20] In Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., [1978] ECR 629, 643, the Court expressed the principle of supremacy in the following terms:

> in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision or current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions.

The existing problems with regard to recognition of the principle of supremacy in some Member States are too complex to be adequately dealt with in this Chapter. Arguably those problems do not have a great practical significance and in all the Member States the principle of supremacy is accepted in substance by the courts.

[21] New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 413 (1973), quoting Schwartz v. Texas, 344 U.S. 199, 202–03 (1952). *See also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978) ("This Court is generally reluctant to infer preemption . . .."); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (the Court will not find that a state law dealing with family and family property law is pre-empted unless the state law does "major damage" to "clear and substantial" federal interests; "mere conflict" in the words of two statutes does not imply federal pre-emption).

empt state law – then Congress' intention may be inferred from the pervasiveness of the federal scheme,[22] the need for uniformity,[23] or the danger of conflict between the enforcement of state laws and the administration of federal programmes.[24]

Community law, when it substantially regulates a subject matter, is generally taken to pre-empt Member State legislation except in the cases in which Community law provides for the contrary.[25] A change of system would allow

[22] *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (state taxes as applied to commerce by non-Indians on an Indian reservation pre-empted by pervasive federal regulation).

[23] *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977) (state may not enact food labeling requirements which do not permit "reasonable weight variations" when the federal law allows such reasonable variations in accuracy due to moisture loss during distribution because the state law conflicts with the goal of the federal law to facilitate value comparisons).

[24] *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497, 505–10 (1956) (enforcement of state sedition acts presents serious danger of conflict with administration of the federal program because sporadic local prosecutions – or even prosecutions by private individuals, as allowed by the Pennsylvania law – may obstruct federal undercover operations and enforcement plans).

[25] Several ECJ decisions deal with the question of pre-emption. The Court has asserted the principle of pre-emption in general terms. *See, e.g.*, Case 41/76, Suzanne Criel, née Donckerwolke and Henri Schou v. Procureur de la République au Tribunal de Grande Instance, Lille and Director General of Customs, [1976] ECR 1921, 1937 ("As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113 (1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community"); Joined Cases 16 to 20/79, Openbaar Ministerie v. Joseph Danis and Others, [1979] ECR 3327, 3339 ("in sectors covered by a common organisation of the market, and *a fortiori* when that organisation is based on a common price system, Member States can no longer take action, through national provisions adopted unilaterally, affecting the machinery of price formation as established under the common organisation"). However, especially with regard to agriculture, the Court has often found that Community secondary legislation has not pre-empted the field. Recent surveys of ECJ decisions concerning pre-emption with regard to common organisations of agricultural markets give a varied picture. *See, e.g.*, Louis, *Quelques réflexions sur la répartition des compétences entre la Communauté européenne et ses Etats membres*, 2 Rev. int. eur. 355, 364–70 (1979); Tizzano, *supra* note 12, at 207–09; J. Usher, European Community Law and National Law. The Irreversible Transfer? 43–55 (London, Allen & Unwin, 1981); Waelbroeck, *The Emergent Doctrine of Community Pre-Emption – Consent and Re-Delegation*, in Courts and Free Markets: Perspectives from the United States and Europe 548, 555–67 (T. Sandalow & E. Stein eds., Oxford, Clarendon Press, 1982). Another area in which the question of pre-emption has been extensively discussed in Court decisions is the field of external relations. *See* Division of Powers Between the European Communities and Their Member States in the Field of External Relations (C.W.A. Timmermans & E.L. Völker eds., Deventer, Kluwer, 1981) [hereinafter Division of Powers]. Some aspects of the problems arising in this area will be analyzed *infra* at § IV.A.

greater flexibility but also add uncertainty, particularly in the beginning. Even the requirement of an explicit provision to prevent pre-emption would not be inconsistent with a more liberal attitude towards parallel Member State legislation.

Congress may authorize state legislation over certain matters considered to be covered by federal law.[26] Thus, in many areas an exclusive federal competence is not irreversible. There is a widespread conviction that, on the contrary, Community competence, once it has been asserted by Community institutions, is irreversible. When the Court, in a case brought against France under the Euratom Treaty, maintained that powers conferred on Community institutions could not "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,"[27] it took mainly into account unilateral action on the part of one of the Member States, rather than Community secondary legislation authorizing Member State action. However, the decision was written in more general terms, and the case law could well be read as preventing any Community measure intending to restore Member States' competence.[28]

The Court's approach seems too rigid. It may have been justified originally in view of the need for Community institutions to assert their competence and defend it from encroachments made by Member States. In the long run, this attitude may not necessarily be the one which best suits the Community's needs. A greater flexibility could persuade Member States to transfer larger powers to Community institutions, once they know that this transference is not an irreversible step.

III. Integrated Legislation

While the Treaties provide simple descriptions of the sources of central, integrated legislation, practice and the Court of Justice's case law have complicated the picture. Some of the effects defined in the Treaties have been qualified

[26] Leisy v. Hardin, 135 U.S. 100, 108–10 (1890); *In re* Rahrer, 140 U.S. 545, 560 (1891).

[27] Case 7/71, Commission v. French Republic, [1971] ECR 1003, 1018. In Case 48/71, Commission v. Italian Republic, [1972] ECR 527, 532, the Court asserted the existence of "a definitive limitation" on the Member States' rights.

[28] In practice, some exceptions to the principle of the "irreversible transfer" were made when the Community adopted certain temporary measures which ceased to have effect without any new provision being enacted. An example is given by Council Regulation (EEC) No. 2527/80 of 30 Sept. 1980, OJ No. L 258, 1 Oct. 1980, p. 1, laying down technical measures for the conservation of fishery resources. When the deadline set by this Regulation and extending regulations expired on 1 November 1981, certain Member States again adopted national measures. *See, e.g.*, BULL. EC 2-1982, at pp. 32–33, points 2. 1. 74–2. 1. 77.

and some unwritten limitations concerning the validity of Community legislative acts have been introduced; on the other hand, some acts have been given effects which are not indicated in the Treaties and new sources of Community law have developed.

A. Central Legislative Action: Regulations

Regulations are the most integrated form of Community secondary legislation. Article 189 of the EEC Treaty describes them as having "general application" and as being "binding" in their "entirety" and "directly applicable in all Member States." Practice has shown that many regulations, although "directly applicable," can in fact be applied only after some implementing legislation has been adopted, either by the Community or by the Member States. Council regulations often delegate power to the Commission to make implementing regulations. This procedure allows implementing legislation to be changed more swiftly when the need arises; and it is possible to avoid the situation of having a Council regulation which cannot be applied by making the date of its entry into force coincide with that of the implementing regulation. Instances in which regulations expressly or implicitly require implementing legislation on the part of the Member States[29] are hardly satisfactory, particularly when they could be avoided by careful drafting. The need for legislation on the part of Member States may arise although it has not been anticipated. In this case some Member State courts or even certain public authorities may do their utmost to give the regulation all its effects, while other courts or authorities may refrain from doing so.[30] While a situation of uncertainty is likely to develop,

[29] This fact is acknowledged in the Court's case law. *See, e.g.*, Case 31/78, Bussone v. Ministero dell'Agricoltura e Foreste, [1978] ECR 2429, 2444 ("The direct applicability of a regulation requires that its entry into force and its application in favour or against those subject to it must be independent of any measure of reception into national law. Proper compliance with that duty precludes the application of any legislative measure, even one adopted subsequently, which is incompatible with the provisions of that regulation. That prohibition is, however, relaxed to the extent to which the regulation in question leaves it to the Member States themselves to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation.").

[30] An apt parallel is offered by two decisions by German courts, concerning EEC Treaty art. 95, para. 1, which has been declared to be directly applicable by the ECJ (*see* Case 57/65, Alfons Lütticke GmbH v. Hauptzollamt Saarlouis, [1966] ECR 205, 210). According to art. 95, para. 1, Member States are under an obligation not to "impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products." While the *Finanzgericht des Saarlandes* (Judgment of 15 Nov. 1966, 15 EFG 76 (1967)) noted that German legislation concerning taxation of foreign products did not comply with article 95, but applied the said legislation all the same, the *Bundesfinanzhof* (Judgment of 11 July 1968, 14 RIW/AWD 354 (1968))

Member States will possibly be slow in recognizing the need for legislation and in adopting it. When, on the contrary, the Community legislator intends to require implementing legislation on the part of Member States, it would be clearer for anybody concerned with applying Community law if the part of the regulation which certainly requires such legislation were to be separated and to take the form of a directive.

Under article 189 of the EEC Treaty, regulations are designed to be "applicable in all Member States"; this is also specified by a clause appearing in each regulation. In the Court's report on the European Union the widespread conviction that Community law should uniformly apply in all the Member States was expressed with the following words:

> Any genuine European structure must involve that the rules in question should apply with the same force in all the Member States. Any departure from this principle would amount to a renunciation of the concept of a common rule, making the legal situation differ from state to state. This would be a step backwards from what has already been achieved.[31]

More recently the Commission expressed the view that "any deferred or differentiated application of Community law should cease as soon as circumstances allow."[32]

The opinion quoted here does not take into account the fact that under the EEC Treaty directives and decisions can be, and often are, addressed to one or only a few Member States. Regulations applying to only some of the Member States, or to only one Member State, are less frequent, but by no means rare. One can take as examples Commission regulations implementing EEC Council Regulation 3059/78 on common rules for imports of certain textile products originating in third countries,[33] article 11 of which provides for quantitative limits in specific regions, giving the Commission the power to make the necessary arrangements. Thus Commission Regulation 1776/82[34] concerned only imports into Italy of handkerchiefs originating in Malaysia, and Regulation 1777/82[35] only imports into the United Kingdom and Ireland of certain textile products originating in Singapore.

While it may be difficult to reconcile the idea that a regulation can apply to only a limited number of Member States with the letter of article 189 of the

used article 95 in order to apply the German legislation concerning the turnover tax on foreign products in such a way as to reduce the statutory tax to the amount of tax to which domestic products were liable.

[31] Bull. EC, Supp. 9/75, at p. 17.

[32] *The Transitional Period and the Institutional Implications of Enlargement*, Bull. EC, Supp. 2/78, at p. 17, point 52.

[33] Council Regulation (EEC) No. 3059/78 of 21 Dec. 1978, OJ No. L 65, 27 Dec. 1978, p. 1.

[34] Commission Regulation (EEC) No. 1776/82 of 1 July 1982, OJ No. L 197, 6 July 1982, p. 10.

[35] Commission Regulation (EEC) No. 1777/82 of 1 July 1982, OJ No. L 197, 6 July 1982, p. 12.

EEC Treaty, this practice corresponds to the effective need of having some Community acts which are immediately binding on a large number of natural or legal persons and which cover only that part of the Community in which a certain regulation is required. Legal integration does not necessarily imply uniformity of rules; it may well be that different rules applying to different sets of circumstances have a greater integrative value. Rules should be examined on their merits; when a Community institution adopts a rule intended to be applied only to parts of the Community, some reason that makes it compatible with the Community aims will probably be present.

Also with regard to the territorial application of regulations, anyone concerned should be in position to ascertain when a regulation applies. The standard clause concerning the applicability of regulations in all Member States should be omitted when such applicability is not intended. Moreover, if a regulation is designed not to be applied to some Member States – as, for instance, Council Regulation 1176/82[36] extending the suspension of imports of all products originating in Argentina – this should appear in the text of the regulation and not only in the verbatim records of the Council or in declarations to the press.

B. Coordinated Legislation Centrally Controlled

One of the forms of cooperation, devised in federal systems, between federal and state authorities is that the federal legislator adopts some acts which substantially regulate a subject matter, but leave certain gaps to be filled by state legislators. This technique has been applied in the Community Treaties by giving Community institutions the power to issue ECSC recommendations and EEC and Euratom directives.

The Constitution of the United States does not explicitly provide for federal legislative action equivalent to the use of directives as defined in article 189 of the EEC Treaty. However, one can identify analogous practices in limited spheres of national interest. These are characterized by a class of statutes which, while recognizing and providing for federal primacy in defining goals and guidelines, also create a significant role for the states in implementation.

In each case, Congress was sensitive to the fact that the important nature of the federal interest justified state submission and direct federal legislation, but the Federal Government was dependent on state cooperation for its success. This implied the return of a significant degree of autonomy to a level of government that is closer to the problems involved, and in a better position to formulate responsive solutions.

[36] Council Regulation (EEC) No. 1176/82 of 18 May 1982, OJ No. L 136, 18 May 1982, p. 1. This Regulation extended sanctions until 25 May 1982, when sanctions were extended indefinitely by Council Regulation (EEC) No. 1254/82 of 24 May 1982, OJ No. L 146, 25 May 1982, p. 1. They were lifted by Council Regulation (EEC) No. 1577/82 of 21 June 1982, OJ No. L 177, 22 June 1982, p. 1.

Whether labelled "New Federalism" or "Cooperative Federalism," in certain critical areas of national concern, a special "partnership" between the Federal Government and the states and localities is essential for the effective implementation of federal programmes. One of the areas in which the mode of legislation somewhat parallels the EEC directives is environmental law.

Reacting to the perceived inability of the states to check or reverse environmental degradation, Congress has enacted comprehensive statutes establishing environmental standards and control strategies. The Federal Government, however, is dependent upon state and local authorities to implement these policies for several reasons. The nation's size and geographic diversity obviously hamper federal enforcement efforts. Moreover, federal environmental goals could not be achieved without the cooperation of state government which has traditionally held responsibility for water supply, highway location, traffic control, mass transit, land use planning and other programmes related to environmental management. The inadequacy of federal implementation and enforcement resources to monitor and control numerous and diverse sources of environmental problems also inevitably results in federal dependence on coordination with state and local authorities.[37]

In areas of environmental concern the Federal Government and the federal Environmental Protection Agency (EPA) have enacted broad legislation that would achieve their federal purpose yet give the local authorities flexibility in implementation. Often under federal air and water pollution statutes the states are responsible for achieving federal objectives.[38] For example, the Federal Water Pollution Control Act as amended (FWPCA)[39] adopts the basic control strategy of "effluent limitations" which are enforced through the mechanism of the National Pollutant Discharge Elimination System (NPDES). The FWPCA prohibits any discharge of pollutants into the nation's waters without a NPDES permit. Therefore, the terms of individual NPDES permits provide the chief means of implementing the strict national standards mandated by the EPA. Congress vested this all-important authority to issue permits and administer the NPDES programme in the EPA as an initial matter. However, a state may administer its own NPDES programme and issue permits by securing EPA's approval if the state's proposed programme conforms to the pollution standards promulgated by the EPA. Unless the Administrator determines that the state's programme fails to meet the minimum federal "effluent limitations"

[37] *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1200–01 (1977); Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289 (1984).

[38] *See, e.g.*, 42 U.S.C.A. § 7410 (under the Clean Air Act states have authority in first instance to develop implementation plans to achieve federal ambient air quality standards); 33 U.S.C.A. §§ 1319 (a) (1) and 1342 (b) (states with regulatory programmes approved by EPA Administrator have initial responsibility for effluent limitations under the Federal Water Pollution Control Act).

[39] 33 U.S.C.A. §§ 1251–1376.

he must approve the proposal. In addition, the FWPCA makes it clear that Congress does not intend to pre-empt a state's efforts to enact requirements more stringent than the federal standards. It should be noted that by 1981 the EPA had granted authority to administer the NPDES programme to thirty-three states and the Virgin Islands.[40] Once approval is granted, the state assumes responsibility for evaluating and issuing permits.

The federal agency, however, retains authority to review approved state programmes. Although the Administrator pays occasional lip service to the importance of the role to be played by the states in this "partnership," the basic structure of the FWPCA, as well as its application in practice, clearly indicates that the Federal Government plays the dominant role in setting and implementing policy for water pollution control.[41] The permit programmes have implied a detailed federal review and close involvement at all stages. There can be no doubt that the federal EPA remains the "dominant agency for achieving the purposes and goals" of the Act "even after a state permit program has been approved."[42] The EPA may veto those permits which a state proposes to issue on the grounds that they are "outside the guidelines and requirements" of the Act.

Although the development of legislative techniques which can be assimilated to directives is only recent in the United States, it conveys the importance of the need in some areas for legislation affording leeway for state authorities with regard to the implementation of common standards and enunciated goals. United States practice also shows that, under appropriate conditions, flexibility may be compatible with keeping the federal authorities in overall control.

1. Implementation of EEC Directives

There is little doubt that the major problems facing the operation of Community secondary legislation concern the implementation of directives. Member States have often taken too lightly their obligation to adopt the legislative or other measures required by directives although these had in most cases been approved by the Council with a unanimous vote of all the Member States' representatives. Delays are a fairly general feature, and in the case of some countries – Italy and, to a lesser extent, Belgium – the word "delays" sounds like a euphemism.

Under article 189 of the EEC Treaty, implementation of a directive should be assessed with regard to the question of whether the "result" required by the directive is achieved. The existence of national legislation purporting to implement a directive should not be the decisive factor. A "result" cannot be said to have been attained if Member State legislation has been adopted but is not applied – for instance, because standards fixed by legislation in pursuance to a

[40] This was stated in United States v. Cargill, Inc., 508 F. Supp. 734, 739 (D. Del. 1981).

[41] *See* H. Lieber, Federalism and Clean Waters. The 1972 Water Pollution Control Act 120–24 (Lexington, D.C. Heath & Co., 1975).

[42] Cleveland Electrical Illuminating Co. v. EPA, 603 F.2d 1, 5 (6th Cir. 1979).

directive are widely disregarded without any appreciably negative consequence. On the other hand, a "result" – even a firm "result" – could be achieved through Member State practice, irrespective of any legislative measure designed to implement the directive.

The Commission and the Court appear to follow a rather formalistic course. The Commission has insisted that there should be some general Member State provisions implementing the directive, and has not given weight to practice – possibly also in view of the difficulties in ascertaining practices. The Court has shared the Commission's attitude and considers that the absence of legislation or other general provisions implementing a directive justifies the conclusion that a Member State has infringed its obligations under the directive. The Court's numerous decisions concerning non-fulfilment of directives are often written in a telegraphic style. For instance, in a recent decision[43] that found that Italy had failed to comply with seven directives covering a variety of subjects, the reasons, apart from a list of the directives, were given in barely twenty lines. The argument in defence of Member States that compliance has been achieved through practice has always been summarily dismissed, without even an examination of the merits. The Court has invoked to this end the need for clarity and certainty.[44] In a recent decision,[45] concerning non-fulfilment by Italy of Council Directive 75/129 on collective dismissals, the Court did take into account some provisions included in collective agreements – however, these were considered as a source of rules rather than as an element of practice.

The Court's case law appears to encourage Member States which may desire not to implement a directive, to adopt some inadequate legislation and then to decline to take the additional measures which may be necessary in order to put it into practice. In order to avoid this risk, a change in the Court's attitude with regard to Member State practice – along the lines suggested above – would be required. The Commission could well second such a change, and assist by extending the range of its inquiries into what the Member States did, or did not do, towards achieving the "result" indicated by the directive.

[43] Case 252/80, Commission v. Italian Republic, [1981] ECR 2373.

[44] This was particularly evident in a decision on a case concerning the non-fulfilment of various technical directives relating to motor vehicles and tractors on the part of Belgium, Case 102/79, Commission v. Kingdom of Belgium, [1980] ECR 1473, 1486. The Court said:

> It is ... essential ... that each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty in legal situations which directives seek for the benefit of manufacturers established in other Member States. Mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation imposed by Article 189 on Member States to which the directives are addressed.

[45] Case 91/81, Commission v. Italian Republic, [1982] ECR 2133, 2140.

The fact that some provisions of a directive may have, as the Court has asserted on various occasions, direct effects, cannot fully absolve a Member State from failure to comply with obligations under a directive[46] since it is highly unlikely that the mere existence of such effects influences practice sufficiently. However, the possibility for an individual to invoke a directive before a Member State court adds significantly to the value of directives as a source of Community law. The principle that directives may have, as such, direct effects – under conditions similar to those asserted for Treaty provisions and for decisions – was first formulated by the Court in the *Van Duyn* case[47] and represented a major development in Community law. Some Member States' courts have shown a certain reluctance to acknowledge the possibility that directives may produce direct effects; two higher courts – the French *Conseil d'Etat*[48] and later the German *Bundesfinanzhof*[49] – overtly challenged the principle formulated by the European Court. On the other hand, the Court has so far failed to draw from the principle in question all its implications.

First of all, direct effects are generally defined with regard to an individual's right to invoke a directive in court,[50] while it may be said that the right and

[46] As the Court said in Case 102/79, Commission v. Kingdom of Belgium, [1980] ECR 1473, 1481, the direct effect of a directive implies "the right of persons affected thereby to rely in law on a directive as against a defaulting Member State.... This minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189 cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive." However, the Commission appears to follow the policy not to proceed under EEC Treaty art. 169 when a Member State declares that it will not apply national legislation conflicting with a provision having direct effects and gives to this declaration an adequate publicity. *See* Ehlermann, *Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten durch die Kommission*, in EUROPÄISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT. FESTSCHRIFT ZUM 70. GEBURTSTAG VON HANS KUTSCHER 135, 145 (W. G. Grewe, H. Rupp & H. Schneider eds., Baden-Baden, Nomos, 1981). The view that implementing measures are required also in the presence of provisions having a direct effect was defended by Easson, *The "Direct Effect" of EEC Directives*, 28 I.C.L.Q. 319, 349–51 (1979).

[47] Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337, 1348. In two previous decisions the Court had said that a directive could have a direct effect in conjunction with provisions included in the EEC Treaty or in decisions. *See* Case 9/70, Grad v. Finanzamt Traunstein, [1970] ECR 825, 838–39; Case 33/70, SpA. SACE v. Ministry for Finance of the Italian Republic, [1970] ECR 1213, 1223–25.

[48] C.E. (F), Judgment of 22 Dec. 1978, Ministre de l'Intérieur v. Cohn-Bendit, [1978] Rec. Leb. 524, [1980] 1 C.M.L.R. 543.

[49] Bundesfinanzhof (D), Judgment of 16 July 1981, 27 RIW/AWD 691 (1981), [1982] 1 C.M.L.R. 527.

[50] *See, e.g.*, Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337, 1348 ("where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their

the corresponding obligation exist irrespective of a judicial decision, since the court only ascertains that rights and obligations arose at the time when the directive became operative. This is clearly recognized by the European Court's case law, as may be illustrated by the decision in the *Ratti* case.[51] The case arose from a reference by a judge in criminal matters, who was trying the head of an undertaking for labelling dangerous products inadequately; the defendant maintained that his action complied with a directive. The Court first defined the directive's effects in a judicial perspective, by stating that "the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law."[52] When addressing the merits, the Court's language became more general: "... after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law – even if it is provided with penal sanctions – which has not yet been adapted in compliance with the directive."[53] A change in the current definition of direct effects, so as to make it clear that these effects do not depend on their recognition by a court, would probably contribute to a greater awareness on the part of anybody concerned – especially public authorities – of a directive's effects; insofar as a directive has direct effects, public authorities must comply with it also in the absence of implementing legislation.

Another development, which would be in line with the case law concerning the direct effect of Treaty provisions, would be for the Court to recognize that directives may also have horizontal direct effects – that is effects between individuals.[54] Once it is accepted that directives may produce direct effects, there

national courts and if the latter were prevented from taking it into consideration as an element of Community law"). The same words were used in Case 51/76, Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen, [1977] ECR 113, 127.

[51] Case 148/78, Pubblico Ministero v. Tullio Ratti, [1979] ECR 1629.

[52] *Id.* at 1642. These lines were almost literally reproduced in Case 8/81, Becker v. Finanzamt Münster-Innenstadt, [1982] ECR 53, 70–71.

[53] Case 148/78, *Ratti*, [1979] ECR 1629, 1642. As early as 1968 the Belgian *Conseil d'Etat* expressed even more clearly that administrative authorities are bound by provisions that are included in directives and have direct effects, in a case concerning art. 3, para. 2, of Council Directive (EEC) No. 64/221 of 25 Feb. 1964, [1964] JO at p. 850 (No. 64, of 4 April 1964) ([1963–64] OJ (spec. Eng. ed.) at 117)). With regard to the expulsion of nationals of other Member States, art. 3, para. 2 stated that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures." The *Conseil d'Etat* considered *"que rien, ni dans la législation ni dans la réglementation, n'empêche le Ministre de la Justice de se conformer à l'article 3 de la directive; qu'il lui suffit de s'abstenir de renvoyer automatiquement un étranger lorsqu'il a fait l'objet de condamnations pénales."* *See* C.E. (B), Judgment of 7 Oct. 1968, T.Y. Corveleyn v. Etat Belge, [1969] Pas IV. 24; 5 C.D.E. 343, 346 (1969).

[54] This possibility has been advocated by several writers. *See*, among the earlier advocates, Stocker, *Le second arrêt Defrenne. L'égalité des rémunérations des travailleurs masculins et des travailleurs féminins*, 13 C.D.E. 180, 208–10 (1977); Wyatt, *Note*, 1

is little reason – apart from considerations of judicial policy in view of some of the Member States' attitudes – for maintaining, for instance, that Treaty provisions concerning non-discrimination with regard to nationality in matters of employment, as in the *Walrave* case,[55] or the principle of equal pay, as in the second *Defrenne* case,[56] should have horizontal direct effects, while similar provisions included in directives should not have the same effects.

The Court has indicated some broad criteria for establishing whether a provision included in the EEC Treaty, a decision or a directive produces direct effects.[57] It is rarely simple to apply these criteria to a particular provision; it is even more difficult to ascertain the existence of horizontal direct effects, since the Court has so far failed to elaborate some guidelines for identifying the instances in which these effects occur. In the case of directives and decisions this state of uncertainty could be partially removed by a more complete and detailed description of the conditions under which a provision has direct effects. Another remedy – which would not necessarily prevent the Court from reaching a different conclusion – would be offered if the relevant Community institution were to specify in the text of the directive or the decision which provisions, if any, were intended to produce direct effects and whether horizontal effects were also included.[58] It may well be that the Council would only rarely provide for direct effects, but this cannot be considered a major disad-

Eur. L. Rev. 414, 417 (1976). For a discussion of the problem *see especially* Easson, *Can Directives Impose Obligations on Individuals?*, 4 Eur. L. Rev. 7 (1979); Easson, *supra* note 46, at 342–43; Kovar, *L'intégrité de l'effet direct du droit communautaire selon la jurisprudence de la Cour de Justice de la Communauté*, in Das Europa der zweiten Generation. Gedächtnisschrift für Christoph Sasse 151, 163 (R. Bieber & D. Nickel eds., Baden-Baden, Nomos, 1981).

[55] Case 36/74, Walrave and Koch v. Association Union Cycliste Internationale, [1974] ECR 1405, 1418 ("Prohibition of ... discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.").

[56] Case 43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, [1976] ECR 455, 476 (Art. 119 applies "not only to the action of public authorities, but also ... to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.").

[57] In Case 8/81, Becker v. Finanzamt Münster-Innenstadt, [1982] ECR 53, 71, the Court indicated these criteria in the following way: "wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon."

[58] When direct effects are intended, it would be logical to publish the directive in the same part of the OJ in which regulations appear. Tomuschat, *Normenpublizität und Normenklarheit in der Europäischen Gemeinschaft*, in Festschrift zum 70. Geburtstag von Hans Kutscher, *supra* note 46, at 461, 472–73, suggests that all directives should be published in the same part of the OJ as regulations in view of the possibility that they may have direct effects.

vantage of the suggestion made above, since the Council can reach the same objective by using drafting techniques which are appropriate in the light of case law. On the other hand, once a directive specifies that it is to produce direct effects, public authorities would be more likely to comply with the obligations under the directive.

2. The Search for New Forms of Coordinated Legislation

In order to look for more radical remedies to the unsatisfactory state of the implementation of directives, a brief analysis of the circumstances that cause the Member States' failure in implementing them is required.

Dissatisfaction with the contents of directives on the part of non-fulfilling Member States can be only a minor cause. Most directives are adopted by unanimous vote, or anyway would not be enacted if one Member State raised a serious objection. It is true that some governmental departments or some regional authorities that are competent to implement a directive may not have had an opportunity to express their views; however, this can be the case of only a few directives, and is hardly likely to apply to the large number of technical directives which are in fact not implemented.

The current way in which directives are formulated can hardly provide a better explanation. The detailed character of many provisions included in directives may be inconsistent with the concept of directive as defined in the EEC Treaty, but no objection has been voiced about this aspect by Member States – whose Governments generally voted in favour of adopting them and thereby acquiesced in this practice – nor has the Court of Justice expressed any criticism. The Commission's suggestion,[59] that detailed provisions included in directives cause a "lack of interest" in their implementation or a "blatant hostility" on the part of Member States – a remark strangely voiced by the very institution which originated this practice – may have some elements of truth. However, Member States' legislators often pay little attention to the options left to them by directives, and in any case failure to implement directives is certainly not limited to those acts which include detailed provisions.

The main cause of failure appears to rest with the slowness of the legislative process in several Member States, coupled with the difficulties which may be encountered in drafting the required legislation. Inertia, rather than a negative attitude, seems to be the major cause of the present state of affairs.

The Commission has suggested that a general power of issuing regulations instead of directives should be given to the Council in the highly sensitive area of harmonization of legislations under article 100 of the EEC Treaty.[60] This

[59] *The Transitional Period and the Institutional Implications of Enlargement*, BULL. EC, SUPP. 2/78, at p. 16, point 51.

[60] *Id.* at p. 16, point 51. For a critical appraisal of this suggestion *see* Gaja, *Armonizzazione delle legislazioni a mezzo di regolamenti comunitari?*, 61 RIV. DIR. INT. 426 (1978).

proposal would involve a substantial encroachment on the competence of Member States and require a modification of the Treaty entailing political difficulties unlikely to be overcome in the present circumstances. The remedy suggested by the Commission may also be considered too radical, as the use of directives has not proved to be totally unsuccessful; the implementation of directives has been reasonably satisfactory in some Member States.

Some other system may be more acceptable to Member States, and also more justified in the light of practice. A directive could be accompanied by a regulation which may be designed to become applicable only with regard to the Member States which fail to implement the directive. A similar idea underlies the system in the United States whereby federal legislation may be modified, when it so provides, by state legislation, if a new state law is subsequently enacted: inertia thus favours federal uniformity. As an example, one may quote the Depository Institutions Deregulation and Monetary Control Act of 1980,[61] which provides that federal law governs certain transactions unless a state subsequently enacts a state law "which states explicitly and by its terms that such State does not want the [federal] provisions" to be applied "with respect to loans, mortgages, credit sales, and advances made in such State."

Another example is provided by bankruptcy laws. Congress is empowered, under article I, section 8, clause 4 of the Constitution "to establish ... uniform laws on the subject of bankruptcies." One of the basic purposes of the bankruptcy laws with respect to debtors that are individuals is to afford the debtor the opportunity to make a "fresh start" in life, free from harrassment by creditors and the worries associated with excessive indebtedness. To achieve this purpose, the federal bankruptcy law has established a schedule of exemptions. Specifically, under the Bankruptcy Reform Act of 1978,[62] all property of the debtor becomes property of the "estate" upon filing of a bankruptcy petition; however, an individual debtor is permitted to exempt certain property. Generally, the individual is able to retain his exempt property since the essential effect of such an exemption is to remove exempt property from liability for any debt of the debtor, with certain exceptions.[63] The Bankruptcy Code allows the debtor an election with respect to which exemptions he will claim, *i.e.*, federal or state. Under section 522 of the Code, an individual debtor may assert the exemptions to which he is entitled under the laws of the state of his domicile and under federal non-bankruptcy laws.[64] Alternatively, the debtor may claim the federal exemptions enumerated in section 522(d) of the Code. Section 522(b), however, provides that this does not apply if "the State law that is applicable to the debtor ... does not so authorize." Congress has thus allowed a state to

[61] Section 501 (b) (2), Pub. L. No. 96–221, 94 Stat. 132, 162 (1980).
[62] Pub. L. No. 95–598, 92 Stat. 2549 (1978) (codified at 11 U.S.C.A. § 101 ff).
[63] 11 U.S.C.A. § 522.
[64] Several federal non-bankruptcy laws provide for exemptions. They include 42 U.S.C.A. § 407 (social security payments), 5 U.S.C.A. §§ 729 & 2265 (civil service retirement benefits) and 45 U.S.C.A. § 352 (E) (veterans' benefits).

supersede the Code in the matter of election of exemptions and to limit the debtor to the exemptions provided by his domiciliary law.

If one wished to introduce into Community law a system whereby uniform rules are adopted in case of inertia on the part of Member States, it would be hard to justify under the EEC Treaty the possibility of the Council enacting regulations intended to be immediately applicable in all the Member States, when the Treaty only gives the Council the power to issue a directive.[65] In order that "action" may be viewed as "necessary" under article 235, failure on the part of Member States must have been previously established. This does not mean that a regulation could only be adopted after the deadline fixed by the directive has expired; at that time the non-fulfilling Member States would probably make it difficult for the Council to enact a regulation. Rather, this regulation could be issued at the same time as the directive, but clearly state that it becomes applicable only on condition that some time after the deadline fixed by the directive has passed and the Commission has ascertained – with a decision subject to review by the Court – that the directive has not been adequately implemented in one or more Member States. Since the "necessity" of a regulation only exists with regard to these Member States, the regulation should become applicable only to them.

Federal legislation in the United States often uses financial incentives in order to encourage states in taking some action the Federal Government wishes to be pursued, or else to prompt them to do something that they would not have otherwise undertaken. Incentives are extensively used, for instance, in order to induce state legislators, officials of state institutions, and others receiving federal funds, not to discriminate. The following provision of the State and Local Fiscal Assistance Act of 1972[66] may be taken as an example: "No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity funded in whole or in part with funds made available" under the Act.

An instance of the use of financial incentives in the context of federal cooperation is given by the Occupational Safety and Health Act of 1970.[67] An analysis of this Act shows how federal authorities tend to keep a continuous control over state activities which are financially encouraged. The Act intended, as one of its primary purposes, to ensure "safe and healthful working conditions" for every worker. One of the means for accomplishing this federal objective was

[65] Many authors hold the view that art. 235 cannot justify the use of a regulation over a certain matter when the Treaty only provides that a directive can be taken. *See* Ferrari Bravo & Giardina, *Art. 235*, in 3 COMMENTARIO CEE, *supra* note 12, at 1699, 1711; Easson, *supra* note 46, at 352.

[66] 31 U.S.C.A. § 1221 ff, § 1242 (a). *See generally* R. ROTUNDA, MODERN CONSTITUTIONAL LAW 221–23 (St. Paul, West Pub. Co., 1981).

[67] 29 U.S.C.A. § 651 ff.

by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith.[68]

Section 18 of the Act allows state authorities to devise their own plan to deal with perceived occupational safety and health needs in their individual state context while complying with federal minimum standards. After a state has submitted a proposed plan to the Secretary of Labor and the Occupational Safety and Health Administration (OSHA), a six-step federal approval process is commenced. The procedure entails: (1) submission and application for initial approval by OSHA, (2) initial approval by OSHA, (3) the developmental stage, (4) certification, (5) the operational stage, and (6) final approval.

A proposal for a state plan to deal with workplace conditions, pursuant to section 18(b) and (c) of the Act, must detail a programme for the state's development and enforcement of occupational safety and health standards and the assumption of jurisdiction over safety and health employment conditions in the state. The plan should contain, *inter alia*, enabling legislation, regulations, staffing projections and qualifications, standards and provisions for inspections, and prohibition against employee discrimination. This detailed document is submitted in the form of a proposal. To be considered "fully operational" a plan must meet all the criteria set forth above and the OSHA regulations at the time of its submission for approval. No state plan to date has been found to be "fully operational" at the time of submission. A plan that fails to meet one or more of the required statutory criteria but does contain assurances of future compliance and a timetable for meeting the necessary federal goals is considered "developmental." All state plans submitted thus far have fallen into this category.

As stated above, a "developmental" plan must meet the criteria set forth in the Act. This requires that the plan contains "satisfactory assurances" that the state will take the "developmental steps" necessary to bring the plan into conformity with the statutory and administrative criteria within a three-year period immediately following the commencement of operations under the plan. Although the Act indicates that the Secretary of Labor has discretion as to whether or not to exercise concurrent jurisdiction in the state, as a general matter federal and state agencies do maintain concurrent jurisdiction during this stage in the approval process.[69]

After OSHA has determined that the state has timely completed all necessary "developmental" steps, it "certifies" the completion of the developmental period. During the final evaluation process that follows, the plan is consid-

[68] 29 U.S.C.A. §651 (b)(11). §672 deals more specifically with grants.

[69] 29 U.S.C.A. §667 (e). *See, e.g., National Steel & Shipbuilding Co.*, 6 OSHC 1131 (1977) and *Par Construction Co., Inc.*, 4 OSHC 1779 (1976).

ered to be in its "operational" phase. During this stage in the approval process the plan is intensively monitored by federal authorities.

The entire approval process by OSHA is geared toward the ultimate goal of "final approval." Following final approval, OSHA technically should relinquish all enforcement authority, while retaining monitoring and evaluation jurisdiction pursuant to section 18(f) of the Act. After the approval, the plan must nevertheless continue to maintain standards "at least as effective as" the federal standards.[70] As a result, approved plans are subject to the Secretary's "continuing evaluation" and "whenever" he finds that there is a failure to "comply substantially with any provision of the State plan (or any assurance contained therein)," the Secretary may, after a hearing, withdraw approval of the plan. The Secretary is authorized to make grants to the states in developing their plans and also "to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary." For the latter purpose, "the Federal share for each State government... may not exceed 50 per centum of the total cost to the State of such a program."

In Community secondary legislation financial incentives have been sparsely used. One significant example is given by EEC Directive 72/159 on the modernization of farms and the related directives:[71] Community financial contributions were made available only if the Commission was satisfied that the Member State's implementing legislation conformed to the directives.

Financial incentives play a limited role in affecting Member State action subsidized by the Social and the Regional Funds.[72] With regard to the Social Fund,[73] Community institutions only approve requests for contributions submitted by Member States, and these requests may concern a large variety of actions: the Commission periodically establishes guidelines setting priorities,[74] but these too concern wide categories of actions, so that the Member State enjoys a considerable freedom of choice. Also the Regional Fund's impact is small, mainly because of the system of national quotas which was adopted from the time the fund was established in 1975.[75] As far as sums covered by na-

[70] 29 U.S.C.A. § 667 (c) (2). *See also* AFL-CIO v. Marshall, 570 F.2d 1030 (D.C. Cir. 1978).

[71] Council Directive (EEC) No. 72/159 of 17 April 1972, JO No. L 96, 23 April 1972, p. 1; Council Directive (EEC) No. 72/160 of 17 April 1972, JO No. L 96, 23 April 1972, p. 9; Council Directive (EEC) No. 72/161 of 17 April 1972, JO No. L 96, 23 April 1972, p. 15 ([1972] OJ (spec. Eng. ed.) at pp. 324, 332, 339.

[72] For a brief overview, *see* D. STRASSER, THE FINANCES OF EUROPE 203–10 & 218–22 (Brussels, EC Commission, 1980).

[73] The basic act is Council Decision (EEC) No. 71/66 of 1 Feb. 1971, JO L 28, 4 Feb. 1971, p. 15 ([1971] I OJ (spec. Eng. ed.) at 52), as amended by Council Decision (EEC) No. 77/801 of 20 Dec. 1977, OJ No. L 337, 27 Dec. 1977, p. 8.

[74] The more recent ones are the *Guidelines for the Management of the European Social Fund for the Years 1982 to 1984*, OJ No. C 110, 13 May 1981, p. 2.

[75] Council Regulation (EEC) No. 724/75 of 18 March 1975, OJ No. L 73, 21 March 1975, p. 1.

tional quotas are concerned, the Commission gives financial support to action which is basically decided by the relevant Member State. The Member States alone are entitled to submit requests; Community action is intended to be "in support of regional policy measures taken by the Member States." The influence of the availability of Community funds has also been minimal because some Member States have used contributions from the Fund as a reimbursement of national aid already given.[76] The area in which the Regional Fund may play a greater role is the 5% of the Fund earmarked by Regulation 214/79 for "specific Community regional development measures"; the first measures were provided by Regulations 2615-9/80.[77] Under the said Regulations, the Member State to which the specific measures are intended to apply must submit a programme for the Commission's approval.

No doubt financial incentives could play a greater role in Community secondary legislation, particularly in order to prompt Member States to implement directives. However, a significant development in this direction would depend on more resources being available to the Community. The maximum 1% of the value added tax levied in the Member States would have to be increased or alternative sources of further income would have to be agreed upon.[78] At the present time, it is difficult to foresee an agreement of all the Member States on increasing the Community budget significantly.

C. Other Sources of Central Law

1. International Agreements

a) Agreements Between the Community and Third States

Among the sources of Community law which are not included in the definition given in article 189 of the EEC Treaty,[79] international agreements concluded by the Community with third states constitute an important category. A basis for considering them a source of Community law can be found in article 228(2) of the EEC Treaty, which states that agreements concluded by the Community are "binding on the institutions of the Community and on Member States." The Court made it clear in the *Haegeman* case that agreements produce effects under Community law irrespective of subsidiary legislation implementing

[76] This practice, which is allowed under art. 4, para. 2(a) of Council Regulation (EEC) No. 724/75 (*supra* note 75), is widely considered to be unsatisfactory. *See* Delmotte & Gelée, *La dotation du Fonds européen de développement régional*, 22 R.M.C. 157 (1979).

[77] Council Regulations (EEC) Nos. 2615-9/80 of 7 Oct. 1980, OJ No. L 271, 15 Oct. 1980, p. 1.

[78] The present resources are allocated to the Community under Council Decision (EEC) No. 70/243 of 21 April 1970, OJ No. L 94, 28 April 1970, p. 19.

[79] Only the sources of greater practical importance are here considered – whether they are indicated in other Treaty provisions or not.

them.[80] According to the Court agreements may also have direct effects: for instance, in the *Bresciani* case the Court found that a provision in the Yaoundé Convention of 1963 conferred "on Community citizens the right, which the national courts of the Community must protect, not to pay to a Member State a charge having an effect equivalent to customs duties."[81] The Court has been reluctant, however, to recognize that provisions contained in a Community agreement may be invoked by interested parties: no doubt the Court's attitude has to some extent been influenced by the Member States' negative position towards the judicial assertion of the direct effect of international agreements – a position particularly evident in the *Polydor* case.[82]

In so far as a provision included in a Community agreement imposes an obligation on the Community but produces no direct effects, it is capable of affecting the validity of conflicting secondary legislation, but some implementing measure on the part of Community institutions is required. The Court has indicated on several occasions that the Community act by which an agreement is concluded – whether taken in the form of a decision or regulation – does not effect the implementation of the agreement.[83] This opens up a wide area in which secondary legislation is required but has not yet been enacted. In order to avoid the risk that a non-member State party to an agreement may be put in a position of advantage with regard to the Community, implementing legislation could be made conditional on reciprocity; however, this would have the serious disadvantage of making it difficult to ascertain whether a certain provi-

[80] Case 181/73, Haegeman v. Belgian State, [1974] ECR 449, 459–60. When considering the Association Agreement with Greece, the Court said:

> The Athens Agreement was concluded by the Council under Articles 228 and 238 of the Treaty as appears from the terms of the decision dated 25 September 1961. This Agreement is therefore, insofar as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177. The provisions of the Agreement, from the coming into force thereof, form an integral part of Community law.

[81] Case 87/75, Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze, [1976] ECR 129, 142.

[82] Case 270/80, Polydor Ltd. and RSO Records Inc. v. Harlequin Record Shops Ltd. and Simons Records Ltd., [1982] ECR 329, 340. In Case 104/81, Hauptzollamt Mainz v. Kupferberg, [1982] ECR 3641, the Court denied that the absence of reciprocity necessarily deprives an agreement of its direct effects. However, in this case also, as in the *Polydor* case and in other decisions, the Court gave to the provisions in the international agreement a narrower interpretation than to similarly worded provisions in the EEC Treaty. Thus, in the *Kupferberg* case direct effect was asserted by the Court, but was of little avail to the party which had invoked it.

[83] The Court has never drawn any consequence from the nature of the act – regulation or decision – by which the Council expressed its consent. In Case 87/75, *Bresciani*, [1976] ECR 129, the Court did not even make any reference, in the part of the judgment containing the reasons, to the fact that the Council had expressed its consent through a decision.

sion should be applied internally, unless the Commission was empowered to take a decision on this point.

b) Agreements Among the Member States

Also international agreements concluded by Member States among themselves may be a source of Community law. Member States often discuss Community affairs outside the framework of Community institutions – mainly in Conferences of Ministers and, more recently, in the Conferences of Heads of State or Government and in the European Council. Resolutions adopted by these Conferences or by the European Council may well constitute an informal international agreement. The same applies to Council resolutions, which are not binding as such. But it may not be easy to ascertain whether an agreement exists and which obligations it imposes on Member States; another difficulty is involved in finding out whether the agreement produces effects under Community law.

In the second *Defrenne* case the Court denied any effect under Community law to a resolution taken by a Conference of Ministers in 1961 with the purpose of deferring the application of the principle of equal pay under article 119 of the EEC Treaty.[84] On the other hand, in the case *France v. United Kingdom*, concerning the protection of fisheries, the Court found that the resolution adopted by the Council in 1976 at the Hague "in the particular field to which it applies, makes specific the duties of cooperation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community."[85] The Court stated that, by bringing some measures into force without seeking – as the Resolution required – "the approval of the Commission, which must be consulted at all stages of the procedure," the United Kingdom had "failed to fulfil its obligations under Article 5 of the EEC Treaty, Annex VI to the Hague Resolution and Articles 2 and 3 of Regulation No. 101/76."[86] It appears that, in the Court's view, an agreement may or may not produce effects under Community law according to its content. This view is not without merit, since an agreement which intends to justify the breach of a Treaty can be defined as illegal under the Treaty and it can be argued that there is no unwritten provision in Community law giving effect to such agreements.

A wide use of the source of Community law now under consideration would not be welcome, given the practical difficulties involved in ascertaining the effects which are produced under Community law. It would be much more convenient for the sake of certainty if agreements were transformed into the appropriate acts adopted by Community institutions. At least in matters for which Community competence is not controversial, if Member States really in-

[84] Case 43/75, *Defrenne* v. *Sabena*, [1976] ECR 455, 478. The Court stated that "the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification on the time-limit fixed by the Treaty."

[85] Case 141/78, French Republic v. United Kingdom, [1979] ECR 2923, 2942.

[86] *Id.* at 2943.

tend to accept obligations under an international agreement, there should be little difficulty for them to agree to have a Community act adopted by the Council.

2. General Principles of Law and "Federal Common Law"

In the United States there has been a substantial development of Federal Common Law with regard to issues both of substance and procedure. When federal statutes could govern an area but have not, federal courts have formulated Common Law rules to regulate matters within federal competence in order to protect federal interests. Thus in *Clearfield Trust Co. v. United States*,[87] the Supreme Court held that the question of whether the United States or a private party should bear the loss of a forged cheque issued by the United States should be governed by Federal Common Law rather than the state law dealing with commercial paper, because of the strong federal interests in a uniform rule. However, as the Supreme Court stated in *Wallis v. Pan American Petroleum Co.*,[88] it would be inappropriate to create Federal Common Law if state law did not represent "a significant threat to any identifiable federal policy or interest."[89]

The Court of Justice has mainly used techniques which evoke the existence of unwritten rules that the Court identifies and applies. The Court has invoked some general principles when interpreting written rules of Community law, but has been reluctant to assert that unwritten rules of Community law could independently impose obligations on Member States or on other subjects. Unwritten rules have been invoked mainly in order to delineate some checks on secondary legislation. Thus, in *Firma Max Neuman v. Hauptzollamt Hof/Saale* the Court asserted that the "wide liberty granted to the authors of a regulation," with reference to the date of entry into force of a Community act, cannot "be considered as excluding all review by the Court, particularly with regard to any retroactive effect."[90] The same approach was taken in the area in which the existence of "general principles of law" has been more frequently asserted – namely, the protection of human rights. As the Court stated in the celebrated *Internationale Handelsgesellschaft* case, "respect for fundamental rights forms an integral part of the general principles of law protected by

[87] 318 U.S. 363 (1943).

[88] 384 U.S. 63 (1966).

[89] *Id.* at 68.

[90] Case 17/67, [1967] ECR 441, 456. *See also* Case 155/79, AM & S Europe Ltd. v. Commission, [1982] ECR 1575, in which the Court established a principle of confidentiality. As Lord Mackenzie Stuart observed, "[the decision] is ... important ... also for the reason that, I think for the first time, the Court, having deduced an unwritten principle of Community law from a study of the comparative law of the Member States, has invoked it to limit the application of what would otherwise be the unqualified terms of a Community regulation. ..." Lord Mackenzie Stuart, Introductory Talk 13 (mimeo of speech delivered on the occasion of the visit of the European Court of Human Rights to the ECJ, Luxembourg, 29 April 1983). *See also* Goffin, *Observations*, 18 C.D.E. 391, 394, 405 (1982).

the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[91] In the third *Defrenne* case the Court made the effects of those principles clear, although somewhat implicitly. The Court said that the right not to be discriminated against in matters of employment according to sex was "part of those fundamental rights" whose respect is "one of the general principles of Community law"; however, this did not entail an obligation for Member States under Community law not to adopt or allow discriminations "as regards the relationships of employer and employee which are subject to national law."[92]

There would be little justification for advocating that the Court should take a less cautious course. Given the profound variety among the Member States' legal systems, any general principle that the Court identifies departs to some extent from the principles applied in several Member States. It would be impossible to maintain that Member States have a common legal background which could be considered as underlying the Treaties. For the Court to state a general principle in Community law is to adopt what appears to be the better rule after a comparative analysis. It would be hard to assume that Member States could accept that the Court should play such a role extensively – even less so with regard to matters which are not yet covered by Community law.

[91] Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125, 1134. In Case 4/73, J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission, [1974] ECR 491, 507, the Court said that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can provide guidelines which should be followed within the framework of Community law." In later decisions more explicit references were made to the European Convention on Human Rights. However, it is clear from the case law that the ECHR is only one of the elements that the Court will take into consideration when ascertaining the existence of a general principle. In Case 44/79, Hauer v. Land Rheinland-Pfalz, [1979] ECR 3727, 3745–46, the Court gave only minor importance to art. 1 of the First Protocol to the Convention, because in the Court's view it did not "enable a sufficiently precise answer." The same approach was taken in Case 136/79, National Panasonic (UK) Ltd. v. Commission, [1980] ECR 2033, 2057, although the Convention was taken into greater account and the formula was slightly changed. Here the Court said that "fundamental rights form an integral part of the general principles of law, the observance of which the Court of Justice ensures, in accordance with constitutional traditions common to the Member States and with international treaties on which the Member States have collaborated or of which they are signatories."

[92] Case 149/77, *Defrenne* v. *Sabena*, [1978] ECR 1365, 1378.

[93] Several Council decisions authorized the extension or the tacit renewal of bilateral trade agreements concluded by Member States with a non-member State. *See, e.g.*, Council Decision (EEC) No. 82/100 of 16 March 1982, OJ No. L 83, 29 March 1982, p. 13.

[94] The assertion of an exclusive power on the part of the Community to conclude an agreement in matters covered by EEC Treaty arts. 113 & 114 was the substance of the Court's Opinion 1/75, given pursuant to Art. 228 EEC (Understanding on a

IV. Coordinated Parallel Developments

A. The Supervision of International Agreements Concluded by Member States

1. The Extent of the Retention by Member States of Their Treaty-Making Power

The case law of the Court of Justice has developed some fairly straightforward principles in order to define the Community's and the Member States' treaty-making power. However, their application may give rise to uncertainties with regard to the negotiation of many treaties and the Court has allowed, on the basis of specific circumstances, some derogations from those principles (some further derogations, on which the Court has not yet ruled, are admitted by certain Council decisions[93]). According to the Court, the Community is exclusively competent to conclude an international agreement if one of the Treaties establishing the Community so provides (for instance, agreements relating to "commercial policy" under article 113 of the EEC Treaty), or if this is implied by the fact that the Treaties give the Community competence to regulate the matter through its secondary legislation and the Community institutions have availed themselves of their competence to do so.[94] When the subject matter of an agreement lies in part outside the Community's competence, there is the need for Member States to take part in the agreement alongside the Community (so called mixed agreements).[95] Finally, whenever the subject matter per-

Local Cost Standard), [1975] ECR 1355. In *Kramer* the question of the Member States' authority in concluding an agreement on fisheries was raised because the Community had "not yet ... fully exercised its functions in the matter." Joined Cases 3, 4 and 6/76, *Kramer*, [1976] ECR 1279, 1310.

[95] This was clearly stated by the ECJ in Ruling 1/78, delivered pursuant to Art. 103 EAEC (Draft Convention on the Physical Protection of Nuclear Materials), [1978] ECR 2151, 2179 ("Where it appears that the subject-matter of an agreement or contract falls in part within the power and jurisdiction of the Community and in part within that of the Member States there are strong grounds for using the procedure envisaged by Article 102 of the Treaty whereby such obligations may be entered into by the Community in association with the Member States."). In Opinion 1/78, given pursuant to Art. 228(1) EEC (International Agreement on Natural Rubber), [1979] ECR 2871, 2918, the Court stated that, if the financing of the fund to be established under the International Agreement on Natural Rubber was "to be by the Member States," that would "imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community." The Court added: "The exclusive competence of the Community could not be envisaged in such a case." In this set of circumstances, Member States and the Community will in practice interfere with the negotiation of matters lying outside their respective competences. Thus, the practice of mixed association agreements, while it certainly allowed Member States to play a role that was not envisaged by the EEC Treaty, also gave Community institutions some possibility of action with regard to any matter, pertaining to the exclusive competence of Member States, which may have been included in the object of negotiations.

tains to an area which the Community institutions can regulate, but have not yet done so, the Community possesses a treaty-making power, but one or more Member States may also conclude agreements, at least provisionally, on their own.[96] In the latter case, there is also the possibility of mixed agreements, in which the respective role of Community institutions and Member States may be hard to define.

It is clear from the Court's case law that only agreements concluded by the Community, and only in so far as the Community is competent to regulate the subject matter of the agreement, pertain to Community law.[97] Agreements concluded by Member States do not, with the exception of agreements which bind the Community because of specific provisions in the Treaties or because the Community is deemed to have succeeded to the agreements of its Member States.[98]

Whenever there is an exclusive treaty-making power on the part of the Community, Member States are under an obligation not to conclude an international agreement. Arguably, such an agreement could also be invalid under article 46 of the Vienna Convention on the Law of Treaties.[99] However, the at-

[96] Joined Cases 3, 4 and 6/76, *Kramer*, [1976] ECR 1279, 1309. *See also* Opinion 1/76, given pursuant to Art. 228(1) EEC (Draft Agreement establishing a European laying-up fund for inland waterway vessels), [1977] ECR 741, 755, where the Court stated that the Community has "authority to enter into the international commitments necessary for the attainment" of its objectives whenever it has an "internal power," but did not rule out that Member States have a concurrent power if the Community does not exert it. According to Groux, *Le parallélisme des compétences internes et externes de la Communauté économique européenne*, 14 C.D.E. 3, 26–27 (1978), the possibility for Member States to conclude an agreement depends on the content of a Council decision concerning Community participation in the negotiations. A different reading of Opinion 1/76 was given by Pescatore, *Contribution to the Discussion*, in DIVISION OF POWERS, *supra* note 25, at 69, 74. Judge Pescatore viewed the Court's Opinion as implying that a "mere grant of power" to the Community, "even if this has not yet been actually exercised (in French one might conveniently oppose here a *compétence actualisée* and a *compétence virtuelle*), precludes Member States from entering international commitments as this would have the effect of prejudging or even blocking the proper exercise of its power by the Community both in the internal and in the external spheres."

[97] This is implied by a passage (quoted *supra* note 80) in Case 181/73, Haegeman v. Belgian State, [1974] ECR 449, 459–60.

[98] With reference to GATT, the Court has said that "insofar as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that Agreement have the effect of binding the Community." Joined Cases 21 to 24/72, International Fruit Co. NV v. Produktschap voor Groenten en Fruit, [1972] ECR 1219, 1227.

[99] *See* J.-V. LOUIS & P. BRÜCKNER, RELATIONS EXTÉRIEURES, 12 LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE, *supra* note 12 (1980), 82–83; B. CONFORTI, LEZIONI DI DIRITTO INTERNAZIONALE 135–36 (2nd ed., Naples, Editoriale Scientifica, 1982). According to H. KRÜCK, VÖLKERRECHTLICHE VERTRÄGE IM RECHT DER EU-

titude of third states or the fact that the conclusion of an agreement is linked with the work of an international organisation to which the Community does not belong may make it necessary for the Member States rather than for the Community to conclude the agreement.[100] Thus, for instance, although article 113 of the EEC Treaty provides for exclusive treaty-making power of the Community with regard to "the conclusion of tariff and trade agreements," only the Member States are "Contracting Parties" in GATT.[101] The substitution of joint Member State action for Community action can be justified by analogy on the basis of article 116, which provides for "common action" on the part of Member States in pursuance of Council resolutions "in respect of all matters of particular interest to the common market" whenever they act "within the framework of international organisations of an economic character": the quoted provision evidently intends to cover the case in which an organisation deals with matters within the competence of the Community, which is not a member of the organisation in question. A similar need for joint Member States' action may arise with regard to the conclusion of international agreements with third States, once Member States have used in vain "all the political and legal means at their disposal in order to ensure the participation of the Community."[102] The same line of reasoning can be read in the Court's *Opinion 1/78*, when it stated that articles 113 and 116 "are founded on different premises" and that in the case of the international rubber agreement "a problem relating to the demarcation of the sphere of application of Articles 113 and 114 on the one hand and 116 on the other hand" arose "from the fact that the agreements on commodities are at present being negotiated within UNCTAD."[103]

The application by analogy of article 116 of the EEC Treaty would imply that participation in the agreement should take place in pursuance of a Council resolution, made on the basis of a proposal by the Commission. Even if one

ROPÄISCHEN GEMEINSCHAFTEN 147 (Berlin/Munich/New York, Springer-Verlag, 1977), this cause of invalidity cannot be invoked by Member States because it cannot be required that a non-member State should be acquainted with the partition of competences between the Community and its Member States.

100 In Case 22/70, Commission v. Council, [1971] ECR 263, 281, (*ERTA*), the Court justified the Member States in taking action because negotiations were "characterized by the fact that their origin and a considerable part of the work carried out under the auspices of the Economic Commission for Europe took place before powers were conferred on the Community as a result of Regulation No. 543/69."

101 However, on 17 Dec. 1979 the Community did sign most of the agreements which were reached at the conclusion of the Tokyo Round; some of these were concluded as mixed agreements. *See* COMMISSION OF THE EC, THIRTEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EC IN 1979, at p. 222, point 494 (Luxembourg, Office for Official Pubs. of the EC, 1980).

102 Joined Cases 3, 4 and 6/76, *Kramer*, [1976] ECR 1279, 1311.

103 Opinion 1/78, given pursuant to Art. 228(1) EEC (International Agreement on Natural Rubber), [1979] ECR 2871, 2915.

could argue that an agreement among all the Member States with regard to joint action may also fully take into account the Community interests, the involvement of Community institutions, and in particular of the Commission – albeit in the function of submitting proposals – provides an important procedural guarantee for the protection of Community interests. Although the Court did not explicitly formulate the requirement that a particular procedure should be followed for joint Member State action in areas of exclusive Community competence, it is significant that in the *ERTA* case the Court noted approvingly that Member States had been "carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council."[104]

If an international agreement covers in part matters for which the Community possesses an exclusive treaty-making power, Member States are allowed to conclude the agreement separately only if they can make a reservation with regard to the part which is within the Community's competence. If such a reservation is not allowed – as, for instance, by the new Convention on the Law of the Sea, which views participation by Member States of an international organisation as implying that a State ratifying the Convention before the organisation accedes to it acquires rights and obligations under the Convention also with regard to matters for which the organisation is exclusively competent[105] – Member States are allowed under Community law to conclude the agreement only under the conditions indicated above for joint Member States' action.

2. The Need for and Means of Supervising Member States' Agreements

The existence of an international agreement concluded by one or more Member States on matters covered by Community competence may represent an obstacle to the development of Community secondary legislation applicable to all the Member States. The obstacle may only be of a practical nature if the agreement is concluded between States which are all members of the Community or if those States are allowed to make a further derogatory agreement *inter se* for matters lying within the Community competence. Since Member States are then free to terminate the agreement – completely or in their reciprocal relations, as the case may be – only their possible reluctance to change existing norms can be in the way of the adoption of Community legislation. Termination need not be made the object of a previous and separate act: an act adopted by the Council with the affirmative vote of all the States which are parties to the agreement may well be construed as implying the conclusion of an informal international agreement among these States purporting to abrogate, totally or partially, the previous agreement. Examples are offered by

[104] Case 22/70, Commission v. Council, [1971] ECR 263, 282 (*ERTA*).

[105] *See* Gaja, *The European Community's Participation in the Law of the Sea Convention: Some Incoherencies in a Compromise Solution*, 5 I. Y.B. INT'L L. 110, 113–14 (1980–81).

EEC Regulations 3/58[106] and 1408/71.[107] Article 6 of the latter stated that, under some exceptions, "the Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either: (a) two or more Member States exclusively, or (b) at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States."

Provided that they are consistent with existing Community law, and the subject matter has not been pre-empted, agreements concluded by Member States among themselves are not objectionable under Community law. Article 8 of Regulation 1408/71, which explicitly allowed Member States to "conclude conventions with each other based on the principles and the spirit" of the said Regulation, can be taken as an example of a provision explicitly declaring that such agreements are allowed under Community law.[108] Should an agreement infringe on an obligation imposed on Member States by Community law, the States which are parties to the agreement are in a position to make the necessary amends: hence, the procedure envisaged in articles 169 and 170 of the EEC Treaty may be considered to provide a sufficient guarantee for the development of Community law.

An international agreement concluded by one, or more, Member States with a third State creates a different set of problems. As we have seen, Member States are allowed to conclude agreements with third States only on matters in which they possess an exclusive or a concurrent competence. Should an agreement be concluded, Community secondary legislation could theoretically develop irrespective of the contents of the agreement, since article 234 of the EEC Treaty – under which "rights and obligations arising from agreements" made by one or more Member States with third States "shall not be affected by the provisions" of the Treaty – only covers agreements "concluded before the entry into force" of the EEC Treaty. However, a Member State bound by an agreement with a third State will reasonably refrain from voting in favour of a Council act which may lead to an infringement of any obligations under the agreement and will also insist on a vote being taken only unanimously.

In the *Kramer* case, the Court found that when the Community has "not yet ... fully exercised its function" on a matter within its competence, the Member States have "the power to assume commitments," although "this authority which the Member States have is only of a transitional nature."[109] In the case in hand, which concerned conservation measures with regard to fish-

[106] Council Regulation (EEC) No. 3/58 of 25 Sept. 1958, [1958] JO 561. Art. 5 of this Regulation corresponds to art. 6 of Council Regulation (EEC) No. 1408/71, which is quoted in the text.

[107] Council Regulation (EEC) No. 1408/71 of 14 June 1971, JO No. L 149, 5 July 1971, p. 2. ([1971] OJ (spec. Eng. ed.) at 416).

[108] Art. 8, para. 2, of Council Regulation (EEC) No. 1408/71 of 14 June 1971, *id.*, imposed on Member States an obligation to notify to the Council the conventions concluded with other Member States.

[109] Joined Cases 3, 4 and 6/76, *Kramer*, [1976] ECR 1279, 1310.

eries, the Court found that the transitional period ended at a date fixed by article 102 of the Act of Accession.[110] In many areas of concurring competence a similar deadline would be difficult to establish; if the end of the transitional period was linked to the adoption of Community secondary legislation, this would mean in practice that Member States could keep their agreements with third States in force as long as they wished.

A Member State frustrating systematically the adoption of any Community act on a certain matter would no doubt be in breach of the obligation – imposed by article 5, paragraph 2, of the EEC Treaty – to "abstain from any measure which could jeopardise the attainment of the objectives" of the same Treaty.[111] However, a procedure for infringement would not necessarily remedy the situation, if the agreement with the third State had been concluded for a long period of time and could not be denounced. The only effective remedy could be provided by a monitoring system operating before the agreements with third States are concluded. The establishment of such a system would be politically unviable if it intended to give the Commission a right of veto or the right to request a binding ruling by the Court, as is envisaged under article 103 of the Euratom Treaty for agreements "concerning matters within the purview" of that Treaty.[112] Anyway, it is questionable whether the Commission and the Court are the most suitable institutions for assessing whether an agreement may conflict with future Community legislation. Since the main legislating powers rest with the Council, it should be the Council itself, on the basis of a proposal by the Commission, that takes a decision affecting the legality of the conclusion of an agreement with a third State. An essential component of the system here envisaged is the setting up of an obligation on Member States to

[110] The Court said: "As to the transitional nature of the above mentioned authority, it follows from the foregoing considerations that this authority will come to an end 'from the sixth year after Accession at the latest,' since the Council must by then have adopted, in accordance with the obligations imposed on it by Article 102 of the Act of Accession, measures for the conservation of the resources of the sea." Joined Cases 3, 4 and 6/76, *Kramer*, [1976] ECR 1279, 1310. In practice, since the Council did not adopt legislation within the deadline, Member States continued to exert a concurrent competence even later.

[111] In Joined Cases 3, 4 and 6/76, *Kramer*, [1976] ECR 1279, 1311, the Court found that the Member States participating in the North-East Atlantic Fisheries Convention and in similar agreements were "under a duty not to enter into any commitment within the framework of those Conventions which could hinder the Community in carrying out the tasks entrusted to it by Article 102 of the Act of Accession." The Court quoted art. 5, but only its first paragraph.

[112] Under Euratom Treaty art. 103 Member States are under an obligation to "communicate to the Commission" these draft agreements. When a draft agreement is notified, "the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned"; "the State shall not conclude the proposed agreement ... until it has satisfied the objections of the Commission or complied with a ruling by the Court of Justice, adjudicating urgently upon an application from the State, on the compatibility of the proposed clauses with the provisions of this Treaty."

communicate to the Commission and the Council the text of all draft agreements in areas of concurring competence, to be done some time before the agreement is intended to be concluded.[113] It may well be argued that the system could be established on the basis of article 235 of the EEC Treaty and the analogous provisions in the other Treaties, since it appears to be "necessary" in order "to attain, in the course of the operation of the common market, one of the objectives of the Community."

3. The Relationship Between Member States' Agreements and Community Law

In the United States, certain agreements that states conclude among themselves or with a foreign State are subject to federal control. Under article I, section 10, clause 3 of the Constitution, "No State shall, without the consent of the Congress ... enter into any agreement or compact with another State, or with a foreign power...." Although the language of the provision is certainly broad, consent has not been deemed to be required if there is no encroachment upon or interference with the supremacy of the United States.[114] As Justice Powell said for the majority in *United States Steel Corp. v. Multistate Tax Commission*, the Supreme Court would not "circumscribe modes of interstate cooperation that do not enhance State power to the detriment of federal supremacy."[115] He also said: "[T]he test is whether the Compact enhances state power *quoad* the National Government."[116] The Court found that the Multistate Tax Compact in question did not alter the supremacy of the federal power, or increase the political power of the states, and thus did not require the consent of Congress.

When consent is sought and given the compact becomes part of federal law[117] – the possibility of uniform interpretation being thereby ensured. This is a major element of distinction with the practice which applies under Community law: to bring agreements involving only some Member States into the domain of Community law would require a modification of the Treaties and would also imply that the current negative attitude towards non-uniform rules of Community law is overcome. Uniformity of interpretation could be attained more simply by inserting in international agreements between Member States a clause conferring jurisdiction on the Court of Justice, on the basis of article 182 of the EEC Treaty.

While consent by Congress to a compact increases the area covered by fed-

[113] An obligation to notify "cooperation" agreements to be negotiated or renewed by Member States and a consultative procedure were established by Council Decision (EEC) No. 74/393 of 22 July 1974, OJ No. L 208, 30 July 1974, p. 23.

[114] Virginia v. Tennessee, 148 U.S. 503, 518 (1893).

[115] 434 U.S. 452, 460 (1978).

[116] *Id.* at 473.

[117] This point was restated in Cuyler v. Adams, 449 U.S. 433, 440 (1981). For a critical approach to the case law and the prevailing opinion *see* Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965).

eral law, it is not clear whether this may also imply that federal competence is enlarged – and to what extent. In *Cuyler v. Adams* the Supreme Court recently said that "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."[118]

Although the requirement of consent by Congress may have been originally formulated by the Supreme Court, in *Virginia v. Tennessee*, with reference to an actual encroachment upon "the full and free exercise of federal authority,"[119] the rule has been generally understood as entailing that consent is required if a compact potentially affects federal authority.[120] This adds an element of similarity between the control by Congress of compacts concluded by states and the system advocated for agreements concluded by Member States of the Community on matters which have not yet been the subject of Community secondary legislation.[121]

Congress has developed some techniques which could be transplanted into the Community system.[122] Consent has been given in advance – sometimes virtually unconditional – for categories of compacts on particular subjects. For instance, by an Act of 1 March 1911 Congress gave its assent to any agreement which states might reach with regard to the protection of the watersheds of navigable streams.[123] In other cases, Congress gave its consent in general terms, with the proviso that further consent was required for any specific compact.[124]

[118] 449 U.S. 433, 440 (1981).

[119] 148 U.S. 503, 520 (1893). The view that the Court referred then to an "actual" encroachment was propounded by Engdahl, *Interstate Urban Areas and Interstate "Agreements" and "Compacts": Unclear Possibilities*, 58 GEO. L.J. 799, 807 n. 37 (1970).

[120] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978).

[121] *See supra* § IV.A.2.

[122] For a review of Congressional practice, *see* Frankfurter & Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); F.L. ZIMMERMANN & M. WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 57–70 (Chicago, Council of State Governments, 1951); F.L. ZIMMERMANN & M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 24–26 (Chicago, Council of State Governments, 1961); Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682 (1961).

[123] 36 Stat. 961 (1911). This is considered to be the first example of assent given by Congress with regard to future compacts. By an Act of 6 June 1934, 48 Stat. 909, Congress consented to "agreements or compacts for cooperative effort and mutual assistance in the prevention of crime," although no such compact had yet been drafted.

[124] *E.g.*, section 201(g) of the Federal Civil Defense Act of 1950, Pub. L. No. 81–920, 64 Stat. 1249, stated with regard to compacts on civil defence as follows:

> the consent of the Congress shall be granted to each such compact, upon the expiration of the first period of sixty calendar days of continuous Session of the Congress following the date on which the compact is transmitted to it; but

There has been some criticism about the way Congress exerts its power of control over compacts. Delays and the fact that Congress often placed conditions for approval prompted states in several instances not to seek consent although it appeared to be required.[125] Some of the difficulties stem from the small weight that individual states' interests have in Congress, and need not necessarily be reproduced in the system here advocated for the Community.

Whenever the subject matter of an international agreement lies outside Community competence, there does not appear to be any reason for misgivings towards agreements concluded by some of the Member States among themselves or with other States.[126] Certainly, in a federal perspective one could hardly find areas which cannot be of interest for a would-be federation. However, any significant enlargement of Community competence is highly unlikely in the present political circumstances.

It would anyway be difficult to define as positive, from the point of view of further integration, only the agreements which involve all the Member States. Any agreement would have to be considered on its merits. This also applies to agreements concerning matters related to those covered by Community competence, like the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.[127] Criticism voiced by the Commission with regard to the fact that the Convention is intended to enter into force when seven Member States have ratified or accepted it appears to be insufficiently justified.[128]

A border-line case is represented by those international agreements which are concluded on the basis of article 220 of the EEC Treaty, which provides

only if, between the date of transmittal and expiration of such sixty-day period, there has not been passed a concurrent resolution stating in substance that the Congress does not approve the compact.

[125] *See* D.E. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE 392–97 (St. Paul, West Pub. Co., 1974).

[126] This idea appears to underlie the distinctions suggested by Grabitz & Langeheine, *Legal Problems Related to a Proposed "Two-Tier System" of Integration Within the European Community*, 18 C.M.L. REV. 33 (1981). In the case of the European Monetary System, which is regulated only in part by Community law, the question of Community competence is moot. *See* Scharrer, *Das europäische Währungssystem - ein Modell differenzierter Integration*, in GEDÄCHTNISSCHRIFT FÜR CHRISTOPH SASSE, *supra* note 54, at 475.

[127] OJ No. L 266, 9 Oct. 1980, p. 1.

[128] Commission Opinion (EEC) No. 80/383 of 17 March 1980 concerning the draft Convention on the law applicable to contractual obligations, OJ No. L 94, 11 April 1980, pp. 39, 40. This Opinion referred to the draft Convention, according to which only five ratifications were necessary for the Convention to enter into force. However, the substance of the Commission's criticism has not been altered by the fact that the Convention requires seven ratifications. The Commission considered that the provision in question had "the effect of preventing the creation and maintenance of a unified juridical area within the Community" and was one of the "fundamental defects, as a result of which the Convention cannot contribute, or can contribute only temporarily, to the functioning of the common market." *Id.* at 40.

that Member States should "enter into negotiations with each other" with a view to concluding conventions on certain matters. These conventions are not part of Community law – whether or not competence is given to the Court with regard to their interpretation. This explains why the 1968 Brussels Convention on jurisdiction and enforcement of judgments[129] entered into force in 1973 for the six original Member States but was not included in the Act of Accession of the United Kingdom and the other candidate States.

While the fact that a subject matter is mentioned in article 220 does not necessarily imply that it lies totally outside Community competence,[130] it would be hard to draw from the existence of a list in article 220 the conclusion that those matters are so closely connected with subjects covered by Community competence that all the Member States must be parties to agreements on the said matters. The opposite conclusion is also supported by practice. The Brussels Convention on jurisdiction and enforcement of judgments still operates only for the six original Member States; the Convention for the accession to the said Convention was concluded on 9 October 1978[131] and will apply "following the deposit of the last instrument of ratification by the original Member States of the Community and one new Member State": thus some new Member States may temporarily be left out.[132] Another example of an agreement that has not included all the Member States for several years, although the subject matter is listed in article 220, is provided by the recognition of foreign arbitral awards. No attempt on reaching a convention on the basis of article 220 has yet been made: the existence of the New York Convention of 10 June 1958 is generally considered to provide a sufficiently adequate tool for integration, which it would be impractical to duplicate. Likewise, many bilateral agreements operate on double taxation, while discussions in order to attain a convention based on article 220 were abandoned in 1968.[133]

[129] OJ No. L 299, 31 Dec. 1973, p. 32.

[130] The Community can, under the appropriate circumstances, act on the basis of EEC Treaty art. 100 or art. 235. This point was emphasized especially by Schwartz, *Voies d'uniformisation du droit dans la Communauté européenne: règlements de la Communauté ou convention entre les Etats membres?*, 115 J. DR. INT. (CLUNET) 751, 754–56 & 790–92 (1978).

[131] OJ No. L 304, 30 Oct. 1978, p. 1.

[132] *See* art. 39 of the new Convention. The requirement that all the original Member States should ratify this Convention before it may enter into force is explained by the fact that the Convention intends to modify some aspects of the Brussels Convention apart from providing specific rules for the new Member States. The 1978 Convention is not open to ratification by States like Greece which entered the Community after the text of the Convention was adopted. A further Convention had to be negotiated for the accession of Greece, for the text of which *see* OJ No. L 388, 31 Dec. 1982, p. 1.

[133] *See* Schwartz, *supra* note 130, at 794.

B. The Promotion of Model Laws and Restatements of the Law

While European Community institutions have played a major role with regard to harmonization of laws through directives under article 100 of the EEC Treaty, they have not been involved so far in the making of uniform or model acts which Member States could adopt if they wished. Member States, on the other hand, have not created any institution which could be compared with the National Conference of Commissioners on Uniform State Laws – in which all the states, territories, the District of Columbia and Puerto Rico are officially represented.

The achievements of the National Conference in promoting parallel legislation in the United States are important, although they naturally vary according to the subject matter: while the Uniform Commercial Code is the most successful uniform act, the majority of acts currently recommended by the National Conference for adoption as uniform acts have been adopted by less than ten states, quite a few by none.[134] However, one must also take into account the impact made by uniform or model acts on the legislation of states which have not formally adopted them.[135]

The technique of uniform or model acts has rarely been resorted to in Western Europe, where uniform laws were introduced primarily by means of international conventions. Until 1964 the Hague Conference on Private International Law followed only the international convention method, as did the Geneva Conferences of 1930 and 1931 on Bills of Exchange and on Checks.[136] The Council of Europe has also used this method for unification of law.[137]

There are two primary reasons for the European preference for international conventions. First, a convention may approach unification differently than a private or even a government-sponsored group drafting a uniform law. Conference delegates, as government representatives undertaking international obligations, naturally seek to arrive at solutions which are desirable and acceptable to the governments which sent them. Uniform laws may not benefit from this non-objective orientation and advance commitment. Second, the resulting convention binds the contracting States, subject to reservations and so long as it is not denounced or modified by treaty amendment; uniform laws,

[134] *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS EIGHTY-EIGHTH YEAR 303–05 (Chicago, 1979) [hereinafter HANDBOOK NCCUSL].

[135] Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 172–73 (2d Cir. 1980) (citing and adopting a principle embodied in some sections of the proposed but unenacted 1978 Draft of a Federal Securities Code, recommended by the American Law Institute (A.L.I.)); Redarowicz v. Ohlendorf, 441 N.E. 2d 324, 330–31 (Ill. 1982) (citing and adopting a portion of the proposed but unenacted Uniform Land Transactions Act, adopted by the National Conference of Commissioners on Uniform State Laws).

[136] *See* Hay, *The United States and International Unification of Law: The Tenth Session of the Hague Conference*, 1965 U. ILL. L.F. 820, 824–25.

[137] *See* Krüger, *The Council of Europe and Unification of Private Law*, 16 AM. J. COMP. L. 127 (1968).

on the other hand, can be changed unilaterally without violating an international obligation. The European view, therefore, seeks the reciprocity element which conventions ensure but uniform laws lack.[138]

Strict adherence to the convention system, however, also has its disadvantages, and in fact a European attempt at unification may benefit by a wider use of the uniform law method. In some areas unification may be better advanced if agreement on rules does not require a promise to be bound internationally, as is the case with the uniform law method. The ability to amend a uniform law internally and unilaterally may thus increase the readiness to cooperate and even to experiment with new concepts. Moreover, reciprocity may not even be necessary in all cases.[139] If States truly need reciprocity in a given situation, they can insert a reciprocity clause in the uniform law.[140] The only aspect which is lost is the presumption (created by the existence of international obligations) that one's own practice is followed elsewhere and that "uniformity" has indeed been achieved.

A limited acceptance of the uniform law method unfolded at the Tenth Session of the Hague Conference. The United States observers had obtained agreement at the Ninth Session of the Hague Conference that the Conference would also consider the making of model laws.[141] A more positive step was taken at the Tenth Session: the Permanent Bureau was entrusted with the task of recasting into model laws the text of the conventions which were adopted.[142]

[138] *See* Graveson, *The Ninth Hague Conference of Private International Law*, 10 I.C.L.Q. 18, 30 (1961); Amram, *Uniform Legislation as an Effective Alternative to the Treaty Technique*, 54 PROC. AM. SOC'Y INT'L L. 62, 64–65 (1960).

[139] Graveson, *supra* note 138, at 30. The Convention on the Formal Validity of Wills, whose text was adopted at the Ninth Conference, was aptly given by Graveson as an example of an instance in which reciprocity was not essential and in which a model law could have been adopted instead of a convention. The same author suggested that one factor in preserving the use of international conventions, particularly in the Hague Conference, was "the need to preserve its quality and standing as a diplomatic Conference on an intergovernmental level, rather than simple gatherings of legal experts, to devise the most suitable solution in a particular field." *Id.* at 30.

[140] Nadelmann, *Méthodes d'unification du droit international privé*, 47 R.C.D.I.P. 37, 38–39 (1958). For example, the Canadian Reciprocal Enforcement of Judgments Act (1956 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, 82–88, published in 39 PROCEEDINGS OF THE CANADIAN BAR ASSOCIATION (1956)), provides that foreign States, along with Canadian Provinces, may be declared "reciprocating" States under the Act and their judgments entitled to recognition. The Act replaces an earlier Act, in effect in six of the 12 Provinces and Territories, which excluded reciprocity for foreign States.

[141] *See* Nadelmann, *The Hague Conference on Private International Law – Ninth Session*, 9 AM. J. COMP. L. 583, 587–90 (1960); Droz, *La Conférence de la Haye de droit international privé et les méthodes d'unification du droit: traités internationaux ou lois-modèles?*, 13 REV. INT. DR. COMP. 507 (1961).

[142] Hague Conference on Private International Law, Tenth Session, Final Act B (III) (1964) (text in 14 I.C.L.Q. 558, 578 (1965)).

The model laws may be useful to States which do not intend to be bound by a convention but still seek to enhance unification.

A variation of the method of combining a convention with a model law was adopted with regard to the international sale of goods.[143] The Rome Institute initiated the work in 1930 and the Conventions and uniform laws were finally adopted at a diplomatic conference held in 1964.[144] The conference produced both a Convention Relating to a Uniform Law on the International Sale of Goods, and a Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods;[145] annexed to each convention was the uniform law relating to it.[146] Contracting States are under an obligation to adopt the uniform laws, while other States may use them as models.

Another system would be to include in a convention only a general statement of policies, while optional uniform laws outline more detailed provisions. This method would provide a greater flexibility, which may be desirable in certain areas.

In Western Europe, the profound differences existing between the various legal systems – particularly between Common Law and Civil Law systems – represent a serious obstacle for any attempt at providing model or uniform acts to be adopted in all the States. Any such attempt should reasonably be made for a group of States wider than those which are members of the Community since the systems of some of the non-member States bear greater similarities to those of some Member States, than systems of Member States with one another.[147] An attempt encompassing only Member States would be justified only when the subject matter of the proposed model or uniform act comes within the Community's concurrent competence or is closely linked with rules pertaining to Community law.

It would depend on the subject matter under consideration whether a model or uniform act should be drafted with all the Western European States in mind, or whether even other States – for instance, other industrialized States – should be taken into consideration. If the United States were involved and the matter pertained to the competence of the several states, some form of

[143] *See* Hay, *supra* note 136, at 832.

[144] Honnold, *The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods*, 13 Am. J. Comp. L. 451 (1964).

[145] Text in 13 Am. J. Comp. L. 453 and 472 (1964).

[146] Text of Uniform Law on the International Sale of Goods in 13 Am. J. Comp. L. 456 (1964); text of Uniform Law on the Formation of Contracts for the International Sale of Goods in 13 Am. J. Comp. L. 474 (1964).

[147] Conventions intending to unify some aspects of the law have been concluded by Member States of the Community mainly within institutions like the Council of Europe, the Hague Conference of Private International Law, UNIDROIT and OECD, in which other European States and also some non-European States are represented. The status of ratifications of these conventions indicates that only a few have been successful, and this appears to depend on specific circumstances like the subject matter and the way it was regulated rather than on the framework within which the text was adopted.

cooperation would have to be established with the National Conference. Alternatively, the United States may be able to protect the states' interests and assure cooperation by proposing a uniform law directly to the states, thereby bypassing the National Conference. The Model Uniform Product Liability Act[148] is such a direct federal proposal, seeking unification of products liability law.[149]

As in the case of international agreements, questions of consistency with Community law could be raised about Member States' legislation adopting uniform or model acts. There are fewer difficulties, since Member States could repeal any such legislation they may have adopted without infringing an obligation towards non-member States. Thus, an act entailing a breach of existing Community law could give way to proceedings under articles 169 or 170, but the Member States involved could easily remedy the breach; no obstacle would prevent the adoption of Community secondary legislation in matters pertaining to concurrent competences. However, in the latter case, the practical obstacle stemming from the Member States' possible reluctance to change their legislation must be reckoned with.

In order to forestall such an obstacle and also to ensure that existing Community law has a greater effectiveness, the institution of a monitoring system of Member State legislation could be usefully advocated. This system should not be limited to uniform or model acts, but should cover all draft legislation in areas of exclusive or concurrent Community competence. At present, a preventive monitoring system operates with regard to draft statutes on specific topics – like aids granted by Member States (under article 93 of the EEC Treaty), modernization of farms and related subjects (under Directives 72/159/EEC, 72/160/EEC and 72/161/EEC),[150] measures which "may cause distortion" in the conditions of competition (under article 102 of the EEC Treaty),[151] protection of the environment (Agreement of 5 March 1973 as

[148] 44 Fed. Reg. 62,714 (1979).

[149] The Department of Commerce published the Act for voluntary use by the states. The Department of Commerce sought uniformity so that product sellers and insurers would know the rules by which they were to be judged. Furthermore, the Department wanted to ensure that the rights of product users would not be restricted by "reform" legislation promulgated in a crisis atmosphere. *Id. See also*, E. Scoles & P. Hay, Conflict of Laws 613 n.1 (St. Paul, West Pub. Co., 1982).

[150] Council Directive (EEC) No. 72/159 of 17 April 1972, arts. 17–18, JO No. L 96, 23 April 1972, p. 1.; Council Directive (EEC) No. 72/160 of 17 April 1972, arts. 8–9, JO No. L 96, 23 April 1972, p. 9; Council Directive (EEC) No. 72/161 of 17 April 1972, arts. 10–11, JO No. 96, 23 April 1972, p. 15 ([1972] OJ (spec. Eng. ed.) at 324, 332, 339 respectively).

[151] EEC Treaty art. 102 is badly drafted in that it requires a Member State to take the initiative in consulting the Commission and, through the Commission, the other Member States, not with regard to some particular subject matter but "Where there is reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion." Member States are not encouraged to do so, because they face the possibility of a recommendation which can

amended on 15 July 1974)[152] and protection of resources in the fishing zones ("Hague Resolution" and further acts).[153] Only in the case covered by article 93 of the EEC Treaty is a Member State clearly under an obligation not to adopt a draft statute if so required by a Community institution.[154] This obliga-

be ignored, but at the cost of some negative consequences that do not apply if no consultation has taken place.

[152] The Agreement of the Representatives of the Governments of the Member States meeting in Council of 5 March 1973 on information for the Commission and for the Member States with a view to the possible harmonization throughout the Communities of urgent measures concerning the protection of the environment was published in OJ No. C 9, 15 March 1973, p. 1; the supplementary Agreement of 15 July 1974 was reproduced in OJ No. C 86, 20 July 1974, p. 2.

[153] The "Hague Resolution" was adopted as a Council Resolution on 3 Nov. 1976; Annex VI to the Resolution, which provided for an obligation to consult the Commission, was reproduced in [1979] ECR 2941. In view of the deadline of 1 Jan. 1979 set by Act of Accession, art. 102 for the adoption of common measures for the conservation of resources of the sea, and of the fact that those measures had not been agreed upon, the Council adopted a decision under which Member States' technical measures were subject to "the procedures and criteria of Annex VI to the Council resolution of 3 November 1976." This decision was intended to have only a temporary effect; the same applied to the string of decisions which succeeded it. The Council Decision of 19 Dec. 1978 was not published (it was referred to in [1981] ECR 1068); the other decisions were published. *See* Council Decision (EEC) No. 79/383 of 9 April 1979, OJ No. L 93, 12 April 1979, p. 40; Council Decision (EEC) No. 79/590 of 25 June 1979, OJ No. L 161, 29 June 1979, p. 46; Council Decision (EEC) No. 79/905 of 6 Nov. 1979, OJ No. L 277, 6 Nov. 1979, p. 10; Council Decision (EEC) No. 79/1033 of 8 Dec. 1979, OJ No. L 312, 8 Dec. 1979, p. 31; Council Decision (EEC) No. 80/365 of 26 March 1980, OJ No. L 84, 28 March 1980, p. 41; Council Decision (EEC) No. 80/601 of 16 June 1980, OJ No. L 160, 26 June 1980, p. 48. When the effects of the last decision were about to expire, the Commission – with a declaration made on 27 July 1981, OJ No. C 224, 3 Sept. 1981, p. 1 – called upon "all Member States in pursuance of their rights and duties to conduct their fishing activities in such a way as to ensure the compliance of vessels, which are flying their flags or are registered in their territory, with the Commission's existing proposals." The Commission also declared that it considered those proposals "in the present situation as being legally binding upon the Member States." According to Council Decision (EEC) No. 81/1052 of 29 Dec. 1981, OJ No. L 329, 31 Dec. 1981, p. 52, Member States need only take the Commission's proposals "into account." The Council recalled "the obligations on the Member States as defined by the Court of Justice." The same wording was adopted in later decisions. *See, e.g.*, Council Decision (EEC) No. 82/346 of 31 May 1982, OJ No. L 152, 2 June 1982, p. 12.

[154] The monitoring system under the directive on the modernization of farms and the related directives only has the purpose of verifying whether a Member State is eligible for financial contributions. Under the Agreement of 5 March 1973, Member States which notified the Commission of their intention to adopt a measure concerning the protection of the environment would appear to be under an obligation not to do so under the following circumstances: the Commission, within two months of receiving the relevant information, notifies the Government concerned "of its intention to submit to the Council proposals to adopt Community measures" on the sub-

tion is essential for the system to work adequately. As for international agreements, the monitoring role should be divided between the Commission, and eventually the Court, for cases of conflict with existing Community law, and the Council, when it comes to a decision whether Member State legislation may adversely affect the adoption of Community secondary legislation in matters of concurrent competences. Member States should be under an obligation to communicate to Community institutions their draft legislation.

The monitoring system here suggested would no doubt be difficult to operate, given the great number of draft acts which should be submitted and the inevitable political difficulties in examining them: these would probably be reflected in a widespread reluctance to adopt a workable system. Moreover, given the fact that no obligation with third States is involved, and thus that there would not be any great obstacle to the later adoption of some measures pertaining to Community law, it would be hard to maintain that the monitoring system is "necessary" so that article 235 of the EEC Treaty could provide a sufficient basis for establishing it. An agreement among the Member States to conclude an amending treaty for this purpose would be an unlikely event.

In the "Statement of policy establishing criteria and procedures for designation and consideration of acts," prepared by a subcommittee of the executive committee of the National Conference of Commissioners on Uniform State Laws, it is said that when a subject matter properly falls within the exclu-

ject, the Commission submits such proposals within five months of the reception of the Government's communication, and the Council acts "on the proposal of the Commission within five months of its receipt." However, the existence of an obligation on the part of Member States is doubtful in view of the fact that "by way of exception" they can adopt some measures irrespective of a communication to the Commission "if these are urgently necessary for serious reasons of safety or health." In Case 141/78, France v. United Kingdom, [1979] ECR 2923, 2942, the Court interpreted the "Hague Resolution" as implying a "duty of consultation" on the part of Member States before they take any legislative measure with regard to the protection of fisheries. In Case 804/79, Commission v. United Kingdom, [1981] ECR 1045, 1076, the Court found that

> in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the Decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.

This reasoning – restated in Case 124/80, Officier van Justitie v. J. van Dam & Zonen, [1981] ECR 1447, 1459 – could be applied to other areas for which the Treaty gives Community institutions some powers which have not yet been exerted.

sive jurisdiction of the Congress, it is obviously not appropriate for legislation by the several states. However, if the subject matter is within the concurrent jurisdiction of the federal and state governments and the Congress has not preempted the field, it may be appropriate for action by the states and hence by the Conference.[155]

The states' attitude as shown in the quoted statement and confirmed in practice, the invalidity of state acts inconsistent with federal law, and the possibility of federal pre-emption over matters for which federal and state authorities possess a concurrent competence, have all made it unnecessary to develop a federal monitoring system over uniform or model acts or other state legislation. The fact that states have adopted uniform acts represents a smaller obstacle to the development of federal legislation than that which would be created within the Community system: pre-emption of state legislation is made easier by the circumstance that states are not represented as such in the federal legislative process and have, if taken individually, a limited influence over Congress.

In some instances, the existence of uniform legislation could make it superfluous for federal or Community institutions to exert their concurrent competence. Thus, federal courts have declined in some cases to develop Federal Common Law in the presence of uniform state legislation which they considered to be adequate. In *United States v. Kimbell Foods, Inc.*,[156] the Supreme Court, quoting from a previous decision,[157] said: "Because the state commercial codes 'furnish convenient solutions in no way inconsistent with adequate protection of the federal interest' ... we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions."

One important element in order that uniform acts may become a factor of integration is their uniform interpretation. An international agreement among the Member States of the Community could give the Court of Justice the power to rule over questions of interpretation submitted by national courts. This system could be used in order to ensure uniformity of interpretation among the Member States also when a uniform act is adopted by some non-member States. If no system designed to achieve uniform interpretation was established, the result would depend on the attitude of national courts and on their awareness of what the Rome Convention on the law applicable to contractual obligations defined as "the desirability of achieving uniformity" in interpretation and application of "uniform rules."[158]

A contribution towards legal integration may be given by the work of private institutions, in particular by means of restatements of the law, if they gain authority before the courts. The restatements made by the American Law Institute give a foremost example of the role that can be played by unenacted codifi-

[155] *See* HANDBOOK NCCUSL, *supra* note 134, at 286.
[156] 440 U.S. 715, 729 (1978).
[157] United States v. Standard Oil Co., 332 U.S. 301, 309 (1947).
[158] Rome Convention, art. 18, OJ No. L 266, 9 Oct. 1980, p. 5.

cations.[159] There is very little which has been done so far by private institutions in order to achieve greater integration among European States. A recent development in this field is the setting-up of a Commission on European Contract Law, composed of academics from the ten Member States of the European Community.[160] In this and other areas the restating of existing common principles "by a clarification and a simplification of the law and its better adaptation to social needs"[161] would be an impossible task, given the profound differences among the legal systems involved. What may be possible, and the said Commission is intending to do this, is to propose some new principles.

[159] An interesting example of the influence of the Restatements is found in the Virgin Islands Code, title 1, § 4:

> The rules of the common law, as expressed by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

See also Callwood v. Virgin Islands National Bank, 221 F. 2d 770, 777 (3d Cir. 1955); Skeoch v. Ottley, 377 F.2d 804, 811 (3d Cir. 1967); Bertolet v. Burke, 295 F. Supp. 1176, 1177 (D. V.I. 1969). For a recent decision where the court applied the *Restatement* tests for the definition of the torts of intentional infliction of emotional distress, abuse of process, and malicious prosecution, *see* Deary v. Evans, 570 F. Supp. 189, 199–201 (D. V.I. 1983).

[160] *See* Hay, Lando & Rotunda, *Conflicts of Laws as a Technique for Legal Integration, infra* this book.

[161] This definition is taken from the original motion to form the A.L.I., as quoted by Darrell & Wolkin, *The American Law Institute*, 52 N.Y. St. B.J. 99, 100 (1980).

Conflict of Laws as a Technique for Legal Integration

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I. Introduction

The preceding chapter analyzed the instruments available to the central authority to act and the various legal mechanisms – whether centralized, directed, coordinated or parallel – which may be used for the approximation or harmonization of laws within a union. But, as was pointed out in that chapter, integration does not require uniformization. Variation in the laws of the different jurisdictions is not only inevitable but to some extent also desirable. In Europe the fields of law which fall within the general "jurisdiction" of the Community are limited – being restricted generally to matters related to the broad common market objectives described in the Treaties. On the other hand, an increase in interstate intercourse is actively fostered by the integration policy as a fundamental objective. It is, therefore, inevitable that transfrontier transactions of all kinds will increase as social and political interaction progresses. Transfrontier activities give rise to legal problems caused by the differences of Member State laws. If these differences seriously inhibit the free movement of persons, goods, capital and services within the union they will have to be removed by Community action. However, the obstacles created by variations in the substantive laws of the Member States may be removed or alleviated by common rules which decide the law applicable to the transactions and the appropriate jurisdiction for resolving disputes arising out of them. It is the possibility of using conflict-of-law rules as a technique for legal integration which is to be discussed here.

This chapter deals with the rules on jurisdiction and choice of law governing private disputes in the United States and the European Communities. As the

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European Communities are an economic union we have chosen mercantile matters as the focus of our analysis with the main stress laid on contracts. Our aim is to analyze whether in this field harmonization of the conflict of laws is a practicable tool for legal integration especially when compared with the harmonization of substantive law.

A. The Classification of Private International Law as Domestic Law

That part of the law which is called the conflict of laws or private international law comes into operation whenever a court is seized of a case which has contacts with more than one legal system. Its functions are:

- to lay down the conditions under which the court is competent to entertain the suit (jurisdiction of the court);
- to determine the system of law which is to decide the case (choice of law); and
- to decide under which circumstances a foreign judgment may be recognized and enforced by the court.[1]

Problems of recognition and enforcement only arise when there is a foreign judgment in issue and therefore not in every case having contacts with more than one legal system. Jurisdiction and choice-of-law questions, however, arise in every case having a foreign element and will, therefore, be given more attention than recognition and enforcement.

Private international law, despite its name, is domestic, that is national or state, law. Each country or state decides for itself the conditions under which courts are competent to entertain suits, the system of law which is to decide the case before a court, and the conditions under which a foreign judgment will be recognized and enforced. In fact the conflict-of-law rules of the European countries and the American states differ in all these matters, the differences in the laws being more marked among the countries of the European Communities than among the states comprising the United States.

B. Is Unification of Conflict-of-Law Rules Needed?

1. The Purpose and Efficiency of Existing Conflict Rules: An Evaluation

One may wonder whether it is desirable for each state to have its own system of conflict-of-law rules. It would not be difficult to find an acceptable justification for the existence of conflict-of-law rules if these rules were uniform in all countries, instead of divergent. One could then argue convincingly that such rules promote certainty and predictability in international relationships.

[1] Here the Common Law definition of the conflict of laws is used. *See* 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 3–4 (10th ed., J. H. Morris gen. ed., London, Stevens, 1980) [hereinafter cited as DICEY & MORRIS]; CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 3 (10th ed., P. North ed., London, Butterworths, 1979) [hereinafter cited as CHESHIRE & NORTH].

Uniform rules on international jurisdiction would make it easier for the parties to know in which country an action arising out of their relationship could be brought. Uniform choice-of-law rules would ensure the application by the courts of the same substantive rules irrespective of where the action was brought. Uniform rules on the recognition and enforcement of foreign judgments would most likely ensure the efficacy of judgments rendered against defendants who were resident or had their assets in a place situated outside the country where the judgment was rendered.

Unfortunately this uniformity does not actually exist. At present, parties to an international transaction very often have no certainty as to where an action may be brought, which law the court will apply, and whether a judgment will be enforced outside the country where it was rendered.

Considering the object of this chapter, one may well be led to ask why the states have each adopted their own conflict-of-law rules. The current situation raises fundamental questions about the very purpose of the conflict of laws and prompts one to consider whether the present approach is satisfactory or whether an international unification of conflict-of-law rules is needed. A consideration of the factors underlying conflict-of-law rules will perhaps help to resolve some of these issues.

a) Jurisdiction Rules

Theoretically the rules which govern the judicial jurisdiction of a country could be so framed as to require the courts to close their doors to all foreign litigants or to any case containing a foreign element. This policy, however, would inflict injustice on both foreigners and nationals alike and would be a severe impediment to international commerce. If a New York citizen buys goods from a German seller and fails to pay for the goods, it would not only be unjust to the seller if he could not sue the New York buyer and have the contract enforced in a New York court, but it would also have adverse effects for other New Yorkers who engaged in international business. Conversely, it would be theoretically possible for the law of a country to order its courts to open their doors to *all* cases, including those which have no nexus to the forum country. This policy, however, would lead to injustice to foreign defendants who might then be sued far away from their home country in a case which had no contact with the forum. It would also be inappropriate for the court to hear the case as it would be difficult to bring parties and witnesses before the court. Moreover, the judgment against the defendant would stand little chance of having any effect if the defendant did not abide by it and had no assets in the forum country. It is, therefore, both just and practical that, on the one hand, courts should open their doors to foreigners and to suits with some foreign elements, while, on the other hand, closing their doors to suits with which they have no relationship.

The jurisdiction rules of both Europe and the United States mostly reflect the considerations of equity and of efficiency described above.[2] On both conti-

[2] *See infra* § IV.

nents, however, national and state law-makers have provided for "long-arm statutes" or "exorbitant fora" which enable a plaintiff to bring an action even when the parties or the subject matter of the dispute have little or no contact with the forum state. Some statutes, for instance, provide that the existence within the jurisdiction of assets belonging to a non-resident defendant shall constitute a ground for jurisdiction. These long-arm statutes, combined with the courts' bias toward the application of the law of the forum,[3] have led to "forum shopping." When one adds that state and national laws on jurisdiction vary considerably, thus often making it impossible for the parties to an international transaction to calculate where an action may be instituted, it is not hard to understand why many lawyers find this state of affairs to be unsatisfactory for international trade.[4]

b) Choice of Law

The purpose of the existing national choice-of-law rules is more difficult to determine. As mentioned above, choice-of-law rules differ from legal system to legal system. In matters of contract, for instance, some systems rely on the law of the place of contracting, some on the law of the place of performance, some on the law which the parties are presumed to have intended to apply, and some again on the law to which the contract has its closest connection.[5] In many international transactions, therefore, the applicable law will depend upon where the suit is brought. Are there any justifications for such uncoordinated choice-of-law rules?

To this must be added another element of uncertainty. Even though most of the choice-of-law rules with which we are concerned have been formulated as multilateral rules designed to give foreign law the same scope of application as the law of the forum, the courts have not applied these rules consistently. In fact the rules have been twisted by various methods. It is remarkable to notice the regularity with which the courts have found that the applicable law is the law of the forum.[6] As a broad generalization it may be stated that in cases which have an appropriate relationship to the forum country the courts will apply the law of the forum. This homeward trend has been noticeable in all the EC countries and in the United States, where it has been openly supported by writers and by statute.[7] However, the homeward trend does not explain why choice-of-law rules are needed. The outcome of these cases would be the same if there were no choice-of-law rules.

[3] *See infra* notes 6–7 and accompanying text, and *infra* § V.

[4] *See, e.g., Report by Mr Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, OJ No. C 59, 5 March 1979, p. 1 at 6 [hereinafter cited as *Jenard Report*].

[5] *See* the survey in Lando, *Contracts*, 3 INT'L ENC. COMP. L. ch. 24, §§ 104–42 (1972).

[6] *See*, on England, 2 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1102 (New York, Voorhis & Co., 1935).

[7] *See infra* § V for a detailed discussion of the choice-of-law rules. *See also infra* note 142 and accompanying text.

When, however, the transaction clearly has most of its relevant connecting elements – for instance the place of negotiation, place of performance and the residence of one party – in a single foreign country, the courts will generally apply the law of that country. Indeed, this significant-connecting-factors test may explain and justify the necessity of some national choice-of-law rules. It satisfies a justified expectation of the parties that the law of the country in which a transaction is clearly localized should govern. If, for instance, an English branch of a New York corporation negotiates and concludes a contract in London whereby goods are sold to the English buyer, and if they are taken from the seller's warehouse in England and delivered to the buyer, payment to be made in England, then English law should apply. None of the parties had any reason to expect that New York law would govern, and, it is submitted, a New York court would at the request of one of the parties apply English law.[8] If, however, we change the facts and let the goods be taken from a New York warehouse and delivered c.i.f. Southampton and if we let payment be made in New York in U.S. dollars, none of the parties will have any assurance which law will apply until it knows where a suit is brought. A New York court would apply New York law[9] and an English court – probably – English law.[10]

On both continents the existence of divergent choice-of-law rules and the homeward trend have produced confusion and uncertainty. Very often parties to an international transaction will not know which legal system will apply. The choice of law will depend upon the country in which the suit is brought, and even then it is not always certain what the court will decide. Many consider this situation to be unsatisfactory for the parties who require foreseeability as to the applicable law irrespective of where an action may be brought.[11]

c) Recognition and Enforcement of Foreign Judgments

The recognition and enforcement of foreign judgments can be regarded as a means of safeguarding the justified expectations of a party who has obtained rights under a judgment. Thus for example, if an English plaintiff sues a German defendant in a German court and obtains a judgment in the plaintiff's favor, he should be entitled to have the judgment recognized and enforced in England if, for instance, the defendant moves his assets and his business to England. Otherwise the plaintiff would have to start all over again in England, with the commencement of a new suit.

In a mobile and interdependent society, where there are also few obstacles to moving from one jurisdiction to another – as in America and increasingly

[8] This, however, is not absolutely certain. *See infra* § V.A.2.a.

[9] *See* U.C.C. § 1–105 (U.S.).

[10] *See* 1 DICEY & MORRIS, *supra* note 1, at 836; and Glynn (H.) (Covent Garden) Ltd. v. Wittleder, [1959] 2 Lloyd's Rep. 409, 420–21.

[11] *See, e.g., Report on the Convention on the Law Applicable to Contractual Obligations by Mario Giuliano and Paul Lagarde*, OJ No. C 282, 31 Oct. 1980, p. 1, at 4 [hereinafter cited as *Giuliano Report*].

in the Community – such rules are extremely important. Thus in America, article IV, section 1 of the Constitution provides that "full faith and credit" shall be given to the judgments of the courts of sister states. This rule is self-executing, and the judgments of sister states must be recognized and enforced even if they violate the public policy of the forum state. The judgments of the courts of foreign countries, however, are subject to the usual recognition and enforcement rules and there are variations in the requirements from state to state. Some states, for instance, require reciprocity: the foreign-country judgment will be recognized and enforced only if the courts of the country issuing the judgment in turn recognize and enforce the judgments of the forum state. Every state in the U.S. will refuse to recognize or enforce a foreign-country judgment which violates its public policy.[12]

The EC countries have widely differing rules on the recognition of foreign judgments. Some countries, like the United Kingdom and Italy, are relatively liberal in their attitude toward foreign judgments. Others – such as Germany, which requires reciprocity – are somewhat stricter; and some (*e.g.*, Belgium, the Netherlands and Denmark) will only recognize and enforce foreign judgments if there is an agreement with the foreign country for mutual recognition and enforcement of judgments.[13]

The importance of reciprocal enforcement of judgments, as well as the unsatisfactory situation created by diversity in the applicable conflict laws, was recognized by the Fathers of the Rome Treaty when they provided in article 220 that "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals...." As we shall see the Member States have found such negotiations to be necessary.[14]

2. The Universalists and the Particularists

Differences in national and state conflict-of-law rules and the strong "homeward trend" shown by national and state courts create considerable uncertainty for international commerce. It is therefore appropriate to ask whether conflict-of-law rules ought to be unified.

It seems to be widely accepted that it is desirable to have uniform rules on the *recognition and enforcement of foreign judgments* among countries and states

[12] *See* R. Leflar, American Conflicts Law 171 ff (Indianapolis, Bobbs-Merrill Co., 1968); E. Scoles & P. Hay, Conflict of Laws 978 ff (St. Paul, West Pub. Co., 1984).

[13] *See Jenard Report, supra* note 4, at 3–6; and *Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice*, OJ No. C. 59, 5 March 1979, p. 71, at 78–79 [hereinafter cited as *Schlosser Report*].

[14] *Infra* § IV.B.2.

which have an integrated economy and trust in each others' courts. As mentioned above, the Full Faith and Credit Clause of the U.S. Constitution and article 220 of the EEC Treaty confirm that it is a declared policy to have judgments recognized and enforced throughout each of the unions. However, no explicit provisions exist in the U.S. Constitution and the EEC Treaty as far as rules on *jurisdiction* and *choice of law* are concerned. The question whether and to what extent uniform or harmonized conflict-of-law rules are needed for the functioning of an integrated economy is controversial and has, as we shall see, received different answers in the two unions.

Uniform conflict-of-law rules are supported by many lawyers including the present writers. The paramount argument in support of uniform rules is that such rules will promote certainty in commercial relationships. A party to an international contract or other international relationship needs rules to guide him when entering into the relationship, when performing it, and when a dispute with the other party threatens. In international trade, predictability can be achieved only if the courts of all countries strive to establish conflict-of-law rules which ensure uniform results. Uniformity in jurisdiction rules is not only the best device to suppress long-arm statutes – thereby assuring that a case will not be brought before the courts of a state unless there is a reasonable basis for those courts to exercise judicial jurisdiction and also reducing the number of possible fora – but is also a prerequisite of giving full faith and credit to foreign judgments. Uniform and multilateral choice-of-law rules, on the other hand, are necessary to give the foreign law the same opportunity to apply as the law of the forum, and to ensure that wherever the case may be heard the same law will be applied.

The universalist approach, however, has been opposed by a particularistic school of thought which does not see any great advantage in uniformity and which alleges that conflict-of-law rules should be framed in close harmony with the substantive-law rules of the forum state or country,[15] since they form part of the law of the state and should serve the governmental interests of that state. According to this school, the policy of the *forum* state should determine when to admit suits and when to apply foreign law: uniformity and equality are only secondary objectives for the conflict-of-law rules. To avoid what one may call an extreme "*lex forism*," so-called long-arm statutes should be curtailed so that a case cannot be brought before the courts of a state unless there is some reasonable basis for that court to exercise judicial jurisdiction. As far as choice-of-law rules are concerned, due process requires that a court should apply the local law of its own state only if the subject matter has an appropriate relationship to the forum state or if there is some other reasonable basis for applying the *lex fori*.

3. The European and the U.S. Approaches

In those areas in which the European Communities have used conflict-of-law rules as a tool for promoting legal integration the universalist approach has

[15] On this school *see* Lando, *supra* note 5, at §§ 6 & 143–46.

been followed. In 1968, the then Member States of the EEC signed the *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* (the Brussels Convention)[16] which is now in force between the six "old" Member States and which within a few years will also be in force in all ten Member States. The jurisdiction rules under the Brussels Convention will then apply uniformly throughout all Member States. The Member States have also signed a *Convention on the Law Applicable to Contractual Obligations* (the Rome Convention)[17] which will introduce uniform and equal choice-of-law rules on contracts.

In contrast, the individual states of the United States have tended to follow the particularist approach, subject to the federal constitutional limitations placed upon the jurisdiction and the choice-of-law rules applied by the states. Some American courts, however, have begun to adopt the more universalist approach[18] advocated by the American Law Institute's *Restatement, Second, Conflict of Laws*.[19] The influence of the *Restatement* does have an integrative effect, but the existing disparities among the laws of the fifty states, the natural tendency to favor one's own law, the existence of long-arm statutes, and the absence of any substantial federal choice-of-law rules,[20] have not brought about any high degree of unification. The integrative pressures have been left to the federal courts which have put some – mostly weak and vague – constitutional limits upon the state conflict-of-law rules.

II. Uniform Conflict-of-Law Rules versus Uniform Substantive-Law Rules as Techniques for Legal Integration

A universalist approach seeks uniformity. The same rules on judicial jurisdiction should apply in all countries and the same substantive rules of law should be applied by the courts wherever the action is brought. The latter objective may be attained either by uniform conflict-of-law rules or by uniform substantive-law rules.

A. The Advantages of Uniform Conflict-of-Law Rules

Compared to the unification of substantive law, the unification of conflict rules has three principal advantages:

[16] OJ No. L 304, 30 Oct. 1978, p. 36. For the text as amended by the 1971 Convention of Accession, *see id.* at 77.

[17] OJ No. L 266, 9 Oct. 1980, p.1.

[18] *See, e.g.*, Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 368–69 (1972).

[19] *E.g.*, Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1970) (tort); Consolidated Mut. Ins. Co. v. Radio Foods Corp., 240 A.2d 47 (1968) (contract).

[20] *See infra* § V.A.

1. Non-Disruptive Rules

First, the reform of conflict rules has the advantage of creating only a small disturbance in the national legal systems. The penetration of conflict-of-law rules into a legal system is slight, since such rules only address themselves to citizens and enterprises taking part in international trade or having some other relationship with a foreign country. In matters such as contract, tort, and property, changes in conflict laws do not imply a revolution, whereas the unification of substantive law rules, on the contrary, will often bring about a perceptible upheaval and entail a considerable disturbance in the countries involved, especially when these rules apply to internal as well as international relationships.

2. Simplicity

Second, the unification of conflict-of-law rules is also a much simpler process than the unification of substantive-law rules. Choice-of-law rules are mostly spacious "portfolios," each provision including large areas of substantive law within its general scope – such as the constitution of corporations, torts and rights over immovables. A whole branch of jurisprudence may be covered by a few conflicts provisions. It has been possible to unify the choice-of-law rules on contracts in a European Convention of about twenty operative articles,[21] but the unification throughout the Community of substantive contract law is a much more ambitious and difficult undertaking.[22] In the United States the part of the *Restatement, Second, Conflict of Laws* which deals with contracts, including several specific contracts, comprises only thirty-six sections, whereas the *Restatement, Second, Contracts*, which only treats the substantive principles of contract law, has 386 sections.[23]

3. Certainty

Third, uniform conflict-of-law rules foster predictability. The uniformization of jurisdiction rules reduces the number of available fora, while uniform choice-of-law rules enable the parties to determine more easily which country's law will apply in an action brought in the courts of the states which have adopted the uniform rules. In addition, such rules are often codified and have the advantages which a codification has over judge-made law. In Europe, as

[21] For further discussion of this Convention (the Rome Convention) *see infra* § V.B.

[22] *See* Lando, *Unfair Contract Clauses and a European Uniform Commercial Code*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE/NOUVELLES PERSPECTIVES D'UN DROIT COMMUN DE L'EUROPE 267 (M. Cappelletti ed., Leyden/Brussels/Stuttgart/Florence, Sijthoff/Bruylant/Klett-Cotta/Le Monnier, 1978) where a unification of the commercial law of Europe is advocated; *see also* J. KROPHOLLER, INTERNATIONALES EINHEITSRECHT § 13, at 167 ff (39 Beitr. z. ausländ. u. intern. Privatrecht, Tübingen, Mohr (Siebeck), 1975).

[23] *See* RESTATEMENT, SECOND, CONFLICT OF LAWS §§ 186–221 (1971) and RESTATEMENT, SECOND, CONTRACTS (1981).

well as in the United States, it is still a matter of some uncertainty which choice-of-law rules the courts will apply to an issue in contract, tort, or property, etc. Uniform choice-of-law rules can, as we shall see, to some extent remove this uncertainty, although one must be careful not to over-estimate the level of predictability which uniform conflict-of-law rules can provide.

B. Disadvantages of Uniform Conflict-of-Law Rules

1. Inherent Uncertainty of Jurisdiction Rules

The first major disadvantage of unification of conflict-of-law, as opposed to substantive-law, rules is inherent in the very nature of jurisdiction rules which have an inevitable flaw: they can never be made into what one may call "no-alternative" rules. Choice-of-law rules generally leave the parties or the courts no alternative since they lead to one legal system only. Jurisdiction rules, however, must be framed so that in many cases they leave the plaintiff with an option to sue in two or more countries. In the case of a delict or a tort, the plaintiff has the choice to sue the defendant either in the latter's home country or in the country in which the tort was committed or produced its effects. In a contract case, most jurisdiction rules give the plaintiff an option to choose between the courts either of the place where the contract was performed or of the defendant's home country. Thus, unless the parties have agreed upon a valid jurisdiction clause in their contract, even uniform jurisdiction rules may not provide the parties with any assurance as to where the case may be brought.

2. Problems of Ascertaining Foreign Law

A second disadvantage arises out of the fact that choice-of-law rules pose the problem of ascertaining foreign law. If one evaluates the efficiency of a tool of legal integration by the frequency and regularity of its operation in legal relationships, the value of *choice-of-law rules* will depend upon how regularly foreign law is in fact applied to relationships to which the conflict rules direct the parties or the court to apply foreign law. Applying this test to choice-of-law rules one finds several factors which suggest they are a poor tool, and that they suffer from inherent defects which cannot be overcome through uniformization.

The frequency of the application of foreign law is a function of several factors. One is the possibility of ascertaining the content of the foreign law to which a choice-of-law rule may refer. If this ascertainment is easy and inexpensive, or if the parties or the courts have easy access to reliable sources of information on foreign law, the conflict rules may be efficient. If, however, this ascertainment is cumbersome and costly, or if reliable sources of information are unavailable, the conflict rules will be inefficient.

In general, the parties or a court will have no difficulty in ascertaining the law of a foreign country which belongs to their own "family of laws" and which speaks their language or a familiar tongue. As will be seen, the United

States courts have no great difficulty in ascertaining the law of a sister state or of a foreign English-speaking Common Law country. A Swedish court has no difficulty ascertaining Danish or Norwegian law; nor does a French court have difficulty in ascertaining Belgian, or Luxembourg law.

A court faced with the problem of acquiring information about the law of a country which belongs to an alien "family" and which speaks a language unfamiliar to the court is in a more difficult position. It will not help a New York party suing in a New York court to know that the court would apply Greek law to the issue if he or the court does not know what the substantive rules of Greek law are. Obtaining reliable information about the contents of foreign law is often cumbersome, time-consuming and costly. This difficulty increases when the foreign law is uncertain, as for instance when the relevent case law is obscure or contradictory. Obscurity and contradiction may also exist in the law of the forum country or in the law of a legal system within the "family," but this obstacle is more serious when one is facing a system which, because it is alien, is doubly obscure. These difficulties may be somewhat relieved if the court has easy access to reliable information concerning the foreign law. But easy access to foreign law is a rare phenomenon.

This problem of ascertainment has influenced the treatment of another question which is decisive for the regularity with which the choice-of-law rule will operate, namely the question whether it is for the parties or for the court to raise the issue. Must the parties plead the application of foreign law or must the court raise the issue ex officio? If the court may only apply the choice-of-law rules when pleaded by the parties, the conflict rules will come into operation less frequently than if the court has a duty to apply the conflict rules even when the parties have not raised the issue. Further, the efficiency of the conflict rules will depend upon whether the ascertainment of foreign law is left to the parties, who must submit evidence in proof of foreign law, or whether the court has a duty to provide the necessary information, either alone or with the cooperation of the parties.

Lawyers, in both the Civil and the Common Law worlds, pretend to decide these questions on conceptual considerations, according to whether foreign law is to be treated as "fact" or "law." In reality these questions are determined with reference to considerations of policy and with a view to the economy and expediency of civil procedure. Should a policy of laissez-faire be adopted, obliging the parties to plead and prove the foreign law, or should society sustain the costs and inconveniences, obliging the courts to raise the issue and ascertain the foreign law? The difficulty in obtaining information about the contents of foreign law is perhaps the most serious problem which the choice-of-law rules raise. These questions and the answers to them given in the United States and in Europe will be treated below in section III.

3. Underlying and Latent Structural Differences

Choice-of-law rules also evoke some controversial questions connected with differences in the structures of the legal systems to which they refer, such as

the problems of classification, adaptation and the preliminary question.[24] In Europe differences in structure of the Civil Law and the Common Law systems will inevitably cause clashes. In the Common Law countries, for instance, statutes of limitation are considered as affecting procedure and are therefore governed by the *lex fori*; in the Civil Law countries they are treated as affecting substance and are governed by the proper law of the action which gave rise to the claim. In some cases these differences could be overcome by an international convention harmonizing or unifying the conflict-of-law rules. Thus the Rome Convention of 1980 has provided that statutes of limitation are to be classified as relating to substance (article 10(d)). But in many cases the structural differences will not be solved in the Convention (either through neglect or because of their complexity) and the disparities will continue to subsist despite apparent uniformity. For example, in later discussion we shall see how the term "the place of performance" of a contractual obligation, which is used in the Brussels Convention as a ground for jurisdiction, has caused conflicts of classification.[25]

Such structural differences are equally often a serious impediment to the adoption of conventions which aim at unifying the substantive law. In conventions concerning substantive law, however, these differences are more apparent and have to be faced openly with the result that the difficulties are more commonly resolved than is the case with conflict-of-laws conventions.[26] In the United States, where the structural differences between the laws of the several states are few, the unification of substantive law has made greater progress than in Europe, where structural differences abound. On the other hand, in Europe the unification of conflict-of-law rules has been used more than in the United States where unification has mainly been undertaken only at a secondary level, for instance in an attempt to "restate" the existing law.[27]

[24] *See* P. Neuhaus, Die Grundbegriffe des Internationalen Privatrechts §§ 11–17 & 46–48 (2d ed., 30 Beitr. z. ausländ. u. intern. Privatrecht, Tübingen, Mohr (Siebeck), 1976).

[25] *See infra* notes 186–93 and accompanying text.

[26] *E.g.*, in the UN Convention on Contracts for the International Sale of Goods of 1980, agreement was reached on several concepts related to substantive sales law, *e.g.*, arts. 45 & 61 (breach of contract and remedies for breach); art. 25 (fundamental breach); arts. 45(2), 49(1) (2), 61 & 81–84 (avoidance); arts. 30–33 (delivery of goods); & arts. 66–70 (passing of risk). For the text of the Convention *see* Final Act of the UN Conference on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, 10 April 1980, Annex I. The Convention was concluded at Vienna and opened for signature on 11 April 1980. By 30 Sept. 1981, the closing date for signature, 21 states had signed. It will enter into force on ratification by 10 states. *See also* J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (Deventer, Kluwer, 1982), §§ 274–78 (remedies for breach), §§ 181 ff (fundamental breach), § 301 (avoidance), §§ 210 ff (delivery), & §§ 358 ff (passing of risk).

[27] *See* Restatement, Second, Conflict of Laws (1971).

4. The Tendency of Courts to Revolt Against the Inflexibility of Choice-of-Law Rules

A fourth disadvantage of the conflict-of-law approach to uniformization is that courts tend to be reluctant to apply foreign law without reservation. The traditional multi-lateral choice-of-law rule requires a leap into the unknown. In a (usually) broad category of cases, it is sufficient to show a certain foreign contact to impose on the court the duty to apply the law of any of a vast number of legal systems. This blindfolded selection of a legal system will sometimes prove offensive to the court.

If a foreign rule of law "outrages its sense of justice or decency,"[28] a court can clearly invoke public policy considerations and refuse to apply the rule. However, in many cases, while not actually violating public policy, the foreign rule of law may prove so alien to the forum as to provoke instinctive rejection. Rules like the French statutory provisions on "*mise en demeure*" and "*délai de grace*,"[29] which apply in cases where performance is delayed, are not obnoxious for foreign courts but they are closely linked to the French court system and therefore difficult to apply abroad. Other rules may contain an element of surprise: for instance, section 27 of the Scandinavian Sale of Goods Act will entitle a buyer to damages for failure of the seller to deliver the goods in time only if the buyer gives notice of the delayed performance immediately upon delivery. In Scandinavia this rule is well known. It is, however, a harsh rule for non-Scandinavian buyers who can hardly be expected to know of it.

These are cases where there are tangible reasons for refusal to apply the foreign law. However, decisions both in Europe and the United States reveal that courts have revolted against the remorseless mandate of the choice-of-law rule in other cases as well: courts want a say in the decision on the merits and are not ready to accept uncritically a foreign substantive rule. When for one reason or another the court does disapprove of a foreign substantive rule it frequently resorts to "covert techniques" to avoid its application. This behavior impairs the effectiveness of the choice-of-law rule. Few rules of law are so frequently sabotaged by the courts as choice-of-law rules.

In the United States new theories on the choice-of-law process have emerged,[30] advocating a more policy-oriented approach. The central idea behind this approach is that the choice-of-law process should take into account the content of the substantive rules which claim application to the subject matter of the dispute. Whenever there are real conflicts between the substantive

[28] 1 DICEY & MORRIS, *supra* note 1, at 83, *quoting from* In the Estate of Fuld (No. 3), [1968] P. 675, 698.

[29] *See* Treitel, *Remedies for Breach of Contracts*, 7 INT'L ENC. COMP. L. ch. 16, §§ 147–48 (1976).

[30] On these theories *see* D. CAVERS, THE CHOICE-OF-LAW PROCESS (Ann Arbor, U. Mich. P., 1965); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (Durham, Duke U.P., 1963); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS; CASES AND MATERIALS ON CONFLICT OF LAWS 76, 408 (Boston, Little, Brown, 1965); E. SCOLES & P. HAY, *supra* note 12, at 16–42.

rules of two or more jurisdictions, the different rules must all be taken into consideration in deciding the outcome of the dispute. However, as we shall see, this new American approach may lead to arbitrariness and confusion.[31]

The dilemma will be a perpetual one. When in order to establish certainty in legal relations a law-maker resorts to the simple and convenient device of providing traditional choice-of-law rules, he will encounter difficulties in their practical application: courts will often refuse to implement the rules. If then in order to avoid injustice and court obstructionism the law-maker resorts to a less traditional approach to the choice-of-law process, which takes into account the substantive rules involved, he will promote unpredictability and confusion. This imbroglio is almost as old as are the choice-of-law rules on contract.

III: The Application of Foreign Law

It was mentioned above that the ascertainment of foreign law is one of the most serious problems which choice-of-law rules create. This problem accounts for the reluctance of the courts of some countries to apply the rules of foreign law *ex officio*; such courts will only apply foreign law when pleaded and proved by the party who invokes it. We shall now see how the courts of the United States and of the countries of the European Communities have attempted to solve these problems.

A. U.S.A.: The Fact Approach to Foreign Law

1. The Common Law Background[32]

In a strict territorialist sense, "law" comprises only the legal norms (statutory and decisional) which have binding force in the court's own territory. A court, in this view, can only apply its own law. Foreign "law" in this sense is thus not "law" at all, but, in situations having a requisite foreign connection as deter-

[31] *See infra* §V.A. *See also* Lando, *New American Choice-of-Law Principles and the European Conflict of Laws of Contracts*, 30 Am. J. Comp. L. 19 (1982).

[32] *See generally*, Sass, *Foreign Law in Federal Courts*, 29 Am. J. Comp. L. 97 (1981) [hereinafter cited as Sass (1981)]; Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke and Prove the Applicable Foreign Law*, 59 Cornell L. Rev. 1 (1973); Sass, *Foreign Law in Civil Litigation: A Comparative Study*, 16 Am. J. Comp. L. 332 (1968); Hay, *Vereinigte Staaten von Amerika*, in Die Anwendung ausländischen Rechts im internationalen Privatrecht 102 (D. Müller ed. for the Max-Planck-Institut für Ausländ. u. Intern. Privatrecht, 10 Materialien z. ausländ. u. intern. Privatrecht, Berlin/Tübingen, De Gruyter/Mohr (Siebeck), 1968) [hereinafter cited as Die Anwendung ausländischen Rechts]; Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law - Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 615 (1967); Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964 (1958). *See also* Jefferies, *Recognition of Foreign Law by American Courts*, 35 U. Cin. L. Rev. 578 (1966); Hay, *Internation-*

mined by local law, constitutes a "fact" like any other fact of the case. In Anglo-American law, this view can be traced to a decision by Lord Mansfield in 1774,[33] adopted for the U.S. by Chief Justice Marshall in 1804.[34] The fact approach extended both to foreign-country law and to the law of sister states, with the result that courts would take judicial notice of neither.[35]

The first *Restatement of Conflict of Laws* in 1934, reflected this theory; thus sections 621–22 of the *Restatement* merely provided for a presumption of identity of another state's *common law* with the *common law* of the forum. As a consequence of the fact approach to foreign law, a party relying on foreign law had to plead and prove it in accordance with the rules of evidence (including examination and cross-examination of witnesses).[36] The issue would be decided by the trier of fact, often the jury, and the resulting decision, as a factual determination, would not be reviewable on appeal:[37] a "burdensome, inconvenient... [and] absurd method of ascertaining foreign law."[38]

Judicial decisions in some states mitigated the problem by extending judicial notice to sister-state (but not to foreign-country) law.[39] In a great many other cases, in which foreign law was in issue but proved insufficiently or not at all, courts engaged in a presumption of identity with forum law.[40] Logically, the presumption should be limited to the common law of sister states (possibly extending as far as statutory law of sister states[41]) and the law of foreign legal sys-

al versus Interstate Conflicts Law in the United States, 35 RabelsZ 429, 445–47 (1971); Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 Nw. U.L. Rev. 602 (1975); *Symposium on Proof of Foreign and International Law*, 18 Va. J. Int'l L. 609–751 (1978).

[33] Mostyn v. Fabrigas, 1 Cowp. 161, 174, 98 E.R. 1021, 1028 (1774).

[34] Church v. Hubbard, 6 U.S. (2 Cranch) 187, 236 (1804).

[35] *See* Cox v. Morrow, 14 Ark. 603, 610 (1854).

[36] *See* E. Scoles & P. Hay, *supra* note 12, at 403–05.

[37] In addition, a mistake in the determination of foreign law would be a mistake of fact, and not of law, and arguably would give rise to a claim for unjust enrichment. *Cf.* Restatement of Restitution § 46(c) (1937).

[38] R. Cramton, D. Currie & H. Kay, Conflict of Laws: Cases, Comments, Questions 56 (3d ed., St. Paul, West Pub. Co., 1981).

[39] *See, e.g.*, Choate v. Ronsom, 323 P.2d 700 (1958); Prudential Ins. Co. of Am. v. O'Grady, 396 P.2d 246 (1964); National Transp. Co. v. J. E. Faltin Motor Transp. Co., 255 A.2d 606 (1969); White v. White, 480 P. 2d 872 (1971) (dictum).

[40] *See* Restatement of Conflict of Laws §§ 621–22 (1934). Cases are collected in 75 A.L.R.2d 529 (1961). More recent cases involving foreign country law include: Adamsen v. Adamsen, 195 A.2d 418 (1963) (Norwegian child custody laws); San Rafael Compania Naviera v. American Smelting & Refining Co., 327 F.2d 581 (9th Cir. 1964) (Peruvian contract law); Schacht v. Schacht, 435 S.W.2d 197 (Tex. Civ. App. 1968) (Mexican divorce law); Enterprises & Contracting Co. v. Plicoflex, Inc., 529 S.W.2d 805 (Tex. Civ. App. 1975) (adequacy of service under Lebanese law); Stein v. Siegel, 377 N.Y.S.2d 580 (1975) (Austrian tort law); Noble v. Noble, 546 P.2d 358 (1976) (parties' rights, in divorce action, to real estate located in Denmark). A case involving sister-state law is Glover v. Sink, 195 S.E.2d 443 (1973) (Maryland law).

[41] *See, e.g.*, Etheridge v. Sullivan, 245 S.W.2d 1015 (Tex. Civ. App. 1951).

tems based on the Common Law.[42] Thus, many decisions refused to extend the presumption to the law of Civil Law systems.[43] In contrast, other states extended the presumption to virtually all foreign law,[44] even to the point of assuming that California's community property law was the same as the law prevailing in China.[45] The approach of the last group of cases blends into, and becomes indistinguishable from, the application of forum law to cases with foreign elements in which the applicable foreign law was not pleaded or proven on the ground that the parties are presumed to have chosen the local law by acquiescence.[46] To the extent that the local law is unconnected with the transaction – a fact which may preclude its express choice by the parties[47] – this result is analytically incorrect, although it does serve the practical and desirable purpose of avoiding the necessity to dismiss the plaintiff's action for failure to prove an essential fact (the foreign law) of the case.[48] We will consider below the use of presumptions and the consequences of failure to establish the applicable foreign law.

In the United States, in the federal courts in particular, but also in many states, statutory changes have modified the Common Law rule. Typically the statutory solutions have moved closer to the intermediate practice which regards foreign law as "law" and calls for its ascertainment by the court with the assistance of the parties. The following subsections detail these changes.

2. Statutes and Uniform Laws

a) State Law

In the United States many states early adopted statutes providing for mandatory judicial notice of foreign (sister-state) law.[49] In at least seven states[50] the

[42] 1700 Ocean Ave. Corp v. GBR Assocs., 354 F.2d 993 (9th Cir. 1965) (Canadian law). *Cf.* Reisig v. Associated Jewish Charities, 34 A.2d 842 (Md. 1943) (on the basis of statutory authorization, court took judicial notice of Palestinian law since it was based on the "common law of England").

[43] *See, e.g.*, Western Union Tel. Co. v. Way, 4 So. 844 (1887) (German law).

[44] *See, e.g.*, Tortugero Logging Operation, Ltd. v. Houston, 349 S.W.2d 315 (Tex. Civ. App. 1961) (Costa Rica).

[45] Louknitsky v. Louknitsky, 266 P.2d 910 (1954).

[46] *See* Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navigacione Almirante S.A. Panama, 437 F.2d 301, 307 (9th Cir. 1971), *cert. denied*, 402 U.S. 996 (1971); Vulcanized Rubber & Plastics Co. v. Scheckter, 162 A.2d 400, 403 n.2 (1960).

[47] The underlying logic of the rule that parties should *generally* not be permitted to displace an applicable law by the choice of an unconnected law usually does not prevent the application of the equally unconnected law of the forum.

[48] Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956).

[49] *See* Hay, *Vereinigte Staaten von Amerika*, *supra* note 32, at 105 ff.

[50] KAN. CIV. PROC. CODE ANN. §§ 60–409 (Vernon 1965); MASS. ANN. LAWS ch. 233 § 70 (1974); MISS. CODE ANN. § 13–1–149 (1972); N.Y. CIV. PRAC. R. 4511 (1963); N.C. GEN. STAT. § 804 (1969); VA. CODE ANN. 8–273 (1957); W. VA. CODE ANN.

rule has been extended to the law of foreign countries.[51] Such "judicial notice," however, does not mean that the parties are freed from the task of assisting the court, for instance by providing references to foreign statutory[52] or decisional[53] law or by adducing expert testimony.[54]

Twenty-six states have adopted the *Uniform Judicial Notice of Foreign Law Act*,[55] originally proposed in 1936. This Uniform Act requires the forum to take judicial notice of sister-state law, but not of foreign-country law. Section 5 provides that foreign law shall be an issue *for the court*, but otherwise the Act retains the Common Law requirement of pleading and proof, including observance of the rules of evidence.[56] In at least two states,[57] the Act was modified to provide for judicial notice of foreign-country law as well. The New Jersey provision is the more far-reaching of the two, because it provides mandatory judicial notice if foreign law is pleaded and judicial notice requested.[58]

Several states have now adopted the *Uniform Interstate and International Procedure Act* (1962).[59] This act requires that a party intending to rely on foreign law (without distinction between sister-state and foreign-country law)

§ 57–1–4 (1966) (an annotation to the section purports to limit its applicability to sister-state and federal law); CAL. EVID. CODE §§ 452 (f), 453 (1967).

[51] In addition, Connecticut provides for judicial notice of foreign country statutory (but not decisional) law. CONN. GEN. STAT. REV. §§ 52–163, 52–164 (1958).

[52] *But see* Rodrigues v. Rodrigues, 190 N.E. 20 (1934).

[53] Bradbury v. Central Vermont Ry., 12 N.E.2d 732 (1938).

[54] Eastern Offices, Inc. v. P.F. O'Keefe Advertising Agency, 193 N.E. 837 (1935). *See also* N.Y. CIV. PRAC. R. 4511 (1963); KAN. CIV. PROC. CODE ANN. § 60–409 (Vernon 1965).

[55] 9A U.L.A. 553 (1965). The states are: Colo., Del., Fla., Hawaii, Ill., Ind., Kan., Ky., La., Me., Md., Minn., Miss., Mo., Neb., N.J., N.D., Ohio, Or., R.I., S.C., S.D., Tenn., Wash., Wis. & Wyo. 13 U.L.A. 496 (Master ed. 1980). Eleven other states have adopted provisions similar to § 4.03 of the Uniform Interstate and International Procedure Act, 3 U.L.A. 459 (1980), that foreign law is to be determined by the court, not the jury, and that the determination is subject to review on appeal as a ruling of law. The Uniform Judicial Notice of Foreign Law Act takes the same approach in § 3.

[56] Thus, the "best evidence rule" may apply, with the result that foreign law may be proved by expert testimony only if the applicable statutory text is not available. *See, e.g.*, Groome v. Freyn Eng'g Co., 28 N.E.2d 274 (1940) (Russian law). In Greenberg v. Rothberg, 35 S.E.2d 485 (1945) the court ruled that a foreign city ordinance could neither be judicially noticed nor proved by testimony of an attorney claiming to be familiar with the ordinance.

[57] MD. CTS. & JUD. PROC. CODE ANN. §§ 10–501 to 10–507 (1976) (in the case of foreign countries, limited to Common Law jurisdictions); N.J. STAT. ANN. §§ 2A: 82–27 to 2A: 82–83 (1976). *See supra* note 42.

[58] *See* Ennis v. Petry, 148 A.2d 722 (1959) (trial court erred in applying Quebec law since statutory preconditions had not been met, presumably because the defendant had raised a defense based on Quebec law only at trial). *But see* Pine Grove Manor, Section No. 1 v. Director, Division of Taxation, 171 A.2d 676 (1961) (court may ascertain foreign law on its own).

[59] 3 U.L.A. 459 (1980).

give notice in the pleadings or "other reasonable written notice" (section 4.01); provides that the issue of foreign law is one for the court, "not jury" (section 4.03); permits the court to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence" (section 4.02); and stipulates that the foregoing provisions do "not repeal or modify any other law of this state permitting another procedure for the determination of foreign law" (section 4.04). The last provision thus serves to preserve more liberal provisions of state law, while the Act's own liberal provisions will supersede more restrictive Common Law and statutory approaches. The Act no longer contains a reference to "judicial notice," the meaning of which had been unclear in prior law. Furthermore, the Act shifts responsibility for the ascertainment of foreign law to the court, giving the latter a large measure of freedom in a manner akin to some Continental approaches, and makes the court's determination "subject to review on appeal as a ruling on a question of law" (section 4.03).

b) Federal Law

Federal Rule of Civil Procedure 44.1, which went into effect in 1966, is modeled after the *Uniform Interstate and International Procedure Act* and hence contains provisions substantially identical to the latter's sections 4.01–4.03.[60] Rule 44.1 raises various problems regarding notice, burden of proof, the nature of the evidence of foreign law used by the court, and the scope of appellate review.

i) Notice requirements

In general, one may infer from appellate decisions (refusing to consider foreign law issues not properly raised at the trial level)[61] that proper ("reasonable," including timely) notice of the intention to invoke foreign law is neces-

[60] FED. R. CIV. P. 4.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law.

See generally Sass (1981), *supra* note 32.

Since the determination of foreign law is now a question of law the presence of an issue of foreign law does not "obstruct the Court's disposition of a motion for summary judgment." Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1156 (D.N.M. 1973). *Accord* Instituto per lo Sviluppo Economico dell'Italia Meridionale v. Sperti Prods., Inc., 323 F. Supp. 630 (S.D. N.Y. 1971).

[61] Ruff v. St. Paul Mercury Ins. Co, 393 F.2d 500 (2d Cir. 1968). In Morse Electro Prods., Corp. v. S. S. Great Peace, 437 F. Supp. 474, 487–88 (D. N.J. 1977) the Court held that the failure of the parties to invoke Chinese law and, despite requests to do so, to submit supplemental pleadings, amounted to an abandonment of rights and liabilities under that law which had been expressly stipulated in the bill of lading. The Court then proceeded to decide the case under principles of admiralty and state law.

sary.[62] However, in at least one case, lack of reasonable notice did not cause the trial court to exclude material on foreign law, although admittedly very special circumstances existed.[63]

ii) Burden of proof

Rule 44.1 seemingly relaxes the old requirement that a party relying on foreign law had to prove it by competent evidence. Thus, to avoid the "potential drastic consequences" of a dismissal based on an inadequate record, one court granted the plaintiff thirty days to supply evidence in rebuttal of the defendant's expert testimony.[64] Other decisions suggest that the submission of the relevant statute alone may be sufficient evidence.[65] The taking of evidence abroad is now also facilitated by a Hague Convention on this problem which entered into force for the United States on 7 October 1972.[66]

When the parties have not raised an issue of foreign law, it is presumed that they agree that foreign law should not be considered.[67] In such a case, the general rule is that the court will apply the *lex fori*.[68]

[62] Even though more liberal than earlier law, especially the Common Law, a rule requiring notice of intent to invoke foreign law in all cases may still be too restrictive. Thus, there may be cases in which foreign law should be applied *ex officio*. For example in custody cases, determination of the child's welfare may include the necessity of ascertaining the law of the jurisdiction of the foreign applicant seeking custody. Similar concerns may apply in status cases generally. A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, *General Part*, 182–83 (Leyden/Dobbs Ferry, Sijthoff/Oceana, 1967).

[63] First Nat'l Bank of Arizona v. British Petroleum Co., 324 F. Supp. 1348 (S.D. N.Y. 1971) (permission granted to raise issue of foreign law seven years after the beginning of the trial because the issue could not have been raised earlier without prejudicing a motion for summary judgment made before the adoption of Rule 44.1 in 1966).

[64] Allianz Versicherungs-Aktiengesellschaft v. Steamship Eskisehir, 334 F. Supp. 1225 (S.D. N.Y. 1971).

[65] First Nat'l City Bank v. Compania de Azuaceros, S.A., 398 F.2d 779 (5th Cir. 1968); Bamberger v. Clark, 390 F.2d 485 (D.C. Cir. 1968). *But see* Gates v. P. F. Collier, Inc., 256 F. Supp. 204 (D.C. Hawaii 1966) (in a decision announced eight days after the entry into force of Rule 44.1, submission of a Japanese statute, without explanatory case law, was held insufficient to prove that Japanese law invalidated the contract); Usatorre v. The Victoria, 172 F.2d 434 (2d Cir. 1949) (in a decision rendered prior to Rule 44.1, the burden of proof was not met by submission of a copy of the foreign statute and the introduction of uncontroverted expert testimony).

[66] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for sig.* 18 Mar. 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

[67] *See, e.g.*, Walter v. Netherlands Mead N.V., 514 F.2d 1130 (3d Cir. 1975) (in absence of any effort to prove foreign law, the Court assumed that the law of the Netherlands Antilles was consistent with that of the forum).

[68] Bartsch v. M.G.M., Inc., 270 F. Supp. 896 (S.D. N.Y. 1967), 391 F.2d 150 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968). *See* A. EHRENZWEIG, *supra* note 62, at 181; RESTATEMENT, SECOND, CONFLICT OF LAWS § 136 reporter's note, comment (h) (1971).

iii) Sources and materials used by the court

Rule 44.1 expressly authorizes the use of sources and materials without regard to the usual rules of evidence. Thus, parties may tender expert testimony and affidavits by experts,[69] English language translations of foreign texts and foreign treatises,[70] and even unauthenticated copies of foreign laws.[71] The court may itself question expert witnesses and consider other material ex officio.[72]

iv) Scope of appellate review

Rule 44.1 treats the determination of foreign law as a ruling on an issue of "law." Therefore the Advisory Committee on Rules[73] has noted that appellate review should not be confined to the "clearly erroneous" standard set by Rule 52(a).[74] The Fifth Circuit adopted this view in 1968, holding that its review was not controlled by the trial court's determination nor by the expert testimony offered at the trial. It reversed the decision below, which had concluded that the foreign law was unclear and thus should not be applied, and instead interpreted the relevant Panamanian statute itself.[75] The District of Columbia Circuit took a similarly wide view of its review function,[76] while a decision by the Third Circuit merely acknowledged the suggested wide standard but affirmed the trial court's determination without independent analysis.[77] As noted earlier, foreign law will not be considered on appeal unless the issue was raised at the trial level.[78]

[69] *See* Instituto per lo Sviluppo Economico dell'Italia Meridionale v. Sperti Prods., Inc., 323 F. Supp. 630 (S.D. N.Y. 1971); Noto v. Cia. Secula di Armanento, 310 F. Supp. 639 (S.D. N.Y. 1970).

[70] *See* Ramsey v. Boeing, 432 F.2d 592 (5th Cir. 1970).

[71] Ramirez v. Autobuses Flecha Roja, 486 F.2d 493 (5th Cir. 1973) (Mexico).

[72] *See generally* Peritz, *Determination of Foreign Law Under Rule 44.1*, 10 TEX. INT'L L.J. 67, 74 ff (1975); *see also Symposium on Proof of Foreign and International Law*, *supra* note 32.

[73] *See* 28 U.S.C.A. Rule 44.1 (West. 1983).

[74] "Findings of *fact* shall not be set aside unless clearly erroneous ...." FED. R. CIV. P. 52(a) (emphasis added).

[75] First Nat'l City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779 (5th Cir. 1968). In *Ramsey*, 432 F.2d 592, the court affirmed the trial court's ruling with respect to Belgian law but only after undertaking its own analysis of the affidavits, expert testimony and an authoritative treatise.

[76] Bamberger v. Clark, 390 F.2d 485 (D.C. Cir. 1968) (Court reversed trial court on the basis of its own interpretation of the relevant German statute after characterizing the foreign law question as one of law, albeit with an erroneous reference to Rule 44(a)(1)).

[77] Mathey v. U.S., 491 F.2d 481 (3d Cir. 1974). This decision is not necessarily contrary to the cases cited *supra* notes 75–76, since the issue involved sister-state and not foreign-country law.

[78] *Supra* note 61 and accompanying text. Despite the implication in Bartsch v. M.G.M., Inc., 391 F.2d 150, 155 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968) that the appellate court could undertake an original and independent analysis of a foreign law issue suggested by the parties, the same court refused to do so in Ruff v. St. Paul

3. The Consequences of Failure to Prove Foreign Law Adequately: Presumptions and Use of the *Lex Fori*

Any legal system which does not provide for the ascertainment of law by the court ex officio must address the question of what law to apply when no proof of foreign law is offered in a case displaying foreign law factors, or when foreign law is properly raised but the particular party fails to sustain the burden of proof.

In the first case, the forum will treat the case as one arising under local law and apply the latter.[79] Thus, the application of the *lex fori* on the basis of party acquiescence is a form of choice of law by the parties. To justify the application of the potentially unrelated *lex fori* in these cases on the basis of party acquiescence is, however, a departure from normal practice because ordinarily American law restricts party autonomy to the choice of a *related* law.[80] American courts thus seem to apply different standards to the choice of the *lex fori* (and consequent displacement of foreign law) than holds true in the converse case, when the parties attempt to oust the *lex fori* (or an objectively connected law) in favor of a preferred (but objectively unrelated) foreign law. The judicial preference for the *lex fori* thus demonstrated accords with Lord Wright's dictum that for English law to apply in an English court a connection of the issue to England "is not, as a matter of principle, essential."[81]

A different, and much more difficult, case is presented when a party raises a foreign law issue but fails to discharge the burden of proof. A fact approach to foreign law would logically require that failure to sustain the burden of proof necessarily results in a non-suit, directed verdict or summary judgment, as the case may be.[82] Such a result can be quite harsh, so the courts have tempered this rule through the use of a variety of presumptions: (1) the foreign law is based on the Common Law and is thus the same as the common law of the forum;[83] (2) the foreign law is the same as forum law;[84] (3) the foreign law

Mercury Ins. Co., 393 F.2d 500 (2d Cir. 1968) when no notice of the foreign law issue had been given in the trial court.

[79] RESTATEMENT, SECOND, CONFLICT OF LAWS § 136 comment (h) with references at 381 (1971). *See, e.g.*, Vulcanized Rubber and Plastics Co. v. Scheckter, 162 A.2d 400, 403 n.2 (1960). For England *see* 2 DICEY & MORRIS, *supra* note 1, at 1206.

[80] RESTATEMENT, SECOND, CONFLICT OF LAWS § 186(2) (1971).

[81] Vita Food Prods., Inc. v. Unus Shipping Co., [1939] A.C. 277 (P.C.).

[82] Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956) (plaintiff's tort action for personal injuries dismissed for failure to prove Saudi Arabian law). *See also* Philip v. Macri, 261 F.2d 945 (9th Cir. 1958). In Weiss v. Hunna, 312 F.2d 711, 717 n.3 (2d Cir. 1963) the Court discussed the hypothetical possibility that, in different circumstances, the case would have to be dismissed for failure to plead and prove Austrian law.

[83] *See* Ohio S. Express Co. v. Beeler, 140 S.E.2d 235 (1965); Copeland Planned Futures, Inc. v. Obenchain, 510 P.2d 654, 659 (1973) (presumption of identity of sister-state law). *See also supra* note 42.

[84] *See* cases cited *supra* note 40, and Tiner v. State, 182 So.2d 859 (1966). *See also supra* note 45.

is based on generally recognized principles of law common to civilized nations;[85] or (4) the parties acquiesced in the application of forum law in the alternative.[86]

A comparison of the opinions in *Walton v. Arabian-American Oil Co.*[87] and *Leary v. Gledhill*[88] show the difficulties inherent in the use of the above presumptions. In *Walton*, the Court rejected the plaintiff's argument that "rudimentary tort principles" were involved (allowing the application of the "identical" *lex fori*) on the grounds that in "countries where the common law does not prevail [Saudi Arabia], our doctrines relative to negligence, and to a master's liability for his servant's acts, may well not exist or be vastly different."[89] The plaintiff's alternative reason for the application of the *lex fori* – that Saudi Arabia has no law or legal system and, in that sense, is "uncivilized"[90] – was also rejected for lack of proof to that effect. Proceeding from a determination that the law of the place of the tort applied, the court therefore dismissed the plaintiff's action for failure to prove that law.[91]

[85] Compagnie Generale Transatlantique v. Rivers, 211 F. 294 (2d Cir. 1914), *cert. denied*, 232 U.S. 727 (1914); Arams v. Arams, 45 N.Y.S.2d 251 (Sup. Ct. 1943); Tidewater Oil Co. v. Waller, 302 F.2d 638, 641 (10th Cir. 1962) (in the absence of proof, the Court refused to assume that Turkey had a workmen's compensation law similar to Oklahoma's but presumed that "Turkey recognizes the universal fundamental principle [of the duty to exercise due care] and that its courts ... will grant compensable redress for the unexcused violation of that duty.").

[86] *See* Leary v. Gledhill, 84 A.2d 725 (1951) and *supra* notes 70 & 81–83.

[87] 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956).

[88] 84 A.2d 725 (1951).

[89] 233 F.2d 541, 545.

[90] Plaintiff's argument was derived from Justice Holmes' statement that the place-of-tort rule does not apply "where the tort is committed in an uncivilized country." Slater v. Mexican Nat'l Ry. Co., 194 U.S. 120, 129 (1904). *See also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 355–56 (1909); Cuba Ry. Co. v. Crosby, 222 U.S. 473, 478 (1912).

[91] For a collection of cases where the court applied forum law under similar circumstances, usually on the basis of various presumptions, *see* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 88 n.46 (2d ed., Mineola, Foundation Press, 1980). Furthermore, as Weintraub correctly points out, a functional approach to choice of law may not have led to the application of Saudi Arabian law in the first place under the factual circumstances of the case. Walton, an Arkansas citizen, had been temporarily in Saudi Arabia where his automobile collided with defendant's truck, driven by defendant's employee. Defendant, a Delaware corporation, licensed to do business in the New York forum also did substantial business in Saudi Arabia. Given the flexibility of modern choice-of-law rules, there will be only few situations in which a court will feel *compelled* to apply a foreign law. These will often be cases involving foreign immovable property, security interests, and questions of status (but not the incidents of such status), as well as those cases, presumably, in which the case displays no connection whatever to the forum. *See* RESTATEMENT, SECOND, CONFLICT OF LAWS § 136 comment (b) at 379 & 382–83 (1971). Similarly, an English court will insist on proof of foreign law (and not apply the *lex fori*) in a limited number of cases. 2 DICEY & MORRIS, *supra* note 1, at 1216, *citing* R. v. Naguib, [1917] 1 K.B. 359 (dis-

In *Leary*, the New Jersey Supreme Court rejected the first presumption mentioned above (*i.e.*, that foreign law is based on the Common Law) because the issue related to French law. For the same reason it also rejected the use of the second presumption (*i.e.*, that foreign law is the same as the *lex fori*) though a lower court subsequently applied it in another case (involving Dutch law).[92] Nevertheless, the Court in *Leary* upheld the lower court's application of the *lex fori*, but on the basis of the fourth presumption (acquiescence in the application of forum law) and not of the third (generally recognized principles of law) as the trial court had done. *Leary* thus demonstrates the courts' general eagerness to avoid a hard result which might result from the "lack of an applicable law" and a degree of judicial flexibility in achieving that goal. *Walton*, in this sense, reached an unfortunate result which today should be avoidable in most cases.[93]

Both *Walton* and *Leary* demonstrate the difficulties inherent in an approach which engages in largely fictitious presumptions to avoid harsh results and to render justice. A view advocated in England has equal value for American law: "[I]t is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies... [local] law."[94] An Austrian law and a Swiss draft statute now also provide for the application of forum law when the foreign law cannot be ascertained.[95] In the United States as well there is now authority for the view that, when proof of foreign law fails, local law is the only law available and should be applied,[96] only excepting the special circumstances noted earlier.[97]

B. Europe: A Mixed Approach

1. Must Foreign Law be Pleaded by the Parties?

The courts of the EC countries have no common approach to the treatment of foreign law.[98] In the United Kingdom and in Ireland, the Common Law ap-

missal of bigamy prosecution upon failure to prove preexisting marriage valid under foreign law).

[92] Somerville Container Sales v. General Metal Corp., 120 A.2d 866 (1956), *modified*, 121 A.2d 746 (1956).

[93] *But see supra* note 91 for instances when court would insist on proof of the content of foreign law.

[94] 2 DICEY & MORRIS, *supra* note 1, at 1216.

[95] For Switzerland, *see infra* note 379. For Austria, *see* IPRG §4 (2), BGBl 1978/304 (Austria); and M. SCHWIMANN, GRUNDRISS DES INTERNATIONALEN PRIVATRECHTS 53–54 (Vienna, Manzsche Verlags- und Universitätsbuchhandlung, 1982).

[96] CAL. EVID. CODE §311(a) (1967) authorizes the application of California law when sister-state or foreign-country law cannot be determined if "the ends of justice require," subject to the limitation that this be "consistent... with the Constitution of the United States and the Constitution of this State." *See also* Rymanowski v. Rymanowski, 249 A.2d 407 (1969); Pioneer Credit Corp. v. Carden, 245 A.2d 891 (1968); Stein v. Siegel, 377 N.Y.S. 2d 580 (1975).

[97] *Supra* note 91.

[98] *See* DIE ANWENDUNG AUSLÄNDISCHEN RECHTS, *supra* note 32, *passim*.

proach prevails. The application of foreign law must be pleaded.[99] A similar rule also seems to have been adopted in France[100] and Italy.[101] In the Federal Republic of Germany,[102] Denmark,[103] and probably also Belgium,[104] a distinction is made between those subject matters in litigation over which the parties have no right of complete control, such as matters of status (marriage, divorce and paternity), and subject matters which are left to the disposal of the parties, such as those relating to contracts, torts, and property. In the former cases the court has a duty to raise the issue and to apply foreign law when the conflict rules of the forum direct it to do so. In the latter instances foreign law must be pleaded. The court seemingly does not even have a duty to call the parties' attention to the issue, and their silence is taken as a tacit or implied agreement to have the law of the forum apply. A large number of the reported German cases, for example, show that the courts have considered the parties' failure to plead foreign law as a tacit or implied agreement to have German law apply to the contract.[105] In contrast, in the Netherlands[106] the court always has a duty to apply foreign law even if its application has not been pleaded.

2. Who Must Ascertain Foreign Law?

In some of the EC countries the ascertainment of foreign law is a question of fact. Foreign law must be proved by the party who pleads its application. This doctrine applies in Ireland, the United Kingdom,[107] and France.[108] In France the court may, if it pleases, help the parties in ascertaining the foreign law. In Denmark and Belgium the court has a duty to apply the foreign law of which it has knowledge. It may ask the parties to supply or to assist it in acquiring further necessary information.[109] In Denmark the courts will often rely on the

[99] *See* A. Anton, Private International Law. A Treatise from the Standpoint of Scots Law 565 (Edinburgh, W. Green & Son, 1967); 2 Dicey & Morris, *supra* note 1, at 1206–16.

[100] *See* 1 H. Batiffol & P. Lagarde, Droit international privé 383 at § 329, 386 at § 331 (7th ed., Paris, Librairie générale de droit et de jurisprudence, vol. 1: 1981; vol. 2: 1983); and Cass. civ. (France), Judgment of 12 May 1959, 49 R.C.D.I.P. 62 (1960).

[101] *See* Cappelletti, *Italien*, in Die Anwendung ausländischen Rechts, *supra* note 32, at 28, 31–33.

[102] *See* Kegel, *Die Ermittlung ausländischen Rechts*, in *id.* at 157, 160.

[103] *See* Lando, *Skandinavien*, in *id.* at 128 ff.

[104] G. van Hecke, American-Belgian Private International Law 47 (17 Bilateral Stud. in Private Int'l L., Parker Sch. Foreign & Comp. L., New York, Oceana, 1968).

[105] *See* cases reported in: 1976 IPRspr. No. 7; 1977 IPRspr. No. 40; 1978 IPRspr. No. 14; 1979 IPRspr. Nos. 10, 28 & 154.

[106] *See* R. Kollewijn, American-Dutch Private International Law 76 (2d ed., 3 Bilateral Stud. in Private Int'l L., Parker Sch. Foreign & Comp. L., New York, Oceana, 1961).

[107] *See* A. Anton, *supra* note 99, at 566; 2 Dicey & Morris, *supra* note 1, at 1206.

[108] *See* 1 H. Batiffol & P. Lagarde, *supra* note 100, at 383, § 329 & 386, § 331.

[109] *See* Lando, *supra* note 103, at 132; G. van Hecke, *supra* note 104, at 47.

parties to assist them in ascertaining foreign law in matters which are left to the disposal of the parties. The courts of Germany,[110] the Netherlands[111] and Italy[112] have a duty to acquire the necessary information on foreign law, but they also may require the parties to provide assistance.

3. Sources of Information

In Ireland and the United Kingdom proof of foreign law is provided by oral expert evidence. It is for the court to decide who qualifies as a competent expert. Often, but not necessarily, a lawyer practicing in the country whose law is in issue is regarded as a competent witness.[113]

In France,[114] Italy,[115] Belgium,[116] the Federal Republic of Germany,[117] and Denmark,[118] the court is free to determine how it will obtain the necessary information concerning foreign law. In France and Italy the information is often submitted by a legal expert of the foreign country who provides a short, abstract, written answer (the *certificat de coutume*) in response to a question formulated by the court. Other kinds of evidence, however, are also admitted, as for instance the testimony of a domestic expert on the foreign law in question. In Germany frequently used sources of information are the Research Institutes of Foreign and Private International Law, which, upon request from the German courts, submit written opinions on the contents of foreign law. In contrast to the *certificat de coutume* on abstract rules of foreign law, the Institutes receive the case file (*Aktenversendung*) and give their advice about the particular case before the court. In giving their opinions, the Institutes to some degree anticipate the findings of the court. The court, however, is free to disregard the opinions, though in practice it seldom does so. The courts of the Netherlands[119] frequently make their own investigations as to foreign law.

Seven of the EC countries – Belgium, Denmark, the Federal Republic of Germany, France, Italy, the Netherlands and the United Kingdom – along with a number of other European countries, have ratified the *European Convention on Information on Foreign Law* signed in London on 7 June 1968.[120] When proceedings have actually been instituted, a judical authority in any

[110] *See* Müller, *Deutschland*, in DIE ANWENDUNG AUSLÄNDISCHEN RECHTS, *supra* note 32, at 66, 67.

[111] *See* R. KOLLEWIJN, *supra* note 106, at 76.

[112] *See* Cappelletti, *supra* note 101, at 36; and Corte cass. (Italy), Judgment of 29 Jan. 1964, 47 RIV. DIR. INT. 644 (1964).

[113] *See* A. ANTON, *supra* note 199, at 467 ff; 2 DICEY & MORRIS, *supra* note 1, at 1209 ff.

[114] *See* 1 H. BATIFFOL & P. LAGARDE, *supra* note 100, at 384, § 329 & 387, § 332.

[115] *See* Cappelletti, *supra* note 101, at 32 n.14 at (d).

[116] *See* G. VAN HECKE, *supra* note 104, at 47.

[117] *See* Müller, *supra* note 110, at 69.

[118] *See* Lando, *supra* note 103, at 133.

[119] *See* R. KOLLEWIJN, *supra* note 106, at 77.

[120] Europ. T.S. No. 62 (1968); 1969 GB T.S. No. 117 (Cmd. 4229).

Contracting State may make a request to another Contracting State for information under the Convention (article 3 (1)). The request must state the nature of the case, the questions on which information concerning the law of the requested state is desired, and the facts necessary both for the proper understanding of the request and for the formulation of an exact and precise reply (article 4 (1) (2)). Copies of documents may be enclosed if they are necessary for the proper understanding of the request. The request must be for information as to law and procedure in civil and commercial fields, or as to judicial organization. Other matters may also be raised if they are incidental to a primary question falling within the above mentioned areas (articles 1 (1), 4 (3)). The request is transmitted through designated national liaison organs, and a reply may be prepared by the liaison organ of the requested state, or by an official or private body, or a qualified lawyer acting on its behalf (article 6 (1) (2)). The purpose of the answer is to provide the court which has made the request with objective and unbiased information on the law of the state providing the answer. Depending upon the circumstances of the case the answer should include the wording of statutory provisions and information on court decisions. When necessary for the proper understanding of the foreign law by the court, excerpts of the statutes and of legal writings should be enclosed. The information given in the reply does not bind the judicial authority from which the request emanated (article 8).

This Convention does not seem to be used with any great frequency. For instance, *Dicey and Morris* relates that no provision has been made in the English rules of court as to the practice under the Convention,[121] which would suggest that this Convention does not operate in England; and the Danish Ministry of Justice, which is the liaison organ in Denmark, reports that requests for information on Danish law under the Convention are very seldom received.

4. Failure to Prove or Ascertain Foreign Law and the Consequences Thereof

The degree of assurance which the courts have required to satisfy themselves that the information they have received gives them a true picture of the foreign law seems to depend upon several factors. One such factor has been the degree to which the picture which the court has received of the foreign law satisfies its own sense of justice, which at times[122] has meant simply the extent to which the foreign law has resembled the *lex fori*. Some courts have strict requirements in this area while others are more lenient.[123]

Legal writers have suggested that in cases of doubt, the foreign law in question should be assumed to be identical to that of a legal system belonging to the same legal family for which information does exist. For instance, Belgian

[121] 2 Dicey & Morris, *supra* note 1, at 1215.

[122] *See* Kegel, *supra* note 102, at 176 ff.

[123] For strict requirements *see, e.g.*, Højesteret, Judgment of 10 Dec. 1959, UfR 1960 A 104 (Supreme Court, Denmark). For lenient requirements *see, e.g.*, Re Duke of Wellington, [1947] Ch. 506, *aff'd* [1947] 1 Ch. 118 (C.A.) (England).

law should be presumed to be the same as French law.[124] It has also been proposed that the foreign law should be construed in accordance with general principles of law.[125] Some cases support these solutions,[126] which could also be used in cases where the true picture of foreign law is one of uncertainty, because the law is unsettled on the issue.

In countries which have not established special facilities, such as the German Institutes of Comparative Law, to determine foreign law, the failure of a party to provide the required evidence of foreign law or of the court to acquire the necessary information may occur more frequently than in countries which have such sources of information. German authors claim, for instance, that such cases of failure to produce information are very few in Germany.[127] In the allegedly few cases before the German courts in this area, German law has been applied in matters concerning status and in other disputes in which the parties do not have complete control over the litigation. In cases where the parties do have the right to dispose of the litigation as they see fit, the German courts in general have found against the party who failed to convince the court of his allegations on foreign law.[128]

In the other EC countries, in cases where the parties have a right to dispose of the litigation the courts have most often applied the *lex fori*. However, this solution is neither practicable nor fair in all situations. Indeed, in some disputes it is highly unlikely that the foreign law could be identical with the *lex fori*, as for instance, when the case is based on legal phenomena so alien to the law of the forum country that an application of the *lex fori* would be inappropriate.[129] In such cases, the courts have either found against the party who had invoked foreign law and failed to prove it sufficiently, or they have dismissed the action. Even in England, whose courts have regularly applied the *lex fori* in the absence of satisfactory evidence on foreign law, the courts have established at least one exception: if, in a trial for bigamy, the validity of the first marriage depends upon foreign law, lack of evidence that the marriage was valid must lead to an acquittal.[130]

[124] *See, e.g.*, Müller, *supra* note 110, at 72; Kegel, *supra* note 102, at 176.

[125] *E.g.*, the principle *pacta sunt servanda*. *See* Lando, *supra* note 103, at 138.

[126] *See* Kegel, in 7 BÜRGERLICHES GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN (KOHLHAMMER-KOMMENTAR) before art. 7 nn.114–16 and cases cited therein (by T. Soergel; W. Siebert gen. ed.; vol 7: G. Kegel ed., Stuttgart, Kohlhammer, 1970).

[127] Müller, *supra* note 110, at 73; and Kegel, *supra* note 102, at 181.

[128] *See* Müller, *supra* note 110, at 73; U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 347 (2d ed., 4 Bilateral Stud. in Private Int'l L., Parker Sch. Foreign & Comp. L., New York, Oceana, 1972); *but see* Kegel, *supra* note 102, at 181, who advocates the application of the *lex fori* also in these cases.

[129] *See, e.g.*, Danish Højesteret, Judgment of 10 Dec. 1959, *supra* note 123.

[130] 2 DICEY & MORRIS, *supra* note 1, at 1216.

5. Review of Foreign Law

In some of the EC countries the allegation that foreign law has been misinterpreted cannot serve as a ground for an application to quash a judgment or for legal review by the supreme court. This rule follows from the contention that foreign law is "fact" which the highest court cannot review.[131] France,[132] Luxembourg, the Federal Republic of Germany[133] and the Netherlands[134] all hold this view. In some other countries the Supreme Court may review the lower courts' findings of facts and, therefore, the higher court may also review the lower courts' findings on the contents of foreign law. Belgium[135] and Denmark[136] both follow this practice.[137] In Italy, the *Corte di Cassazione* may review the lower courts' findings on foreign law because the findings are considered to be law.[138]

C. Comparative Conclusions: An Evaluation of the Approaches to the Ascertainment and Application of Foreign Law

1. Raising the Issue of Foreign Law: The Duty of the Parties or of the Courts?

In matters of status and in other areas in which the parties have no right freely to dispose of the litigation, foreign law should be applied by the court acting ex officio when the conflict rules of the forum refer to foreign law. This rule, for instance, should apply to matters concerning marriage, divorce and paternity. In matters where the parties are more or less free to dispose as they wish, such as matters of contracts, torts and property, the question whether foreign law must be pleaded is more doubtful. If the parties have expressly agreed not to invoke a foreign law, this agreement should be enforced everywhere.

[131] For criticism of this conceptualism *see* Zajtay, *Die Lehre vom Tatsachencharakter und die Revisibilität ausländischen Rechts*, in DIE ANWENDUNG AUSLÄNDISCHEN RECHTS, *supra* note 32, at 193.

[132] *See* Zajtay, *Frankreich*, in *id.* at 15, 21.

[133] *See* Müller, *supra* note 110, at 74.

[134] *See* 4 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 998 (vols. 1 & 2: 2d ed., U. Drobnig ed., 1960; vol. 3: 2d ed., H. Bernstein ed., 1964; vol. 4: 1958; Ann Arbor, U. Mich. P., 1958–1964).

[135] G. VAN HECKE, *supra* note 104, at 40.

[136] Lando, *supra* note 103, at 140.

[137] In the U.K. although appellate courts generally cannot interfere with trial courts' findings of fact, it seems that foreign law is "a question of fact of a peculiar kind" and may be more readily reviewed on appeal. Parkasho v. Singh, [1968] P. 233, 250 (Divisional Court reversed manifestly erroneous decision of magistrates on question of foreign law), *approved*, Dalmia Dairy Indus. Ltd. v. National Bank of Pakistan, [1978] 2 Lloyd's Rep. 223, 286 (C.A.). *See* 2 DICEY & MORRIS, *supra* note 1, at 1209. The appeal court will, however, always review whether the fact (foreign law) was properly admitted and whether the proper weight and interpretation was given to it. Lazard Bros. v. Midland Bank, [1933] A.C. 289 (H. L.). *See* Zajtay, *The Application of Foreign Law*, 3 INT'L ENC. COMP. L. ch. 14, § 25 (1972).

[138] Cappelletti, *supra* note 101, at 34–40.

The main issue is how a court should react to the silence of the parties in cases where the court would apply foreign law if its application had been pleaded. In countries, such as Germany and Denmark, where the courts may also act ex officio in these matters, a court should not raise the issue if it is likely that the ascertainment of foreign law would be so time-consuming and costly that the result would be disproportionate to the efforts expended. Cases involving small claims would often fall into this category. On the other hand, some cases are sufficiently important to warrant the efforts and costs of ascertaining the foreign law, especially if the court realizes that a party may suffer a disadvantage if the applicable foreign law is not pleaded. In such cases, the duty of the court to raise the issue will follow from its general duty provided for in the code of (civil) procedure to inform the parties of questions which are of importance for the decision.[139]

In countries which adopt the approach that foreign law is a question of fact and that fact must be pleaded in order to be considered by the court, it would be difficult to advocate the imposition of a duty on the court to raise the issue. Whether European law should be harmonized on this point seems to be linked to the question of whether civil procedure as such should be harmonized. Such harmonization seems premature at the present stage of European integration.

2. How is Foreign Law Best Ascertained?

General experience of comparative lawyers shows that information on foreign law is best provided by someone who besides being familiar with the foreign law, also knows the law of the forum. Therefore, in most cases it is preferable to have a domestic expert procure the necessary information.

Though perhaps costly for society, the German system, which provides, among other things, for sending the full case file (*Aktenversendung*) to the domestic Research Institutes of Foreign Law, seems more advantageous for the parties and for the public interest than the other systems discussed here. Under this system it is possible for the court to acquire information on foreign law in cases even where the parties themselves usually cannot afford to do so, for example in matrimonial cases and in other cases in which matters are not left to the free disposal of the parties. Further, since the Institutes inform the courts on how the cases would be decided under the foreign law, the picture which the court receives of the relevant foreign law is better than the one it would get from a *certificat de coutume*. However, the court's understanding of the foreign law based on a written report may not be as complete as it would be if an additional oral examination of the expert were held in court. Such an additional examination, which is very rarely admitted in Germany, should be allowed in complicated cases involving large amounts or important issues.

[139] ZPO § 139 (Germany); Lov om rettens pleje § 339 (Code of Procedure, Denmark) and Lovbekendtgørelse no. 1 of 2 Jan. 1980.

IV. Rules on Judicial Jurisdiction

A. The U.S. Approach: Particularism Tempered by Constitutional Limitations

Conflict-of-law rules in the United States are not part of a national body of law.[140] According to the U.S. Supreme Court's decision in *Klaxon Co. v. Stentor Electric Mfg. Co.*,[141] these rules are part of the law of the individual states. To the existing differences in the laws of the several states, one must add the fact which we have already noted that many modern approaches to choice-of-law in the United States are inward looking,[142] that is, they tend to favor the application of the law of the forum. This homeward trend is increased by the common use of long-arm statutes. Therefore, if a plaintiff has a multiple choice of available fora in which to bring suit, he – in effect – has the opportunity to select the law most favorable to him ("forum shopping"). The *Restatement, Second, Conflict of Laws* does attempt to find and, more importantly, encourage[143] a certain uniformity in conflicts rules, and indeed the prospects for this or future uniformity are good, since the American state courts increasingly are adopting the approach of the *Restatement, Second*.[144] However, the true federal approach in the United States in the area of conflict of laws consists of the important federal and constitutional limitations on which this section focuses.

The goals of all rules of private international law are to promote predictability and uniformity of result.[145] Presently American conflicts law is in a period of transition, and so it lacks the comparative certainty and predictability which exists among the European states because of their partial codification of conflicts rules and settled judicial precedents.[146] In the United States context, where application of the law of the forum is the current trend, achievement of the goals of predictability and uniformity requires either a restriction of the available fora – through limitations on judicial jurisdiction – or limita-

[140] *But see* E. Scoles & P. Hay, Conflict of Laws 110–13 (St. Paul, West Pub. Co., 1982).

[141] 313 U.S. 487 (1941).

[142] *See* Hay, *Reflections on Conflict of Laws Methodology*, 32 Hastings L.J. 1644 (1981).

[143] Reese, *Discussion of Major Areas of Choice of Law*, [1964] I Rec. des Cours Acad. dr. int. 311, 360 ff. Of course, the fact that the *Restatement* provides more of an *approach* rather than *rules*, leaves to future litigation much of the burden of resolving present uncertainty. *See* Kahn-Freund, *General Problems of Private International Law*, [1974] III Rec. des Cours Acad. dr. int. 139, 246, 339–40.

[144] *See, e.g., in tort*, Schwartz v. Schwartz, 447 P.2d 259 (1968); *in contract*, Rungee v. Allied Van Lines, Inc., 449 P.2d 378 (1968).

[145] This is what the German scholar Kegel calls "conflicts justice." *See* G. Kegel, Internationales Privatrecht 54–56 (4th ed., Munich, Beck, 1977).

[146] Audit, *A Continental Lawyer Looks at Contemporary Choice of Law Principles*, 27 Am. J. Comp. L. 589 (1979).

tions on the freedom of courts to apply local law. The result would then be the "proper law in the proper forum."[147] The following discussion analyzes limitations on judicial jurisdiction; developments in the choice-of-law area are treated separately in section V.A below.

Historically, judicial jurisdiction was based on *power* and thus had a *territorial* focus.[148] A person served with a summons within the territorial boundaries of a state, even if his presence was only casual or transient, was subject to the judicial power of that state without regard as to whether the asserted claim had a connection to that state.[149] A person not physically present in a state originally was beyond its reach; however, the definition of "presence" was soon expanded to encompass those domiciled[150] within the state but temporarily absent.[151]

Modern needs soon required a broader view. Early decisions upheld jurisdiction on the basis of the defendant's presumed (fictitious) consent, for instance, because – in automobile accident claims – he had used the state's highways,[152] or because he had committed certain acts said to be within the regulatory power of a state.[153] The landmark decision in *International Shoe Co. v. State of Washington*[154] concerned a company's business activities and held that judicial jurisdiction may be exercised – consistent with the U.S. Constitution's Due Process Clause – whenever the defendant has "minimum contacts" with the state, so that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."

[147] Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori" Approach*, 18 OKLA. L. REV. 340 (1965).

[148] Pennoyer v. Neff, 95 U.S. 714 (1878).

[149] *See* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (service on defendant while a passenger in an airplane in flight above the state). In Europe a forum based on casual presence is generally regarded as exorbitant: *see infra* § IV.B.2.c.

[150] Milliken v. Meyer, 311 U.S. 457 (1917). In Anglo-American law, in contrast to some other legal systems, a person can only have *one* domicile. *See* P. HAY, AN INTRODUCTION TO U.S. LAW 41–42 (Amsterdam, North-Holland, 1976). The elements of domicile are: abandonment of the previous domicile, arrival at the new domicile, and intent to remain there indefinitely (*i.e.*, absence of intent to leave at a specific time). Jurisdiction at the domicile, therefore, means jurisdiction at the place with which the person is more closely connected than with any other. *See* RESTATEMENT, SECOND, CONFLICT OF LAWS § 29 in connection with § 11 (1971).

[151] Jurisdiction – on the federal level – has also been exercised on the basis of the defendant's U.S. nationality (citizenship). Blackmer v. United States, 284 U.S. 421 (1932). While U.S. citizens also possess *state* citizenship, the latter concept is synonymous with domicile, *supra* note 150.

[152] Hess v. Pawloski, 274 U.S. 352 (1927).

[153] *See* Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (issuance of securities); McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (insurance). On state regulatory interests as a basis for jurisdiction, *see* Hay, *The Interrelation of Jurisdiction and Choice-of-Law*, 28 I.C.L.Q. 161, 172–76 (1979).

[154] 326 U.S. 310 (1945).

The early concept of *physical presence* had not been abandoned but had been given a more transcendental meaning: presence through activity would sustain jurisdiction related to that activity, while actual physical presence continued to be sufficient for unrelated claims. In the desire to give local plaintiffs a local forum, states were quick to seize on the opening provided by *International Shoe* and to adopt so-called long-arm statutes which enumerated the kinds of contacts which were deemed sufficient. Among these are, for instance, the commission of a tort within the state, the making of a contract, and "doing business." Some states simply specified "jurisdiction to the limits of due process."[155] Finally, following the Supreme Court's early acceptance of *quasi-in-rem* jurisdiction,[156] two states (Minnesota and New York) asserted jurisdiction in tort over out-of-state defendants by means of the attachment of the insurance obligation owed that defendant by an insurance company doing business within the state.[157] As a result of all of these developments, many defendants became subject to judicial jurisdiction almost anywhere in the United State and plaintiffs enjoyed substantial opportunities for forum shopping. The pendulum had swung too far.

In a series of a decisions, beginning with *Shaffer v. Heitner* (1977)[158] and culminating in *World-Wide Volkswagen v. Woodson* (1980),[159] the U.S. Supreme Court overruled its earlier decision for attachment-based jurisdiction and thus reversed the procedures adopted by Minnesota and New York.[160] It introduced the requirement that there be a nexus of forum, defendant, and cause of action. Specifically, the Court held that it is not enough that it is foreseeable that injury might occur in a particular state, or in all states. Rather, it must be foreseeable that *litigation* would occur in that state. Thus, in *World-Wide Volkswagen* it was indeed foreseeable for the importer and national distributor that suit might occur anywhere in the United States;[161] nation-wide business, after all, was their activity. On the other hand, the local retailer in New York could foresee that the car sold by him might be taken out of New York and cause injury in Oklahoma but could not *foresee* – in the sense of "expect" – that his New York sale would subject him to jurisdiction in Oklahoma.

As a result of these decisions, the plaintiff-orientation of earlier laws has been tempered in favor of the defendant. Jurisdiction now exists: at the de-

[155] *See, e.g.*, State *ex rel.* Western Seed Production Corp. v. Campbell, 442 P.2d 215 (Or. 1968).

[156] Harris v. Balk, 198 U.S. 215 (1905).

[157] Seider v. Roth, 216 N.E.2d 312 (1966); Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1969), *cert. denied*, 396 U.S. 844 (1969); Savchuk v. Rush, 245 N.W.2d 624 (Minn. 1976) and, on remand from the U.S. Supreme Court, 272 N.W.2d 888 (Minn. 1978). *But see infra* text accompanying note 160.

[158] 433 U.S. 186 (1977).

[159] 444 U.S. 286 (1980).

[160] Rush v. Savchuk, 444 U.S. 348 (1980).

[161] *Accord* Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980); Poyner v. Erma Werke GmbH, 618 F.2d 1186 (6th Cir. 1980).

fendant's domicile or principal place of business; where the tort was committed or the contract was made (perhaps also where it was to be performed); where the activities of the defendant made litigation in the forum "foreseeable"; by consent; and at the situs of immovable property. Transient jurisdiction, based on mere casual presence and unrelated to the cause of action, has not been expressly overruled.[162]

These decisions clearly limit state court jurisdiction. Nonetheless, multiple fora will often be available to the plaintiff. This indeterminacy is unavoidable in a highly mobile and interdependent society. Indeed, too restricted an approach to judicial jurisdiction would not even be desirable: apart from preserving some freedom of choice for the plaintiff, technical aspects of litigation – for instance, suits involving multiple parties – require jurisdiction over absent parties.

Thus, there is no single "proper forum," nor can there be. The limited restriction of available fora brought about by the recent decisions must therefore be matched by a similar limitation on a court's choice of its own law if avoidance of forum shopping is to be achieved. As later discussion details,[163] the Supreme Court so far has failed to establish appropriate limitations and criteria.

B. The European Approach: Particularism in Intra-Community Relationships Abolished by a Convention

1. National Jurisdiction Rules of the EC Countries

The existing national rules on jurisdiction of the EC countries are based on the three main considerations which underlie most rules in international jurisdiction. These are convenience, effectiveness and submission. A forum is convenient when consideration for a party to the dispute or the desire for a smooth and efficient procedure make it reasonable to bring the action before the courts of that particular country. A forum is effective when the defendant can be forced to abide by the judgment, for instance because he has assets in the forum country. Finally, a court may assume jurisdiction if the parties have agreed to submit their dispute to that court or if a defendant party enters an appearance before the court without contesting its jurisdiction.

Convenience is claimed to dictate the venerable rule that the plaintiff must sue the defendant at the defendant's home or location, *i.e.*, at his domicile (*actor sequitur forum rei*). It is argued that the party against whom an action is brought should have the privilege of being sued at his domicile and that, there-

[162] In Shaffer v. Heitner, 433 U.S. 186 (1977), the Court left open the possibility that the presence of property *might* be enough to sustain *in personam* jurisdiction "when no other forum is available to the plaintiff." *Id.* at 211 n. 37. This may be especially true in the case of foreign country defendants. *See* Hay, *supra* note 153, at 175–76.

[163] *See infra* § V.A.

fore, the domicile of the defendant must be the "forum general." Civil Law countries generally follow this rule.[164] However, it is doubtful whether the *actor sequitur* rule is in fact based on fairness to the defendant. It may be reasonable to bring an action at the defendant's domicile for a claim which is controversial and doubtful. But many actions are brought against defendants who have not paid debts for which their liability is indisputable, *i.e.*, for the collection of bad debts.[165] In these cases it would be more reasonable to let the plaintiff have the privilege of suing at his domicile.[166] But fairness apart, it may be that the *actor sequitur* rule in international disputes is based on considerations of effectiveness – on the fact that most defendants have assets at their domicile which may be seized to enforce the judgment.

The *actor sequitur* rule has not been received in the Common Law countries, but an approximation to the Civil Law is noticeable. In the United Kingdom and in Ireland, where the presence of the defendant in the forum country at the time when the writ is served upon him is the main requirement for jurisdiction,[167] a non-personal service of process may be had against an absent resident. However, it is at the discretion of the court whether the action should be allowed.[168]

Convenience has clearly dictated many of the "secondary" fora of which a plaintiff may avail himself in the Civil Law countries in addition to the forum of the defendant's domicile. The rules providing these secondary fora have, however, varied from country to country. In tort actions all the EC countries except the Netherlands have a general rule on the *forum loci delicti* allowing the plaintiff to sue at the place where a delict or tort was committed or had its harmful effects. In contract, most countries allow the plaintiff to sue at the place where the contract is to be performed, and some of them at the place where the contract was made.[169]

Effectiveness lies behind the rule of the Common Law that a writ may be served on the defendant during his presence in the *forum* country regardless of whether he is a resident; a similar rule applies in Denmark. Considerations of effectiveness have also dictated the rule, found in some of the EC countries, which bases jurisdiction on the presence within the country of property belonging to the defendant. Effectiveness, however, is a cynical consideration, and most of the fora based solely on effectiveness have, as we shall see, been regarded as exorbitant.[170]

[164] *See* S. DENNEMARK, OM SVENSK DOMSTOLS BEHÖRIGHET I INTERNATIONELLT FÖRMÖGENHETSRÄTTSLIGA MÅL 64 ff & 69 ff (Stockholm, Norstedt, 1961).

[165] *Id.* at 70 *citing* Ekelöf.

[166] This rule which is provided in the Belgian CODE JUDICIAIRE art. 638 has been ruled out by the Brussels Convention art. 3.

[167] 1 DICEY & MORRIS, *supra*, note 1, at 181.

[168] *Id.* at 201, *citing* R.S.C., Order 11, rule 1(1)(c).

[169] *See* G. DROZ, COMPÉTENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN 57 ff (Paris, Dalloz, 1972).

[170] *See* Brussels Convention art. 3.

In all the EC countries a court will assume jurisdiction to entertain an action against a person who *submits to the jurisdiction* of the court. The submission may take place by way of entering an unconditional appearance or it may be inferred from the terms of a contract. At the same time a court may dismiss an action brought before it if it can be inferred from a contract or other agreement between the parties that the court in question should *not* have jurisdiction (provided there are no public policy considerations against such ousting of the court's jurisdiction). Jurisdiction clauses in contracts are also often understood as making courts other than the one chosen by the parties incompetent to entertain actions between the parties. However, article 2 of the Italian Code of Civil Procedure provides that an agreement to substitute for the jurisdiction of Italian courts the jurisdiction of the courts of a foreign country is not valid if one of the parties is an Italian citizen who is either resident or domiciled in Italy.[171] In relationships with citizens who are domiciled or resident in the EC this rule has now been abrogated by the Brussels Convention (article 3).

2. The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

a) Genesis and Scope of the Brussels Convention[172]

The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was signed in Brussels on 27 September 1968 by the original six Member States of the Community. It was adopted in implementation of article 220 of the EEC Treaty, the "full faith and credit clause" of the European "Constitution." Unlike the American Full Faith and Credit Clause, article 220 has been used to bring about a convention not only on the enforcement of judgments but also on judicial jurisdiction, a convention which streamlines the laws of the EC Member States to a larger degree than those of the United States.

The Brussels Convention came into force on 1 February 1973 for the six original Member States of the EEC. By a protocol of 3 June 1971,[173] which came into force on 1 September 1975, the original Member States agreed to confer upon the European Court of Justice at Luxembourg jurisdiction to interpret the provisions of the Convention. As of 1 July 1982, the Court of Justice had published about thirty decisions handed down under this protocol.

When the Community was enlarged in 1973, article 4 of the Act of Accession (signed in January 1972) provided that new Member States would undertake to accede to conventions concluded by the original Member States. Arti-

[171] *See* M. Cappelletti & J. Perillo, Civil Procedure in Italy 95 (The Hague, Nijhoff, 1965).

[172] *See generally Jenard Report, supra* note 4, at 3; and *Schlosser Report, supra* note 13, at 77 ff.

[173] Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, OJ No. L 304, 30 Oct. 1978, p. 50.

cle 63 of the Brussels Convention also provides that the parties recognize that any new member of the EEC shall be bound to accede to the Convention pursuant to article 220 of the EEC Treaty and that the "necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member State of the other part." Similar provisions were made in 1981 when Greece became a member of the European Community.

The Convention of Accession under which the United Kingdom, Ireland and Denmark will accede to the Convention was signed on 9 October 1978.[174] This new Convention makes certain amendments to the original text of the Brussels Convention, partly to accommodate the new Member States. The main ideas and the purpose of the new Convention, however, remain the same as those of the original Convention. The new Convention is also a double convention with exhaustive rules on jurisdiction for each of the Member States. In intra-Community relationships a Member State may not enact rules on judicial jurisdiction other than those embodied in the Convention, which also provides rules on recognition and enforcement of judgments of "sister states." In this latter respect, it formalizes rules which are not very different from those prevailing in the United States under the Full Faith and Credit Clause. The Convention, however, applies only to judgments in civil and commercial matters; it does not apply, for example, to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and testate or intestate succession, bankruptcy, winding-up arrangements, compositions, or similar proceedings. For these latter purposes, the EC Member States are considering a separate convention. Furthermore, the present Convention also excludes social security and family law matters. Its scope is much narrower than that of the American Full Faith and Credit Clause which covers all judgments of sister states except for judgments based on penal claims.

b) Single or Double Convention?

A distinction can be made between a double convention (based on so-called direct jurisdiction), and a single convention (based on indirect jurisdiction). Conventions based on direct jurisdiction lay down common rules of jurisdiction for all member states. In conventions based on indirect jurisdiction, on the other hand, each state's national provisions apply without restriction in determining international jurisdiction; however, the convention's specific rules on jurisdiction govern when recognition or enforcement of a judgment of one contracting state is sought in another. Under the jurisdiction rules of such a convention, a foreign judgment will only be recognized and enforced in the other contracting states if the foreign court had jurisdiction under the terms of the convention.

The Committee that drafted the EEC Convention spent much time consid-

[174] *See* OJ No. L 304, 30 Oct. 1978, p. 1.

ering whether it should be a single or a double convention.[175] The Committee eventually decided in favor of a double convention, because it concluded that a convention based on rules of direct jurisdiction would allow increased harmonization of law within the EEC, avoid discrimination, and facilitate the ultimate objective of "free movement" of judgments. It concluded that legal certainty is most effectively secured by a convention based on direct jurisdiction since the courts thus derive their jurisdiction from the convention itself.

The Convention establishes an autonomous system of international jurisdiction in relations between the Member States and at the same time excludes certain rules of jurisdiction generally regarded as exorbitant. Further, by setting up rules of jurisdiction which may be relied upon as soon as proceedings are begun in the state of origin, the Convention regulates the problem of *lis pendens* and also helps to minimize the conditions governing recognition and enforcement.

c) Exorbitant Rules of Jurisdiction

European exorbitant rules of jurisdiction, comparable to American long-arm statutes, are prohibited by the Convention. The most famous of these are articles 14 and 15 of the French Civil Code, which provide that any French national may sue a foreigner in the French courts (article 14) and that any French national may be sued in France (article 15). In each case it is immaterial whether the suit has any connection with France. Luxembourg has similar provisions. An equally infamous provision is article 23 of the German Code of Civil Procedure which provides that a German court may hear any case against a foreigner who owns property in Germany regardless of whether the suit has any relationship to Germany, or whether there is property in Germany sufficient to satisfy the plaintiff's claim. Article 248, paragraph 2 of the Danish Code of Procedure contains a similar provision, scornfully called the "umbrella jurisdiction" since under it a foreign tourist who forgets his umbrella in a Danish hotel may be sued in Denmark for virtually any amount, in matters totally unrelated to his umbrella or his stay in Denmark. Finally, the Common Law rule which enables jurisdiction to be founded on a writ having been served on the defendant during his presence in the country is also deemed to be "exorbitant" if this presence is temporary only.

The Brussels Convention uses a double, and in our view, redundant technique in its attempt to quash exorbitant rules of jurisdiction. Article 2 states that, subject to the provisions of the Convention, persons domiciled in a Contracting State shall be sued in the court of that State regardless of their nationality. In the following articles the Convention lists exhaustively all the other grounds for jurisdiction. No grounds other than those listed are permitted. However, article 3 of the Convention further states that certain national provisions shall not be applicable to persons domiciled in a Contracting State, and then expressly lists the provisions on exorbitant fora of the various countries.

[175] *See Jenard Report, supra* note 4, at 7.

However, since the other articles exhaustively provide the grounds of jurisdiction, article 3 is superfluous.

d) The "Privilege" of Being Domiciled in the EC

Only a person "domiciled" in a country belonging to the European Communities will be able to invoke the Convention. It is the concept of domicile prevailing on the European continent which decides who is "domiciled" in a Member State.

On the European continent the notion of domicile differs somewhat from country to country.[176] In the Federal Republic of Germany and Denmark domicile *(Wohnsitz, bopæl)* expresses a person's connection with a local community. A person has "*Wohnsitz*" in Hamburg or "*bopæl*" in Copenhagen. In France and Luxembourg a person is "*domicilié*" at his exact address, for instance at 122 Boulevard Haussmann, Paris. However, for purposes of establishing international judicial jurisdiction it is never a person's connection with a local community or his exact address within the country that matters: a person's domicile is his habitual residence in a state. Therefore, it has been possible in article 52 of the Brussels Convention to provide that in order to determine whether a party is domiciled in a Contracting State whose courts are seized of a matter, a court shall apply its internal law.

The concept of domicile under the laws of Ireland and the United Kingdom differs considerably from that which prevails on the Continent. Under the laws of the U.K. and Ireland, a person always has only one domicile. At birth a legitimate child acquires the domicile of its father and retains it until after having reached majority it acquires a new domicile. There are very strict requirements for a change of domicile: the habitual residence must have been transferred to another country and the person must have the intention of keeping his residence there permanently or at least for an unlimited period. Under Article 52 of the Convention, the United Kingdom and Ireland would be free to retain their traditional concept of domicile when the jurisdiction of their courts are invoked. This, however, would create an imbalance in the application of the Convention and it was, therefore, agreed in the accession negotiations that in the legislation implementing the Convention the United Kingdom and Ireland would give the word domicile a meaning similar to the one prevailing on the Continent.[177]

In contrast to the wording of article 220 of the EEC Treaty, the Convention is applicable to all those who are domiciled in the Member States, irrespective

[176] *See Schlosser Report, supra* note 13, at 95-97.

[177] In the U.K., the Brussels Convention has been implemented by the Civil Jurisdiction and Judgments Act 1982, c. 27 (not yet in force). Sec. 41 provides that for the purposes of the Act and the Convention, a person is domiciled in the U.K. (or part thereof) if he is resident in *and* has a substantial connection with the U.K. (or that part); substantial connection is to be presumed, unless the contrary is proved, from three months or more residence. *See* 1 DICEY & MORRIS, *supra* note 1, at 228; and SECOND CUMULATIVE SUPPLEMENT to *id., re* pp. 181–229 (1983).

of whether they are nationals of the Member States (*see* article 2, paragraph 2 of the Convention, where it is provided that persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State). The Convention does not apply to those who are nationals of but not domiciled in the Member States: an American living in France may avail himself of the Convention, but a Frenchman living in New York may not. Article 4 provides that if the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to an exception provided for in article 16, be determined by the law of that State, including its rules of exorbitant fora. Thus, an American citizen who is domiciled in one of the Member States may sue another American citizen who is not domiciled in the Communities by availing himself of the exorbitant fora of that state. An American living in France, for instance, may in France sue another American living in the United States by invoking article 14 of the French Civil Code. Moreover, all judgments rendered against those domiciled in third countries by a court in the EC are now recognized and enforced by courts in the other EC countries, even when the court has based its jurisdiction on an exorbitant rule.

The reason given for this attitude toward those domiciled in third countries is that such an approach offers parties domiciled in the EC the assurance that judgments rendered by a court anywhere in the EC will be recognized and enforced all over the Community.[178] Within the EC itself there is no use for exorbitant fora. In relationships with defendants from third countries, however, the exorbitant fora of the EC countries do serve a useful purpose; they allow actions against persons who, although domiciled in countries far away, have assets in an EC country. If a person domiciled in the EC could not use the exorbitant fora he would have to sue the defendant in the defendant's home country, without any assurance that the foreign judgment could be recognized and enforced in the EC. Why not then let him take advantage of the exorbitant fora rules, which are provided exactly for this purpose? Furthermore, similar rules exist abundantly in non-EC countries.

The above reasoning rests on the same philosophy which underlies article 14 of the French Civil Code. It is, as a French author has said, "*un texte de suspicion vis à vis du juge étranger et de faveur pour le plaideur français.*"[179] It is assumed that those who bring actions outside of the Community are not treated as well as those who sue in a court within the EC. Let us therefore, the authors of the Convention argue, extend the jurisdiction of our courts beyond what is reasonable between ourselves so that those domiciled in the EC may benefit as far as possible from our courts. This unconvincing reasoning reveals a haughty contempt for the courts of third countries.

[178] G. Droz, *supra* note 169, at 234 ff.

[179] J. Niboyet, Cours de droit international privé français 632 (2d ed., Paris, Rec. Sirey, 1949).

e) The Jurisdiction Rules of the Convention

To a large extent the jurisdiction rules of the Convention reflect the existing rules of the six "old" EEC Member States. The Convention retains the "forum general." A person domiciled – in the Continental sense of that word – in a Contracting State may always be sued in the courts of that State. A defendant domiciled in a Contracting State need not necessarily be sued in a court where he is domiciled. Rather under article 2 he may be sued in any local court having venue under the law of that State.

Furthermore, persons domiciled in a Contracting State may in contract matters be sued in the courts of the place of performance of the obligation in question (article 5 (1)). In non-contractual liability matters, the same persons may be sued in the courts of the place where the harmful event occurred (article 5 (3)). In disputes arising out of the operations of a branch, agency or other establishment, such persons may be sued at the place where a company or firm has a branch, an agency or other establishment (article 5 (5)).

Insurance (articles 7–12(a)) and consumer contract (articles 13–15) matters have special, detailed rules of jurisdiction. One of the main principles underlying these rules is that an insured party or a consumer has a right to sue and to be sued at the place where he is domiciled, a right which cannot be waived at the time of the making of the contract. In consumer contracts which are not hire-purchase or consumer credit agreements, this right to sue or be sued at one's place of domicile exists only in cases where a foreign enterprise has sought out the consumer at his domicile (article 13(3)).

In certain specified disputes, and in derogation of the principle of domicile provided for in article 2, the Convention assigns exclusive jurisdiction to other courts. In cases involving rights *in rem* or in tenancies of immovable property, the courts of the situs of the immovable property have exclusive jurisdiction (article 16(1)). The courts of the state in which a company or other legal person, or an association of legal or natural persons, has its seat have exclusive jurisdiction in proceedings concerned with the decisions of the company's organs or with the validity of the constitution, nullity or dissolution of an organization (article 16(2)). Article 16(3) states that the courts of the state in which a public register is kept have exclusive jurisdiction in proceedings relating to the validity or effects of entries in that register, and article 16(4) provides that proceedings concerned with the registration or validity of patents, trademarks, designs and other similar rights must be brought before the courts of the state where the party made or applied for the deposit or registration of the right.

Choice of forum agreements must be given effect if they are in writing or evidenced by writing, or, in international trade and commerce, in a form which accords with practice (article 17). However, this freedom to select the courts of a Contracting State is subject to the exceptions relating to insurance and consumer contracts mentioned above, and to the rules of exclusive jurisdiction contained in article 16. Finally, according to article 18, appearance normally confers jurisdiction except when appearance is entered solely to contest jurisdiction.

For the Common Law countries of the EC the Convention will bring about a considerable change: it abrogates the rule that jurisdiction may be based on the writ having been served on the defendant during his temporary presence in the United Kingdom and Ireland, and it abrogates the discretionary powers of the courts regarding jurisdiction; the courts of these countries will nevertheless be obliged to exercise jurisdiction in accordance with the rules of the Convention.

f) The Interpretation of the Convention by the Court of Justice

The Brussels Convention can be interpreted by the Court of Justice of the European Communities, as it is so provided in the Protocol to the Convention of 3 June 1971, which entered into force on 1 September 1975.[180] This Protocol gives the Court of Justice jurisdiction to give rulings on the interpretation of the Convention, in a procedure which is in many respects similar to that instituted for the rulings which the Court of Justice can give under article 177 of the EEC Treaty. To avoid a flood of requests for rulings on the interpretation of the Convention, the right to ask for an interpretation by the Court of Justice has been restricted to the supreme courts of the Member States and to other courts when they are sitting in an appellate capacity (article 2). Further, if judgments given by the courts of a Member State conflict with an interpretation either by the Court of Justice or by one of the courts of another Contracting State, the procurator general of the court of cassation of the Member State, or any other authority designated by that state, may request the Court of Justice to give a ruling on the interpretation of the Convention (article 4). This *pourvoi dans l'intérêt de la loi* has so far as is known not yet been used.

The opportunity to ask the Court of Justice for a ruling on an interpretation of the Convention has not been taken very frequently. From September 1975 until July 1982, only about thirty cases had been published. The judgments of the courts of the Member States interpreting the Convention are much more abundant. Nevertheless the Court of Justice has rendered important rulings touching upon the scope – both *ratione materiae*[181] and *ratione temporis*[182] – of the Convention. From the point of view of assessing the techniques of this kind of legal integration some aspects of these rulings deserve special mention.

i) In some of the cases the Court of Justice has been faced with the problem whether it should leave the interpretation of a concept used in the Convention to national law or whether it should establish a "Community concept" to be followed by the courts of all the Member States. The latter approach has been followed in most rulings, notably in those in which the scope of the Convention

[180] OJ No. L 304, 30 Oct. 1978, at 50.

[181] Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, [1976] ECR 1541; Case 133/78, Gourdain v. Nadler, [1979] ECR 733; Case 143/78, De Cavel v. De Cavel, [1979] ECR 1055; Case 814/79, Netherlands v. Rüffer, [1980] ECR 3807; Case 125/79, Denilauler v. S.n.c. Couchet Frères, [1980] ECR 1553.

[182] Case 25/79, Sanicentral GmbH v. René Collin, [1979] ECR 3423.

has been decided upon.[183] Thus, it has been established that the concept of "civil and commercial matters," to which the Convention is confined, must be regarded as "an independent concept which must be construed with reference first to the objectives and scheme of the Convention and secondly to the general principles which stem from the corpus of the national legal systems."[184] In at least two of its rulings, the Court of Justice has also held that certain judgments in actions between public authorities and persons governed by private law may come within the area of application of the Convention, but that this "is not the case if the public authority is acting in the exercise of its public authority powers."[185]

In other cases, the Court of Justice has allowed the national legal systems to determine the meaning of a concept. Such was the case with the interpretation of "the place of performance" concept mentioned in article 5(1) of the Convention.[186] Article 5(1) provides that in matters relating to a contract a person domiciled in a Contracting State may be sued "in the courts for [*sic*] the place of performance of the obligation in question." In the *Bloos* case[187] the Court of Justice was asked to interpret the notion "obligation in question." Bloos, who was established in Belgium, had been sole distributor for the French enterprise, Bouyer, which had dismissed him without notice. Bloos sued Bouyer in a Belgian court for damages and for good-will compensation. The issue in the case was whether the "obligation in question" was Bouyer's duty to give notice or the duty to pay damages in case of dismissal without notice. Was the duty to give notice the primary and the duty to pay damages the secondary obligation? Did the notion "obligation in question" refer only to the primary or also to the secondary obligation? If the obligation in question was the duty to pay damages then article 5(1) would not confer jurisdiction upon the Belgian court to hear this claim, because the obligation to pay damages is a money obligation to be performed under both Belgian and French law at the debtor's residence in France.

The Court of Justice held in *Bloos* that "the obligation in question" is a Community concept. The "obligation in question" is the primary obligation which the contract imposes upon the debtor, and not the secondary obligation. National law, however, decides whether an obligation to pay damages or other kinds of compensation is a primary obligation. "National law" is the law which is applicable to the contractual obligation in question under the choice-of-law rules of the forum country. In the *Dunlop* case,[188] which was decided

[183] *See* cases cited *supra* note 181.

[184] Case 814/79, Netherlands v. Rüffer, [1980] ECR 3807, 3819. *See also* Case 29/76, *Eurocontrol*, [1976] ECR 1541, 1551.

[185] Case 814/79, Netherlands v. Rüffer, [1980] ECR 3807, 3819. *See also* Case 29/76, *Eurocontrol*, [1976] ECR 1541, 1551.

[186] Case 12/76, Industrie Tessili Italiana Como v. Dunlop AG, [1976] ECR 1473; Case 14/76, Ets. A de Bloos, S.P.R.L. v. Société en commandite par actions Bouyer, [1976] ECR 1497.

[187] Case 14/76, [1976] ECR 1497.

[188] Case 12/76, [1976] ECR 1473.

simultaneously with *Bloos*, the Court further held that the place of performance was to be decided by national law in the sense indicated above.

In several respects the solutions reached by the Court in these two cases were not fortunate. First, the implications of the judgments regarding the place of performance of a monetary obligation will create disparities. Under German, Belgian, French and Dutch law, the place of performance of a monetary obligation is the residence of, or the place of business of, the *debtor*. However, under the Common Law of England and Wales and Ireland, as well as under Danish and, in most cases, Italian law, the residence or place of business of the *creditor* controls. The plaintiff-creditor will thus be able to sue the defendant-debtor in the plaintiff's country when English, Irish and Danish law – but not when German, French, Belgian or Dutch law – applies to the monetary obligation in question.

Although the Court of Justice on several occasions has held that "the Brussels Convention must be applied in such a way as to ensure that the rights and obligations which derive from it for... the persons to whom it applies are equal and uniform,"[189] this principle will not always be followed if national law determines the place of performance. This is an example of the "conflicts of classification" which will arise in a Community which has no uniform rules of contract law and therefore no uniformity of legal concepts in this field.[190] Obviously a court will have difficulties in making this kind of Community law. Furthermore, until the Convention on the Law Applicable to Contractual Obligations signed in Rome on 19 June 1980 (the Rome Convention) enters into force, each of the Member States will continue to apply its own conflict-of-law rules to decide which law governs a contractual obligation and consequently which law determines the place of performance and the "primary obligation." The conflict-of-law rules of the Member States differ considerably. Thus, in granting jurisdiction in contractual matters, courts of the Member States will not give article 5(1) a uniform application.

Second, in its judgment in the *Bloos* case the Court implied that the obligation to consider in order to determine the jurisdiction of a court was the one upon which the plaintiff based his claim.[191] In the case of a bilateral contract under which each party has to perform his obligation in a different country, a court which is seized of the case would strictly only be competent to hear claims based on one of the obligations. This solution would cause problems in cases where the obligations of both parties to a bilateral contract were involved in the same litigation. In the *Ivenel* case[192] the Court of Justice sought to avoid this outcome. Mr Ivenel, who lived in Strasbourg, had acted as an em-

[189] *See, e.g.*, Case 29/76, *Eurocontrol*, [1976] ECR 1541, 1551; Case 814/79, *Rüffer*, [1980] ECR 3807, 3821.

[190] *See* Lando, *supra* note 22, at 282.

[191] Case 14/76, [1976] ECR 1497, 1508.

[192] *See* Case 133/81, Ivenel v. Schwab, [1982] ECR 1891. For a critical discussion of the line of cases from *Bloos* to *Ivenel*, *see* Hay, *The Case for Federalizing Rules of Civil Jurisdiction in the European Community*, 82 MICH. L. REV. 1323 (1984).

ployed agent (*représentant et voyageur de commerce*) for Schwab Maschinenbau, an enterprise established in West Germany. After having been dismissed as Schwab's agent, Ivenel brought an action against Schwab claiming various kinds of compensation and damages, notably for unpaid commission. The action was brought before the Strasbourg labor court and Schwab moved to have the action dismissed for lack of jurisdiction. Schwab argued that under both German and French law the place of performance of its money obligations toward Ivenel was in Germany, where Schwab was established. Ivenel pleaded that the obligation to be considered under article 5(1) of the Convention was the obligation which characterized the contract, *i.e.* his obligation to render services to Schwab, and that the place of performance of that obligation was situated in France.

The question was brought before the Court of Justice by the French Court of Cassation. The Court of Justice found in favor of the plaintiff, Ivenel. It held that the obligation to consider for the application of article 5(1) of the Convention, in the case of claims based upon different obligations under an agency contract which binds an employee who is dependent upon an enterprise, is the obligation which characterizes the contract.

The main line of reasoning of the Court of Justice was the following. Article 6 of the Rome Convention on the Law Applicable to Contractual Obligations provides that in the absence of a choice of law by the parties a contract of employment shall be governed by the law of the country in which the employee habitually carries out his work in performance of the contract "unless it appears from the circumstances as a whole that the contract is more closely connected with another country." This provision protects the employee who is the weaker party to the contract. Article 5(1) of the Brussels Convention purports to establish jurisdiction in a country which has a close connection to the case. In the case of a contract of employment this connection exists, notably, with the country of the law applicable to the contract. Under the choice-of-law rules this contact is mainly determined by the obligation which characterizes the contract and that is normally the obligation to perform the work. This result is in accordance with the jurisdiction rules under the Brussels Convention which in other questions of jurisdiction, such as those concerning insurance, hire-purchase and lease of immovables, has been inspired by a need to protect the weaker party to a contract.

In a case like the present, in which the court is faced with obligations under an agency contract where some obligations concern the payment due to the employee by an enterprise which is established in one country and others relate to claims for damages based on the way in which the employee has carried out the work in another country, the provisions of the Brussels Convention should be interpreted in such a way that the court which is seized of the case is not led to declare itself competent to adjudicate upon some and incompetent to adjudicate upon other claims under the same contract.

The reasoning of the Court of Justice seems to be based on several different considerations. The first concern is the need to protect the weak party. In his relationship with the employer, the employee should be subject to the laws of

the country in which he carries out his work and he should be entitled to have disputes with the employer tried by the courts of the same country. But this concern is in fact two-fold: to the desire to protect the weak party both in questions of applicable law and in questions of jurisdiction, should be added the wish to streamline applicable law and jurisdiction, in other words to have the case decided by the "proper law in the proper forum."

The second, or third, concern is the need to avoid splitting the case into two or more jurisdictions. If "the place of performance of the obligation in question" could mean that each of the obligations under a bilateral contract – such as one party's obligation to render services and the other party's obligation to pay for these services – could have its own place of performance, and if these places were to be located in different countries, a court might be competent to hear some and incompetent to hear other claims under the same contract. This splitting of the case must be avoided, and can be avoided if the "obligation in question" is taken to mean only the obligation which characterizes the contract, in this case the obligation to render services.

The concept of "the characteristic obligation" was formulated by the Swiss author Adolf Schnitzer.[193] It has been adopted by the Swiss courts in the choice-of-law of contracts where the characteristic obligation is defined as that which indicates the economic purpose of the contract. The result of *Bloos* and *Ivenel* appears to be that the doctrine of the characteristic obligation is to operate only in weak-party contracts and not in contracts, like the distributorship agreement or the *Bloos* case, where the parties were on a more equal footing. This solution is not a happy one. The concern to avoid a splitting of the litigation is equally valid for equal-party contracts as for weak-party contracts. Therefore, the doctrine of the characteristic obligation should operate for other contracts as well. This approach would considerably increase the ability of the parties to predict the consequences of the application of article 5(1) of the Brussels Convention. Consider, for example a sales case in which the buyer alleges there is a breach of a warranty in the goods sold. If the buyer has paid the purchase price, he will be the plaintiff claiming damages for breach of a warranty. If the buyer who has not yet paid the purchase price withholds it, the seller will be the plaintiff suing the purchaser for payment. In both cases the place of performance under article 5(1) should be the place where the seller was to deliver the goods, since this would be the place of performance of the obligation characterizing the sales contract.

The doctrine of the characteristic obligation will avoid a different determination of the place of performance under the various laws in relation to most contracts for which the characteristic obligation is not a money obligation. Generally, there is no difference among the laws in the determination of the place of performance of the characteristic obligation of a sale, a bailment, a contract for labor and work or for the rendition of services, a license agreement, an agency, a distributorship contract, etc.

[193] *See infra* notes 374–79 and accompanying text.

ii) In some cases the problems experienced in the interpretation of the 1968 version of the Brussels Convention have caused the Member States either to clarify the Convention or to change it in its 1978 version. Two examples deserve mention.

The first example concerns the French and Dutch versions of article 5(1) of the 1968 version, which were unclear as to whether the place of performance of the obligation meant the place of performance of the obligation in question or, as the French text now states in the 1978 version, "*l'obligation qui sert de base à la demande.*" This amendment makes it clear that the obligation is the primary obligation, as held by the Court of Justice,[194] and not the secondary one (to pay damages, etc.) which arises when the primary obligation has been violated.

The second example relates to article 17 of the 1968 version of the Brussels Convention, which provided that an agreement conferring jurisdiction upon a court or the courts of a Contracting State "shall be made in writing or by an oral agreement evidenced in writing." Some of the earlier judgments of the Court of Justice in 1976[195] and decisions of several national courts[196] were concerned with imposing severe formal requirements upon the incorporation of jurisdiction clauses in general conditions of trade in agreements, in order to protect a party to a contract from the danger of inadvertently finding himself bound by a jurisdiction clause. Thus, the Court of Justice held that the adhering party must give written acceptance of an inclusion by the other party of a jurisdiction clause in the general conditions of the contract.[197] This requirement, however, did not adequately cater to the needs of international trade,[198] since commerce is heavily dependent upon standard form contracts containing jurisdiction clauses. Contract forms are often negotiated by representatives of the opposing interests in the market and are then issued as agreed documents. In addition, contracts frequently need to be concluded swiftly by means of a mere confirmation order (with jurisdiction clauses included among other standard conditions) sent by one party to the other. Article 17 of the 1978 Brussels Convention, therefore, now provides that a jurisdiction clause "shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware."

This interplay between the courts and the "Community legislators" seems to have been fortunate. The Brussels Convention, like the EEC Treaty, is effective for an unlimited period of time.[199] However, any Contracting State

[194] *See supra* notes 187–88 and accompanying text.

[195] Case 24/76, Estasis Salotti di Colzani Aimo e Gianmario Colzani v. RÜWA Polstereimaschinen GmbH, [1976] ECR 1831; Case 25/76, Galeries Segoura SPRL v. Rahim Bonakdarian, [1976] ECR 1851.

[196] *See* the cases cited in the *Schlosser Report, supra*, note 13, at 149 n.45.

[197] Case 24/76, *Colzani*, [1976] ECR 1831; Case 25/76, *Segoura*, [1976] ECR 1851.

[198] *See Schlosser Report, supra* note 13, at 124, para. 179.

[199] Brussels Convention art. 66: "This Convention is concluded for an unlimited pe-

may request that the Convention be revised and that a revision conference be convened (article 67). Such conferences may be useful from time to time, in view of the experiences gained from the decided cases.

C. Permissible and Non-Permissible Fora in Europe and the United States

It is not easy to compare the bases of jurisdiction permissible under the Due Process Clause of the United States Constitution, as now interpreted by the federal courts, with the rules of jurisdiction in the Brussels Convention.

Both the EEC and American systems seem to agree that jurisdiction exists at the defendant's domicile and principal place of business; at the place where a tort was committed or had effects; and at the situs of immovable property, provided that a right *in rem* over this property is involved in the litigation. In Europe, the Brussels Convention also admits jurisdiction at the place where the contract was to be performed, but here American law seems to be uncertain.

If attempts were to be made to transplant to the American continent article 14 of the French Civil Code which allows a French national to sue a foreigner in the French national courts, the rule would probably not be admitted as a basis for jurisdiction. The Brussels Convention does not allow article 14 to operate between residents of countries which are signatories to the Convention. Nor does it permit article 15 of the French Civil Code which allows anyone to sue a Frenchman in France. This rule would probably be accepted in the United States, where the defendant's nationality has been recognized as furnishing an adequate basis for federal but not state jurisdiction.

Article 23 of the German Code of Civil Procedure, insofar as it allows jurisdiction over a foreigner who owns property in Germany, is also one of the exorbitant fora not allowed under the Brussels Convention. This rule would perhaps be permitted in the United States within the limits in which federal courts allow the *quasi-in-rem* jurisdiction to operate. However, article 23 provides for an action *in personam* against a non-resident defendant who owns property in Germany, which would not be compatible with the American Due Process Clause.

The Common Law rule permitting jurisdiction on the basis of a writ having been served on a defendant during his temporary visit in the forum state is, when presence is the the sole basis of jurisdiction, also an exorbitant rule which the Brussels Convention will exclude. It is, however, an integral part of the Common Law rule that an action commences with the service of a writ upon the defendant in the forum state. Mere presence within the jurisdiction is the basis of jurisdiction *in personam* and an American lawyer would probably not find this basis "exorbitant," even when the presence is only temporary.

riod." (*Contrast* Rome Convention 1980, art. 30, which provides for a duration of 10 years, with automatic renewal every 5 years thereafter, absent denunciation.)

In Europe doing business in a state confers jurisdiction when the defendant has a branch, independent agency, or other establishment in the state, and the dispute arises out of the operation of the branch, agency or establishment. In the United States the concept of "doing business" seems to give the courts a wider basis for jurisdiction. On the other hand, some of the consumer and insurance policy-holder protective provisions in articles 3 and 4 of the Brussels Convention give the policy-holder and the consumer an option to sue the insurer, seller or lender at the domicile of the insured party or the consumer and a right to be sued there. Such fora are found among neither the admissible nor the overruled fora in the United States. On the other hand, the doing-business rules of the United States, to the extent that they are still retained, may provide the United States policy-holder and consumer with a basis for jurisdiction in his home state.

V. Rules on Choice of Law

A. The U.S. Approach: Constitutional Limitations on Choice of Law

1. Due Process and Full Faith and Credit: From Interest-Balancing to Minimum Contacts

a) Introduction

As explained earlier,[200] although the influence of the *Restatement, Second, Conflict of Laws* provides some integrative effect on the choice-of-law rules of the several states, the main coordinating effort was realized through the federal constitutional limitations on state choice of laws.

The United States Supreme Court has often intermingled due process and full-faith-and-credit principles when addressing the question of constitutional limitations to choice of law. If construed broadly, either clause could address most choice-of-law limitation problems.[201] However, each clause speaks to essentially different considerations. The Due Process Clause addresses issues of the territorial reach of state power and the fairness to individuals in the exercise of that power.[202] The Full Faith and Credit Clause, on the other hand, balances conflicting state interests by commanding that the states respect the sovereignty of sister states in a federal context.[203] When a forum applies its own

[200] *Supra* § IV.A.

[201] Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROBS. 706, 711 (1963); Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 95 (1976); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 186, 195 (1976) [hereinafter cited as Martin, *Constitutional Limitations*]; Martin, *A Reply to Professor Kirgis*, 62 CORNELL L. REV. 151 (1976).

[202] Kirgis, *supra* note 201, at 95.

[203] *Id.* at 110; Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV.

law to impose on a party a burden that another law would not, it may thereby effectively deprive the party of life, liberty, or property.[204] By contrast, governmental interests of affected states in multi-state transactions result in the desire of the forum to advance the policies of its own law if it may do so consistent with due process requirements. In these circumstances, if the forum applies its law and if this law differs from the law of the situs of the events or of the domicile of the parties, the interests or policies of the other state or states may be frustrated. If the interests of the affected other state(s) clearly outweigh the forum's interest, full faith and credit principles may require that the forum defer to the federal interests by not applying its own law.

At first, the U.S. Supreme Court used the Full Faith and Credit Clause to impose on the forum the affirmative duty to apply the law of some other state to a particular case.[205] In so doing, the Court held that the interest of one state, as expressed in its statute, outweighed the interest of the forum state in applying its own law. Where the Court undertakes to weigh competing state interests it introduces an element into the choice of law that goes far beyond the limitations of due process. When used in this manner to identify the controlling law, Full Faith and Credit imposes a positive constitutional requirement that the forum apply the law of a particular interested state. The clause in this sense, therefore, is not merely a negative limit preventing the use of forum law, but a positive prescription of law. The Supreme Court in these cases performs the task of balancing the conflicting state interests and chooses the interest that will prevail.[206]

The Supreme Court, in the more recent cases, has abandoned the attempt to strike a balance between conflicting state interests[207] and has used the Full Faith and Credit Clause merely as a negative limitation on the application of forum law. When the Court uses full faith and credit principles in this manner it clearly equates the effects of that Clause with the limitations of due process.[208] The following sections trace the development of the case law under both clauses and show that the one test of constitutional limitations of choice of law is whether the law to be applied has a sufficient relationship with the multistate transaction in question to permit its application.

b) The Due Process Cases

Home Insurance Co. v. Dick[209] is the leading American case relying on due process as a limitation on state choice of law. In that case the plaintiff, Dick,

872, 881 (1980); Hay, *Full-Faith-and-Credit and Federalism in Choice of Laws*, 34 MERCER L. REV. 709, 717 (1983).

[204] Leflar, *supra* note 201, at 711.

[205] *E.g.*, Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932).

[206] *See infra* notes 245–47 and accompanying text.

[207] *Infra* notes 250–57 and accompanying text.

[208] Leflar, *supra* note 201, at 706. *See* the discussion *infra* text accompanying note 249.

[209] 281 U.S. 397 (1930).

brought suit in Texas against a Mexican insurance company and two New York companies that had reinsured the risk.[210] While the insured[211] was living in Mexico, the Mexican company issued him an insurance policy to cover loss to a tug but only while in Mexican waters. The insurers defended the Texas suit on the grounds that it was brought more than one year after the loss and that a policy term, valid in Mexico, barred any action commenced after one year. The Texas court rejected the defense and instead applied Texas law that held invalid any claim limitation shorter than two years. The U.S. Supreme Court reversed that decision holding that the Texas court's rejection of the contract term that was valid in Mexico violated due process.[212] When Texas deprived the insurers of their defense, it imposed a liability that was extinguished where the contract was made, and thus deprived the defendant of property. The Court held that Texas could not validly affect the insurance policy in a case in which "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was done or required to be done in Texas."[213] The state was without power to affect "the rights of parties beyond its borders having no relation to anything done or to be done within them."[214]

The lasting importance of *Dick* is the Court's reference to the forum's relationship to the issue. Because of the absence of any significant connections between the forum and the cause of action,[215] the Supreme Court concluded that "Texas was therefore without power to affect the terms of contracts so made."[216] The Due Process Clause's negative proscriptions were applied in *Dick*: the Constitution commands that when a state has no significant contact with the parties or the occurrence it *may not* apply its law to alter the rights or duties of the parties.

Dick's due process aspect relates largely to the state's absence of "power" over the defendant because of the lack of a relationship *to the state*. Nevertheless, fairness *to the defendant* has been a major factor in the formulation of criteria for limitations on choice of law in the literature. Professor Martin observed correctly that:

[210] Jurisdiction was *quasi-in-rem*, based on garnishment of the defendant's Texas property. Assertion of jurisdiction in this manner is now precluded by the Court's decision in Rush v. Savchuk, 444 U.S. 348 (1980).

[211] The policy was issued in Mexico to Bonner who assigned the policy to Dick. The policy had named Dick as a possible transferee of benefits. Dick's permanent residence was Texas, but he was living in Mexico at the time of the assignment. *See* R. WEINTRAUB, *supra* note 91, at 502–03.

[212] The case raised no full faith and credit issues because the Clause applies only to sister states.

[213] 281 U.S. 397, 408.

[214] 281 U.S. 397, 410.

[215] The plaintiff's domicile is not enough, without other contacts, to give a state jurisdiction over an absent defendant. *See* Home Insurance Co. v. Dick, 281 U.S. 397 (1930); Silberman & Shaffer, *End of an Era*, 53 N.Y.U. L. REV. 33, 84–85 (1978).

[216] 281 U.S. 397, 408.

differing treatment of contacts in the jurisdiction and choice-of-law cases turns things on their head. In the typical jurisdiction case, overreaching on the part of the forum state results at worst in inconvenience and greater expense for the defendant. In the typical conflicts case... if the plaintiff has chosen his forum wisely, the defendant will lose a case he would otherwise have won, simply because the forum has asserted its legislative authority.... [F]rom the defendant's perspective, it seems irrational to say that due process requires minimum contacts... merely to hale him into the forum's court while allowing more tenuous contacts to upset the very outcome of the case.[217]

Several years after *Dick*, the Supreme Court broadened the scope of the due process limitation in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*[218] Delta had entered into a contract with the Hartford company in Tennessee to insure losses resulting from employee embezzlement. After an employee, who was working for Delta in Mississippi, had embezzled money, Delta sought to recover from the insurer in that state. Suit was brought after the expiration of the time limit for filing claims as established in the policy. The limitation was invalid in Mississippi but permitted in Tennessee. The U.S. Supreme Court reversed a judgment for the plaintiff on the grounds that imposition of liability by the forum, Mississippi, violated due process when such liability was barred by the law of Tennessee. Because of the exclusive force attributed to the place-of-making rule, the Court reasoned that Mississippi was powerless to alter vested rights created by another state, even though Mississippi had an interest in the transaction and had several contacts with the events.[219]

However, later developments demonstrate that the Court would *not* adhere to *Delta & Pine* on similar facts today.[220] In *Watson v. Employers Liability Assurance Corp., Ltd.*[221] and *Clay v. Sun Insurance Office, Ltd.*,[222] the Court held that a state with a significant relation to the transaction may apply its law. The Court no longer requires some particular key factor, such as the place of contracting,[223] but rather looks to the interests of the forum and the significance

[217] Martin, *supra* note 203, at 879–80.

[218] 292 U.S. 143 (1934).

[219] The employee had worked in the forum and thus the plaintiff as well as defendant had done business there. Application of Mississippi law would not have been unfair because by expressly insuring a risk there, the defendant could expect Mississippi law to apply. *Cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.11 (1981), discussed *infra* text accompanying notes 228–41. Because these facts would be considered significant, the due process limitation would not be followed today. *See* Leflar, *supra* note 201, at 706, 718–19, and *infra* notes 220–22.

[220] *See* R. Leflar, American Conflicts Law 109–10 (3d ed., Indianapolis, Bobbs-Merrill, 1977); Hertz, *The Constitution and the Conflict of Laws: Approaches in Canadian and American Law*, 27 U. Toronto L. J. 1, 16 (1977).

[221] 348 U.S. 66 (1954).

[222] 377 U.S. 179 (1964).

[223] The earlier cases, with their emphasis on the place of contracting, raised choice of law to the level of constitutional law. With the advent of *Erie* and *Klaxon*, choice of law is largely state law and constitutional concerns now relate to a state's power and fairness to defendants, and to the balancing of state interests. *See supra* text accompanying notes 201–05.

of its contacts with the transaction. In *Watson*, the Court allowed Louisiana to provide a direct action remedy against an insurance company for an injured party. The state statute did not require a preliminary finding of liability on the part of the insured. The defendants relied on terms in the policy valid where the contract was made, that provided for no liability until the insured's liability was first established. The Supreme Court distinguished *Dick* and *Delta & Pine* as cases where the forum had no contact with the transaction. In *Watson*, by contrast, the injury occurred in Louisiana, the forum and the plaintiff's domicile. The Court considered these contacts "enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there," so as to permit the application of Louisiana law.[224]

The Supreme Court also found sufficient contacts with the forum so that the application of its law did not violate due process in *Clay v. Sun Insurance Office, Ltd.*[225] In that case the defendant insurer had issued a policy of world-wide protection for personal property[226] to the plaintiff in Illinois. Shortly thereafter the insured moved to Florida where two years later the loss was sustained. The limitation of action clause of the policy was violated because suit was filed more than one year after the loss. That limitation was valid in Illinois, but not in Florida. The Supreme Court sustained the Florida forum's application of its own law, allowing the insured to recover, solely on the sufficiency of Florida contacts.[227]

A significant and recent decision in this area is *Allstate Insurance Co. v. Hague*.[228] The case merits extended discussion. In this plurality opinion the Court upheld Minnesota's application of forum law (which permitted "stacking" of uninsured motorist insurance benefits) to a claim arising from the accidental death of a Wisconsin resident in Wisconsin. The uninsured operator of the other vehicle was also a Wisconsin resident. Writing for a four Justice plurality, Justice Brennan – as he had in his partial dissent in *Shaffer*[229] – identified three "contacts" with the case which, in the aggregate, satisfied the restated test "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or a significant

[224] 348 U.S. 66, 73.

[225] 377 U.S. 179 (1964).

[226] World-wide coverage should lead to a fair application of any law, because the company can reasonably expect losses and suits wherever it insures a risk.

[227] By the time *Clay* was decided the Supreme Court had abandoned its attempts to balance competing state interests which had also been prevalent in the full faith and credit cases. Instead, the Court decided *Clay* purely upon due process grounds. Even though the U.S. Supreme Court did not mention that the policy had been purchased with a lump sum payment (*see* Sun Ins. Office Ltd. v. Clay, 265 F.2d 522, 524 (5th Cir. 1959)) Florida's contacts were minimally sufficient for due process purposes.

[228] 449 U.S. 302 (1981). The following material is based in part on Hay, *supra* note 142.

[229] Shaffer v. Heitner, 433 U.S. 186, 223 (1977). For criticism *see* Hay, *supra* note 153.

aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[230]

The first contact was the fact that the decedent had worked in Minnesota on a commuting basis for fifteen years and was thus a member of the Minnesota work force. These facts gave Minnesota an "interest." "While employment status may implicate a state interest less substantial than does resident status, that interest is nevertheless important. The State of employment has police power responsibilities towards the non-resident employee.... [S]uch employees use state services and amenities and may call upon state facilities in appropriate circumstances."[231] He summarized: "Employment status is not a sufficiently less important status than residence ... when combined with [the decedent's] daily commute ... and the other Minnesota contacts ... to prohibit the choice-of-law result...."[232]

It is no doubt true that one type of status is not necessarily less important than another: it depends for what purpose one asks the question. That employment status in Minnesota should give that state "police power responsibilities" and an interest in what happens between two Wisconsin residents in Wisconsin and in the insurance obligations entered into in Wisconsin is a jump in logic that is difficult to follow. Already it would be stretching it far to apply this reasoning if the accident had occurred while the decedent was commuting to or from work in Minnesota: even that had not been the case.

Justice Brennan's second contact – Allstate's doing business in Minnesota – is said to be important for the same reason that it was in *Clay*. In that case, the Court had said that one reason why Florida could apply its law to an out-of-state insurance contract was that the defendant company, licensed to do business in Florida, "must have ... known that it might be sued there."[233] The result may well have been right because "Florida [for regulatory reasons] had sufficient interest in the case to justify application of its law."[234] However, Florida's interest in *Clay* was a necessary conceptual link. Without it, it does not follow that amenability to suit should also result in the application of local law. A further important distinction, of course, is that in *Clay* the loss was incurred in Florida two years after the insured had moved there. The Court does not note this difference.

The third contact which the Brennan plurality found significant – the plaintiff's move to Minnesota following the accident and appointment there as the estate's personal representative – is equally irrelevant. Surely both the subjective determination that "there is no suggestion that [the plaintiff] moved to Minnesota in anticipation of this litigation or for the purpose of finding a

[230] 449 U.S. 302, 312–13.
[231] 449 U.S. 302, 314.
[232] 449 U.S. 302, 317.
[233] 377 U.S. 179, 182.
[234] Reese, *Limitations on the Extraterritorial Application of Law*, 4 DALHOUSIE L.J. 589, 602 (1978).

legal climate especially hospitable to her claim"[235] and the conclusion that, moreover, Minnesota had an interest in the administration of a local estate and with it in a recovery by the personal representative,[236] are bootstrap arguments. A post-accident change of domicile has never been enough,[237] because of the *potential* for forum shopping; and administration of a Minnesota estate occurred only because the plaintiff chose to pursue an alleged debtor of the decedent, the insurer, in Minnesota rather than elsewhere.

The Brennan plurality opinion in *Hague* presents no real analytical framework. After posting a requirement of "significant" contacts (presumably for due process purposes), Justice Brennan addressed three contacts of which only the first is genuine and not contrived. And even that contact, the Minnesota-based employment relation of the decedent, unconnected as it is with the occurrence, is too slim a reed on which to hang the choice-of-law decision.[238] The plurality largely ignores its own tests and unfairly manufactures "contacts."

Justice Stevens' concurrence is equally unsatisfactory. He distinguishes between the full faith and credit aspect of the case – infringement of Wisconsin's own state interests ("sovereigny") – and due process to the defendant. The two provisions indeed address different concerns.[239] However, it is troublesome that he finds due process satisfied – in that the expectations of the parties were not frustrated and there was no element of unfair surprise – just because

[235] 449 U.S. 302, 319.

[236] *Id.*

[237] "[T]he post-accident residence of the plaintiff-beneficiary is constitutionally irrelevant to the choice-of-law question." 449 U.S. 302, 335 (Powell, J., dissenting), *citing to* John Hancock Mutual Life Insurance Co. v. Yates, 229 U.S. 178, 182 (1936): "[T]here was no occurrence, nothing done, to which the law of Georgia could apply." (*See infra* notes 277–87 and accompanying text for further discussion of *Yates*.)

[238] [While the decedent worked in Minnesota and the insurer had insured against loans in Minnesota], . . . the fact remains that the accident actually took place in Wisconsin, that Minnesota therefore lacked any meaningful contact with the case, and that Wisconsin substantive law must therefore apply where it conflicts with that of Minnesota. By analogy, the fact the airplane accident may take place anywhere within several hundred miles of the scheduled route, and that the airline will be subject to the laws of the place of the accident wherever it occurs, has never given nearby states carte blanche to apply their own laws in favor of the survivors of their residents.

(Footnotes omitted.) Martin, *supra* note 217, at 887–88.

[239] Apart from Wisconsin's "sovereignty," there is another aspect:

> The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation . . .. [T]he fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause.

449 U.S. 302, 322–23 (Stevens, J., concurring). It is submitted that the conclusions follow from the basic principle.

the decedent had paid three uninsured motorist premiums, covering his three vehicles, and because "stacking" is the more usual rule of substantive law in the United States. Thus, while the analytic framework is appropriate, the analysis individualizes too much with respect to the particular case and provides no test by which to determine the "significance" of the required contacts. Justice Stevens' concurrence accepts a most minimal connection for the application of forum law.

Justice Powell's dissent, joined by Chief Justice Burger and Justice Rehnquist, accepts the plurality's basic test ("significance"), but in contrast, finds significant contacts lacking: "The Court's opinion is understandably vague in explaining how trebling the benefits to be paid to the estate of a nonresident employee furthers any substantial state interest relation to employment. Minnesota does not wish its workers to die in automobile accidents, but permitting stacking will not further this interest."[240]

The 4-1-3 decision[241] in *Hague* is thus less than helpful in addressing the growing fragmentation. But this case, in conjunction with the prior case law, does tell us that the Court will permit the application of the law of any state that is significantly related to the issue. The fact that another state has an interest, or that a different choice-of-law rule or theory would refer to the law of another state or would produce a fairer or better result is not a due process question. Due process reduces to the single consideration: What constitutes sufficient connection with the transaction so that application of forum law is permissible? An analysis attempting an answer to this question follows the discussion of the full faith and credit cases.

c) The Full Faith and Credit Cases

The Supreme Court at one time used the Full Faith and Credit Clause affirmatively, as a sword to mandate choice of law in order to prevent the forum from denying a party a defense he would have under some other law, but this approach has been largely abandoned. However, full faith and credit analysis also applies to another situtation: Unconstitutionality may be claimed when the forum denies redress to a party because a claim arising under the law of another state is not recognized by the forum.

The major full faith and credit cases have involved workmen's compensation statutes. The issues concerned which state law should apply when the state where the employer and employee formed their relationship and the state of injury were not the same. As with due process, the early decisions enforced affirmative requirements mandating the choice of law. More recently, however, the Court requires only minimum contacts with the forum as a precondition for the application of its law. Thus, while the Court has often spoken in terms of governmental interests rather than fairness to individuals be-

[240] 449 U.S. 302, 339 (Powell, J., dissenting).

[241] Stewart, J., did not participate in the decision of the case.

cause of the nature of full faith and credit analysis,[242] the decisions parallel the development in due process analysis.

The leading example of a mandated choice-of-law rule is the 1932 decision of *Bradford Electric Light Co., Inc. v. Clapper.*[243] In this case the defendant had hired Clapper in Vermont to aid in the maintenance of its electrical power equipment. While on temporary duty in New Hampshire, Clapper was killed. The administratrix sued in New Hampshire, bringing an action in negligence. The Vermont workmen's compensation statute, however, purported to provide the exclusive remedy for any work-related injury occurring within or without Vermont. The U.S. Supreme Court held that New Hampshire could not entertain the negligence suit in contravention of the Vermont statute. The Court reasoned that statutes are "public acts" and that, therefore, New Hampshire could not deny the extraterritorial application of rights created under the Vermont statute because of the full faith and credit requirement. The Court recognized that a court might refuse to enforce a foreign cause of action if obnoxious to its policy but held that the Constitution prohibited the rejection of a valid defense based on a foreign statute. Additionally, the Court noted that New Hampshire, as the place of injury, had only a casual connection with the incident, whereas Vermont's interests were more involved and Vermont had most of the contacts. The employment contract was made there and both parties had been Vermont residents. Nevertheless, the Court did not stress the interests of the states and made no reference to the underlying policy of Vermont's workmen's compensation regime, which was to compensate injuries while limiting employer's liability; instead, it concentrated on the need for New Hampshire to recognize the employer-employee relationship created by the Vermont statute.[244]

Three years later, the Court decided *Alaska Packers Association v. Industrial Accident Commission.*[245] In contrast to *Clapper,* which involved a conflict between a strict liability statute and a common law negligence recovery, *Alaska Packers* was concerned with two compensation statutes both of which provided exclusive recovery in lieu of any other remedy. The employer-employee relation was formed in California for work to be performed in Alaska. The employee, who was injured in Alaska, filed a claim with the California Accident Commission on his return to that state. His employer, the Alaska Packers Association, then sued to set aside the award.

The Supreme Court held that California was entitled to apply its law despite the agreement of employer and employee that the compensation law of Alaska would apply to them, and despite the purported exclusivity of the Alaska

[242] *See supra* notes 202–03.

[243] 286 U.S. 145 (1932).

[244] It has also been suggested that *Clapper* should be regarded as a case in which the Court, in the days before *Erie,* simply announced a rule of federal common law. Thus, the case "is more easily seen as an early indication of the Court's inclination toward interest analysis." Allo, *Book Review,* 30 J. Leg. Ed. 612, 618 (1980).

[245] 294 U.S. 532 (1935).

statute. The Court first noted[246] that full faith and credit does not *always* require a state to look to the other state's law because the "absurd" result would be that each state's law would be enforceable only in the other state.[247] Rather, the Constitution compels deference to the foreign law only when the governmental interests of the other state outweigh the interests of the forum. The Court relegated to itself the ultimate duty of balancing the interests and of determining which were the weightier. In *Clapper*, New Hampshire had to defer to the more important interests of Vermont, especially because in so doing no important interest of New Hampshire was infringed. The Court in *Alaska Packers*, however, found that a vital interest of California (the compensation of its domiciliaries under the terms of its statute) would be abridged if the Alaska law applied.

The *Alaska Packers* Court purported to balance state interests, but it also relied on the "obnoxious" test developed in *Clapper*. The Court had recognized in *Clapper* that the forum could refuse to enforce sister state statutes if so doing would be obnoxious to domestic policy. Thus, in *Alaska Packers* the Court took the California Supreme Court's holding as a declaration that Alaska's different statute was obnoxious to California; therefore the application of California law did not violate full faith and credit principles.

The Court again mentioned the obnoxiousness test in *Pacific Employers Insurance Co. v. Industrial Accident Commission*.[248] However, the weighing of governmental interests was in the forefront of the analysis. In *Pacific Employers*, the California Accident Commission again gave a recovery despite the conflicting compensation statute of Massachusetts. Unlike the decision in *Alaska Packers*, the injury occurred in California. Thus, the forum state was the state of injury and the sister state the place of the formation of the employment relationship, as in *Clapper*. Unlike *Clapper*, however, the Supreme Court upheld the application of forum law. While the Court did examine the conflicting interests of the states, in the result it simply held that the Full Faith and Credit Clause did not require a state to ignore its own policy to enforce another state's statute.[249]

[246] The Court also dismissed a due process challenge to the California compensation award because a state has power to regulate in-state contracts for work to be performed out of state. The forum clearly had sufficient physical connections with both plaintiff and defendant to justify the exercise of power. Furthermore, because the employment relation was created in the forum, it was fair for forum law to apply.

[247] 294 U.S. 532, 547.

[248] 306 U.S. 493 (1939).

[249] Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 476 (1947) seems to have marked the end of "weighing." In that case the Court said that the propriety of the application of District of Columbia law "depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case. . . . And as so applied the statute fully satisfied any constitutional questions of Due Process and Full-Faith-and-Credit." The two tests seemed to have merged. R. WEINTRAUB, *supra*, note 91, at 522.

Carroll v. Lanza[250] expressly recognized *Pacific Employers'* apparent "departure" from *Clapper*. In *Carroll* as in *Clapper*, the plaintiff sought a common law negligence recovery in the forum despite the exclusive workmen's compensation statute of the state where the employee lived and where the employment relationship was formed (Missouri).[251] The Court expressly held that *Pacific Employers* had recognized that the Full Faith and Credit Clause did not require application of a foreign statute that conflicts with the policy of the forum. The Court noted that the forum where the injury occurred had important interests relating to medical care and dependents to serve and to protect; notwithstanding the fact that this plaintiff had no special connection with the forum Arkansas, and imposed no burdens on her institutions, the Court held that "cases of this type"[252] could be adjudicated by the law of the forum. *Carroll*, in effect if not word, overruled *Clapper*.[253]

If the *Carroll* Court had followed the analysis of *Clapper*, Arkansas would have been required to defer to the law and policy of Missouri, unless that law was obnoxious to Arkansas or, at least, its policies were considered to have greater weight. The Court made no inquiry into the underlying policies of the statutes; it considered only the stated exclusivity of the forum statute and dispensed with the need to establish that the forum specifically, or even by inference, considered the sister state's statute to be obnoxious to the policy of the forum. Furthermore, the opinion in *Carroll*, stating that the Court was deciding "cases of this type," indicates that whenever the forum is the place of injury,[254] that fact alone will provide a sufficient contact to permit the application of local law despite contrary statutes in other states. *Carroll v. Lanza*, as interpreted, brings full faith and credit analysis into step with due process concepts.[255]

As the Court later summarized the test:

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another State having such interest in the multistate activity.[256]

By this analysis, the Supreme Court permits the states significantly related to the parties or the issue to adopt whatever choice-of-law provisions suit their needs. The only real constitutional limitation is that the law chosen be the law

[250] 349 U.S. 408 (1955).

[251] The plaintiff, Carroll, sued Lanza, a general contractor, in Arkansas. The accident occurred in Arkansas. Missouri law barred common law recoveries from a general contractor; in Arkansas, the compensation law did not extend to general contractors who were considered third parties and thus liable to negligence suits.

[252] 349 U.S. 408, 413 (1955).

[253] R. WEINTRAUB, *supra* note 91, at 523.

[254] It is important to note, however, that the place of injury in *Carroll* was not fortuitous since Arkansas was the state of Carroll's longterm employment.

[255] *See supra* note 249.

[256] Richards v. United States, 369 U.S. 1, 15 (1962).

of a state having some significant "contact" or relation with the transaction in question.[257]

Full faith and credit issues are also involved when one state refuses to entertain an action based on the law of a sister state. Thus in *Hughes v. Fetter*,[258] the Supreme Court held that Wisconsin could not dismiss a claim based on the Illinois wrongful death statute. All the parties were residents of Wisconsin, but the accident had occurred in Illinois. The Wisconsin court interpreted its own wrongful death statute to bar recovery because that statute gave relief only for accidents occurring within the state. The Supreme Court held that the Full Faith and Credit Clause required the recognition of the Illinois statute as a "public act." The Court reasoned that because Wisconsin, by statute, itself gave recovery for wrongful death, such a claim, although based on the Illinois statute, could not be repugnant to Wisconsin public policy, especially since all parties were Wisconsin residents and the possibility existed that no other court would have jurisdiction.[259]

Broderick v. Rosner,[260] provides another example of this principle. There the

[257] One line of cases still affirmatively imposes choice-of-law rules. Although these cases, so far not expressly overruled, may not stand if the Court applied the analysis of *Carroll* and *Richards*, they remain a special category where perceived needs of national uniformity require a choice of law mandated by the Constitution. *Cf.* Pennsylvania v. New York, 407 U.S. 219 (1972); Texas v. New Jersey, 379 U.S. 674 (1965). These are escheat cases and their result may also be put on jurisdictional grounds. Thus, it may be said that intangibles have their situs at the last known address of the creditor and are subject to escheat there, and that the forum applies local law to escheat of local assets.

Another line of cases involves fraternal benefit societies and is best represented by Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586 (1947). In these cases, the Supreme Court has held that various insurance benefits provided by the fraternal societies to their members may be governed only by the law of the home state of the society. The Court found a need to keep the rights and duties of all members uniform no matter where they lived. *See* R. WEINTRAUB, *supra* note 91, at 526–27. The society and its members are considered an undivided entity to be governed by the law that granted the society's charter. The fraternal benefit cases are unique and *Wolfe*, the most recent case, was decided in 1947. While the cases have not yet been expressly overruled, their continued validity is doubtful, given the Court's attitude toward constitutionalizing choice of law.

[258] 341 U.S. 609 (1951). *Hughes v. Fetter* is regarded by Weintraub to be an exceptional case: "A state's forum-closing rule should be immune from attack under the Full-Faith-and-Credit Clause unless the state's interest in the application of that rule is outweighed by the national need for a uniform result under the public act, record or judicial proceeding of another state." R. WEINTRAUB, *supra* note 91, at 578.

[259] However, there is no reason to assume that jurisdiction could not have been exercised in Illinois under nonresident motorist legislation or that the Wisconsin court, under notions of *forum non conveniens*, could not have required the defendant to consent to jurisdiction in Illinois. For criticism *see* R. WEINTRAUB, *supra* note 91, at 532–34.

[260] 294 U.S. 629 (1935).

Supreme Court required the recognition by New Jersey courts of a New York statute imposing assessments on the stockholders of an insolvent bank. The New Jersey court had raised "impossible" procedural barriers to protect its citizens from the assessment. The Supreme Court ruled that a state may not deny enforcement of claims based on sister state law through the guise of merely affecting the remedy. Full faith and credit required deference to the regulatory laws of New York because New Jersey had no legitimate policy that would be impinged by the enforcement.

2. The Constitutional Limits Analyzed

a) Due Process

The Supreme Court's elaboration, in *Shaffer*,[261] *Kulko*,[262] and also in *World-Wide Volkswagen* and *Rush*,[263] of the minimum-contacts test for state court jurisdiction originally announced in *International Shoe*,[264] holds important implications for the choice of law. *Hague*[265] complicates the picture. The jurisdiction cases narrow the permissible bases for the exercise of judicial jurisdiction and thereby effectively eliminate some instances in which the choice of forum law would most likely violate constitutional limits. *Home Insurance v. Dick*[266] showed that local law may *not* be applied when no significant relation to the forum exists. Although confirming *Dick*, *Hague* speaks of the requirement of significant contacts but fails to provide guidance to measure sufficient significance. In effect, the Supreme Court seems to have suggested that it will not involve itself in the choice-of-law process so long as the forum has the most minimal contacts that might support the application of the *lex fori*.

Hague is an unfortunate decision. It restates the significant-relation requirement of *Dick* but overlooks the fact that the need for similar tests for judicial jurisdiction and for applying local law[267] results from the fact that many of the same concerns are present when a court attempts to exert its power over the absent defendant and when the court seeks to apply its law to adjudicate the parties' dispute. In both instances the Constitution looks to the extent of the court's territorial power and the fairness of the exercise of that power. Both elements, together comprising due process,[268] should be present to permit either the exercise of jurisdiction or the application of forum law. It is these two

[261] Shaffer v. Heitner, 433 U.S. 186 (1977).
[262] Kulko v. Superior Court, 439 U.S. 84 (1978).
[263] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 348 (1980).
[264] International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).
[265] Allstate Ins. Corp. v. Hague, 449 U.S. 302 (1981). For discussion *see supra* text accompanying notes 228–41.
[266] 281 U.S. 397 (1930). *See supra* notes 209–17 and accompanying text.
[267] *See* Martin, *supra* note 203; Hay, *supra* note 153.
[268] *See* Reese, *supra* note 234, at 597–98; Kirgis *supra* note 201, at 95.

elements which comprise "minimum contacts" for jurisdiction and "significant connection" for the application of local law.[269]

Contact with a state is established by a connection to its territory or its people. The power element is related to territoriality.[270] Traditionally, the state could exercise power only over persons within its sovereign territory.[271] When presence provided the clearcut dividing line between proper and improper exercise of power, the concept of fairness was submerged. As states were allowed to extend the "long arm" of jurisdiction, however, the fairness concept became critical. The contact necessary to legitimate the exercise of judicial power then required additional consideration of the element of "fairness."

To be sure, fairness is a flexible concept. But in its essentials, it is measured by the relation of the facts and of the parties' activities to the forum state. It is unfair to exercise jurisdiction when the parties have no contact with the state. Of course, the contact need not be physical. Fairness and the significance of contacts are also measured by purposeful activity directed to the forum[272] or by the type and quantum of benefits derived by the parties from the state seeking to exercise power. By American standards it is not unfair, and therefore not unconstitutional, to take jurisdiction when the party against whom the power is directed has minimum contacts with the forum as established either by his presence in the state, or his purposeful activity directed to the state, or his derivation of substantial benefits from the state. Separately, or in some combination, these factors make it reasonable for the defendant to anticipate being subjected to the state's adjudicatory power. Finally, if the cause of action of the plaintiff is related to the defendant's connection with the state, the exercise of jurisdiction over the defendant comports with traditional notions of fair play. On the other hand, a state may not subject a minimally related defendant to its jurisdiction for a cause of action *unrelated* to those contacts. Thus due process requires for jurisdiction a *nexus* between the defendant and the forum, and, if this connection be slight, also the cause of action.[273]

Application of the *lex fori* often follows jurisdiction.[274] Power to exercise jurisdiction, however, does not automatically give the state constitutional authority to apply forum law: while jurisdiction and choice of the *lex fori* will often coincide, the "minimum contacts" for one do not always provide the necessary "significant contacts" for the other.[275] Jurisdiction and choice of law address two different questions. Jurisdiction considers whether it is *fair* to

[269] Weintraub, *Due Process and Full Faith and Credit Limitations on State's Choice of Law*, 44 Iowa L. Rev. 449, 455–56 (1959).

[270] *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Martin, *Constitutional Limitations, supra* note 201, at 193–95; Kirgis, *supra* note 201, at 97.

[271] *E.g.*, Pennoyer v. Neff, 95 U.S. 714 (1878).

[272] *E.g.*, Hanson v. Denkla, 357 U.S. 257 (1958). *Cf.* Pearson v. Northeast Airlines, Inc., 309 F. 2d 553 (2d Cir. 1962) (en banc).

[273] Shaffer v. Heitner, 433 U.S. 186 (1977).

[274] Martin, *Constitutional Limitations, supra* note 201, at 202–03.

[275] Hay, *supra* note 153.

cause *this* defendant to travel to *this* state; choice of law asks the further question of whether the application of this substantive law, which will determine the merits of the case, is fair to *both* parties.[276] Thus, for choice of law there must be a sufficient nexus *between the transaction* to be adjudicated *and the forum*, as well as the parties.

Some examples serve to illustrate these distinctions. In *John Hancock Mutual Life Insurance Co. v. Yates*,[277] the Supreme Court struck down the application of forum law. The Georgia court had jurisdiction[278] but could not apply its law because the state had no relation to the events which led to the suit. The transaction involved a life insurance policy issued in New York. The insured and his wife had paid the premiums while living in New York. After the insured's death, the widow moved to Georgia where she sued to collect the proceeds. The company claimed that the insured had concealed an illness when applying for the insurance, an absolute defense to the claim under New York law. In Georgia, the court determined that the issue of the insured's alleged fraud was, procedurally, an issue for the jury. Not surprisingly, the jury found for the plaintiff-widow and the Georgia Supreme Court affirmed this verdict.

The U.S. Supreme Court noted that, *in relation to the contract*, there was "no occurrence, nothing done [in Georgia] to which the law of Georgia could apply."[279] The only relation with the forum was the plaintiff's recently acquired domicile.[280] Georgia had power to adjudicate, but application of its law was unfair[281] to the party resisting that law. Even though the insurance company apparently did sufficient business in Georgia for jurisdiction to lie, as to the particular contract under consideration the defendant had no reason to expect[282] that Georgia law would apply even if it were sued there. Application of that law, therefore, was grossly unfair and a violation of due process.[283]

Yates must take into account *Watson v. Employers Liability Assurance Corp., Ltd.* and *Clay v. Sun Insurance Office, Ltd.* both discussed earlier.[284] Recall that the Supreme Court allowed the forum to apply its law to overcome a provision in the contract of insurance made in another state in fact situations similar to *Yates*. Several factual differences, however, are important. In both *Watson* and

[276] *See supra* note 217 and accompanying text.

[277] 299 U.S. 178 (1936).

[278] The Court made no mention of any jurisdictional issue. Presumably doing business or consent was the basis.

[279] 299 U.S. 178, 182. The Court's language in *Dick* was similar: *see supra* notes 213, 214 & 216 and accompanying text.

[280] On after-acquired domicile, *see supra* note 237.

[281] Kirgis, *supra* note 201, at 97–98; Weintraub, *supra* note 269, at 457–58, refers to surprise.

[282] Kirgis, *supra* note 201, at 106.

[283] Allowing plaintiff's suit would also raise problems of forum shopping. *See* Reese, *supra* note 234, at 602.

[284] *Supra* notes 221–27 and accompanying text. The Court, however, based its decision in these cases on full faith and credit considerations. As previous discussion showed, full faith and credit and due process converge. *See supra* note 249.

Clay the loss insured against occurred in the forum. Additionally, in both cases the insurance company had expressly insured against loss in most or all of the United States. The defendant, therefore, could reasonably expect *suit* in *any* state. The occurrence of the particular *loss* in the *forum* thus provided the nexus of forum and transaction. Given the propriety of jurisdiction, the additional step of application of forum law is not unfair because the defendant could expect that the state's *law* would apply. An additional relevant factor in insurance cases is the state's governmental interest, for instance to aid its injured citizens in the recovery of claims. The states in *Watson* and *Clay* demonstrated these interests;[285] by contrast, in *Yates* the plaintiff had only recently arrived in the state and the *events* which gave rise to the claim had no connection with the state, but rather had all occurred elsewhere.

This conclusion – that constitutional application of the *lex fori* requires a nexus between the forum and the transaction – calls the holdings of several other cases into question. A comparison of several New York cases demonstrates the requirement of a nexus of the transaction to the forum. In *Kilberg v. Northeast Airlines, Inc.*[286] the New York Court of Appeals held that while the liability of the defendant for the wrongful death of the plaintiff's intestate would be judged by the law of Massachusetts where the death occurred, the limitation of damages provision in the Massachusetts statute would be ignored because it violated New York public policy. The decedent's airplane flight originated in New York, where the decedent had bought his ticket, and was bound for Nantucket, but crashed in Massachusetts. The application of New York law was not unfair in this case. The defendant, by doing business in New York, was subject to jurisdiction. Moreover, the defendant could expect the application of New York law. There was a nexus of the transaction and the forum. The decedent bought his ticket in New York and, but for the fortuitous accident in Massachusetts, the liability could easily have arisen in New York. The defendant purposefully derived a benefit from the forum *and* the transaction.

Rosenthal v. Warren[287] stands in contrast to *Kilberg*. In *Rosenthal* suit was filed in New York against Dr Warren, a Massachusetts surgeon. Again, the plaintiff relied on the Massachusetts wrongful death statute but sought to disregard its limitation on damages. The federal court (sitting as though it were a

[285] *See* R. LEFLAR, *supra* note 220, at 118.

[286] 172 N.E.2d 526 (1961). Full faith and credit and due process objections to *Kilberg* were expressly rejected by the Second Circuit in Pearson v. Northeast Airlines, Inc., 307 F. 2d 131, 136–47 (2d Cir. 1962) (Kaufman, J., dissenting), 309 F.2d 553 (2d Cir. 1962) (en banc, adopting Judge Kaufman's opinion), *cert. denied*, 372 U.S. 912 (1963). The decision rested on the principal ground that New York had a sufficient connection to, and interest in, the case to permit the application of its law to the extent that it declined to follow the Massachusetts damage limitation.

[287] 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). Additionally, *Rosenthal* was based on *Seider*-type jurisdiction, 475 F. 2d 438, 440 n. 2 (discussed *supra* at note 157), and would now also violate due process on jurisdictional grounds. Rush v. Savchuk, 444 U.S. 348 (1980).

state court, because it had jurisdiction only because of the diverse citizenship of the parties), followed *Kilberg* and held the damage limitation inoperative.

Rosenthal, however, differs from *Kilberg* in important respects.[288] The decedent in *Rosenthal* went to Boston for the specific purpose of obtaining the service of Dr Warren. The place of the injury, therefore, was not fortuitous: if an action were to arise from the interaction of Dr Warren and his patient, it would necessarily arise in Massachusetts. The nexus of the event and the New York forum was therefore missing. The additional facts of *Kilberg*, that gave New York the power to apply its law in that case, are also missing from *Rosenthal*. Although the *Rosenthal* Court describes the defendant as a "world-renowned physician and surgeon" who practiced in a hospital with a national reputation drawing one-third of its patients from out-of-state,[289] the doctor had no particular contact with New York. The doctor could not *expect* that his conduct might be judged by the liability standards of his various patients' domiciles.[290] Nor could he be aware of, or plan to accommodate, the standards of states other than that where he practiced, whether those standards related to his liability for instructions to his anesthesiologist or to his other attendants, or to his insurance to cover his liability exposure. He derived no benefit from the patients' states in any sense relevant to the choice-of-law issue[291] and he certainly was engaged in no purposeful acts directed toward those states that were related to his surgical practice.[292] Thus, Dr Warren's liability to the plaintiff in excess of that provided in Massachusetts was *unexpected* and unfair in the due process sense. The Court, under constitutional restraint, should have deferred to the law of the defendant's domicile.

Cases in which the plaintiff travels to the defendant's domicile to sue him at his home also demonstrate that the "minimum contacts" needed for jurisdiction and for choice of law are not always identical. The propriety of applying the *lex fori* does not automatically follow from the fact that jurisdiction is readily established. In *Young v. Masci*,[293] for example, the plaintiff, a New Yorker, brought suit in New Jersey against a domiciliary of that state. Suit was based on a New York statute making automobile owners liable for injuries caused by others who used the car with permission. The defendant had given permission to a third party to drive the defendant's car to New York where

[288] In *Rosenthal*, the Second Circuit, moreover, failed to consider adequately the changes in New York conflicts law since *Kilberg*. *See* P. Hay & R. Rotunda, The United States Federal System: Legal Integration in the American Experience 153 n. 441 (Milan, Giuffrè, 1982).

[289] 475 F.2d 438, 439–40. *See also id.* at 444.

[290] Reese, *supra* note 234, at 605.

[291] *See* Martin, *Constitutional Limitations*, *supra* note 201, at 207–08; Kirgis, *supra* note 201, at 106. Additionally, New York had no regulatory interest to protect. All conduct in question occurred outside New York.

[292] *Cf.* Bernhard v. Harrah's Club, 546 P.2d 719, *cert. denied*, 429 U.S. 859 (1976). (Nevada defendant's solicitation of California business made it fair to apply California dramshop law).

[293] 289 U.S. 253 (1933).

the bailee struck and injured the plaintiff. The defendant asserted that New York could not constitutionally impose liability on a non-resident owner. The Supreme Court, in affirming judgment for the plaintiff, rejected this argument, holding that the New York statute could impose such liability because the defendant set in motion the acts that caused the injury.

Stated in more current terminology, Young engaged in such purposeful activity directed toward New York that he could expect that state's law to apply to him.[294] Given the defendant's expectations that New York law might apply and given also the nexus of this law with the transaction, the application of New York law was not unfair so as to violate due process. *Young* concerned only the constitutionality of the New York statute, not whether New Jersey should apply it. The question was, therefore, not in issue whether New Jersey could have applied forum law to *protect* the local *defendant.* Since the transaction also had contacts with New Jersey (place of bailment, registration of automobile, point of origin of the trip, domicile of defendant), there was sufficient contact with New Jersey as well: in effect, the application of *either* law would have been constitutional.

Lilienthal v. Kaufman[295] raises more clearly this same issue, whether forum law may apply when all the significant contacts lie in the out-of-state plaintiff's home state. In this case the defendant, Kaufman, an Oregonian, went to California where he entered into an agreement with the plaintiff to enter a joint venture. Pursuant to the agreement and while still in California, Kaufman executed and delivered to Lilienthal two promissory notes representing his investment in the venture. When Lilienthal demanded payment of the notes, he discovered that Kaufman had been declared a spendthrift under an Oregon statute. Kaufman's guardian used his statutory power to avoid payment of the notes. Lilienthal sued in Oregon and sought application of California law as the law of the place where the transaction occurred, where the notes were executed and delivered. California would not recognize the disability of a spendthrift.[296] The Oregon court observed that the most significant relationship was

[294] Under modern jurisdictional analysis, these contacts would be sufficient to give New York jurisdiction and often plaintiff would sue at home. On the facts of this case, if plaintiff had sued in New York, application of New York law also would have been constitutionally appropriate. *Compare* Sheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

[295] 395 P.2d 543 (1964). *See* Reese, *supra* note 234, at 598–99.

[296] Had litigation occurred in California, a California court (using *any* of the approaches to choice of law) would surely have applied forum law. The defendant's *status* of a spendthrift under Oregon law would have been irrelevant for the determination of the *consequences* of such status in the forum. *Cf.* Estin v. Estin, 334 U.S. 541 (1948). Civil Law countries arrive at like solutions: capacity is governed by a party's "personal law" (ordinarily the law of nationality) but the effectiveness of the persons' acts, when done within the forum, is determined by forum law in the interest of commercial certainty. For France, *see* 2 H. Batiffol & P. Lagarde, *supra* note 100, at § 491; for Germany, *see* EGBGB art. 7 (I) & (III) (1), and G. Kegel, *supra* note 145, at 257.

with California but upheld the guardian's avoidance upon a finding that Oregon's public policy of protecting spendthrifts required application of Oregon law.

Application of forum law in *Lilienthal* to deny the plaintiff's claim was unfair and should have been considered a violation of due process.[297] The nexus between the forum and the transaction was clearly missing. The only connection to the forum was the *defendant's* domicile. Furthermore the application of the *lex fori* deprived the *plaintiff* of his legitimate expectation that the transaction with another who came into his state, carried out completely in his state, would be governed by his state's law. The plaintiff was not connected with the forum, nor did he engage in any purposeful activity or derive any benefit from the forum.

A choice-of-law analysis that uses the concepts of due process as applied to jurisdiction in order to determine when a state has the sufficiently "significant contacts" in order to apply constitutionally its law, overlooks the fact that jurisdictional and choice-of-law considerations, while similar, are not the same.[298] The connection of the state must be to the *defendant* in order to gain jurisdiction. The nexus of the state and the *transaction* provides the necessary relation for the application of local law. Such a view of due process analysis can adequately deal with issues of fairness to the parties – plaintiffs *and* defendants; it can also test when a state's power is sufficient to adjudicate by application of the *lex fori*. However, a due process analysis cannot address problems of conflicting state interests: When may a state with significant relation to a transaction apply its law and disregard the contrary existing interests of a sister state? In a few limited areas the Supreme Court has set the balance of conflicting state interests; but largely the need for respect for conflicting policies and interests must be perceived by the states themselves and is self-imposed. The following section explores what constitutional requirements, if any, may exist under United States law that would impose a duty on states to defer to countervailing interests of other states.

b) Full Faith and Credit

The task of balancing state interests and of preventing undue parochialism perhaps should fall to the Full Faith and Credit Clause, since the case law as developed has not interpreted the Due Process Clause in the choice-of-law context to require a higher quality of contacts than for jurisdiction. A reasonable choice-of-law system should only permit the application of the law of a state that had a *significant* state interest in the transaction.[299] Superimpos-

[297] At most, Oregon's public policy should have led the court not to entertain the action, leaving the plaintiff free to sue elsewhere. The decision on the merits unconstitutionally deprives him of his claim.

[298] *Supra* note 267. *See also* Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112, 1132–33 (1981).

[299] Reese, *supra* note 234, at 602; Martin, *Constitutional Limitations, supra* note 201, at 211, 215; Kirgis, *supra* note 201, at 97, 105. *See also supra* §§ I & II.A.

ing a requirement to find a constitutional choice of law thus expands the inquiry into the difficult area of inter-state relations. It is the purpose of the Full Faith and Credit Clause to ensure extraterritorial effect for the governmental acts of a state[300] and to provide a uniform nation-wide rule where needed.[301] Thus, under an invigorated Full Faith and Credit Clause, a state could not apply its own laws, even if it had the requisite "contact" (*i.e.*, power plus fairness), if, in so doing, it would impair a predominant interest of a sister state or violate a national interest.

Although the Supreme Court on occasion has provided for the concerns of national uniformity by creating a uniform "Federal Common Law," the Court has left almost completely undefined any limits on the extraterritorial effect of state policy as embodied in a statute so long as a state has *power*, in due process terms, to apply its law. The Court now seems to have rejected a state interest approach, despite its once active balancing of interests to determine what law should apply.[302] The balancing of state interests is thus left to the states themselves, and, as one might expect, the states often strike the balance in their own favor.

[300] Primarily judgments.

[301] *See* Leflar, *supra* note 201, at 725. *See also* Redish, *supra* note 298.

[302] Nevada v. Hall, 440 U.S. 410 (1979) presented the Court with a unique opportunity to balance state interests because the defendant was a State of the Union and interposed, as defenses to an action for injuries caused by an automobile owned by the state and driven by one of its employees, both its sovereign immunity and Nevada statutory limitation on recoveries against the state. After rejecting the sovereign immunity defense, the Court noted that California had a substantial interest (protection of residents who are injured on its highways), an interest so substantial that it had waived its own immunity for like cases. Under these circumstances, California could well regard the Nevada limitation as "obnoxious" to its policy. The Court stated in its n. 24:

> California's exercise of *jurisdiction* in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result. (Emphasis added.)

The italics show how jurisdictional and choice-of-law considerations blended into each other. Full faith and credit considerations, to which the footnote was appended, were seen in power (due process) terms. The interest analysis, moreover, emphasized California's interest, with only passing reference to Nevada's. The other state's interest may be expected to be even less important when the defendant is not a State of the Union but a private party. *See supra* notes 250–52 and accompanying text. *See also* Note, *Sovereign Immunity in Sister-State Courts*, 80 COLUM. L. REV. 1493, 1494–1502 (1980).

c) Privileges and Immunities and Equal Protection

Both the Privileges and Immunities[303] and Equal Protection[304] Clauses of the U.S. Constitution are designed to eliminate discriminatory classifications that have no legally justifiable (rational) basis. In the conflict-of-laws setting, these Clauses come into play when a state applies a local rule in a case with multistate contacts in a fashion which discriminates against the out-of-state party because of nonresidence or noncitizenship.[305]

In order to form a unified nation and in order to legally integrate the country, it is essential that each of the states treat all similarly situated persons equally; thus these constitutional clauses limit the state's power to classify (that is, discriminate unfairly) according to citizenship or place of residence. Unlike the Due Process or Full Faith and Credit Clauses, however, the Privileges and Immunities and Equal Protection Clauses do not invalidate the forum's choice of its own law as opposed to the law of another state; they merely require the forum to have a law that applies equally to citizen and noncitizen alike.[306]

i) Privileges and immunities

The Privileges and Immunities Clause is really a comity clause, and it is often so called. It provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[307] Early decisions gave limited scope to this comity clause.[308] In *Corfield v. Coryell*, Justice Bushrod Washington confined the rights contained in the clause to those "which are in their nature, fundamental; which belong of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union."[309] Additionally, the guarantee of the Clause is unavailable to corporations.[310]

[303] U.S. Const. art. IV, § 2. *See* U.S. Const. amend. XIV, § 1; J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 378 (St. Paul, West Pub. Co., 1978) [hereinafter cited as Nowak, Rotunda & Young].

[304] U.S. Const. amend. XIV, § 1.

[305] For two comprehensive articles dealing with the Privileges and Immunities and Equal Protection Clauses, *see* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 Yale L.J. 1323 (1960) [hereinafter cited as Currie & Schreter I]; and Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. Chi. L. Rev. 1 (1960) [hereinafter cited as Currie & Schreter II]. *See* Toomer v. Witsell, 334 U.S. 385 (1948). On "state citizenship" *see supra* note 151.

[306] The Equal Protection Clause applies more broadly to "persons." *See infra* note 329.

[307] *Supra* note 303.

[308] *See, e.g.*, Connor v. Elliott, 59 U.S. (19 How.) 591 (1855); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922). *See* Nowak, Rotunda & Young, *supra* note 303, at 276.

[309] 6 Fed. Cas. 546, 551–52 (No. 3230, C.C.E.D. Pa. 1823).

[310] Paul v. Virginia, 75 U.S. (9 Wall.) 169 (1868); Blake v. McClung, 172 U.S. 239 (1898); Nowak, Rotunda & Young, *supra* note 303, at 276. The reason for the ex-

The Court later expanded this clause to protect more than just "fundamental" rights.[311] *Blake v. McClung*[312] is the leading case. It held that Tennessee could not give priority to its own citizens in the distribution of an insolvent firm's assets to the detriment of nonresidents. The Court in *Blake* noted, however, that the right of noncitizens to enjoy the privileges and immunities of citizens of the forum state is not absolute. Thus, the thrust of the comity clause is that any distinction based on citizenship must have a reasonable basis or fall as an unconstitutional discrimination.[313]

In some cases, preference for local residents may be justified. In *LaTourette v. McMaster*,[314] for example, the Court upheld a South Carolina statute which required that all licensed insurance brokers reside in the state. The discrimination against nonresidents was upheld on two grounds. First, the Court emphasized that the distinguishing feature in the statute was residence, not citizenship. Because the Constitution, the Court said, bans only *citizenship* classifications, a statute drawn in terms of residency poses no problems. This reasoning is unpersuasive and this leg of *McMaster* should no longer be followed.[315] Second, the Court pointed to what now appears to be the only proper justification for the discriminatory aspects of the statute: the discrimination had a reasonable basis. The state's conceded authority and power to regulate insurance brokers could be effectuated more easily if all brokers were local residents. As in other areas of constitutional review, the Court did not attempt to find that the regulation was wise or the best way to achieve a goal.[316]

Chemung Canal Bank v. Lowery[317] illustrates that state rules of procedure that differentiate between citizens and noncitizens need not violate the Privileges and Immunities Clause. In that case a statute of limitations for actions to enforce judgments was held constitutional even though the statute was tolled for resident plaintiffs when the defendant was absent from the state, but the defendants' absence had no such effect for nonresident plaintiffs.[318] The state justified the difference because the state had a good reason to toll the statute for

clusion of corporations is the historical power of a state to exclude foreign corporations completely. *But see infra* note 329, with respect to the Equal Protection Clause.

311 *See, e.g.*, Chalker v. Birmingham & N.W. Ry., 249 U.S. 522 (1919); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920). Currie & Schreter I, *supra* note 305, at 1339–40.

312 172 U.S. 239 (1898).

313 *Id. See* McGrovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219 (1918). *Cf.* Hague v. CIO, 307 U.S. 496, 511 (1929) (Roberts, J.).

314 248 U.S. 465 (1919).

315 Currie & Schreiter I, *supra* note 305, at 1343–49, 1383.

316 *See* NOWAK, ROTUNDA & YOUNG, *supra* note 303, at 404, 518.

317 93 U.S. 72 (1876).

318 A similar situation is presented in Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553 (1920) where Minnesota's "borrowing" statute of limitations was upheld. Enforcing a shorter limitation on nonresidents whose own statute had run lessened the crowding of the forum's courts and prevented forum shopping. Currie & Schreter I, *supra* note 305, at 1389.

local plaintiffs, but if the same benefit was extended to nonresidents, undesirable forum shopping could result. If the nonresident judgment creditor happened to find the defendant in the state, he could collect on a claim perhaps long extinguished in the state where the judgment arose. The nonresident would be using his status as a nonresident to gain an unfair advantage. The statute's distinction thus allowed the state to protect local creditors whose claims are frustrated by debtors who flee the jurisdiction and, at the same time, to guard against recovery on stale claims held by out-of-state residents.[319]

The doctrine of *forum non conveniens* is another procedural device that may discriminate against noncitizens but which may be justified because it is useful in preventing plaintiffs from utilizing liberal jurisdictional bases to gain an advantage over a defendant who is available in another more convenient forum (forum shopping).[320] This doctrine explains *Douglas v. New York, N.H. & H.R.R. Co.*[321] in which the Supreme Court upheld New York's dismissal of a Connecticut plaintiff's suit based on a foreign cause of action against a Connecticut defendant who did business in New York. The decision asserted that it is permissible to limit access to overcrowded local courts to those who paid for maintaining the courts.[322] A forum's obligation to hear cases, however, extends beyond granting access to its courts only to those who pay.[323] Rejecting a noncitizen's suit, when a similar action by a citizen would be heard, is justified only if the denial advances some permissible interest of the state.[324] Thus, in *Douglas*, New York had no interest in the dispute since all the contacts were outside the state.[325] Dismissal of the claim, therefore, increased the efficient operation of the courts and served the added purpose of preventing forum shopping in a situation in which another forum was reasonably available to the plaintiff.[326]

[319] The *Lowery* Court's alternative grounds seem to apply to causes of action not reduced to judgment. The absent debtor is obligated to pay at the creditor's residence. When he fails to pay, the debtor is in contempt of the law of the creditor's domicile only, and not the forum state's law. The forum is entitle to use the debtor's absence to toll only the limitations running in favor of *its* creditors. Additionally, the refusal to aid nonresident creditors works no hardship since the creditor can reduce the claim to judgment and thereafter keep the liability alive by revival of the judgment. Currie & Schreter I, *supra* note 305, at 1387–89.

[320] *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[321] 279 U.S. 377 (1929). Currie & Schreter I, *supra* note 305, at 1379–80.

[322] The decision also rested on the distinction between residence and citizenship. *See supra* note 315 and accompanying text.

[323] *Cf.* Hughes v. Fetter, 341 U.S. 609 (1951), and *supra* note 258. *See* Currie & Schreter I, *supra* note 305, at 1384.

[324] Currie & Schreter I, *supra* note 305, at 1383.

[325] "Significant contacts" for choice-of-law purposes are not in issue in this case; the case relates only to access to the courts.

[326] Currie & Schreter I, *supra* note 305, at 1383. Even if New York could not have applied forum law to the unrelated foreign cause of action, the plaintiff might have

ii) Equal Protection

The Equal Protection Clause of the fourteenth amendment commands each state not to "deny to any person within its jurisdiction the equal protection of the laws."[327] The Clause requires similar treatment for similarly situated persons, unless a classification differentiating among them relates to, and is designed to achieve, a legitimate governmental purpose.[328]

Although the Equal Protection Clause is limited in application to those "within the jurisdiction" of the state, it applies to "persons" and thus encompasses corporations.[329] The major equal protection cases have dealt with corporations where the issue of presence "within the jurisdiction" was critical. In *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*,[330] the plaintiff, a foreign corporation, had brought an action in Wisconsin to replevy an automobile in the defendant's wrongful possession. Wisconsin law provided that local claimants could require an officer of a foreign corporation to submit to pre-trial examination in any county in Wisconsin, whereas nonresident natural persons could be examined only in the county where personal service was obtained, and Wisconsin residents could be examined only in their home county. The Court rejected the argument that the corporation was not present within the jurisdiction. By virtue of bringing suit in a Wisconsin court, the corporation had come into the state and was, therefore, present for the purposes of that undertaking and subject to examination only under the same conditions as nonresident individuals. Thus, any person invoking the protection of the courts must be granted equal protection.[331]

Other procedural distinctions have been held equally invalid. For example, the Court has struck down provisions allowing a foreign corporation to be sued in any county, when the proper venue for local corporations or resident natural persons was in the county where they did business or resided.[332] Similarly it has invalidated provisions permitting substituted service, without no-

gained some advantages from the choice of a New York forum: *e.g.*, a longer statute of limitations; tactical advantages caused by absent witnesses, or higher awards of New York jurors. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). *See also* Missouri *ex rel.* Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950).

[327] U.S. CONST. amend. XIV, § 1.

[328] *See* NOWAK, ROTUNDA & YOUNG, *supra* note 303, at 517–22; Currie & Schreter II, *supra* note 305, at 5 *passim*. The equal protection test is different when fundamental rights are involved. Then the state must show a compelling interest to justify the classification. NOWAK, ROTUNDA & YOUNG, *supra* note 303, at 522–27.

[329] The Equal Protection Clause applies to all "persons": citizens, aliens, and corporations. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). With respect to corporations *see* Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888).

[330] 262 U.S. 544 (1923); Currie & Schreter II, *supra* note 305, at 8–9. *See* the dissent of Brandeis and Holmes, JJ., 262 U.S. 544, 551–53.

[331] The earlier decision in Blake v. McClung, 172 U.S. 239 (1898) had still taken the position that the pursuit of a claim within the state did not constitute presence within the jurisdiction.

[332] Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927).

tice, in the case of foreign corporations when different provisions applied to local corporations.[333]

iii) Summary

The Privileges and Immunities and Equal Protection Clauses both guard against the application of forum law in circumstances where that law discriminates against the out-of-state party unless the underlying basis for the distinction bears some rational relation to a legitimate state purpose. Thus in many cases both clauses will apply. When the complainant is a natural person, the Privileges and Immunities Clause is the more common device used. When corporations are the subject of discrimination, the Equal Protection Clause must be used because the comity clause is unavailable. Both clauses protect the out-of-state party against the parochial application of law to favor local claimants. Just as a state may not choose its own law over that of another involved state without some basis for doing so under the "significant contacts" test discussed earlier,[334] the state also may not, without more, differentiate between residents and out-of-state parties in the application of the chosen law.

These clauses then round out the picture, under the U.S. Constitution, of limitations on choice of law. The importance of the Privileges and Immunities and Equal Protection Clauses is slight compared to that of the Due Process and Full Faith and Credit Clauses. Even the latter two, with the Court's focus on "significant contacts" which fails to differentiate adequately between jurisdiction and choice of law, posit only outer limits of permissible choice. Thus, federal standards are still largely lacking to coordinate state policies within the federal system, and this task continues to remain with the states.

B. The European Approach: The Adoption of Uniform Choice-of-Law Rules Concerning Contracts by Means of a Convention

1. The Background and Genesis of the Convention

The EEC Treaty has no provision directly ordering the Member States to adopt uniform choice-of-law rules; nor can one find provisions in the Treaty which put limitations upon the power of Member States to apply the *lex fori*

[333] In Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1933), the Court did hold that such substituted service without notice did not violate due process and that the distinction between local foreign corporations did not violate equal protection. However, in Blake v. McClung, 172 U.S. 239 (1898), the Court had earlier recognized that the power to exclude corporations did not include the power to condition entry on an agreement to conditions that would impair rights secured by the Constitution. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Court required actual notice to nonresidents with known addresses over substituted service. *Bond & Goodwin, supra,* should therefore be regarded as overruled with respect to due process. *See* Currie & Schreter II, *supra* note 305, at 16. Equal protection would now seem to require equal treatment of nonresident corporations and nonresident individuals. *See supra* note 329.

[334] *Supra* notes 299–302 and accompanying text.

to intra-Community transactions. Perhaps an extreme application of the *lex fori* might be viewed as a non-tariff trade barrier prohibited under article 30, but there are no cases and very few viewpoints expressed on this question.

Article 3 (h) of the EEC Treaty establishes that one of the objectives of the EEC is "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." Article 100 provides that the Council, acting in unanimity upon a proposal submitted by the Commission, may issue directives on the approximation of provisions laid down by laws, regulations or administrative actions in Member States directly affecting the establishment or functioning of the common market. However, in spite of its potential, article 100 has not yet been used to provide uniform choice-of-law rules.

Nevertheless, on occasion special provisions have been invoked in attempts to impose uniform choice-of-law rules in particular areas. For example, article 51 on social security for migrant workers has been used as authority for the establishment of choice-of-law rules on social security,[335] and article 49 concerning the free movement of workers has been relied upon as a legal basis for a draft regulation which provides uniform conflict rules on labor relationships.[336] Furthermore, article 57(2) may be used to issue a directive on common choice-of-law rules governing insurance contracts in intra-Community realtionships.[337]

In general, therefore, choice of law in the Community Member States is governed by national provisions, subject to any international conventions to which the States may be parties. In the field of contractual obligations, among the ten Member States only the Civil Codes of Italy and Greece make specific provision for choice of law in contract. The Italian provisions are mostly to be found in the provisions concerning the law in general, contained in the introduction to the Civil Code of 1942. The most important provision is article 25 which states that in the absence of a choice of law by the parties, the contract is to be governed by the law of the common nationality of the parties; if they have no common nationality, the law of the place of contracting is applied to the contract.[338] The Greek Civil Code of 1940 provides in article 25 that contractual obligations are governed by the law chosen by the parties.[339]

[335] Council Reg. (EEC) No 1408/71 of 14 June 1971, Title II (arts 13–17), JO No. L 149, 5 July 1971, p. 2 ([1971] OJ (spec. Eng. ed.) 416, at 422).

[336] Proposition de réglement (CEE) du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l'intérieur de la Communauté, JO No. C 49, 18 May 1972, p. 26 (presented by the Commission to the Council on 23 March 1972).

[337] Rome Convention art. 1 (3) exempts certain insurance contracts from application of the Convention rules.

[338] *See* 3 E. Vitta, Diritto internazionale privato 217 ff (Turin, UTET, 1975); T. Ballarino, Diritto internazionale privato 848 ff (Padua, CEDAM, 1982).

[339] Les Législations de droit international privé. Conflits de lois et conflits de juridictions 140 (Asser (TMC) Instituut ed., Oslo, Universitetsforlaget, 1971); *see* comment by Kokkinē-Iatridou, *id.* at 136.

In the absence of such a choice the law which, considering all the circumstances of the case, is the most appropriate to the transaction applies.

In the other Member States the choice-of-law rules on contracts are founded on rules derived from court decisions, which to some extent have been "harmonized" by legal theory.[340] There has been a general acceptance of the parties' capacity to choose the law applicable to the contract.[341] In the absence of an effective choice of law by the parties the courts of all EC countries except Italy seem to have expressed adherence to the multilateral choice-of-law principle that the law to which the contract has its closest and most real connection should govern.[342] In fact, however, the law of the foreign country with the most real connection to the contract has not regularly been applied. In England, France and Germany in particular the so-called "homeward trend" has been strong. In the other EC countries this trend has also been noticeable but less striking. However, even within the same country the decided cases often conflict. Sometimes the principle of the closest connection has been followed, while at other times the homeward trend has prevailed. The cases themselves rarely offer sufficient guidance as to which approach will be adopted in a given situation.

It is against this background that one must consider the 1980 Rome Convention on the law applicable to contractual obligations, which to date is the most important effort toward uniform choice-of-law rules which has yet been made.[343] It was the Benelux countries who took the initiative and proposed the unification of the private international law of the Member States by way of codification. The aim of this proposal was to eliminate the inconveniences arising from diversity among conflict rules, notably in the field of contract law. "An element of urgency" existed because of the reforms likely to be introduced in some Member States and the consequent "danger that the existing divergencies would become more marked."

[340] Belgium: 2 F. RIGAUX, DROIT INTERNATIONAL PRIVÉ §§ 378 ff (Brussels, Maison F. Larcier, 1979); Denmark: O. LANDO, KONTRAKTSTATUTTET: DANSKE OG FREMMEDE LOVVALGSREGLER OM KONTRAKTER 99 ff, 172 ff (2 Udenrigshandelsretten, Copenhagen, Juristforbundet, 1981); Germany: C. REITHMANN, INTERNATIONALES VERTRAGSRECHT 10 ff (3d ed., Cologne, Otto Schmidt, 1980), U. DROBNIG, *supra* note 128, at 225 ff; France: 2 H. BATIFFOL & P. LAGARDE, *supra* note 100, at 257 ff, §§ 565 ff; Italy: 3 E. VITTA, *supra* note 338, at 314 ff; Netherlands: J. SAUVEPLANNE, ELEMENTAIR INTERNATIONAAL PRIVAATRECHT 43 ff (2d ed., Deventer, Kluwer, 1966); England: 2 DICEY & MORRIS, *supra* note 1, at 745 ff, CHESHIRE & NORTH, *supra* note 1, at 195 ff; Scotland: A. ANTON, *supra* note 99, at 184 ff.

[341] *See* Lando, *supra* note 5, at §§ 25–103.

[342] *Id.* at §§ 104–76.

[343] The text of the Convention is published in OJ No. L 266, 9 Oct. 1980, p. 1. For a commentary on the Convention and on the events leading up to its adoption, *see generally, Giuliano Report, supra* note 11. *See also* Commission Opinion of 17 March 1980 Concerning the Draft Convention on the Law Applicable to Contractual Obligations, OJ No. L 94, 11 Apr. 1980, p. 39.

The Benelux proposal sought to provide uniform conflict rules which would govern both the Member States' relations *inter se* and relations with non-Community countries. Such rules, it was argued, would enhance the level of legal certainty, fortify confidence in the stability of juridical relations, facilitate agreements on jurisdiction according to the applicable law, and augment the protection of acquired rights over the whole field of private law. The harmonization of law might create, or at least help to create, legal conditions for economic activity similar to those governing an internal national market. In the EEC there were – and, it must be added, still are – fields in which the differences between substantive rules combined with the absence of unified conflict rules impeded the free movement of persons, goods, services and capital.

At the same time, it is likely that there will be a growing number of cases in which the courts of the Member States will have to apply a foreign law. The 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, imposing a uniform jurisdiction regime on the courts within the Community, has helped to facilitate and expedite many civil actions and enforcement proceedings, and has, in fact, led to a considerable increase in intra-Community litigation in the six "old" Member States. The Convention has also enabled parties, in many matters, to choose among several courts. The result may be that the parties will give preference to a state whose law seems to offer a more favorable resolution to the proceedings. To prevent such forum shopping and to anticipate more easily the applicable law, conflict-of-law rules should be unified in areas of particular economic importance so that the same law is applied, irrespective of the state in which the decision is given.

These were the motives which prompted the Community to convene a Working Group of Experts (hereinafter the Group) from the Member States in order to form a complete picture of the status of the conflict-of-law rules and to decide whether and to what extent a harmonization or unification of private international law within the Community should be broached.

At a meeting in October 1969, the Group agreed that, without prejudice to future developments, a start should be made on the matters most closely bound up with the proper functioning of the common market, such as: 1) the law applicable to corporeal and non-corporeal chattels; 2) the law applicable to contractual and non-contractual obligations; 3) the law applicable to the form of legal transactions and evidence; and 4) general matters under the following headings: renvoi, classification, application of foreign law, acquired rights, public policy, capacity and presentation. The Group unanimously agreed that the proposed harmonization, while not specifically connected with the provisions of article 220 of the EEC Treaty, would be a natural sequel to the Convention on Jurisdiction and the Enforcement of Judgments.[344]

The Group began its work by considering a convention on the law applicable to contractual and non-contractual obligations. It submitted a Report in

[344] *See Giuliano Report, supra* note 11, at 4–5.

1972 containing a draft convention on these subjects.[345] The work was resumed in 1975, after the accession of Denmark, Ireland and the United Kingdom to the EC in 1973. The Group then decided to postpone work on choice-of-law rules concerning non-contractual obligations, and to confine its work to contractual obligations. On 18 June 1980, after some amendments made in the Council, seven of the nine Member States signed a Convention on the Law Applicable to Contractual Obligations in Rome; Denmark and the United Kingdom later signed the Convention in 1981. On 1 July 1984 the Convention came into force in Denmark.[345a]

2. Universality of the Rome Convention

The Working Group of Experts favored uniform rules governing both nationals of Member States and persons domiciled or resident within the Community, as well as nationals of, or persons domiciled or resident in, third countries. The Group considered their main purpose to be the framing of general rules such as those currently existing in Italian law. Such general rules, which would become the law common to all the Member States for the settlement of legal conflicts, would not affect the detailed regulation of clearly delimited matters (*e.g.*, other conventions) procceding from work done elsewhere, especially at the Hague Conference on Private International Law. The application of these particular conventions is safeguarded by article 21 of the Rome Convention.[346]

3. The Cornerstones of the Rome Convention

The Convention has three cornerstones. First, the parties are free to select the law governing the contract. Second, to the extent that the law applicable to the contract has not been chosen by the parties, the contract is governed by the law of the country with which it is most closely connected. Third, the interests of the weaker party and the public order are safeguarded by special conflict provisions relating to certain consumer contracts and to labor contracts, as well as by the provisions contained in article 7 on the effect of mandatory rules.

a) Party Autonomy

Article 3 of the Rome Convention provides that a contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circum-

[345] *Id.* at 6. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, EC Commission, DG Internal Market and Approximation of Legislation, Doc. XIV/398/72-E, Rev.: 1 (1972).

[345a] *See* Act No. 188 of 9 May 1984 (Lov om gennemførelse af konvention om hvilken lov der skal anvendes på kontraktlige forpligtelser, m. v.).

[346] *Giuliano Report, supra* note 11, at 8–9 & 36.

stances of the case. The Convention lays down the principle, almost universally recognized, that parties to an international contract are free to choose the law applicable to their contract.[347] No contact or other kind of relationship between the law and the contract and the parties or the contractual acts (for instance its making or performance) is required.

This attitude is well founded. Party autonomy is supported by two main considerations:

i) Certainty

The choice-of-law clause ensures certainty in commercial transactions. In the absence of such a clause the law of the contract will often be unknown to the parties until the court has spoken. In international contracts the forum is frequently unforeseeable when the contract is being made, and even when the forum is predictable the applicable law very often cannot be foreseen because of the great uncertainty existing in so many countries as to the conflict rules respecting contracts. There is, however, one point upon which there is almost unanimous agreement between the laws of the various countries: the choice-of-law clause should be respected in principle. This uniformity ensures that such a reference by the parties will relieve them of their uncertainty as to the law governing their contract.

As Rabel points out in his *Conflict of Laws*, the choice of law by the parties "endeavours to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course."[348]

ii) Need for freedom

Another consideration is the need of the parties for freedom. In many international commercial contracts (sale, transport, agency, transport insurance, distributorship and licensing agreements, etc.) the parties have creditable motives for their choice. They many want to use a certain standard form which is internationally known. They may want to submit the contract to the law of the country that dominates the market. They may want to select a "neutral" law in which each of them has more confidence than in that of the domicile of the other party. A certain legal system may be well-developed and well-suited to the contract in question. The parties may wish to refer to a law which they have used in earlier transactions with each other. The contract may have a close relationship to some other contract which is governed by a certain law (*e.g.*, an insurance or underwriter's contract).

All these reasons may justify a choice-of-law clause, and even if they are not recognized in domestic contracts they must be respected in international commercial contracts, where the parties are competitors not only with regard to the goods and services but also with regard to the legal system they may offer. The French Court of Cassation has expressly recognized these consid-

[347] *See* Lando, *supra* note 5, at § 60.

[348] *See* 2 E. Rabel, *supra* note 134, at 365.

erations,[349] and the Swiss, English and West German courts seem to have adopted the same attitude.[350]

b) The Closest Connection

i) Rigidity versus flexibility in the choice-of law rules

When the law applicable to the contract has not been chosen, the Rome Convention provides that the contract shall be governed by the law of the country with which it is most closely connected (article 4(1)). Thus the Convention has adhered to the center-of-gravity approach.

Like other legislators, the Group was faced with a difficult dilemma: Is a method to be adopted which ensures justice in the individual case, but which abandons to a greater or lesser degree the quest for predictable solutions? Or are rules to be introduced which pay regard to the need for foreseeability but which, if applied consistently, will sometimes cause hardship in the individual case?

The more rigid the rules, the more frequent the clashes between law and equity will be. This is a serious objection to rigid solutions. The modern judge is probably more aware of the individual concerns of the parties than were his predecessors, and thus for him predictability will often carry little weight when confronted with his notions of equity and fairness. An excessively remorseless rigidity should be avoided.

On the other hand the choice-of-law process should not focus on litigated cases alone. Contracts producing hard cases are more apt to be taken to court than contracts which take their normal course in accordance with the rules. When reported and discussed, litigated contracts are more likely to attract attention in those circles where law-in-the-making is being debated than is the unnoticed majority of contracts in which the rules work smoothly and which therefore pass without comment. A court dispensing justice in a hard case seldom intends to give a directive to govern future conduct, but in several countries decided cases are the major source of the law, and what is believed to have been the *ratio decidendi* will become a rule, even if this result was not intended. Conflict rules respecting contracts are needed above all by the parties who wish to be guided by the law when making and performing their contracts. This need for certainty is a very important consideration, and a factor supporting the adoption of rigid rules. But one may wonder whether rigid rules are really capable of bringing about the desired certainty and foreseeability, and if so whether in the long run this objective will be worth the effort.

At present it is not possible for the legislature of any one country alone to bring about the high degree of certainty and predictability which the parties need. This is due to the existing diversity among the nations of the conflict rules respecting contracts and to the existing possibilities for bringing an action

[349] *See* Cass. civ. (France), Judgments of 19 Feb. 1930 & 27 Jan. 1931, 1933 S. Jur. I, at 41.

[350] *See* Lando, *supra* note 5, at § 62.

on an international contract in more than one country. Only a convention on conflict rules which is adopted by a large number of countries can assure a substantial degree of predictability. However, in the long run a convention introducing rigid and uniform conflict rules on contracts may not be worth the effort. At present the substantive law of contract is in a stage of rapid evolution in many countries, and so are the patterns of international trade. Conflict rules will no doubt be affected by these developments, and rigid rules will not give effect to them; more flexible standards would be better able to meet the changing conditions, since they would not arrest the dynamic element in adjudication.

ii) Which rule of presumption should apply in determining the closest connection?

Although the Group preferred flexibility, it did not abandon all reliance on rules.[351] Rather, it chose to establish a general rule of presumption. Its problem, however, was which rule of presumption to select: which connecting element was best suited for such a rule?

In the legal traditions of several countries, such as the United Kingdom, France, the Benelux countries and the United States, the place of contracting and the place of performance have been the two most important factors for determining the law applicable to a contract.[352] The first American *Restatement of Conflict of Laws* (1934) advocated a rigid application of the law of the place of contracting for the validity of the contract and the law of the place of performance for questions related to the performance of the contract,[353] and even the *Restatement, Second, Conflict of Laws* (1971), which adopted a more flexible method than the first, also attaches great importance to the place of contracting and the place of performance.[354]

For centuries it has been maintained that a contract must be governed either by the law of the place of contracting or by the law of the place of performance because the sovereign of the territory in which an act is carried out is the one and only authority with power to attach legal effects to the act. For a long time this belief sustained the principle of the territoriality of laws which, in turn, brought forward several theories to explain why a foreign *lex loci actus* must be applied (comity,[355] vested rights,[356] etc.). "Territoriality" has become a very ambiguous term in the conflict of laws.[357] Moreover, the idea that the law of the place where an act occurs should govern the act has dominated the Com-

[351] *See Giuliano Report, supra* note 11, at 19 ff.
[352] *See* Lando, *supra* note 5, at §§ 115–21.
[353] *See* RESTATEMENT OF CONFLICT OF LAWS §§ 332 & 358 (1934).
[354] *See* RESTATEMENT, SECOND, CONFLICT OF LAWS §§ 188 (1971).
[355] J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 35 at 34 (1st ed., Boston, Little, Brown 1834).
[356] 1 J. BEALE, *supra* note 6, at 308; 2 J. BEALE, *supra* note 6, at 1091.
[357] *See* A. NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 40 n. 29 (New York, O.U.P. 1943).

mon Law countries and has influenced several of the Civil Law countries.[358] The idea, it is submitted, has not been abandoned completely although, as will be seen, it will not always result in the application of the law of the place of contracting or the law of the place of performance. Nor can the approach claim any general validity based on *a priori* considerations.

(*a*) The place of contracting: In former times the place of contracting was regarded as the most significant connecting factor. It is still regarded as significant in many countries. As mentioned above, abstract principles have been invoked to support the application of the *lex loci contractus*: the contract must be governed by the law of the place where it came into existence.[359] That law and that law alone can indicate whether the agreement became a valid contract. Therefore, the law of the place of contracting must apply "by the general law of Nations, *jure gentium*."[360]

Most lawyers agree nowadays that neither logic, necessity nor public international law require the application of the *lex loci contractus* and that the conflict rules should be framed according to economic and social considerations. The importance of the place of contracting as a connecting factor should be determined by these standards and not by general *a priori* maxims.

(*i*) Contracts made *inter praesentes* and the place of negotiation: Where the parties have their places of business in different states or countries and where each of them performs his obligation in his own country, the contract may be difficult to localize and its proper law difficult to ascertain. If the parties have made the contract while both were present at the place of business of one of them, the contract will often have its center of gravity there. The application of the law of that place meets the general expectations of the party who is at home there and who may either not realize that he is dealing with a foreigner or not appreciate the consequences thereof. Application of this law is also supported by the consideration that a foreigner who seeks out another party must be taken to have submitted to the law of the residence of the latter. The place of contracting may also carry weight if the contract is made *inter praesentes* either at the place of performance or at some other place having a significant contact with the contract.

The fact that a contract has been negotiated in a particular country will seldom carry much weight by itself. A contract made at the J.F. Kennedy Airport in New York between a Swiss and an Argentinian businessman but which has no contact with the state of New York should not be governed by New York law.[361] One could argue in favor of applying the *lex loci contractus* to such cases on the grounds that it is at the place of negotiation that parties can obtain the services of a counsel to help them draft their agreement and that it is

[358] *See, e.g.*, J. NIBOYET, *supra* note 179, at 603.
[359] 2 J. BEALE, *supra* note 6, at 1091.
[360] J. STORY, *supra* note 355, § 242.
[361] *See* Cour d'appel, Paris, Judgment of 26 March 1966, 57 R.C.D.I.P. 58 (1968); Bundesgericht (Switzerland), Judgment of 25 Aug. 1961, BGE 87 II, 194.

there that courts and other judicial authorities will be available for non-contentious proceedings in connection with the formation of the contract – and that counsel and courts will act in accordance with their own laws. Few commercial contracts, however, will need the help of counsel in drawing them up. In those cases where legal advice is needed, modern means of communication make it easy to obtain this advice over large distances. In addition the necessity to resort to non-contentious proceedings mainly arises where land is being conveyed or mortgaged, and in these circumstances it is the *lex rei sitae* which will apply.

Dealings at commodity and security exchanges and at auctions should, however, generally be governed by the *lex loci* regardless of the residence of the parties. He who patronizes such a market submits to the rules in force there because he knows that one can only contract there swiftly and safely if those rules apply.

(*ii*) Contracts made *inter absentes*: In England and the United States, as well as in the Commonwealth countries, the place of contracting has played an important part even when the contract is made between parties communicating across frontiers.[362] In these countries contracts made by letter are considered to be made at the place where the letter of acceptance was posted. If the parties use "instantaneous" means of communication, such as telephone, teleprinter or teletype, the solution is more doubtful. For the purpose of jurisdiction an English case has held that a contract made by teletype was made where the acceptance was communicated to the offeror, that is in the country of the offeror.[363]

These rules, however, are not accepted everywhere. In some countries conflict-of-law statutes or case law designate the place of contracting for contracts made *inter absentes*. Thus, for example, the Japanese *Horei* designates the place from where the offer is sent as being the place of contracting (article 9, paragraph 2),[364] while the Italian cases refer to the place where the offeror

[362] The importance is decreasing. Thus the *Restatement, Second,* makes a distinction between the place of contracting (*i.e.*, the place where the last act necessary to give the contract binding effect occurred) and the place of negotiation (*i.e.*, where the parties negotiated and agreed on the terms of the contract), attaching more importance to the latter than to the former. *See* RESTATEMENT, SECOND, CONFLICT OF LAWS § 188, comment (e) (1971): "By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip." *Id.* at 580.

[363] Entores, Ltd. v. Miles Far East Corp., [1955] 2 Q.B. 327 (C.A.). For the relationship of jurisdiction based on R.S.C., Ord. 11, r. 1 (1) (f) (jurisdiction in England if the contract is governed by English law) *see* Graveson, *Choice of Law and Choice of Jurisdiction in the English Conflict of Laws*, 28 BRIT. Y.B. INT'L L. 273–90 (1951).

[364] Law Concerning the Application of Laws of 21 June 1898; English translation in A. EHRENZWEIG, S. IKEHARA & N. JENSEN, AMERICAN-JAPANESE PRIVATE INTERNATIONAL LAW 115 (12 Bilateral Stud. in Private Int'l Law, Parker Sch. Foreign & Comp. L., Dobbs Ferry, New York, Oceana, 1964).

takes cognizance of acceptance.[365] Thus several countries, though relying on the concept of the law of the place of contracting, do not agree on the definition of the place of contracting. In reality contracts concluded between parties communicating across frontiers are made not in one place but in two, but since two laws cannot govern a contract, a more or less arbitrary choice of one of the two laws has to be made.

More than a hundred years ago the place of contracting lost its importance in business practice. Contracts ceased to be made mainly *inter praesentes* and were no longer necessarily to be performed where made. This fact should have reduced the importance of the place of contracting in contracts made *inter absentes*. It is a striking example of the conservatism of lawyers that the place of contracting still carries so much weight in so many countries.

(*b*) The place of performance: Today the place of performance is regarded as an important contact in many countries. In England and France it has played a part almost equal to that of the place of contracting. In some states of the United States the place of performance is the decisive contact for questions pertaining to the performance of the contract. In Scandinavia the place of performance is a connecting factor which generally carries more weight than the place of contracting. In West Germany the law of the place of performance is applied where the courts do not rely on the express, tacit or presumed intention of the parties.

The French writer Batiffol[366] has advocated that the parties should be presumed to have localized their contract at the place of performance. In his view, performance is the object of the agreement. At the place of performance the contract will "manifest" itself to the outer world. The expectations of the parties are directed toward the fulfillment of the obligations and that fulfillment will occur at the place of performance. In carrying out many of his acts, the performing party is bound to obey the law in force at the place of performance. When each of the parties to a bilateral contract has to perform in the country of his residence two legal systems might apply, but such a "scission" of the contract must be avoided. One of the two possible places of performance of a bilateral contract must prevail; according to Batiffol this must be the place where the characteristic obligation is to be performed. In sales contracts the characteristic performance is the supply of the goods by the seller, in employment contracts the execution of the work of the employee, in insurance contracts the assumption of risks, etc.[367]

The arguments of Batiffol in favor of the place of performance carry weight in respect of many contracts. Employment contracts, contracts for labor and work, some distributorship contracts and some licensing contracts should *pri-*

[365] 3 E. Vitta, *supra* note 338, at 274; T. Ballarino, *supra* note 338, at 856.

[366] H. Batiffol, Les conflits de lois en matière de contrats 78–85 (Paris, Rec. Sirey, 1938); 2 H. Batiffol & P. Lagarde, *supra* note 100, §§ 580–81.

[367] Batiffol's theory had the support of the draftsmen of the proposed bill for the reform of French private international law (*reproduced in* 59 R.C.D.I.P. 832 (1970)).

ma facie be governed by the law of the place of performance.[368] In these as in other contracts the emphasis should, if possible, be laid on the performance of the characteristic obligation, as suggested by Batiffol. However, reliance on the place of performance has shortcomings. In some cases the place of performance in its technical legal sense is not significant as a connecting factor because it is not the place where the essential performance takes place. In contracts of sale the place of performance is often the place where "the seller is to complete his performance with reference to the physical delivery of the goods."[369] This place may be the place where the risk passes, but is not always the place where the seller in fact manufactures, collects, packs, and dispatches the goods. A seller living in Cologne who sells goods f.o.b. Rotterdam to a New York buyer "performs" his contract in the legal sense of the term in Rotterdam, but in reality the performance is almost wholly carried out at his residence, and merely completed when he delivers the goods to a common carrier in Cologne.

In respect of some contracts the laws of various countries disagree as to the location of the place of performance. Thus, for example, monetary obligations are to be performed at the place of the creditor's domicile according to English and Scandinavian law, but at the place of the debtor's domicile according to German and French law.[370]

Finally, in some contracts the place of performance is dispersed over several countries or is unknown at the time of contracting.[371] According to most charterparties the shipowner must perform his obligations both at the place of loading and at the place of discharge, and sometimes when signing the charterparty he will not know where the cargo is to be loaded or to be discharged.

These considerations suggest that the importance of the place of performance will in each case depend on whether that place is effectively the place where the contract is to be carried out. If the real place of performance is located in a particular country and if this place was known at the time of contracting then the place of performance is of significant importance. However, as we have seen, these conditions are rarely satisfied in practice, and for these reasons the place of performance is not fit to serve as a general rule of presumption.

(*c*) The law of the "seller": The Group chose another connecting element for its rule of presumption, and article 4(2) of the Rome Convention provides:

> [I]t shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate its central administration. However, if the contract is en-

[368] *See* 2 E. Rabel, *supra* note 134, at 464–74; O. Lando, *supra* note 340, at 343.

[369] *See* American U.C.C. §2–401(2) and Restatement, Second, Conflict of Laws §191 comment (d) (1971).

[370] 2 Dicey & Morris, *supra* note 1, at 772.

[371] *See* Restatement, Second, Conflict of Laws §188 comment (e) (1971).

tered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other then the principal place of business, the country in which that other place of business is situated.

This rather heavy-handed provision expresses the idea that the law of the party providing the characteristic performance shall *prima facie* govern all contracts for which the Convention does not make explicit exceptions. This presumption, which is the same as that which has been established in Swiss case law, is based upon the following considerations.

(*i*) As a general rule, a party to a contract is subject to the law of his place of business in carrying out those acts (including entering into contracts) which are preparatory to the performance of his obligations under his international contract.

(*ii*) Given the fact that the parties to an international contract generally have their places of business in different states or countries, and that a contract should not be governed simultaneously by two laws, the law of one of the parties must be preferred. Here, too, the place of business of that party should be chosen whose performance is more complex, and therefore more extensively regulated by the law. Whenever a person for a monetary consideration agrees to provide a movable, transfer a right, allow the use of a thing, cover a risk, supply a completed piece of work, or tender some other service that characterizes the contract as a sale, a hire, an insurance contract, an agency contract, or a contract for the rendition of services, the obligations of the party who might be described compendiously as the "seller" are generally more complex, and therefore more extensively regulated by the law, than those of the party who might be described somewhat inaccurately as the "buyer."

It is also generally the "seller" who frames the conditions of the contract. Another basis for applying the "seller's" law is that mass bargaining like mass production, brings down the cost and the price. The enterprise must calculate expenditure and risks on the basis of a multitude of contracts, and this calculation can be made safely only if all the contracts are governed by the same law, that is the law of the seat of the enterprise.

(*iii*) Moreover, the principal place of business is the real place of performance of most contracts made by an enterprise. It is at this place that most of a firm's contracts are prepared, calculated, decided upon and performed. In some contracts, as for instance contracts of sale, clauses such as f.o.b. and "free delivered" may locate the technical place of performance at another place, but the center of the real obligations of the seller remains at his principal place of business.

In fact the theory of the characteristic performance rests on two main assumptions: the first, is that the duties of the party performing the characteristic obligation are more detailed, more complicated and more regulated by law than are the duties of the other party. The second is that the debtor of the char-

acteristic performance (the "seller") is acting within the ambit of his commercial expertise, while the other party is his customer.

The rule deserves a broad, although not a universal, application. The law of the principal place of business of the "seller" should apply *prima facie* to the following contracts: commercial sales and hire of movables, license contracts, agency contracts and other commercial contracts for the rendition of services, contracts made with banks and other finance companies, contracts made for professional services, and transport insurance.

However, even these general considerations do not apply in all circumstances. First, in certain types of contracts it is difficult, if not impossible, to state which of the parties is charged with the characteristic performance. Cooperation agreements between enterprises and barters are examples of contracts for which it is impossible to make such a determination, and in contracts with publishers it is often difficult to evaluate whether the obligations of the author or those of the publisher are more complex and which party provides the professional expertise and which is the customer. Second, there are individual contracts where other connecting elements may carry more weight than does the place of business of the party performing the characteristic obligation.

As mentioned above, the relevant connecting factor for natural persons and for companies is their principal place of business. In Europe the preparation, negotiation and performance of a contract made by a company generally takes place in accordance with the law of one country. Mostly a company is incorporated and has its seat of administration and its centers of control, management, and production in the same country. In the United Kingdom and in the countries of the Commonwealth, and even more so in the United States, it will happen more frequently than in Continental Europe that a company has its place of incorporation in one state, its place of administration in another and its place of production in a third. In the United States, where some authors have argued in favor of an increased reliance on the place of business of the parties, it may therefore be difficult to locate the principal place of business of a corporation. In the United States, where each state has laws of its own, one cannot maintain – as is the case for most nations in Europe and elsewhere – that the preparation, completion and performance of a contract will take place in accordance with the laws of one legal system. It is generally accepted that the place of incorporation has little significance in contractual matters,[372] and problems in finding the principal place of business will usually arise in situations where the center of control and management of an enterprise is located in one state and the production or manufacture takes place in another. In such cases, each of the contacts will carry some weight, but it is likely that the location of the center of control and management will be a more important contact than that of the place of production or manufacture.

If the contract has been made with an agency or branch of a foreign enterprise which has acted more or less independently of the central administration, the law of the place of business of the branch or agency should govern

[372] *Id.* at 581.

the contract. This approach is in accordance with article 4(2) of the Convention.

Several authors have been critical both of the center-of-gravity method provided in article 4(1) and of the presumption in favor of the law of the characteristic obligation provided in article 4(2), on the grounds that they lead to uncertainty and injustice.[373] Article 4(1), according to some of the critics, is too vague. It is often difficult to determine the center of gravity of a contract having dispersed contacts. The courts will not know when to follow the presumption provided in paragraph 2 or when to make an exception from it. Uniform solutions are, therefore, not likely to occur among the courts in Europe. The rule on the characteristic obligation will favor the powerful "seller" at the expense of the weak "buyer," and will give "more to the one who already has." The true object of the law should be to protect the weaker against the stronger, and not to increase the already existing inequality.

The fear of vacillation and diversity is, however, not confirmed by the experiences so far in Europe. Since 1952 the Swiss courts have adopted the center-of-gravity method,[374] giving preference to the law of the characteristic obligation, adopting a formula devised by Adolf Schnitzer.[375] In conformity with this principle the courts have established a catalogue of presumptions for various contracts, *e.g.*, for sales the law of the seller,[376] for leases of movables the law of the lessor, for agency the law of the agent, for insurance the law of the insurer. However, contracts concerning immovables are *prima facie* governed by the law of the situs of the immovable and employment contracts by the law of place of work.[377] The Swiss case law shows that the principle of the characteristic obligation is useful as a rule of presumption but like other connecting elements not fit for use as a hard and fast rule.

The Swiss courts have generally applied these rules without vacillation and the case law has been approved of in Switzerland.[378] The Swiss Draft Law on Private International Law of 1982 has retained both the center-of-gravity method and the presumption in favor of the characteristic obligation.[379] In the

[373] *See, e.g.*, Juenger, *Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht*, 46 RabelsZ 57, 68 (1982); Jessurun d'Oliveira, *"Characteristic Obligation" in the Draft EEC Obligation Convention*, 25 Am. J. Comp. L. 303 (1977).

[374] *See* Bundesgericht (Switzerland), Judgment of 12 Feb. 1952, BGE 78 II, 74, 79.

[375] 2 A. Schnitzer, Handbuch des internationalen Privatrechts 639 (4th ed., Basel, Verlag für Recht und Gesellschaft, 1958).

[376] In 1972 Switzerland ratified the Hague Convention on the Law Applicable to International Sales of Goods (1955) (for the text of which *see* Collection of Conventions, *infra* note 410).

[377] *See* F. Vischer, Internationales Vertragsrecht 114 (Bern, Stämpfli, 1962).

[378] *See* Vischer, in 1 Schweizerisches Privatrecht 672 (M. Gutzwiller ed., Basel/Stuttgart, Helbing & Lichtenhahn, 1967).

[379] IPRG §§ 120 & 121, 42 RabelsZ 716, 739 (1978) (draft proposal, Switzerland); *see now* Projet de Loi fédéral sur le droit international privé, Conseil fédéral suisse,

last two decades a trend similar to the Swiss has been noticeable in West German and Dutch case law. For those contracts to which the presumption of the characteristic obligation has been applied – such as agency contracts, license contracts and contracts with banks – the West German and the Dutch courts have acted very much in the same way as have the Swiss courts.[380]

The protection of the weak party is, as we shall see, taken care of by special choice-of-law rules. It is too rough a generalization to hold the "seller" to be the stronger and the "buyer" the weaker party to every contract. Big and powerful enterprises buy almost as much as they sell.

c) Protection of the Weaker Party: Consumer and Employment Contracts

The idea of applying choice-of-law rules to protect the weaker party to a contract has been inspired by American courts and writers, both in their attitude toward the parties' choice of law and in their selection of the law applicable to a contract in the absence of a choice of law by the parties.[381]

American courts accept, in principle, the parties' choice of law. However, their freedom of choice has never been completely unrestricted. If the choice-of-law clause has been obtained by unfair means – for instance written in a language unknown to the other party[382] – the courts have paid no heed to it. In some cases lack of local contact with the chosen legal system has led the courts to disregard the choice-of-law clause, and they have said *obiter* that they will give no effect to a reference to a law that has "no normal relation"[383] to the contract, nor to a choice that was made "to avoid applicable law."[384] However, in several of these cases it was not clear whether lack of local contact or the intention to avoid the applicable law was the decisive criterion. In other cases the choice-of-law clause was disregarded because some fundamental policy of the *lex fori* rendered the latter applicable.

In a number of cases a choice-of-law clause pointing to the law of one state was set aside in order to enable the court to enforce a fundamental policy of another state. This has mostly happened in contracts tainted with dirigism, such as insurance and employment contracts. References to the permissive law of a liberal state have been set aside in order to apply the protective statutes of a less liberal state.

In *life insurance* contracts, state and federal courts have applied the law of the domicile of the insured party when that law gave the insured party a better protection against the insurance company than the law of the domicile of the

Message concernant une loi fédérale sur le droit international privé du 1er novembre 1982 (82.072).

[380] Lando, *supra* note 5, at 62 & 64.

[381] *See* Lando, *supra* note 31.

[382] Fricke v. Isbrandtsen Co., 151 F. Supp. 465 (S.D. N.Y. 1957).

[383] *E.g.*, Owens v. Hagenbeck-Wallace Shows Co., 192 A. 158, 164 (R.I. 1937).

[384] Lauritzen v. Larsen, 345 U.S. 571 (1953).

company or the law of the place where the contract had been concluded.[385] In most of these cases the courts did not openly state that they were applying the law of the insured party's domicile because of its protective statute, but rather used other methods – asserting, for instance, that the contract was governed by the law of the place of contracting but construing the place of contracting to be the domicile of the insured. Party references to a more liberal law have not infrequently been set aside.[386] In contracts for *fire, surety, and casualty insurance* a tendency to apply the protective statutes of the place where the risk was located has also been noticeable.[387] In marine insurances contracts, however, the courts have generally upheld choice-of-law clauses if there was a reasonable basis for the choice. It seems that in these international contracts, where the location of the contract and the risk are difficult to define, the parties' need for certainty as to the applicable law and their need for freedom of bargaining have persuaded the courts of the utility of choice-of-law clauses.[388]

In *employment contracts* choice-of-law clauses have sometimes been disregarded in order to apply a protective statute of another state. This has been noticeable in workmen's compensation cases. Since the middle of the 1930's the federal courts have tolerated the application by the state courts of their own statutes provided that the contract had a reasonable contact with the *forum*. One of the first leading cases was *Alaska Packers Association v. Industrial Accident Commission of California*.[389] The parties had inserted a choice-of-law clause referring to the workmen's compensation law of Alaska, where all the work was to be done and where the injury was suffered. The employee had, however, made the contract in California with a California employer and had in accordance with the terms of the contract returned to that state after the termination of the working period. The California Workmen's Compensation Act was applied by the California courts which for practical reasons did not

[385] For cases concerning insurance, *see* New York Life Ins. Co. v. Gravens, 178 U.S. 389 (1900); Mutual Life Ins. Co. of New York v. Hathaway, 106 F. 815 (9th Cir. 1901); Ragsdale v. Brotherhood of Railroad Trainmen, 80 S.W.2d 272 (Mo. 1934); New England Mut. Life Ins. Co. of Boston, Mass. v. Olin, 114 F.2d 131 (7th Cir. 1940), *cert. denied*, 312 U.S. 686 (1940); Mutual Life Ins. Co. v. Mullen, 69 A. 385 (Md. 1908); Jones v. New York Life Ins. Co., 122 P. 702 (1912). *See also* C. W. Carnahan, Conflict of Laws and Life Insurance Contracts 290 (2d ed., Buffalo, Dennis, 1958).

[386] *See* on this trend, H. Batiffol, *supra* note 366, at §§ 322 & 341; C. W. Carnahan, *supra* note 385, at 290; and 3 E. Rabel, *supra* 134, at 319–35.

[387] *See* Restatement, Second, Conflict of Laws § 193 (1971).

[388] Griese, *Marine Insurance Contracts in the Conflict of Laws – A Comparative Study of the Case Law*, 6 U.C.L.A. L. Rev. 55, 83 (1958–59) concluded: "In American law the parties can without restrictions agree on the application of English marine insurance law; they can only agree on another law, it seems, if it has at least a substantial connection with the contract. . . ."

[389] 294 U.S. 532 (1935) (an appeal to the U.S. Supreme Court under the Judicial Code § 237 (28 U.S.C.A. § 344)). The case is discussed *supra* notes 245–48 and accompanying text.

apply the Alaskan statute.[390] The decision was affirmed. The Supreme Court pointed out, *inter alia*, that the workman would get fair compensation through application of the California statute whereas his possibilities of getting back to Alaska, to prosecute his claim for compensation there, under the Alaskan statute, were small.

In cases concerning employment and in the life, casualty and fire insurance cases, judicial policy differs to a remarkable degree from the policy which the American courts pursue in contracts concerning mercantile sales of goods, commercial loans, agency and marine insurance. In these latter cases the trend has been the reverse of that followed in the workmen's compensation and the insurance cases, with the parties' choice of a validating law generally being upheld. In such cases validation has been thought more important than protection.[391] Thus a distinction in the treatment of choice-of-law clauses between contracts tainted with dirigism and "free" contracts is a noteworthy feature of American case law.

As for cases in which the parties have not made a choice of law, the American decisions have sometimes shown a tendency toward validation. Contracts which are threatened by invalidation by one of the laws involved have been saved if another law which has some connection to the contract upholds it.[392] However, it is disputed whether a similar tendency is to be found in the numerous conflicts cases on usury provoked by the existing differences between state legislation on the permissible maximum interest on money loans or on the consequences of excess charges of interest. Some writers[393] have discerned in these cases a rule of validation, finding support in decisions of the United States Supreme Court,[394] the most recent of which dates from 1927. In that

[390] Alaska Packers Assoc. v. Indus. Accident Comm'n of Cal., 34 P.2d 716 (1934).

[391] Employment: Owens v. Hagenbeck-Wallace Shows Co., 192 A. 158 (R.I. 1937); Life insurance: New York Life Ins. Co. v. Gravens, 178 U.S. 389 (1900); New England Life Ins. Co. v. Olin, 114 F.2d 131 (7th Cir. 1940), *cert. denied*, 312 U.S. 686 (1941); Fire, surety or casualty insurance (apart from marine insurance): Johnston v. Commercial Travelers Mut. Acc. Ass'n, 131 S.E.2d 91 (1963); marine insurance: *see* cases cited by Griese, *supra* note 388; *see also* Mummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 924 (1st Cir. 1960) (contract to build oil refinery); and for contracts for the sale of goods: U.C.C. § 1–105.

[392] Ehrenzweig, *The Statute of Frauds in the Conflict of Laws*, 59 COLUM. L. REV. 874 (1959). In his treatise, Ehrenzweig has found the rule of validation to be a basic rule followed by American courts in cases concerning the validity of a contract; it may, he says, not be expressed in the reasonings of the courts, but it is followed in their actual holdings. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 465 (St. Paul, West Pub. Co., 1962). *See also* R. WEINTRAUB, *supra* note 91, at 284–89. To the present writers the validation of contracts is an important trend in American case law concerning validity, but it can hardly be termed the basic rule.

[393] 2 J. BEALE, *supra* note 6, at § 332–2; A. NUSSBAUM, *supra* note 357, at 182; 2 E. RABEL, *supra* note 134, at 410.

[394] In the beginning through covert techniques (*see* Andrews v. Pond, 38 U.S. (13 Pet.) 65 (1839); Miller v. Tiffany, 68 U.S. (1 Wall.) 298 (1863)) and later more openly (*see* Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927)).

year, in *Seeman v. Philadelphia Warehouse*, the Court held that a loan granted by a Philadelphia corporation to a New York businessman who pledged property in New York as security was valid in accordance with the law of Pennsylvania although it would have been void if the usury statute of New York had applied. The Court stated that it would support a policy of upholding contractual obligations assumed in good faith. By stressing the need for good faith the Court wished to indicate that it would not tolerate an "evasion or avoidance at will of the usury law otherwise applicable, by the parties entering into the contract or stipulating for its performance at a place which has no normal relations to the transaction and to whose law they would not otherwise be subject."[395] The Court thus expressed the view that a contract which is invalid according to the law which is otherwise applicable will be upheld if valid by the law of one of the states with which the transaction had a "normal relation." The same principle was expressed in several later decisions of other courts[396] and by the authors of the *Restatement, Second, Conflict of Laws* (1971).

However, in his careful analysis of American cases in 1938, Batiffol[397] was able to demonstrate that less than a quarter of all usury cases had adopted the law of validation, and later studies by Ehrenzweig (1962), Weintraub (1961) and Westen (1967)[398] also contest the general acceptance of a rule of validation in the American case law, with Ehrenzweig even contending that the usury cases represent the most important example of the absence of a rule of validation. The multitude of American cases, however, does not show a clear picture. In a substantial number of cases the American courts have treated a transaction as invalid if it was invalid by the law of the *lex fori*.[399] Many of these cases involved weaker-party contracts made between a money lending enterprise and a private individual, and often substantial differences existed between the rate of interest allowed by the law of the *forum* and the law of the lender or some other law with which the contract had a "normal" or "substantial" relationship. Westen and Ehrenzweig maintain that validating decisions have been rendered in those cases where both parties were incorporated business enterprises or the borrower an "experienced individual" and where, therefore, inequality of bargaining power was absent. In several of these cases the permissible rate of interest of the statute upholding the transaction – or the

[395] Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 408 (1927).

[396] *E.g.*, Fahs v. Martin, 224 F.2d 387 (5th Cir. 1955); National Sur. Corp. v. Inland Properties Inc., 286 F. Supp. 173 (D.C. Ark. 1968); Blackford v. Commercial Credit Corp., 263 F.2d 97 (5th Cir. 1959).

[397] H. Batiffol, *supra* note 366, at 198.

[398] A. Ehrenzweig, *supra* note 392, at 481; Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws - A Critique*, 46 Iowa L. Rev. 713 (1960–61); Westen, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 Calif. L. Rev. 123 (1967).

[399] *See* cases cited by Westen, *supra* note 398.

rate charged – was not greatly in excess of the rate allowed by the otherwise applicable law.[400]

Another group of cases in which lip service was paid to the traditional rules, but where other considerations governed, was that involving *life insurance* claims. In these cases the courts, using various methods, found that the place of contracting was the place where the insured party was domiciled.[401] This hidden application of the law of the domicile served to protect the insured party whenever the rule of the law of his domicile gave him a better protection against the insurance company than the rules in the law of the business seat of the company, which the company had often specified as the place of contracting, relying upon the general rule of the Common Law.[402]

In some cases the American courts have gone further and selected the law which gave the weak party the best protection even if the connection of the contract to that law was weak. This happened in *Hague v. Allstate Insurance Co.*,[403] where the Minnesota court applied its own law which it believed furnished the "better" solution.

The American case law and literature have been observed and discussed by European writers who have suggested that in Europe as well choice-of-law rules should take into consideration the fact that the legislator to an increasing extent restricts the freedom of contract. One school of thought has suggested that this "*police du contrat*" should entail the operation upon the contract of the mandatory rules of the law applicable to the contract, irrespective of a choice of another law by the parties. However, in matters not governed by mandatory rules the parties should still be free to select the law governing their relationship.[404] Another school of thought has argued that the parties' freedom to select the law to govern contracts tainted with dirigism and weak party contracts should be substantially restricted. Such contracts should be subject to the applicable law and it should depend upon that law whether and under which conditions the parties would be permitted to incorporate into their contract rules from another legal system.[405]

The authors of the Rome Convention seemingly paid heed to the American developments, as is witnessed by articles 5 and 6 of the Convention. Article

[400] *See, e.g.*, London Finance Co. v. Shattuck, 117 N.E. 1075 (1917); Kinney Loan & Finance Co. v. Sumner, 65 N.W.2d 240 (1954).

[401] *See* cases mentioned in H. BATIFFOL, *supra* note 366, at 295 & 305; and in 3 E. RABEL, *supra* note 134, at 319–35.

[402] 2 J. BEALE, *supra* note 6, at §§ 314.1–319.1 and RESTATEMENT OF CONFLICT OF LAWS §§ 314–19 (1934); *see also* RESTATEMENT, SECOND, CONFLICT OF LAWS §§ 192–93 (1971).

[403] 289 N.W.2d 43 (1980). *See supra* notes 228–41 and accompanying text.

[404] *See, e.g.*, 2 H. BATIFFOL & P. LAGARDE, *supra* note 100, at § 576.

[405] *See* Lando, *The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 38 RABELSZ 6, 36–39 (1974); Lando, *Consumers' Contracts and Party Autonomy in the Conflict of Laws*, in MÉLANGES DE DROIT COMPARÉ EN L'HONNEUR DU DOYEN ÅKE MALMSTRÖM 141 (S. Strömholm ed., Stockholm, Norstedt, 1972). *See also* Lando, *supra* note 5, at §§ 61 ff.

5(1) (on "certain consumer contracts") applies to contracts the object of which is the supply of goods or services to a person ("the consumer") for a purpose regarded as being outside the consumer's trade or profession, or to a contract for the provision of credit for that object. Article 5(2) restricts party autonomy in consumer contracts, providing:

> Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded by the mandatory rules of the law of the country in which he has his habitual residence:
> - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
> - if the other party or his agent received the consumer's order in that country, or
> - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

Article 5(3) provides a hard and fast rule for the cases where the parties have not chosen the applicable law: "Notwithstanding the provisions of Article 4, a contract to which [Article 5(1)] applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in [Article 5(2)]."

Article 5 does not apply to contracts of carriage; nor does it apply to the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence. However, it does apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation (package tours).

Article 6(1) on individual employment contracts also restrains party autonomy, providing that: "Notwithstanding the provisions of Article 3, in a contract of employment, a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under [Article 6(2)] in the absence of choice." Article 6(2) elaborates the rules to apply in determining the applicable law in the absence of a choice of law by the parties, but this is a rule of presumption only. Article 6(2) provides:

> Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of [the parties'] choice in accordance with Article 3, be governed:
> (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
> (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
>
> unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

The Rome Convention has thus stuck to the classic choice-of-law rules. Such rules do not protect any person in particular, nor do they provide for a selec-

tion of the "better rule of law." They merely refer to a law of a country – *e.g.*, the law of the habitual residence of the consumer – which may (or may not) protect the weak party. This approach deserves approval.

However, in other respects the approach of the Convention is open to criticism.[406] Articles 5 and 6 of the Convention only apply to the consumer and the employee; the insured party to a life or casualty insurance or the tenant of premises, who are also weak parties protected by mandatory rules, do not enjoy a similar position. They may rely on the protection which article 7 – to be treated below – may give them. However, the operation of article 7 – which some countries relying on article 22 may reserve the right not to apply – is more uncertain than that of articles 5 and 6. It has not been adequately explained why the Convention does not give the party who insures a risk situated outside of the territory of the Member States or the tenant of permises a position similar to the one accorded to consumers and employees.

Further, the Convention has limited the application of the law governing the contract under articles 5(3) and 6(2). The parties' freedom to select another law is excluded only insofar as mandatory rules of the governing law are concerned. The parties are free to select another law for matters not regulated by mandatory rules. The distinction between mandatory rules and non-mandatory rules is not clear. Are, for instance, rules relating to the formation of contracts, such as the rules on consideration, mandatory or not? Is a rule of interpretation, such as the rule *in dubio contra stipulatorem*, mandatory, or may the parties agree that it shall not apply, or may they select a law under which it does not apply? And which law determines whether a rule of law is mandatory, the *lex fori* or the law governing the contract under articles 5(3) and 6(2)? This has not been made clear in the Convention.

A better approach, it seems, would be to subject the weak party contract to the law governing the contract and to let this law decide whether the party may derogate from its substantive rules by express stipulation or by a "short hand" incorporation of another legal system into the contract. The latter way may be a dangerous covenant for a party who does not know the rules of such a legal system.

d) Directly Applicable Mandatory Laws

After World War II the dirigism of modern states over national economies faced Europeans with the problem of whether courts and legislatures should pay heed to substantive rules of a jurisdiction which claimed to govern an issue in contract in such a resolute way as to exclude the application of any other law. Such substantive rules may frequently be found in economic legislation, for instance in exchange control regulations and cartel laws, or in laws protecting the consumer and other presumably weak contracting parties, such as employees, agents and sole distributors, against unfair contract terms.

Some European scholars have argued that courts and legislatures, while maintaining the classic structure of the conflict-of-law rules, should apply or

406 *See* O. LANDO, *supra* note 340, at 119 ff.

"take into consideration" the rules of a jurisdiction which claimed to govern an issue in contract in the resolute way mentioned above. Such rules they called "directly applicable rules" or "*lois d'application immédiate.*"[407] The idea was that these rules operate directly and immediately upon the issue, so that the conflict-of-law rule which would lead to another law on the issue is put out of action. Hitherto such directly applicable rules have regularly been applied only when they formed part of the law of the forum state. In support of their application, the courts in Europe have invoked public policy, the purpose of the rule of the forum, or other principles. Very seldom have such rules been applied when they formed part of a law other than that of the forum. Their application has, therefore, depended upon where the action was brought and this has sometimes caused forum shopping and uncertainty in international transactions. The new theory will also allow fair play to foreign public policies.

One of the very few European cases in which the theory of the directly applicable rule was accepted – albeit in a dictum – was the famous *Alnati* case,[408] decided by the Dutch Supreme Court in 1966. Here the Court said that although the law applicable to contracts of an international character as a matter of principle can only be that which the parties themselves have chosen, "it may be that for a foreign state, the observance of certain of its rules, even outside its own territory, is of such importance that the courts ... must take them into consideration and therefore apply them in preference to another law which may have been chosen by the parties to govern their contract." In the *Alnati* case, however, the Belgian Hague Rules in question were not applied and the Dutch law chosen by the parties was applied, even though the contract was more closely connected with Belgium than with the Netherlands. The Belgian Hague Rules were obviously not considered to be so vital for the Belgians that they deserved application. In a later case, *Kharagitsingh v. Sewrajsingh*,[409] where the Dutch Supreme Court could also have referred to the doctrine of directly applicable rules, no mention was made of the doctrine. The idea of directly applicable mandatory rules, however, has been adopted in article 7(1) of the Rome Convention on Contractual Obligations and also by article 16 of the Hague Convention on the Law Applicable to Agency of 14 March 1978[410] and article 18 of the Swiss Draft Federal Law on Private International Law (1982).[411]

Article 7(1) of the Rome Convention provides:

[407] *See* P. Francescakis, La théorie du renvoi §§ 7 ff (Paris, Sirey, 1958).
[408] Hoge Raad (The Netherlands), Judgment of 13 May 1966, 1967 N.J. no. 3.
[409] Hoge Raad (The Netherlands), Judgment of 12 Jan. 1979, 69 R.C.D.I.P. 68 (1980).
[410] Hague Conference on Private International Law, Collection of Conventions, 1951–1980, at 252 (Convention No. XXVII) (Permanent Bureau of the Conference ed., The Hague, Hague Conference on Private Int'l L., 1980).
[411] *See supra* note 379.

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

As can be seen from the words "effect may be given" the courts are given a considerable margin of discretion in the application of article 7(1).

There is some similarity between this provision and several of the factors relevant to the choice of the applicable rules advocated by the modern American theories and followed in some American decisions. However, the policy-oriented approach advocated in America differs in several respects from that of the Rome Convention. The American "New Thinkers" advance a general solution to *all* choice-of-law situations,[412] while article 7 of the Convention is only *an exception* to the operation of the traditional choice-of-law rules provided for in the other articles of the Convention. Further, the Americans will consider the relevant policies of the interested states and the relative interests of those states in the determination of the particular issue in conflict, and when deciding whether the interests of a state are worthy of consideration they will weigh the contacts of that state according to their importance with respect to the particular issue. Article 7 of the Rome Convention in contrast provides that "giving effect" to the mandatory rules of a foreign state is possible only when this state has a significant contact with the *contract as a whole*.[413]

In spite of these and other minor differences between the American and European rules there is a similarity in the basic idea. The fertile American case law has provided and may continue to provide examples which could teach the European courts when to apply article 7 of the Rome Convention. Some of the much debated American cases involving "real" conflicts may provide food for thought.

This hope, however, may be no more than wishful thinking. Some Member States will reserve for themselves the right not to enact article 7(1), as provided for in article 22. In other countries the courts may find a pretext for not applying foreign mandatory rules given the very weak appeal to do so which article 7 provides.

4. Will the Rome Convention Attain Its Goal?

It will not be possible for the Community to harmonize the substantive commercial law of its Member States for some time to come. At the same time, the growth in intra-Community trade, and the increase in intra-Community litigation following from that growth and from the adoption of the Brussels Convention, has forced the Community to take steps to create some certainty and predictability for the parties to commercial transactions. The device chosen

[412] *See* Lando, *supra* note 31, at 32.
[413] *See Giuliano Report, supra* note 11, at 26–28.

from among the several possibilities to further these goals is the Rome Convention, which has brought about uniform choice-of-law rules for contracts. This, as pointed out, is a relatively simple and non-disruptive device.

Contrary to the expectations of a number of European and American writers, the present authors do not expect the Rome Convention to increase the existing uncertainty as to which law governs a contract. On the contrary, we believe that the Convention will increase predictability. Two considerations support this view.

First, efforts have been made to prevent the national courts from relapsing into the previous *lex forism*. Thus, the presumed intention of the parties, which was a device to reach the *lex fori*, has been ousted and the parties' choice of law must be expressed or demonstrated with reasonable certainty. Further in the absence of a choice of law by the parties, the Convention has established clear rules of presumption to replace the "no-rule" approach which the courts of several Member States currently practice and which also leads to the *lex fori*. And finally, renvoi has been excluded.

Second, the Convention resolves some conflicts of classification – notably the one concerning the rules of prescription which, following the Civil Law approach, have been classified as rules of substance and not, as in the Common Law, as rules of procedure.

Despite these improvements, however, it is likely that the Convention will be able only to diminish and not to obviate the existing unpredictability nor will it be able to completely oust the existing *lex forism*.[414]

VI. Final Remarks on Conflict-of-Law Rules as a Technique for Legal Integration in Europe

It follows from what has been said earlier that whenever feasible harmonization of the substantive law should be preferred to harmonization of the choice-of-law rules. However, political and technical obstacles may make it impossible for the harmonization of substantive law to keep pace with the dismantling of economic frontiers. A unification of substantive law may be a very distressing change for societies which have widely different legal concepts and techniques; it may, therefore, lag behind economic integration. Such economic integration, however, will generally lead to a substantial growth of contract relationships across the frontiers; the number of international disputes will increase proportionally and with them the number of cases in which the question of determining the applicable law arises. The need to resolve these disputes in a uniform way will grow correspondingly. Although imperfect, the harmonization of choice-of-law rules may be helpful as a transient measure in fields of law where harmonization of substantive law must wait.

[414] *See infra* § VI.

In the United States the efforts to harmonize substantive law have been more successful than in Europe. This may be due to the fact that the existing substantive laws of the American states, practically all of which are based on the Common Law, differ so little that enactment of uniform laws does not entail any painful alteration of existing legal structures. The considerable amount of harmonized substantive law which has always existed in the United States has made the harmonization of the conflict of laws there a less urgent task. It has been considered sufficient to ensure that the tendency toward *lex forism* – the long-arm statutes on jurisdiction and the application of the *lex fori* to the subject matter of a dispute – is contained within certain limits imposed by the Constitution. Thus, the universalist attitude to substantive law has made it possible to tolerate a particularist attitude to the conflict of laws.

In Europe, where there has not been the same common basis for a unification of the substantive law of ten legal systems, the situation has been different. Such unification represents a much more painful process for each of the ten European countries than it does for each of the states in the United States. These difficulties inhibiting the unification of substantive law have, therefore, led to a unification of the conflict-of-laws rules.

The conflict of laws as a technique of legal integration has severe shortcomings. It has been shown that unified rules on jurisdiction fail to provide any substantial certainty in international legal relationships. The same is true of the choice-of-law rules, for, as we have seen, the courts frequently revolt against the application of foreign law – the determination of which is often a cumbersome and costly process – and incline toward applying the *lex fori*, in the belief that their own law generally provides the better rule of law.

Therefore, if unification is sought through uniform conflict-of-law rules the law-maker must devise additional safeguards to ensure uniform application as well. In the case of the Rome Convention two measures could be taken: first, the Community and the Member States could take measures to facilitate access to reliable information on foreign law. In Germany such a facility already exists in the shape of the German Institutes of Foreign and Private International Law, which may be called upon by the courts to provide the necessary information. This arrangement, we believe, offers the best way to obtain information and will help considerably to make the choice-of-law rules work. All Member States should be required to institute facilities and procedures similar to those found in Germany to provide the courts and parties with reliable information on foreign law. When established throughout Europe, such research institutes could collaborate in this field by regular exchanges of information and scholars.

Second, the European Court of Justice should be given powers to interpret the Rome Convention. It is true that the experiences so far gained in relation to the Court's interpretation of the Brussels Convention may have made the Member States reluctant to give the Court such powers. However, although the Court may have erred in some cases, it has also made valuable contributions to the interpretation of that Convention. It is believed that the mere existence of a power of interpretation will help to keep the national courts on the right

track in cases where they might be tempted to disobey the conflict rules of the Rome Convention. As provided in the protocol on the Court's jurisdiction to interpret the Brussels Convention, the national procurator-general or a similar authority should have the right to request a ruling "*dans l'intérêt de la loi.*" However, since the national procurators have not been very active in using their right of request under the Brussels Convention protocol, the right should also be given to the Commission of the European Communities.

There is a link between the ease of access to information on foreign law and the Court's power to interpret the Rome Convention. Given the existing shortcomings in access to information, a power of interpretation loses much of its value. What is the use of obliging a national court to ask the Court of Justice whether it must apply foreign law when in case of an affirmative answer the national court cannot obtain the necessary information on the contents of the foreign law and, therefore, must apply the *lex fori*?

Without these additional safeguards the choice-of-law convention on contractual obligations or any other similar convention which might follow it will probably not radically change the present situation, in which the application of foreign law to an international relationship is a rare event.

However, the choice-of-law process will always be cumbersome. It is hard on those who when doing business in Europe will have to familiarize themselves with the laws of the other Member States. It is troublesome for the litigants who will have to go through the often difficult procedure of ascertaining and applying foreign law. In many cases the variations of the substantive laws in Europe is a true non-tariff trade barrier.

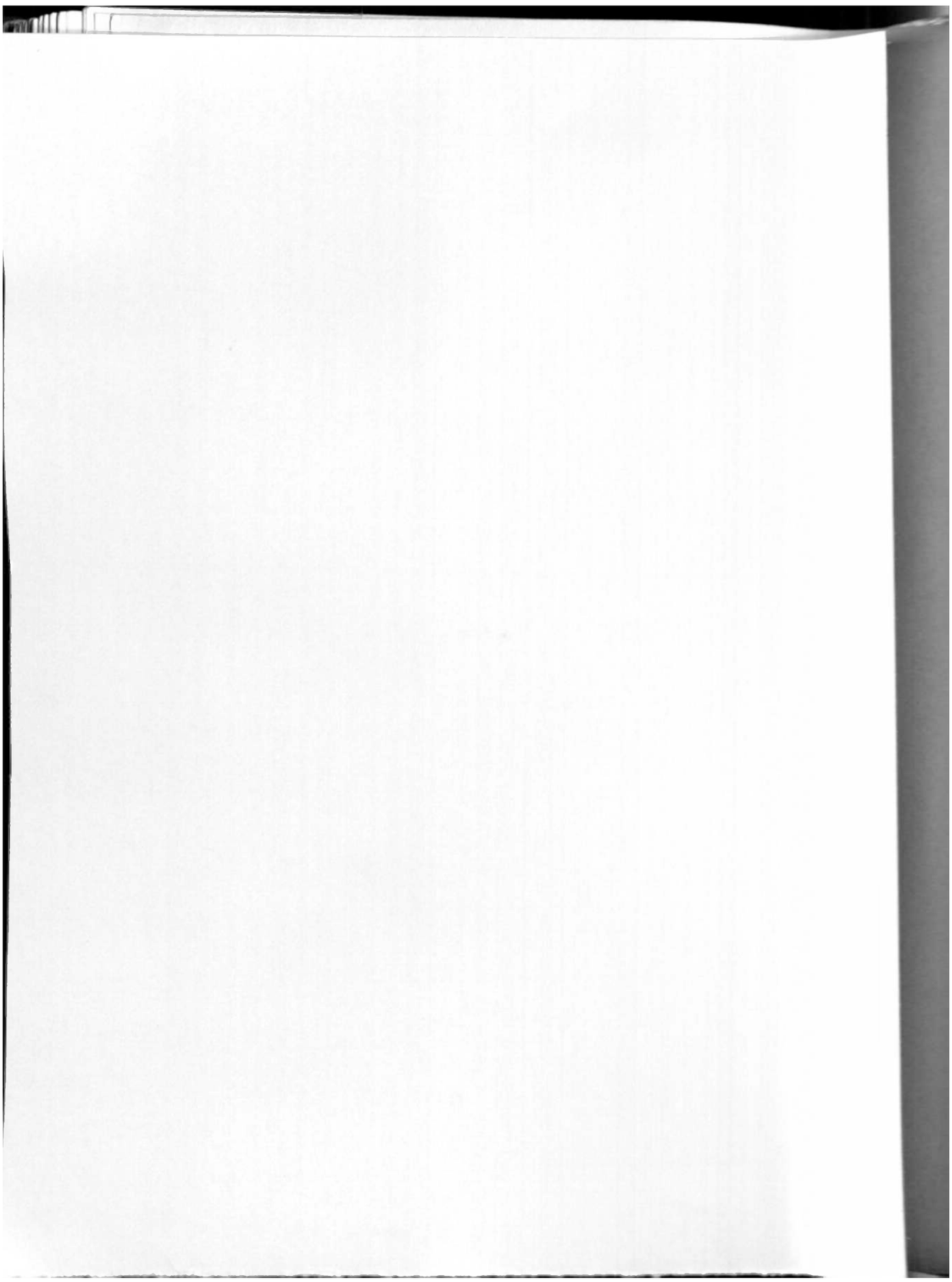
In the long run an integrated market with an extensive interstate commerce will require a harmonization of the substantive laws of contract. The history of Europe shows that in each country a political and economic integration was followed by a unification of the civil and commercial law. In 1804–1807 this happened in France, in 1866 in Italy and in 1900 in Germany. In each of these countries a civil and commercial code replaced provincial statutes and customs.

Europe has to be prepared for the day when a European Contract Law is needed.[415]

[415] *See* Lando, *European Contract Law*, 31 Am. J. Comp. L. 653 (1983).

Part III

Judicial Process



The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*

MAURO CAPPELLETTI** and DAVID GOLAY***

I. Introduction

It is a commonplace that a federal or transnational union of states is one means of promoting legal integration. Both the United States and the European Community[1] – to take only the two "unions" principally concerned in this study – were founded in part to promote greater legal harmony, and the same is no doubt true of other federal systems. A prime rationale of any federal system is to create the institutions of government capable of making uniform laws for the member states in those areas where uniformity is believed to be desirable. While the principal law-making powers in federal, or any other system of government, are not normally conferred on the judiciary, it is probably a further commonplace that little actual integration among members of a feder-

* Portions of this study are based upon and sometimes literally drawn from several previous studies by M. Cappelletti, especially one published in 53 S. CAL. L. REV. 409 (1980), *infra* note 4, and one published in 8 MONASH U. L. REV. 15 (1981), *infra* note 30.

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[1] It is more accurate to speak of the European Coal and Steel Community (ECSC) (established by the treaty signed in Paris on 18 April 1951), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom) (both established by treaties signed in Rome on 25 March 1957) together as the European Communities. In view of their extensive institutional integration, however, we have chosen to refer to them collectively as the European Community.

al or transnational union of states can take place without judicial assistance or acquiescence. After all, it is the judges who apply laws. Yet, questions that arise in the course of applying the laws of the federal or transnational union are often complex, to say nothing of the overriding issues of the nature and limits of the judicial role in a federal or transnational system of government; such questions deserve critical analysis and the careful attention of anyone interested in federalism, transnationalism and legal integration.

In part, therefore, this study is an analysis of why certain substantive issues must be especially addressed by the judiciary in a federal or transnational system, and in part an analysis of the institutional strengths and weaknesses of the judiciary as a law-maker with a role to play in legal integration.[2] Before turning to a discussion of the role that the judiciary has played in legal integration in the United States and the European Community, it may, therefore, be useful first to outline the principal areas where one can expect a judicial contribution to legal integration and second to take note of some of the continuing differences and converging trends among the judiciary of the United States and Europe.

II. The Areas of Judicial Activity

The areas of judicial contribution to legal integration in a federal or transnational system are, we believe, essentially three-fold. For purposes of description we will label these the areas of constitutional adjudication, judicial procedure and the protection of fundamental rights.

A. Constitutional Adjudication

Fundamental to the federal or transnational system of government is the idea that governmental powers shall be shared or divided among a central federal or transnational authority and the governments of the member states. Two judicial questions are inherent in this division of powers: the question of supremacy and the delimitation of powers.

1. Supremacy

Conceptually, legal integration requires no more than the uniform application and enforcement of a law in more than one nation or state. One could, of course, promote legal integration by forcefully imposing a uniform system of fully centralized law, or by otherwise inducing individual sovereign states to relinquish their sovereignty to a higher central authority. However, a develop-

[2] We will not attempt to discuss in detail specific substantive issues, which are analyzed more fully elsewhere. *See especially,* Frowein, Schulhofer & Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration, infra* this vol., Bk. 3; Kommers & Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience, infra* this vol., Bk. 3.

ment common in the political culture of the western democracies has been the creation of the federal or transnational union in which government powers are *divided* or *shared* among several sovereigns: state and federal as in the United States, or national and transnational as in the European Community.

It is inevitable that in such a union the laws of the federal or transnational government will sometimes conflict with those of a member state. When this occurs, as people cannot reasonably be expected to follow two conflicting commands, the law of one sovereign must apply at the expense of the law of the other, and in the federal or transnational union, if the union – and integration – are to be meaningful, it must be the federal or transnational law that, if validly enacted, is supreme. Without this supremacy, the federal or transnational law can have no direct integrative force.[3]

Legal integration in the federal or transnational union requires initially, therefore, acceptance of a legal hierarchy. The federal or transnational law when it conflicts with the law of a member state must be deemed to be "higher" law, and must apply at the expense of the conflicting state or national law. Although this principle of supremacy is itself frequently declared in the constitution or treaty establishing the union, application of the principle depends on those who apply the law. Maintaining the supremacy of the federal or transnational law must be, therefore, the initial contribution of the judiciary to legal integration in the federal or transnational union. Indeed, without judicial review, or some similar instrument of control, the supremacy of the federal or transnational law must remain at best theoretical, and its force merely exhortatory.[4] If the constitution or treaty establishing the union fails clearly to

[3] This assumes that the federal or transnational powers are to some extent co-extensive with the state powers. It is of course possible, as in Canada, to apportion what are in theory mutually exclusive powers between the central and state governments. Under this latter form of constitution, questions of supremacy per se need not arise. *See* Soberman, *The Canadian Federal Experience - Selected Issues*, *supra* this vol., Bk. 1, at § I.A.

[4] Similarly, lack of judicial review remained one of the principal weaknesses of European efforts in the 19th and first half of the 20th centuries to establish the supremacy of constitutional law and meaningful checks on legislative powers. *See infra* notes 17–28 and accompanying text. *See also* Cappelletti, *The Significance of Judicial Review in the Contemporary World*, in Ius Privatum Gentium, Festschrift für Max Rheinstein 147 (E. von Caemmerer, S. Mentschikoff & K. Zweigert eds., Tübingen, Mohr (Siebeck), 1969) [hereinafter cited as *Significance of Judicial Review*]. For the history of judicial review, *see generally* M. Cappelletti, Judicial Review in the Contemporary World (Indiana, Bobbs-Merrill, 1971) [hereinafter cited as Judicial Review]; and M. Cappelletti & W. Cohen, Comparative Constitutional Law ch. 1 (Indiana, Bobbs-Merrill, 1979) [hereinafter cited as Comparative Const'l Law]. For a preliminary report touching on certain aspects of the role of judicial review in legal integration, *see* Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. Cal. L. Rev. 409 (1980), also published, with some revisions, in [1979] 2 L. I. E. I. 1 [hereinafter cited from this latter version, unless otherwise indicated, as *Mighty Problem*].

declare the supremacy of the federal or transnational law, the challenge to the judiciary on this question will, of course, be all the greater.

2. Powers

The principle of supremacy does not mean, however, centralization of all power in the federal or transnational union. To the contrary, federalism and transnationalism both presuppose to some degree the decentralization or sharing of power. There are good reasons for this. Harmonization of the law among nations or states may be a more or less worthy goal depending on many factors. Not every area of the law equally demands harmonization, and in many areas local control affords a flexibility, a responsiveness to the desires of citizens in different regions with different values, that surely outweighs any benefits of harmonization. In any federal or transnational union, therefore, a second fundamental question will concern the division of law-making powers and responsibilities among the different sovereigns.

This division of powers again is initially a responsibility of the constitutional draftsmen, and every constitution or treaty establishing a federal or transnational union in some manner defines the powers granted and retained by the constitutent states or nations.[5] Important questions inevitably remain, however, and these questions sooner or later also demand judicial attention in any federal or transnational union. Some of these questions arise simply from the natural imprecision of language – *e.g.*, what is the meaning of "commerce" in the commerce clause of the U.S. Constitution? What federal or transnational powers, if any, may be implied from those explicitly granted in the constitution or treaty?

Another set of questions concerns the nature of the powers granted. For example, which powers reside exclusively in the federal or transnational government and which are held concurrently or partially concurrently by the member states? And, related to this, to what extent does an exercise of power by the federal or transnational government pre-empt those powers held concurrently by the member states? While the basic issue of supremacy may not be compromised in any meaningful federal or transnational union, these related questions concerning the division of power can only be answered after careful consideration of the often competing claims of uniformity and diversity.

B. Judicial Procedure

In the area of judicial procedure, the questions posed in the federal or transnational union are in large measure corollaries of the principle of supremacy.[6]

[5] As we have noted, there are different ways of apportioning powers. Specific, enumerated powers may devolve upon the state governments, with the federal government retaining the residuary, or vice versa. Alternatively, a specific enumeration may be used to define the powers of both the state and the federal governments.

[6] *See generally* J. Weiler, Supranationalism Revisited – Retrospective and Prospective: The European Communities After Thirty Years 79–83 (EUI Working Paper

One of these corollaries is that, if federal or transnational law is to be supreme, there must be a final interpreter of federal law with the power of binding the governments and courts of the member states. If there is no ultimate voice, and governments and courts of the member states are free to adopt whatever interpretation of federal law best suits their purposes, then the principle of supremacy, and the process of integration – which to some degree must mean uniformity of application and effect of legal norms within member states – will risk great subversion. Another of these corollaries, also flowing from this need for uniformity in the application and effect of norms, is that supremacy and integration must mean harmonization not only of laws, but also of the mechanisms which make laws effective.[7] For although the text of the law may read the same in two countries, the substantive rights granted by the law to the citizens of those same countries will differ if their courts are unequally available for the vindication of those rights. The more unequal the access to judicial protection the more formidable will be the problem. Harmonization of judicial procedures will thus present a compelling problem in the federal or transnational union comprising countries with different legal traditions and varied judicial customs and institutions.

However, these same differences in legal traditions, institutions and judicial customs suggest that the procedural problems confronting legal integration in the federal or transnational system do not encourage a monolithic solution. Both realism and common sense counsel that uniform procedures cannot easily be imposed on all courts in a union comprising diverse legal traditions. Nor is this solution desirable. Rather, the legal systems in the federal or transnational union must in some way afford centralized control of the interpretation of federal or transnational law while remaining flexible and sensitive to legitimate demands for diversity and national autonomy.

C. Fundamental Rights

So far, we have described the judicial concerns of the federal or transnational union as involving a process of ordering legal hierarchies. However, this concern with defending the "supreme" or "higher law" status of federal or trans-

No. 2, Florence, EUI, 1981). An abridged version of this study has been published in 1 Y.B. Eur. L. 267 (1981).

[7] This challenge is, in many ways, an "access-to-justice" challenge. The access-to-justice challenge is not, of course, found only in federal or transnational unions; it is present worldwide. *See generally* 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., 1978–1979); Vol. III, Emerging Issues and Perspectives (M. Cappelletti & B. Garth eds., 1979); Vol. IV, The Anthropological Perspective (K.F. Koch ed., 1979). *See especially* Cappelletti & Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report*, in *id.*, Vol. I, at 3.

national law does not mean that federal or transnational law must inevitably prevail in *any* conflict with competing legal norms in the federal or transnational union.

In modern times, another important source of higher law has been the national "Bill of Rights," and it is axiomatic that the national guarantees and the federal or transnational law cannot both be supreme within the same union. A neatly drawn constitution or treaty establishing a federal or transnational union would, of course, also resolve this conflict. But for whatever reasons – perhaps the powers granted to the federal or transnational legislators seem too weak to pose a threat to fundamental rights – the issue may, as in the case of the European Community, be overlooked. When it is, it is likely to become a judicial question, as it has in fact become in the Community, the solution to which is not easily formed. For it is not self-evident that federalism, transnationalism and legal integration are such worthy goals that we should be eager to sacrifice our fundamental rights to their cause. At the same time, to carve out a national exemption to Community supremacy would create a doctrine dangerous to the system in its entirety. The solution to this third fundamental question of judicial concern in the federal or transnational union must, therefore, seek to preserve the federal or transnational prerogatives not by denying fundamental rights, but by compensating any loss of state guarantees with the promise to protect fundamental rights at the federal or transnational level. This solution agrees, moreover, with our intuition or belief that fundamental rights represent one area of the law that naturally favors greater integration.[8]

III. Judicial Review in Comparative Perspective – The Relevance of the American Experience

As the foregoing discussion has suggested, the problems of legal integration which require judicial solutions in a federal or transnational system are many and complex. Moreover, these problems rarely can be treated or solved in the manner of logical puzzles with a single solution equally applicable to all societies. Integration, in the sense of harmonization, is not an end in itself, but a means to some ends and a hindrance to others. It need hardly be added that the responsibility of distinguishing those areas of the law that favor harmonization from those that do not rests ultimately with the political branches and not with the judicial branch.

Moreover, differences in legal traditions and judicial customs will significantly affect the limits of the judicial role in formulating answers to many, if not all, of these questions. For, inherent though they may be in any federal or transnational system of government, these questions and problems require

[8] This would seem to be true at least to the extent that there is a converging recognition among Western nations of a common core of fundamental rights. *See infra* § V.D.2 for a brief comparison of some fundamental concepts in American and European law.

answers and solutions that are sensitive to different historical and cultural traditions. As a result, though we may expect many of the answers and solutions to federalism concerns that have been fashioned by courts in the United States to be suggestive of solutions to transnationalism concerns in Europe, it would be naive to expect the role of European courts in promoting legal integration to be a replay of the role of their American counterparts. European solutions must above all be sensitive to European traditions – traditions, moreover, which in the past have differed from no American tradition more than that of judicial review.

A. The Problem of Judicial Review

Judicial review is a conundrum to constitutional democracies. To be sure, the logic of Chief Justice Marshall's doctrine in *Marbury v. Madison*[9] – that, if the constitution is to be "higher law," judges must be bound to apply it over conflicting ordinary law – is as forceful as it is simple.[10] Alexis de Tocqueville recognized the strength of the *Marbury* logic when he wrote that the "*raison d'Etat*" alone, and not the "*raison ordinaire*," had led France to reject the same doctrine.[11] Yet, especially when extended to the unavoidably vague value judgments inherent in the judicial protection of human rights, the *Marbury* doctrine presents exceedingly serious questions. Ultimately, these questions turn around the "mighty problem"[12] of the role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or "personal predilections"[13] into the relatively empty boxes of such vague concepts as liberty, equality, reasonableness, fairness and due process.[14]

[9] 5 U.S. (1 Cranch) 137 (1803).

[10] *See* JUDICIAL REVIEW, *supra* note 4, at 26–27, 52 and the references therein.

[11] 1 A. DE TOCQUEVILLE, DE LA DÉMOCRATIE EN AMÉRIQUE 179–80 (Brussels, Maline, Cans & Co., 1840).

[12] *See generally Mighty Problem, supra* note 4.

[13] *See* the dissent of Chief Justice Burger in Eisenstadt v. Baird, 405 U.S. 438, 472 (1972).

[14] Citations seem superfluous; they would include much of the library-sized American literature on judicial review. Solely for the benefit of non-American readers, we will refer to the discussion and the selected bibliographical information in the influential university textbook by G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 3–25 (10th ed., St. Paul, Foundation Press, 1980).

For a recent insightful discussion by a noted European jurist *see* Koopmans, *Legislature and Judiciary - Present Trends*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE/NOUVELLES PERSPECTIVES D'UN DROIT COMMUN DE L'EUROPE 309, esp. at 322–32 (M. Cappelletti ed., Leiden/Brussels/Stuttgart/Florence, Sijthoff/Bruylant/Klett-Cotta/Le Monnier, 1978) [hereinafter cited as NEW PERSPECTIVES].

A recent and unconditional, but alas, pretty insular plea by a British authority against judicial review – indeed, more generally, against "a written constitution, a Bill of Rights, a supreme court, and the rest" – is Professor J.A.G. Griffith's Chorley Lecture, *The Political Constitution*, 42 MOD. L. REV. 1, 17 (1979).

B. The Historical Responses to the Problem of Judicial Review

1. The United States

Historically, the United States and Europe have responded to the problem of judicial review in radically different ways. In the United States, judicial review rather rapidly achieved an accepted – even glorified – place in the American system of government aptly defined as checks and balances. Today, nobody in the United States would seriously propose reversing *Marbury v. Madison*. Yet this does not mean that the debate in the United States over the mighty problem has come to an end. It is, on the contrary, a very lively debate,[15] but one that remains clearly within limits imposed by the requirement of a federal system of government. Thus, Americans argue about whether and when it is legitimate for the Supreme Court to invalidate a law on the grounds that it violates some vague provision of the Bill of Rights, but no one questions the Court when the issue involves a conflict between "higher" federal law and "lower" state law. Most Americans, we believe, would still agree with what Justice Holmes said many years ago:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.[16]

The acceptability of judicial review per se is simply not a serious issue in the United States. It is too obviously required for the success of the American federal system.

2. Europe

In the United States then, the mighty problem was early resolved in favor of judicial review, and the subsequent debate, heated though it has often been, has been concerned more with the limits than with the necessity of the institu-

[15] Recent debaters have included R. Berger, Government by Judiciary (Cambridge, Harv. U.P., 1977); J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (Chicago, U. Chi. P., 1980); A. Cox, The Role of the Supreme Court in American Government (Oxford, Clarendon Press, 1976); J.H. Ely, Democracy and Distrust (Cambridge, Harv. U.P., 1980); Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978) [hereinafter cited as *Origins*]; and Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975) [hereinafter cited as *Unwritten Constitution*]. The list is by no means exhaustive.

[16] O. Holmes, Collected Legal Papers 295–96 (New York, Harcourt, Brace, 1920). The system contemplated by Justice Holmes in fact exists in Switzerland where there is judicial review only of cantonal laws vis-à-vis federal law (including the federal Constitution) but there is no judicial review of federal law. *See generally* Frowein, *Integration and the Federal Experience in Germany and Switzerland*, *supra* this vol., Bk. 1, at § III.

tion. In Europe, on the other hand, from the time of the French Revolution until the end of World War II the mighty problem was resolved largely against judicial review, and such appearances as it made were short-lived and, on the whole, unsuccessful.[17] In part, of course, Europe rejected judicial review because most European countries had unitary governments and no need for the institution comparable to the need created by federalism in America. More fundamentally, however, Europe's historical rejection of judicial review may be traced to the mighty problem itself. For judicial review, at least when vague constitutional questions are involved, can be seen as undemocratic and antimajoritarian, although, perhaps, less so than its critics claim.[18] Thus throughout the nineteenth and the first half of the twentieth centuries in Europe the national parliaments, embodiment of the democractic will, remained largely immune to judicial control, and proponents of human rights and supporters of parliamentary supremacy remained largely one and the same. They pursued fundamental rights through the means of democratic control and put their trust in the elected spokesmen for the majority.

The history of parliamentary supremacy is, nevertheless, peculiar to each nation. In France, for example, it may be traced to the abuse of the judicial office by the *Parlements* – the higher courts of justice – of the *Ancien Régime*, which asserted the power to review acts of the sovereign against "fundamental laws of the realm"[19] and arrogantly used such power to declare the "*heureuse impuissance*" of the legislator to introduce even minor liberal reform.[20] Largely as a result of such abuses and the consequent unpopularity of the judiciary, the ideology of the French Revolution proclaimed as one of its foremost principles the supremacy of statutory law, and demoted the judiciary to what was conceived of as the mechanical task of applying the law to individual cases.[21] In England, on the other hand, where the judicial role in protecting individual liberties enjoyed widespread respect,[22] the triumph of parliamentary supremacy in the "Glorious Revolution" of 1688 reflected not so much revulsion against the judiciary as affirmation of the principle, later certified by Black-

[17] *See Significance of Judicial Review, supra* note 4, at 149–50; Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966).

[18] This hoary objection to judicial review is at least substantially involved in the continuing controversy over the active law-making role of the ECJ. *See infra* § VI.A.

[19] *See* JUDICIAL REVIEW, *supra* note 4, at 33–34 and references therein.

[20] *Id.* at 35. *Cf.* the role of the U.S. Supreme Court in thwarting liberal economic reforms in the early part of this century. It is in large part the memory of this "substantive due process" jurisprudence that accounts for the continued debate in the U.S. over the legitimacy of judicial review. *See infra* § IV.C.3.

[21] The famous passage by Montesquieu describing judges as *"la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur,"* is contained in DE L'ESPRIT DES LOIS, Book XI, ch. 6, reprinted in 1 ŒUVRES COMPLÈTES DE MONTESQUIEU 217 (A. Masson ed., Paris, Nagel, 1950).

[22] JUDICIAL REVIEW, *supra* note 4, at 36 and the references therein; *see also, e.g.*, J.H. MERRYMAN, THE CIVIL LAW TRADITION, ch. 3 (Stanford, Stan. U.P., 1969).

stone in his *Commentaries*,[23] of the absolute pre-eminence of Parliament – and its corollaries, the omnipotence of positive law and judicial powerlessness to control or review statutory law.[24]

What is common to these diverse national experiences, however, is the supreme position accorded to parliament. This period of parliamentary supremacy has elsewhere been called the era of "legal justice."[25] The ideologues of legal justice denied that the law is something existing in nature that judges can find. Laws are made by men and women. Legal justice also meant that judges should be subservient to the law, and in order that they might not mistake what the law did and did not require, it was obviously convenient that the law be written down. In theory, everyone else too could then "know" the law. The era of legal justice thus found its natural expression in the great national codifications, exemplified by the *Code Napoléon*, which tried so to occupy the legal order with written, or positive, law as to leave no room for what Jeremy Bentham, in advocating English codification, called, and condemned as, "judiciary law."[26] It is true that the idea of legal justice was not in principle opposed to the written constitution. But judicial subservience to the law necessarily meant, or was believed to mean, the impossibility of effective constitutional control of parliamentary power. Thus, while written constitutions purporting to guarantee fundamental rights were hardly unknown in nineteenth century Europe, their power was more theoretical than real.[27] Later attempts as were made at implementing judicial review in Europe were, not surprisingly, short-lived or otherwise limited in their effects.[28]

[23] W. Blackstone, Commentaries on the Laws of England, Book I, 157–59 (Oxford, Clarendon Press, 1765). *See also* E.S. Corwin, The "Higher Law" Background of American Constitutional Law 86 (Cornell, Cornell U.P., 1963).

[24] *See generally* E.S. Corwin, *supra* note 23, at 87 *et passim*.

[25] *Significance of Judicial Review, supra* note 4, at 158.

[26] As is well known, Bentham emphasized the vices of judiciary law, which in his opinion was uncertain, obscure, confused, and difficult to ascertain. Hence his advocacy of codification. *See* The Collected Works of Jeremy Bentham, Of Laws in General, esp. at 184–95, 232–36, 239–40 (H.L.A. Hart ed., London, Athlone Press, 1970). *Cf.* Barwick, *Judiciary Law: Some Observations Thereon*, 33 C.L.P. 239 (1980) (pointing out, however, that Bentham realistically did not expect codification completely to eradicate judiciary law).

[27] *See* Judicial Review, *supra* note 4, at 32–33. Italy's *Statuto Albertino*, for example, could be altered by ordinary statute, and the French Constitutions of 1799 and 1852, while theoretically admitting the possibility of constitutional control of ordinary legislation, gave the – largely ineffective – power of deciding constitutional questions not to the courts but to politically controlled bodies. The French Constitution of 1958, however, has substantially expanded the possibility of constitutional control of legislation. This development is more fully discussed *infra* § III.C. For a discussion of the ability of Congress to control the jurisdiction of the Supreme Court, *see* Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

[28] The most ambitious of these efforts occurred in Austria and Weimar Germany. The Austrian Federal Constitution of 1920, after the *Verfassungsnovelle* of 1929,

C. The Converging Trends and Remaining Differences

1. The Converging Trends

Since World War II, many European countries have changed their minds about judicial review – and, indeed, they have done so even about the judicial review of ordinary legislation on the basis of vague appeals to fundamental rights, which is to say judicial review in its most controversial form.[29] There are, we think, two principal reasons for the revival of judicial review in Europe, apart from the role that the foundation of the European Community and transnationalism have played in this revival. First, fascism and World War II demonstrated the horrendous potential for tyranny, even majoritarian tyranny, of governments not subject to constitutional restraint. From the War's legacy of human tragedy and political oppression was thus revived the movement toward constitutionalism cut short by the rise of the fascist regimes. Second, the post-War period coincided with the growth in the industrial West of what we have come to call the welfare or social state, which has produced profound changes in the role and structure of government. These changes have given further impetus both to the adoption of written constitutions as repositories of fundamental – individual and social – rights and to the recognition of the desirability of judicial review as a check on the unprecedented proliferation of legislation not only by parliament but also by other agencies – perhaps the principal phenomena characterizing the welfare state.[30]

permitted certain courts to challenge before the newly established Constitutional Court ordinary statutes that violated the Constitution. In Germany, the landmark decision of November 4, 1925 of the *Reichsgericht* introduced judicial review of legislation on the strength of *Marbury*'s principle that in a hierarchical legal order courts are bound to prefer constitutional norms over conflicting ordinary legislation. However, both attempts to introduce judicial review ultimately failed under the onslaught of fascist regimes whose ideologies included no place for principled restraints on government power. *See Significance of Judicial Review, supra* note 4, at 194 and the references therein.

[29] *See infra* text accompanying notes 54–55.

[30] For further elaboration of the reasons for the growth of the judicial power, *see generally Mighty Problem, supra* note 4; Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U.L. REV. 15 (1981) [hereinafter cited as *Law-Making*]. The process is perhaps best illustrated by the case of France where the Constitution of 1958 limited the legislative jurisdiction of Parliament to certain enumerated areas and reserved the residue to the legislative ("regulatory") power of the Executive. The *Conseil d'Etat*, long established as the court having the power to control administrative action, was not long in seeing this opening; in 1959, in the landmark decision of *Syndicat Général des Ingénieurs-Conseils*, Judgment of 26 June 1959, [1959] D. JUR. 541 (English translation in COMPARATIVE CONST'L LAW, *supra* note 4, at 37–38), it decided that legislation by the Executive, being a form of administrative action, is subject to judicial review for conformity to the *"principes généraux"* contained in, or derived from, the *Déclaration des droits de l'homme* of 1789, the Preambles (*i.e.*, the Bills of Rights) of the 1946 and

Perhaps not surprisingly, it has been especially in those countries where democratic traditions were most thoroughly shaken by historical events in the 1930's and early 1940's, that judicial control of legislation has been most widely accepted. Austria re-established its 1920-29 system of constitutional adjudication in 1945,[31] and both Italy and the Federal Republic of Germany created Constitutional Courts in the aftermath of World War II.[32] These countries have openly professed to see in their Constitutional Courts – especially in the Court's principal role of judicial review of the constitutionality of legislation – a pivotal tool for protecting themselves against the return of dictatorial regimes, and against the consequent trampling upon fundamental human rights by legislators subservient to opressive regimes.[33] Independent adjudicators such as those in the newly established Constitutional Courts have thus been expected to act as stabilizing anchors to protect freedom and to ensure a balanced system of governmental powers in a turbulent age. In the view of the drafters of the new Constitutions, "constitutional justice" (*Verfassungsgerichts-*

1958 Constitutions and the (hazier yet) "Republican tradition." However, legislation by Parliament has remained beyond the reach of direct review by the *Conseil d'Etat*, although the *Conseil* and other French courts have, perhaps, played a more creative role than generally acknowledged in conforming French statutes to fundamental principles under the guise of interpretation and construction. But parliamentary legislation too has been subject to review for conformity to constitutional precepts and the *"principes généraux"* since a landmark decision in 1971 by the *Conseil Constitutionnel*, a new body established by the Constitution of 1958 and originally conceived as having the limited role of preventing parliamentary interferences within the autonomous legislative power of the executive. *See* Decision of 16 July, 1971, [1971] JORF, 18 July 1971, p. 7114 (English translation in COMPARATIVE CONST'L LAW, *supra* note 4, at 50–51). Such review is still limited, however, to the period prior to promulgation, and standing to challenge a not-yet-promulgated *loi* is limited to the President of the Republic, the Prime Minister, the Presidents of either Chamber of Parliament and, since 1974, a Parliamentary minority of sixty Members of either Chamber. Once promulgated, Parliamentary legislation in France cannot be challenged for non-conformity to the Constitution.

[31] *See* the *Verfassungsüberleitungsgesetz* of 1 May 1945; *see generally* JUDICIAL REVIEW, *supra* note 4, at 46–47, 72–74.

[32] For Italy *see* COST. arts. 134–37; *leggi costituzionali* of 9 Feb. 1948, no. 1, art. 3, and of 11 Mar. 1953, no. 1, arts. 3–8, 11; and the law of 11 Mar. 1953, no. 87. For Germany *see* GG arts. 93–94, 99–100; Gesetz über das Bundesverfassungsgericht of 12 Mar. 1951, BGBl 1/243. *See generally* JUDICIAL REVIEW, *supra* note 4, at 50, 74–77.

[33] *See* JUDICIAL REVIEW, *supra* note 4, at 46–51; *see also* COMPARATIVE CONST'L LAW, *supra* note 4, at 12–17. A list of the countries that have adopted some form of judicial review of legislation after World War II would also have to include Japan (since 1947), Cyprus (1960), Turkey (1961), Yugoslavia (1963), Sweden (1964 and 1980), Israel (1969), Greece (1975), Portugal (1976) and Spain (1978). Countries in which systems of judicial review are more ancient include Mexico, Switzerland (limited to Cantonal laws), Norway (where judicial review has been known since the 19th century), and Denmark (since the early 20th century). Judicial review is also known in most of the Common Law world outside of Great Britain.

barkeit) has become the ultimate "crowning" of the Rule of Law, hence the foremost development of a democratic and civil-libertarian state.[34]

2. Remaining Variations

This is not to suggest that the judiciary and the practice of judicial review are the same in all countries. True as it may be that the impressive expansion of judicial review of constitutional questions represents an important trend in Western societies, the remaining differences between the judiciary and judicial review in the United States and Europe are also important. Some of these differences especially deserve to be mentioned.

a) European Variations

First, the legitimacy of judicial review has not been equally accepted in all of the Member States of the European Community and other countries of Europe. In Germany, Italy and Austria, at the one end, judicial control of the conformity of legislation to constitutional justice is now widely accepted, but such control power does not belong to all courts; in principle, it can only be exercised by the newly created Constitutional Courts. In Ireland a mid-way solution prevails: the Constitution confers a power to review constitutionality only upon the High Court, with the possibility of appeal to the Supreme Court.[35] Similar to the German, Austrian and Italian systems are the systems of control adopted in the 1960's in such countries as Cyprus, Turkey, and Yugoslavia, and more recently in Greece, Portugal and Spain.[36] Norwegian, Danish and Swedish courts, on the other hand, are all endowed with the power to refuse

[34] The impact of the Constitutional Courts in Germany and Italy, and perhaps to a somewhat lesser extent in Austria, has been profound – particularly, as might be expected, in the area of human rights. To give but one example, all three Constitutional Courts, like their counterpart in the United States, almost contemporaneously ruled on the question of constitutionality of abortion legislation; indeed, the same is true even for the French *Conseil Constitutionnel*. The results, however, were quite different. *Compare* C.C. (France), Decision of 15 Jan. 1975, [1975] JORF, 16 Jan. 1975, p. 671 (English translation in COMPARATIVE CONST'L LAW, *supra* note 4, at 577); VerfGH (Austria), Decision of 11 Oct. 1974, [1974] VerfGHE 221 (English translation in COMPARATIVE CONST'L LAW, *supra* note 4, at 615) (both decisions upholding new liberal legislation), and C.C. (Italy), Decision of 18 Feb. 1975, No. 27, 43 Rac. uff. C.C. 201 (1975), [1975] Giur. Cost. 117 (English translation in COMPARATIVE CONST'L LAW, *supra* note 4, at 612) (voiding in part an old "conservative" law); *with* BVerfG (Germany), Decision of 25 Feb. 1975, 39 BVerfGE 1 (1975) (English translation in COMPARATIVE CONST'L LAW, *supra* note 4, at 586) (striking down a liberalizing statute).

[35] IRISH CONST. OF 1937, arts. 34.3.2 & 34.4.3–5; *see* J.M. KELLY, THE IRISH CONSTITUTION 219–53, 256–65 (Dublin, Jurist Publishing Co. Ltd., 1980).

[36] *See* JUDICIAL REVIEW, *supra* note 4, at 50–51 (for Cyprus, Turkey, and Yugoslavia); GREEK CONST. OF 1975, art. 100; PORTUGUESE CONST. OF 1976, arts. 207, 280–82; SPANISH CONST. OF 1978, arts. 161, 163.

to apply an "unconstitutional law," even if in practice they very rarely do so.[37] In France, parliamentary legislation once promulgated is not open to review in any court, but the possibility does exist of a "preview" by the *Conseil Constitutionnel* in the brief period between the approval of the law by Parliament and its official promulgation by the President of the Republic.[38] The French system does, however, permit judicial review of laws (*décrets, ordonnances, règlements*) issued by the Executive in the exercise of its executive powers under articles 37 and 38 of the Constitution. In Belgium, the Netherlands and Luxembourg, notwithstanding the proclaimed "rigid" character of the constitutions – which can only be altered following a special procedure – there is no power in any of the courts to review the constitutionality of legislation; and the same principle holds true in the United Kingdom, under its unwritten and "flexible" constitution.[39]

b) Centralized Control

The second difference is strictly connected with the first. If many European countries, including several Members of the European Community, have come to approve *Marbury*'s result, few countries outside the Common Law world have been willing to implement Marshall's rationale in that case to its logical end. That rationale led to the conclusion that *all* courts confronted with a conflict between ordinary law and higher constitutional law were bound to give effect to the latter at the expense of the former. As we have just indicated, in most Civil Law countries, on the contrary, the conferral of such power on all courts has proved unacceptable, or otherwise impracticable. Thus, instead of the "decentralized" system of judicial review found in the United States and other former British colonies, these countries have given the power of constitutional review to a single high court, typically a specially created constitutional court, and have denied such power to all other courts.

The principal reasons for the rejection of decentralized control and the adoption of centralized review are threefold.[40] First, centralized control requires less drastic alterations in the doctrine, central to the Civil Law tradition, of the separation of powers and the supremacy of parliament. If such su-

[37] *See* JUDICIAL REVIEW, *supra* note 4, at 49, 59. For the constitutional reform of Sweden, in force since January 1, 1980, which has reaffirmed the obligation of all courts – an obligation already affirmed by a Supreme Court decision of November 13, 1964 – to refuse application of unconstitutional laws, *see* Hahn, *Verstärkter Grundrechtsschutz und andere Neuerungen im schwedischen Verfassungsrecht*, 105 AöR 400, 408–09 (1980).

[38] *See supra* note 30.

[39] *See* JUDICIAL REVIEW, *supra* note 4, at 36; *see also infra* § V.A.2.b.

[40] For a fuller discussion of the conditions prompting the adoption of centralized versus decentralized control *see* JUDICIAL REVIEW, *supra* note 4, chs. 3–4. *See also* Cappelletti, *The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference – or no Difference at All?*, in FESTSCHRIFT FÜR KONRAD ZWEIGERT 381, 383–92 (H. Bernstein, U. Drobnig & H. Kötz eds., Tübingen, Mohr (Siebeck), 1981) [hereinafter cited as *Stare Decisis*].

premacy must be checked by an independent power, better that such power be exercised by a single court, itself more easily subject to reciprocal controls, than by every petty judge and magistrate.[41]

Second, the doctrine of stare decisis, which requires courts to follow their own precedents and/or those of superior courts within their jurisdiction and thus permits centralized control within a decentralized system, does not exist as such in the Civil Law tradition. Without such a doctrine, decentralized control risks degenerating into chaos. A law deemed unconstitutional by one judge may continue to be applied by another, or may even be resurrected by the first on other occasions. Constitutional rights thus may differ from chamber to chamber, day to day, and litigant to litigant.[42]

Third, even though a limited de facto precedential effect does derive from decisions of traditional appellate courts in Civil Law countries, these courts usually lack the structure, procedures and mentality required for constitutional adjudication.[43] In structure, they are too large and diffuse to insure that uniformity and to command that respect demanded of a constitutional adjudicator. In procedure they lack the discretionary power to limit their jurisdiction to the cases and issues that really matter.[44] Appeal being usually as of right, their attention and their voice are too easily diverted and distorted by trivia. Moreover, in most Civil Law systems there is a dichotomy (as in France and Italy) or even a plurality (as in Germany) of court systems, each system having at its head an independent and superior (in practice supreme) judicial organ; should the American brand of judicial review be introduced in such systems, each of these supreme organs could independently decide the constitutionality of a law relevant to an issue before it. In mentality, too, Civil Law judges often lack the temperament and inclination to make the hard, controversial choices often demanded by constitutional adjudication. In Civil Law countries, the judicial profession is often a career like that of any public servant. The judge-aspirant trains in the technical application of statutes, graduates to a judgeship,

[41] *See* JUDICIAL REVIEW, *supra* note 4, at 54–55.

[42] *See id.* at 55–60. While it may be true that the difference in precedential impact between a decision of a court of last resort in the Common Law countries and, say, the French *Cour de Cassation* or the German *Bundesgerichtshof* today is less than in years past (*see e.g.*, 1 K. ZWEIGERT & H. KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 318 (Tübingen, Mohr (Siebeck), 1971)), such a difference is still important, although for reasons perhaps less attributable to the doctrine of stare decisis itself than to differences in the organization, procedures and personnel of the courts in the Civil and Common Law countries. *See Stare Decisis, supra* note 40, at 383–89; *see also infra* notes 43–45 and accompanying text.

[43] *See* JUDICIAL REVIEW, *supra* note 4, at 60–66; *Stare Decisis, supra* note 40, at 383–92.

[44] It is true that the U.S. Supreme Court until early in this century also lacked discretionary power to decline to review cases raising issues of lesser significance. But its appellate jurisdiction during this earlier period was also more strictly limited to cases raising real constitutional or federal-state conflicts. *See infra* §IV.B.

advances by seniority and retires to his pension.[45] Such a career neither attracts people with penumbral vision, nor trains them in clairvoyance.

In part, these three reasons for the rejection of decentralized control are interrelated. The rejection of the doctrine of stare decisis conforms to the Continental tradition of the separation of powers and the supremacy of parliament. By limiting the precedential effect of judicial decisions, the Continental tradition restrains the law-making powers of the judiciary. Where a judge's rulings on questions of law apply only to the parties to the specific controversy it is obvious that the judge possesses less law-making authority than the judge whose interpretations apply not just to the case at hand, but to future cases and controversies as well. Therefore, rejection of the doctrine of stare decisis is a way of defending statutory law against judicial subversion.

The nature of the judiciary in Continental Europe also derives from this heritage. Since the judicial role is perceived as being subservient to that of the legislator, it quite naturally commands less prestige than that of the modern judiciary in the United States where the judicial branch is considered to be coequal with the other branches of government. Moreover, the nondiscretionary appellate jurisdiction of the higher courts may in part be seen as an institutional substitute for the doctrine of stare decisis. Instead of being controlled by judicial precedent, which in Common Law jurisdictions serves to fill the lacunae in the positive law, the lower courts are controlled by the litigants' right of appeal.[46]

Lastly, the form of judicial reasoning is itself affected by these characteristics of the dominant constitutional ideology. As others have commented, the Continental judicial opinion is remarkable to the Common Law lawyer for its oracular and inscrutable style. Panels of judges hand down final "pronouncements" on the law with no reference to possible dissenting views, thus guaranteeing the anonymity – and impersonality – of the adjudicatory process. Especially in the French style, judgments in factually specific cases are attached to general legal principles without much connective tissue of reasoning – a style both serving, and resulting from, strict adherence to the belief that all legitimate law emanates from the political branches. This practice implies that legal results are strictly controlled by statutory law without the necessity of any judicial creativity based on evaluations which go beyond the mere normative texts. At the same time, this practice is a natural product of the dominant ideology because the legal opinion, lacking the precedential force of opinions in countries where the principle of stare decisis is observed, does not itself serve as a source of law in later cases. As a result, there is no need in the ordinary Conti-

[45] *See* JUDICIAL REVIEW, *supra* note 4, at 63; *Stare Decisis*, *supra* note 40, at 387.

[46] This is not to deny that appellate review is important in the U.S. and other Common Law countries. However, in large part because of the doctrine of stare decisis, the highest courts are able to concentrate their attention on what they deem to be important issues. In cases not involving novel or important issues, the decisions of lower courts frequently are affirmed or reversed on a summary or *per curiam* basis.

nental European judicial opinion, comparable to the need in Common Law jurisdictions, for elaborate principled reasoning.[47]

Paradoxically, however, those countries that have restricted the formal law-making power of the judge by denying precedential force to the judicial opinion have correspondingly increased judicial discretion in relation to actual cases and controversies. This occurs because a statute is inevitably less confining in the result to be obtained in any specific case than is the same statute when it has been glossed by judicial opinions whose reasoning must be observed or distinguished in later cases.

This paradox, moreover, helps to explain the third principal difference between contemporary judicial practice in the United States and Europe, which is similarly, on the surface at least, paradoxical.

c) The Scope of Review

A third difference between contemporary judicial practice in the United States and Europe concerns the scope of judicial review. For, though many think of the United States as being the very "motherland"[48] of judicial review, in post-World War II Europe judges have perhaps been even less inhibited in their methods of review than their American brethren. To appreciate the point, the terminology adopted by Professor Thomas Grey can be of help. Grey distinguishes a "purely interpretive" and a "non-interpretive" model of judicial review. The former, which "has recently called forth an unusual number of explicit affirmations" by American writers,[49] was the model originally affirmed by Alexander Hamilton and Chief Justice Marshall and later advocated by such American critics of the non-interpretive model as Judge Learned Hand.[50] It can be defined as follows: "legitimate constitutional adjudication is limited to the application of concrete norms derivable from the written constitution itself."[51] The non-interpretive model, on the other hand, is distinguished by Grey in several forms: "The purest form . . ., a form virtually moribund [in the United States] today, invokes general principles of republican government, natural justice or human rights as confining legislative authority regardless of

[47] To the extent there is a need, it may be partially filled by the submissions of the *procureur général* and similar organs.

[48] *See* Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, in ACCESS TO JUSTICE AND THE WELFARE STATE 256 (M. Cappelletti ed., Alphen a/d Rijn, Sijthoff, 1981); *cf.* JUDICIAL REVIEW, *supra* note 4, ch. 2.

[49] *Origins, supra* note 15, at 846, citing R. BERGER, *supra* note 15; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1 (1976).

[50] *See Origins, supra* note 15, at 845; L. HAND, THE BILL OF RIGHTS 70 (New York, Atheneum Press, 1964).

[51] *Origins, supra* note 15, at 846.

the terms or even the existence of a written constitution."[52] The other forms, which Grey calls the "surviving forms," have one basic feature in common: they "all claim some connection to the constitutional text" even though "their actual normative content is not derived from the language of the Constitution as illuminated by the intent of its framers."[53]

The forms of judicial review "virtually moribund" in the United States are, however, very much alive in Europe. Both the French *Conseil d'Etat* and *Conseil Constitutionnel*, have undertaken to control the conformity of executive and parliamentary legislation to vague, undefined, mostly unwritten "general principles" and "Republican traditions" – principles and traditions creatively "found" by the judges themselves and affirmed as having a higher law status.[54] A similar development also characterizes the case law of the Court of Justice of the European Community, which as discussed further on,[55] has begun to develop a jurisprudence of fundamental rights based upon the "common traditions" of the Member States. In this jurisprudence, the Court too has appealed to "general principles," principles found by the Court itself and forming what is seen as an emerging transnational – and as yet unwritten – Bill of Rights of the European Community.

d) The Remaining Points of Controversy

A fourth difference between judicial practice in the United States and Europe today is related to, is indeed the reverse of, the third difference. It is mentioned only in passing here, for it too requires fuller treatment at a later point.[56] The difference is, quite simply, that transnationalism – or more specifically, the idea that European Community or transnational law should be superior to national law – remains controversial in Europe, whereas in the United States the supremacy of federal law is accepted by all. And thus, judicial review in a transnational capacity remains a subject of controversy in Europe, whereas, as we have noted, it has long been seen as a necessity in the United States.

With these similarities and differences in mind, then, we shall now consider the role of the judicial branch in American and European legal integration. For the purposes of this study, the discussion of the American case will be brief and merely instrumental to a better understanding of the European case; and no attempt shall be made here to undertake a critical examination of the specific American doctrines upon which our comparative analysis is founded.

[52] *Id.* at 844 n.8.
[53] *Id.*
[54] *See supra* note 30.
[55] *See infra* § V.D.
[56] *See infra* §§ V.D. & VI.

IV. Federalism, the Courts, and Integration in the United States

A. Constitutional Adjudication

1. Supremacy

As we have noted, in any meaningful federal union the supremacy of federal law is an important matter. However, it is not necessarily, or even usually, a question for judicial resolution, and such has been true of supremacy in the United States. The authority of the United States Congress to adopt laws of general effect in all the states, far from being a judge-made doctrine, was set forth in the aptly named "supremacy clause" of article VI of the Constitution.[57] Supremacy was indeed one of the least controversial issues at the Constitutional Convention of 1787.[58] In the view of most of the members of the Convention, the principal defect of the Articles of Confederation then in effect was their failure to confer supremacy on the central government.[59] Thus the very first vote of the Convention as a whole was the adoption of a resolution "that a national government ought to be established consisting of a *supreme* Legislative, Executive and Judiciary."[60] It followed from this decision that the new federal government, "instead of operating on the States should operate without their intervention on the individuals composing them."[61] The new government would, in other words, be a national government, and the citizens of the states would be national citizens as well.

[57] U.S. CONST. art. VI, cl. 2.

[58] *See, e.g.*, Levy, *Introduction*, in ESSAYS ON THE MAKING OF THE CONSTITUTION ix, xi-xii (L. Levy ed., New York, O.U.P., 1969) [hereinafter cited as ESSAYS]. Professor Levy provides a good, short account of the Convention. There are, of course, many other accounts. A basic document for the study of the Convention is 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (New Haven, Yale U.P., 1937).

[59] The Articles of Confederation "had established what in the usage of the time was called a 'federal' government, meaning a league or confederacy of autonomous or nearly sovereign states whose central government was their subordinate agent and could act only through them and with their consent." Levy, *supra* note 58, at xii. Levy adds that "the Articles failed mainly because there was no way to force the states to fulfill their obligations or to obey the exercise of such powers as Congress did possess." *Id.* For example, Congress depended for its funds upon contributions by the states, and requests were frequently denied. By 1786, Congress often lacked even the necessary quorum of nine state delegations for conducting its business. *See* Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 85, 86 (L.M. Friedman & H.N. Scheiber eds., Cambridge, Harv. U.P., 1978) [hereinafter cited as AMERICAN LAW].

[60] The resolution was adopted with the New York delegation divided and only Connecticut opposed. 1 M. FARRAND, *supra* note 58, at 30–31.

[61] Levy, *supra* note 58, at xiii, quoting James Madison's report to Jefferson, who was in Paris at the time.

2. Powers

When federal law is the supreme law of the land by virtue of the constitution, and states are precluded from ignoring federal laws they do not like, constitutional disputes tend to turn to other matters. One question they often turn to then is that of power. Unlike some other federal systems,[62] the U.S. Federal Government possesses only specific enumerated powers;[63] the remainder are left to the states.[64] It has been in the course of interpreting the scope of Congress' enumerated powers and in balancing the interests of Nation and states in protecting legitimate exercises of state power, that the U.S. Supreme Court has made some of its most important contributions to integration.[65]

a) Federal Powers

From almost the very beginning the U.S. Supreme Court has chosen to read the "necessary and proper" clause[66] of the Constitution very broadly, giving to Congress great leeway in the scope of legislation it may enact in furtherance of its exercise of its enumerated powers. In *McCulloch v. Maryland* Chief Justice Marshall laid the foundation of the "implied powers" doctrine with the famous words

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, and which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[67]

In a way, the question of the scope of federal power was at that time more academic than practical, as the Federal Government's full-scale intrusion into the regulatory sphere occurred only much later in the nineteenth, and especially in the twentieth, centuries; but the debate over the extent of federal powers that existed at the time of *McCulloch* and after was a heated one nonetheless, and a major source of political disagreement.[68] Once resolved in favor of a

[62] *See* the studies on the federal experiences of several nation states, *supra* this vol., Bk. 1, part III.

[63] *See* U.S. CONST. art. I, § 8.

[64] *See* U.S. CONST. amend. X.

[65] It has been maintained, however, and probably with good reason, that the question of powers in the U.S. is no longer an important one. Recently, Professor Choper has even argued that the U.S. Supreme Court unnecessarily expends "institutional capital" on reviewing federalism cases, capital which could be better spent on the protection of civil liberties. J. CHOPER, *supra* note 15, ch. 4. He therefore urges the Court to treat these allocation of powers issues as nonjusticiable. But is there anything to be gained by ignoring these issues? As Professor Monaghan observes in his review of Professor Choper's book, 94 HARV. L. REV. 296, 301 (1980), "[c]onstitutional battles over the allocation of power between nation and states occupied center stage for close to two centuries in our constitutional history, but those battles are now over, and their results generally accepted." He might have added that it was the Federal Government that emerged victorious from these battles.

[66] U.S. CONST. art. I, § 8, cl. 18.

[67] 17 U.S. (4 Wheat.) 316, 421 (1819).

[68] G. GUNTHER, *supra* note 14, at 92–106.

broad grant of federal power, the stage was set for later exercise of that power; perhaps as will someday be true of seemingly academic legal issues facing the European Community today, the early doctrinal stance favoring a strong central government helped make possible later expansions of central power.

That central power is, of course, not without its own limits, and here too the judiciary has played a role in helping to define the scope of federal powers.[69] However, at least for the past forty years, the Supreme Court has permitted continued growth of federal power especially via its expansive interpretations of the commerce clause[70] and its toleration of legislative delegation of powers.[71] It is illustrative that, in the years since the New Deal, only two feder-

[69] *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957) and Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960). In these cases involving a federal attempt to extend court martial jurisdiction to civilians associated with the armed forces, the Court found limitations on the scope of federal power; somewhat surprisingly, the Court based its reasoning on a narrow reading of the "necessary and proper" clause rather than on restrictions stemming from specific individual rights guarantees. For this reason the rationale – but not the result – of these cases has been criticized. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 118–26 (9th ed., Mineola, Foundation Press, 1975).

[70] One of the principal goals motivating the adoption of the U.S. Constitution was to improve the chaotic conditions of commerce among the various states. Thus, art. 1, § 8, cl. 3 provided that Congress shall have the power "To regulate commerce with foreign nations, and among the several States...." The Framers' desire to create a national market is remarkably similar to a principal aim of the signatories of the EEC Treaty. As a source of legal integration the commerce clause has been important in two ways: first as a limitation on the states' powers to interfere with interstate commerce, and second as a positive source of federal legislative power. Federal power under the commerce clause has been enormously expanded by the Supreme Court in this century. *Compare* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (sugar refining monopoly not controllable by federal legislation because *connection between "manufacturing" and "commerce" was "indirect"*), *with* Katzenbach v. McClung, 379 U.S. 294 (1964) (Congress may prohibit racial discrimination in restaurants since the restaurant business exerts a substantial economic effect on interstate commerce). *See generally* Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187 (1972).

[71] The last important non-delegation decisions occurred in 1935: Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Today, the doctrine is virtually moribund. *See, e.g.*, Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976); National Cable Tel. Ass'n v. United States, 415 U.S. 336, 341–42 (1974). The modern growth of the Federal bureaucracy has, however, revived interest in finding ways of making elected representatives more responsible for administrative law-making. *See, e.g.*, J.H. ELY, *supra* note 15, at 131–34, advocating revival of a non-delegation doctrine; Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977), analyzing and criticizing proposals designed to increase Congressional oversight of administrative rule-making; and McGowan, *Congress, Courts and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977), criticizing Congress for shifting oversight responsibilities to the courts.

al regulations imposing an obligation to act on someone other than the Federal Government have been struck down on the grounds that the regulation was beyond the scope of federal powers.[72] In both cases, the regulations in question placed obligations on *states*; and thus the decisions may be seen as reflecting a concern for the ability of the states to function as sovereign units within the federal system.[73]

In general then the U.S. Supreme Court has both aided the expansion of federal competence and permitted the creation of the administrative bureaucracy capable of exploiting the expanded federal powers. While we may agree with Sir Kenneth (now Lord) Diplock that courts could never have created the modern welfare state,[74] it is doubtful whether those features of the welfare state that exist in the United States could have been created without the cooperation of the judicial branch.[75]

b) State Powers

Despite its permissive, broad reading of powers conferred by the Constitution on the Federal Government, the Supreme Court has nonetheless showed particular sensitivity to valid state interests when they come into conflict with potential federal interests. The court has done so by elaborating a doctrine of "concurrent powers," particularly as regards state regulation of commerce; by rejecting the more extreme forms of the doctrine of pre-emption; and by permitting Congress to consent to certain types of state regulation which would otherwise amount to unconstitutional encroachments on exclusive federal powers.

[72] Oregon v. Mitchell, 400 U.S. 112 (1970) (federal law granting voting rights to 18-year olds in state elections); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (federal law extending coverage of minimum wage and maximum hour protection laws to state and local government employees). *National League of Cities* has always been widely regarded as somewhat aberrant and has now been overruled by Garcia v. San Antonio Metropolitan Transit Authority *et al.*, No. 82–1913, slip. op. at 3 (U.S. Sup. Ct. 19 Feb. 1985).

[73] But despite these two examples, one may still doubt how much life is left in the old argument that Congress' enumerated powers are limited powers. According to Professor Monaghan, "[t]he radical transformation that has occurred in the structure of 'Our Federalism' in the nearly two centuries of our existence has emptied the concept of nearly all legal content and replaced it with a frank recognition of the legal hegemony of the national government." Monaghan, *The Burger Court and "Our Federalism,"* 1980 Law & Contemp. Probs. 39, 39. *See also* J. Choper, *supra* note 15, *passim*, arguing that federal-state relations are largely a political question and ill-suited to judicial mediation; 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).

[74] Diplock, *The Courts as Legislators*, in The Lawyer and Justice 263, 279 (B.W. Harvey ed., London, Sweet & Maxwell, 1978).

[75] An interesting attempt to create a guaranteed income through the courts is discussed in Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 Minn. L. Rev. 211 (1973).

i) Concurrent powers and the commerce clause[76]

The problem presented by the commerce clause is, stated simply, that article I, section 8 of the Constitution gives Congress power "To regulate commerce with foreign nations, and among the several States...." If the commerce clause grants an exclusive power to Congress to regulate all commerce, then any state law affecting commerce among the states would be, by virtue of such exclusivity, unconstitutional. If, on the other hand, the states retain powers coextensive to those granted to the Federal Government, then state laws affecting interstate commerce must be valid unless Congress has adopted a contrary law. If such a contrary federal law were enacted, then the state law would of course be unconstitutional under the supremacy clause.

These are, of course, the extreme positions. After some initial failed attempts at resolving the dilemma[77] the Supreme Court reached an early compromise in *Cooley v. Board of Wardens*.[78] *Cooley* helped define the notion of "concurrent powers" in terms of the commerce clause: the states were permitted to exercise some control over local commerce, while other questions – that fundamentally affected national interests – were deemed impermissible subjects of state regulation.[79] Indeed, the *Cooley* "shift" in judicial review was from earlier standards that had focused on the source of power being exercised to a new standard that concentrated on the *subject of regulation*.[80] As stated in *Cooley*

> whatever subjects of [the commerce power] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.[81]

The *Cooley* focus on "subjects" of regulation for a determination of how far concurrent powers may extend was only a start. Since *Cooley* there has been a "staggering" number of cases testing the constitutionality of state commercial regulations,[82] and despite the wealth of jurisprudence there is still great uncertainty in the area. However, some themes may clearly emerge. On

[76] For a more detailed discussion of the issues raised in this section, *see* Kommers & Waelbroeck, *supra* note 2.

[77] *Compare* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) *with* Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

[78] 53 U.S. (12 How.) 299 (1851). Prior to *Cooley*, the Supreme Court tried unsuccessfully to reach a consensus on how to resolve these conflicts. Sometimes the majority used a definitional analysis: state regulations of "commerce" were prohibited, but so-called "police regulations" were constitutional. *See, e.g.*, Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

[79] 53 U.S. (12 How.) 299 (1851). *See* G. GUNTHER, *supra* note 14, at 267–68.

[80] *See* Blasi, *Constitutional Limits on the Power of States to Regulate the Movement of Goods in Interstate Commerce*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 174, 179–80 (T. Sandalow & E. Stein eds., Oxford, Clarendon Press, 1982); Linde, *Transportation and State Laws Under the United States Constitution: The Evolution of Judicial Doctrine*, in *id.* at 135, 152–53.

[81] 53 U.S. (12 How.) 299, 319 (1851).

[82] *See* Blasi, *supra* note 80, at 176.

the one hand, there is an overriding principle of nondiscrimination.[83] States may not via commercial regulations *discriminate* against out-of-state goods or burden out-of-state transactions or activities;[84] show favoritism toward local interests over foreign interests;[85] or attempt to preserve business for their own state that would otherwise be carried on elsewhere.[86] On the other hand, the states retain great leeway in the regulation of their own internal economies, as long as their actions do not unjustifiably burden out-of-state transactions.[87] Furthermore, in bona fide questions of public safety and health the states retain great power to protect consumers and to otherwise regulate for the public welfare.[88] But even when a state regulation is facially "neutral" – nondiscriminatory – or ostensibly serves some legitimate state purpose, the regulation may still be questioned on commerce clause grounds, as the Court may inquire as to whether the legitimate state purpose might be met by other, less burdensome means. It is this latter situation that has generated the most difficult decisions, and as a result standards are not entirely clear in this area.[89]

In general it may be said of the *Cooley* compromise and subsequent jurisprudence that they attempt to take into consideration the valid interests of both the nation as a whole and those of the separate states. The courts have sought to distinguish, in the words of Justice Jackson,

> between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or restrict the flow of such commerce for their economic advantage.[90]

ii) Pre-emption

Related to the problem of concurrent powers is the question of pre-emption. The U.S. Supreme Court has never embraced the most extreme form of the pre-emption doctrine, that would hold that *all* state legislation that enters into areas of federal competence is prohibited.[91] Such a position would clearly be

[83] *Id.* at 180; *see also* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
[84] Blasi, *supra* note 80, at 188, 192, 207.
[85] *Id.* at 192.
[86] *Id.* at 197; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
[87] Blasi, *supra* note 80, at 188, 207.
[88] *Id.* at 199, 211.
[89] *Compare* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977) (North Carolina may not prohibit Washington apple growers from employing an apple grading system with standards higher than those required by the Federal Government), *with* Exxon Corp. v. Maryland, 437 U.S. 117 (1978) (Maryland may prohibit companies which produce or refine oil from owning retail outlets in the state). *See* Blasi, *supra* note 80, at 185–87, 202–03.
[90] H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).
[91] *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941), discussed in Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 218 (1959). Professor Waelbroeck calls this the "conceptualist-federalist" approach to pre-emption problems. *See* Waelbroeck, *The Emergent Doctrine of Community*

antithetical to the U.S. doctrine of concurrent powers. Moreover, in American law when a state statute is challenged on the grounds that it regulates in an area in which the Federal Government has been granted the *exclusive* power to regulate, then the question is said to be not one of pre-emption, but rather a general question of constitutional law – that is, of the extent and scope of the specific powers granted to the Federal Government, and the extent of those that remain with the states. It is only when a state law is challenged on the grounds that a *concurrent* federal power to regulate has in fact been *exercised* that the question is properly one of pre-emption. True pre-emption problems arise thus not from the mere establishment of federal powers, but from the exercise of these powers in areas where the states have retained concurrent competence.

Pre-emption problems are at root problems of supremacy. They arise immediately not out of substantive grants of power to the Federal Government, but from the supremacy clause itself, which states that

> [The] Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.[92]

In American jurisprudence, pre-emption problems may arise in two types of cases. In the first, a state law is held to conflict with general policy objectives of federal law.[93] Where a state regulation would thus interfere unduly with the accomplishment of federal objectives, the state law is held pre-empted. In the second, federal laws or federal concerns in an area are so comprehensive or compelling that they are deemed to transform the federal competence into an exclusive power.[94] Federal law "occupies the field," and the concurrent state power to regulate in the field is held to be extinguished. It is truly pre-empted.

The significance of the distinction between judicial examination of a state statute on pre-emption grounds, and on grounds of the scope and exclusivity of federal powers – for example, of the commerce clause – may be somewhat elusive. Indeed, the Supreme Court's analysis of a state statute on pre-emption grounds may closely resemble what would be a commerce clause analysis of the same statute.[95] Using pre-emption analysis, the Supreme Court has, for example, invalidated state statutes when it appeared that the statute was an effort to favor local over interstate business.[96] However, when the court has been satisfied that valid local interests outweigh the restrictive effect on inter-

Pre-Emption – Consent and Re-Delegation, in 2 COURTS AND FREE MARKETS, *supra* note 80, at 548, 551.

[92] U.S. CONST. art. VI, cl. 2.

[93] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1941).

[94] *See, e.g.*, Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[95] The parallels between the Court's pre-emption and commerce clause opinions are analyzed in Note, *supra* note 91, *passim*.

[96] Note, *supra* note 91, at 220.

state commerce, the Court has rejected the pre-emption challenge and allowed the state regulation to stand.[97]

But pre-emption analysis does differ from commerce clause analysis in significant respects. As a matter of form, pre-emption questions are properly ones of *statutory construction*. The Court is not to examine the statute in general constitutional law terms, but only to ask whether it was the *intent* of *Congress* to occupy a regulatory field. As questions of statutory construction, pre-emption decisions do not create or need to rely on general principles of constitutional law. Pre-emption analysis may thus both permit more *activist* intervention and allow more ad hoc decision-making by the Court than decisions made on a commerce clause ground; hence, it gives the Court needed flexibility to examine those regulations on a case-by-case basis and to better balance national and local interests.[98]

In applying the doctrine of pre-emption the U.S. Supreme Court has largely avoided a formalistic approach requiring federal pre-emption every time Congress passes a law regulating a new area of social or economic activity. In general, the Court has held in favor of pre-emption only when "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it... [o]r the Act of Congress [touches] a field in which the federal interest is so dominant that the federal system [is] assumed to preclude enforcement of state laws on the same subject."[99] When the federal scheme has been less than comprehensive, or the federal interest not clearly dominant, the states have been left free to enact parallel legislation not openly conflicting with federal law, or hindering policies.[100]

iii) Consent

There is yet another means by which the U.S. Supreme Court has promoted integration – at least indirectly, by promoting federal-state cooperation in *declining* to interfere with the results of the political process, rather than by stepping in to protect federal or state interests. The Court's doctrines of concurrent powers and pre-emption are, of course, designed to insure the continued, efficient functioning of the federal system, resolving conflicts over power by balancing the interests of nation and states in the context of the constitutional plan. However, this same jurisprudence may at times threaten to interfere with or upset compromises between the federal and state governments on questions of power reached in the political sphere, and thereby threaten the efficiency of the federal system rather than support it. To avoid this problem, the Court has in modern times permitted Congress to consent to various state regulations which would, in the absence of this consent, under the

[97] *Id.* at 220–21.

[98] *See* Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Pre-Emption*, in 2 COURTS AND FREE MARKETS, *supra* note 80, at 523, 545.

[99] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229–30 (1941).

[100] *See, e.g.*, the pre-emption provisions of the Consumer Products Safety Improvements Act of 1976, 15 U.S.C. § 1203.

Court's own jurisprudence certainly violate the commerce clause.[101] Many theories have been elaborated to justify this power of consent, but the power is said to be "so solidly established that theoretical disputes over the source of that power are of little consequence."[102]

Yet there are limits to the power of consent, limits which have important implications in the case of individual rights guaranteed to all citizens of the U.S. by the federal Constitution.[103] As a general rule, it is safe to state that Congress cannot validly consent to a state regulation when the Congress itself could not constitutionally enact the same or similar legislation.[104]

B. Judicial Procedures

1. Federal Courts and Supreme Court Supremacy

Article III of the U.S. Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Congress, in article I, section 8 of the Constitution, is given the power to constitute tribunals inferior to the Supreme Court. These two sections reflect a compromise made at the Constitutional Convention between those who favored establishing a system of lower federal courts and those who feared that such courts would unduly interfere with the jurisdiction of existing state courts.[105] Alexander Hamilton argued in the *Federalist* that the power of constituting inferior courts was "calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance."[106] It was argued by others that the "prevalency of local spirit," the fact that state court judges do not necessarily serve with the same protections as members of the federal judiciary (who serve for life during good behavior),[107] and the fact that possibility of appeal to the Supreme Court was not in all cases an adequate remedy – all these factors made the state courts undesirable as fora for the consideration of

[101] Cohen, *supra* note 98, at 523.

[102] *Id.* at 530.

[103] *See* the discussion in G. GUNTHER, *supra* note 14, at 1096–104.

[104] Cohen, *supra* note 98, at 537.

[105] *See* P.M. BATOR, P.J. MISHKIN, D.L. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11–12 (2d. ed., Mineola, Foundation Press, 1973) [hereinafter cited as HART & WECHSLER].

It probably does not bear noting that today the federal courts in the U.S. include not only the Supreme Court, but also District Courts, which serve principally as trial courts, the Courts of Appeals, which act as intermediate appellate courts in eleven circuits and the District of Columbia, as well as several specialized courts.

[106] THE FEDERALIST No. 81, at 485 (A. Hamilton) (C. Rossiter ed., New York, American Library, Inc., 1961) [hereinafter all references are to this edition]. *See also* HART & WECHSLER, *supra* note 105, at 28.

[107] U.S. CONST. art. III, § 1.

federal claims.[108] On the other hand, it was argued that the preservation of the state court systems would require a certain degree of deference from the federal system and that the Congress should attempt to use state courts whenever this could be done with safety to the general interest.[109]

This latter concern was met in the language of the First Judiciary Act, passed in 1789.[110] The Act set up a system of lower federal courts, but rejected the theory that the grant of federal judicial power to the Supreme Court in article III of the Constitution obligated the Congress to endow the lower federal courts with the full scope of federal judicial power.[111] Moreover, the Act limited the appellate jurisdiction of the Supreme Court over state court proceedings involving federal law to those cases in which the federal claim had been *denied* by the state court.[112]

At this early stage the two-headed limitation on the federal courts – both on the original jurisdiction of the lower courts, and on the Supreme Court's appellate review of state court decisions – presented minor problems, given that federal law questions then were few (there being very little federal law) and given that a far more serious issue confronted the system: the supremacy of the Supreme Court as the ultimate interpreter of the Constitution. *Marbury v. Madison* established the principles of judicial review and the supremacy of the U.S. Constitution, but did not guarantee the supremacy of the Supreme Court's interpretations; as a result, the first half of the nineteenth century witnessed repeated challenges to the Court's view of its own pre-eminence. In 1815 the Virginia Court of Appeals argued that the Supreme Court lacked jurisdiction to review its interpretations of the federal Constitution on the grounds that the courts of one sovereignty cannot be deemed superior to those of another.[113] An even more extreme position, espoused by a number of

[108] The arguments are cited by Hamilton in THE FEDERALIST No. 81, at 486. *See also* HART & WECHSLER, *supra* note 105, at 28.

[109] HART & WECHSLER, *supra* note 105, at 12.

[110] Act of Sept. 24, 1789, 1 Stat. 73.

[111] It should be recalled that art. III of the U.S. Constitution defines the federal judicial power, but, with the exception of the Supreme Court, does not create jurisdiction in any of the federal courts. *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

[112] Act of Sept. 24, 1789, § 25, 1 Stat. 73, 85.

[113] In the words of Judge Cabell,

> [B]efore one Court can dictate to another ... it must bear, to that other, the relation of an appellate Court. The term appellate, however, necessarily includes the idea of *superiority*. But one Court cannot be correctly said to be superior to another, unless both of them belong to the same sovereignty. It would be a misapplication of terms to say that a Court of Virginia is *superior* to a Court of Maryland, or vice versa. The Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty – and of course, their commands or instructions impose no obligations.

spokesmen of the Antebellum South, claimed the right of the states to "interpose" their own interpretations of the Constitution to prevent the enforcement of federal constitutional interpretations, the most notorious of these efforts being the South Carolina nullification movement of 1832 and, of course, the secession of the Confederate States.[114]

The Civil War settled more or less the question of Supreme Court supremacy,[115] and also marked the beginning of a period of real expansion in the scope of federal jurisdiction, both original and appellate.[116] It is a serious question – especially for purposes of this comparative analysis – to what extent the growth of the federal judicial power may be attributed to the need to control state courts in the defeated South, for among other reasons to protect the federal rights of black citizens. It is, however, probably an impossible question to answer, as the continuing history of the expansion of federal jurisdiction presents a more complicated picture.

2. The Expansion of Federal Jursidiction

The expansion of federal jurisdiction began in small ways before the Civil War,[117] as the Congress foresaw the need to provide a federal forum for,

Quoted in G. GUNTHER, *supra* note 14, at 39–40 (emphasis in original). This contention was, of course, rejected by the Supreme Court in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (establishing Court review of state criminal convictions).

[114] *See* Bestor, *The American Civil War as a Constitutional Crisis*, in AMERICAN LAW, *supra* note 59, at 219, 223, 233–34.

[115] The question might have come to the fore again in 1935, had the Supreme Court ruled against the Government on the constitutionality of its decision to abrogate the "gold clauses" (providing for government payments to be made in gold) in federal obligations. Franklin Roosevelt was prepared to meet such a decision with emergency action, arguing in a speech written for the eventuality (but never given) that

> [I]t is the duty of the Congress and the President to protect the people of the United States to the best of their ability. It is necessary to protect them from the unintended construction of voluntary acts, as well as from intolerable burdens involuntarily imposed. To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made in accord with the actual intention of the parties. [I] shall immediately take such steps as may be necessary, by proclamation and by message to [Congress].

Quoted in G. GUNTHER, *supra* note 14, at 29–30.

[116] HART & WECHSLER, *supra* note 105, at 844–45.

[117] *Id.* at 845. *See* Act of April 10, 1790, § 5, 1 Stat. 109, 111; Act of Feb. 21, 1793, § 6, 1 Stat. 318, 322; Act of March 23, 1792, §§ 2, 3, 1 Stat. 243, 244; *see also* Act of Feb. 15, 1819, 3 Stat. 481.

among other things, patent claims and claims under federal pension laws. In addition, the last Federalist Congress had attempted to bestow jurisdiction on lower federal courts almost coextensive with that of the grant of article III, the move being an attempt to preserve power for the Federalist cause by shifting it to the one branch of government (the judicial) where Federalists continued to dominate after the Republican victories of 1800.[118] But the real shift in federal jurisdictional power began with the Civil War. The federal courts were given jurisdiction to hear claims made by citizens against federal officers for arrest and imprisonment under U.S. authority (insuring that state courts could not punish federal officers for arresting those suspected of sedition and rebellion); and, ultimately, to protect the rights of freed slaves and all those who could not enforce their rights in the courts of "the state or locality where they may be."[119] The post-Civil War Amendments and the Civil Rights Acts of 1866[120] and 1871[121] in general made state laws subject to federal civil rights for the first time; the 1866 Act imposed criminal penalties on persons acting under color of state law who denied any citizen his rights under the Act, and section 3 of the Act conferred exclusive jurisdiction on the federal courts for civil enforcement actions. The 1871 Act expanded these remedies by expressly authorizing civil injunction and damage actions against deprivation of federal rights under color of state law.[122]

Concern for the protection of federal civil rights was only one of the various influences on the expansion of federal jurisdiction, however. There were concurrent pressures for the expansion of federal jurisdiction for questions involving commercial matters – such as for suits against nationally-chartered banks, or against U.S.-authorized corporations.[123] In addition, the first Congressional attempt at regulation of the Pacific Railroads carried with it a grant of jurisdiction to the federal courts.[124] Pressure for increasing the scope of federal jurisdiction may thus be seen as stemming in part from the increasingly "national" nature of the economy and not just as a wanton federal interference with the state courts of the defeated Confederacy. A general shift in attitudes toward federal judicial power was reflected in the (post-Reconstruction) Judiciary Act of 1875, which granted original jurisdiction to the federal courts over all civil actions "arising under the Constitution, laws, or treaties of the United States,"[125] and granted to state court defendants the right to "re-

[118] Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92. *See also* HART & WECHSLER, *supra* note 105, at 845.

[119] Act of April 9, 1866, § 3, 14 Stat. 27.

[120] Act of April 9, 1866, c. 31, 14 Stat. 27.

[121] Act of April 20, 1871, c. 22, 17 Stat. 140.

[122] The substantive provisions are now codified in 42 U.S.C. §§ 1983 & 1985. The jurisdictional provisions appear in 28 U.S.C. § 1343.

[123] Act of June 3, 1864, § 57, 13 Stat. 99, 116; Act of July 27, 1868, § 2, 15 Stat. 226, 227.

[124] Act of June 20, 1874, 18 Stat. 111, 112.

[125] Act of March 3, 1875, c. 137, 18 Stat. 470 (codified at 28 U.S.C. § 1331).

move" to federal court cases which could have been brought there by the plaintiffs.[126]

The Judiciary Act of 1875 passed "almost unnoticed inside or outside the halls of Congress," and yet it marked a revolution in the concept of the scope of the power of the federal judiciary.[127] For the first time, the language of the jurisdictional statute[128] (almost) matched the language of article III defining the federal judicial power, and when this was recognized the result was a "flood of litigation" into the federal courts.[129] To stem the tide Congress began to qualify this broad grant of jurisdiction, by denying plaintiffs the right to remove to federal court; by making an order remanding a case to state court non-appealable; and by raising the jurisdictional amount for cases brought in federal court.[130]

These limits to federal jurisdiction were only a helpful beginning, as the period after 1875 witnessed an even further expansion of the potential scope of the federal judicial power. The Congress expanded the appellate jurisdiction of the Supreme Court over state court cases in 1914,[131] for the first time making possible an appeal when a federal right was *upheld* by a state court as well as when denied; the earlier rule,[132] permitting appeal only when a federal right was denied, had proved to be a barrier to the uniform interpretation of federal law. The original jurisdiction of the lower federal courts was expanded further by the Declaratory Judgments Act of 1934,[133] which permitted the federal courts to declare the rights and other legal relations of "any interested party." And finally, the Congress through regular legislation created a wealth of new federal rights, many allowing federal causes of action for their enforcement. For its part, the Supreme Court made available an increasing number of the procedural rights guaranteed in the Bill of Rights to state criminal defendants, especially through the agency of the writ of habeas corpus.[134]

[126] *Id.* (codified at 28 U.S.C. § 1441).

[127] HART & WECHSLER, *supra* note 105, at 847.

[128] *See* Act of March 3, 1875, § 1, 18 Stat. 470.

[129] HART & WECHSLER, *supra* note 105, at 847.

[130] Act of March 3, 1887, 24 Stat. 552, corrected by Act of Aug. 13, 1888, 25 Stat. 433.

[131] The Judiciary Act of 1914, c. 2, 38 Stat. 790, for the first time authorized review in cases where the state court "may have been in favor of the validity of the treaty or statute or authority exercised under the United States" or "against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States" or "in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States." Since 1914, periodic revisions have juggled the types of cases falling within the Court's discretionary *certiorari* jurisdiction without otherwise subtantially affecting its jurisdiction. *See generally* HART & WECHSLER, *supra* note 105, at 440–41.

[132] *See supra* text accompanying note 112.

[133] 36 Stat. 557 (codified at 28 U.S.C. §§ 2201–2202).

[134] *See* Frowein, Schulhofer & Shapiro, *supra* note 2, at § III.C.

Faced with this vast expansion of the federal judicial competence, both the Congress and the federal courts themselves have found it necessary to define more precisely the proper extent of federal jurisdiction so as to preserve the integrity of the two-court system. Above all, the concern has been to protect *federal rights* without destroying the authority or autonomy of *state courts*. It is the process of seeking the appropriate compromise between these two concerns that has created the hypertechnical, and constantly evolving, American law of federal jurisdiction. But in a larger sense the major issues are still significant, as in the debates that continue to rage over seemingly arcane doctrines in this area it is possible to see reflected the key tensions between federal and state power consciously built into the federal system.

3. Some Doctrines of Federal Jurisdiction

It would be impractical to discuss the modern law of federal jurisdiction in detail, and also probably more confusing than helpful for comparative analysis. We therefore limit our discussion to some key issues that have arisen in the course of the history of the American jurisprudence, first focussing on the appellate jurisdiction of the Supreme Court over state court decisions, and then examining the varieties of cases in which the lower federal courts will decline to hear a claim that may nevertheless "arise under" federal law or the Constitution.

a) Supreme Court Review of State Decisions

A central tenet of the U.S. federal system is that each system of courts is the ultimate interpreter of the law of that jurisdiction. Since federal law is "interstitial" rather than complete – state laws being needed to fill the numerous gaps in the federal statutes[135] – it is generally true that a federal rights claim will of necessity include some questions of state law, either substantive or procedural. The Supreme Court has long declined to adjudicate in a situation where resolution of the state law issue would by itself be dispositive of the case; the case is said then to rest on "adequate and independent state grounds."[136]

This doctrine, founded in part on the demands of judicial economy and in part on notions of "comity" between federal and state judiciaries, obviously may operate to frustrate the vindication of federal rights. This is particularly so when a substantial federal question is dismissed as a result of a failure to comply with state procedural requirements.[137] Not only are federal rights frustrated, but variations in procedure from state to state will mean that the ability of a citizen to vindicate federal rights will, to some extent, differ from state to state.[138]

[135] *See infra* note 236 and accompanying text.

[136] *See, e.g.*, Wolfe v. North Carolina, 364 U.S. 177 (1971); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

[137] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963).

[138] Of course, they will also differ from citizen to citizen to the extent that litigants

The Supreme Court's approach to this problem has been to balance the requirements of due process against the interests of the states in controlling their own judicial procedures. In this balancing process, the Court has placed several restrictions on the power of state courts to allow state law to compromise federal rights. First, whether the non-federal grounds resulting in the denial of a federal claim are "independent and adequate" is itself a question of federal law over which the federal courts exercise ultimate control.[139] Second, the Supreme Court will review the state law issue if that law is itself not "independent" – as in the case where federal law is used to give content to state law.[140] Third, the Court will review a state law question to prevent the state from distorting or misconstruing its own law to defeat a federal right,[141] or to prevent the state from discriminatory application of a state rule to prevent the hearing of a federal claim.[142] Fourth, even if there has been no distortion of state law, if application of state law prevents the effectuation of a federal substantive right, the state law is quite simply unconstitutional under the supremacy clause;[143] in the procedural context, the Court has held that a state rule that prevents the effectuation of a federal right is unconstitutional under the supremacy clause unless it otherwise serves a legitimate state interest.[144]

The imprecision of this approach – such as the reliance on interpretation of "legitimate" state interest – naturally tolerates substantial differences in the procedural rules applied by the states. For example, the limitations period for the same cause of action may differ among the states, yet the period employed by each may be reasonable from the point of view of affording due process. In this context, the adequacy standard employed by the Supreme Court does no more than assure a uniform baseline, and, as in many areas of the substantive law, there is probably no special reason why this should be otherwise.

One may nevertheless wonder why the Supreme Court and the federal courts generally have not applied more stringent standards in reviewing appeals from state court denials of federal claims, particularly when the denials have resulted from technical defaults. The answer is that in the United States the appellate process has played only a small role in controlling the performance of the states in making federal rights available to their citizens. Much more important in promoting the uniform application of federal law has been the option available to many litigants of raising federal claims in the federal courts.

fail to raise or appeal relevant federal questions. While American courts have tended to worry about whether such "waivers" are informed, this can hardly be considered to be a problem peculiar to federalism.

139 Henry v. Mississippi, 379 U.S. 443 (1965).

140 Delaware v. Prouse, 440 U.S. 648 (1979).

141 *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Ward v. Love County, 253 U.S. 17 (1920); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

142 *See, e.g.*, Barr v. City of Columbia, 378 U.S. 146 (1964).

143 *Cf.* Ward v. Love County, 253 U.S. 17 (1920).

144 Henry v. Mississippi, 379 U.S. 443 (1965).

b) Jurisdiction of the Lower Federal Courts

Despite the existence of lower federal courts[145] and a convincing argument that they provide the most capable forum for the airing of federal issues, the question of what federal issues may be argued in a federal forum is still a complicated one. In some easy cases Congress has made federal jurisdiction exclusive, so that no state court may hear cases based on certain federal claims. In these special instances – for example, in the area of the federal patent laws[146] – the federal interests in uniformity and certainty are considered to be such that any possible state interest in the claim is outweighed. However, even this statutory exclusivity does not guarantee that all related federal law issues will necessarily be decided in a federal forum: exclusivity applies only to cases brought under federal law, leaving open the possibility of a federal defense based on, for example, federal patent law appearing in a state court case for breach of a licensing agreement or other contract made under state law.

Moreover, it may be that the statute creating a federal right has not expressly provided any cause of action for the person who is injured by a violation of the statute.[147] Allowing a private right of action may further federal interests, but, if permitted by implication, does the right qualify as a federal claim cognizable in federal courts, or does it arise merely from the application of state tort law? Theoretical as this question may appear, it was only in 1971 that the Supreme Court held that the victims of an unreasonable search and seizure by a federal agent, which violated the fourth amendment, had a cognizable federal claim.[148]

The vagaries that determine when a federal right falls within the exclusive jurisdiction of a federal court, or when a federal right creates no federal cause of action, already exhibit some of the constantly evolving tensions that exist between the state and federal court systems. However, nowhere are these tensions more evident than in the vast majority of those instances where a federal claim may be asserted in either a state or federal court. In these cases the Congress and the federal courts themselves have promulgated rules and doctrines designed to restrain the exercise of federal judicial power.

Perhaps the most important of these restraints falls under the heading of the "abstention doctrine." Under this doctrine, the federal courts may be required to postpone exercising jurisdiction over federal questions where other state proceedings may be dispositive of the case. The purest form of the doctrine requires a federal court to abstain whenever an unclear or ambiguous state law

[145] For the current organization of the federal court system, *see supra* note 105.

[146] 28 U.S.C. § 1338.

[147] A typical case is sec. 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b), which in broad terms prohibits fraudulent securities transactions and has been interpreted to authorize victims of fraud to sue to recover losses caused by violations of the statute.

[148] Bivens v. Six Unknown Named Agents of the F.B.I., 403 U.S. 388 (1971). *Bivens* created a right against federal officers. The Civil Rights Act of 1871, created a cause of action only for state violations of federal rights.

is challenged as being unconstitutional. Abstention in these circumstances is appropriate where clarification of the state law may eliminate the constitutional issue.[149] The doctrine as explained by Justice Frankfurter in *Railroad Commission of Texas v. Pullmann Co.* was thus intended to serve three key purposes: to help the federal courts avoid deciding unnecessarily questions of constitutional law; to avoid unnecessary friction between state and federal courts; and finally, to avoid the possibility of error in determining the meaning of state law.[150]

Abstention is not, it should be emphasized, equal to dismissal of the federal case. If resolution of the state law issues does not decide the entire case then the plaintiff may continue to prosecute his federal claims. In fact, a plaintiff may insist on a federal forum for remaining viable federal claims even when the federal court has sent both federal and state issues to the state court for decision; the Supreme Court has held that the parties need submit only state law issues to the state court if they so choose.[151]

To promote the efficient administration of the abstention device, the state of Florida has begun a practice of certifying state law questions on which a federal court has abstained directly to the state Supreme Court for decision, thus guaranteeing a final, authoritative resolution of the state law issue.[152] The Florida innovation is unique in America, but will be of no surprise to European observers who are used to similar practices of referral of constitutional questions from lower national courts to constitutional courts and, of course, of Community law questions from national courts to the European Court of Justice. A separate system of Community courts of the first instance, should such a system ever be instituted, could just as easily refer questions of Member State law to Member State courts – perhaps to the Supreme Court – for the same reasons outlined by Justice Frankfurter in *Pullmann*.[153]

Related to the abstention doctrine are a set of principles and rules which define the power of the federal courts to issue injunctions or declaratory judgments against real or threatened state administrative and judicial proceedings. These doctrines have both statutory and constitutional sources. Since 1793 federal law has prohibited the federal courts from issuing injunctions against proceedings in any court of a state unless the injunction is otherwise authorized by a federal statute,[154] and the eleventh amendment to the Constitution, as interpreted by the Court, in general prevents the use of the federal courts as a forum in which to sue a state.[155] However, the federal courts easily found other means of limiting the prohibition of the anti-injunction statute, and

[149] *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).
[150] *Id.*
[151] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).
[152] *Approved in* Clay v. Sun Insurance Office, 363 U.S. 207 (1960).
[153] *See supra* text accompanying note 150.
[154] Act of March 12, 1793, c. 22, §5, 1 Stat. 334 (codified with miscellaneous amendments at 28 U.S.C. §2283).
[155] Hans v. Louisiana, 134 U.S. 1 (1890).

through the use of a creative legal fiction also managed to partially circumvent the sovereign immunity of the states established by the eleventh amendment. A key limitation to the anti-injunction statute was the ruling that it applied, at most, only to state court proceedings already instituted;[156] another notable exception to the statute was made for suits brought under the Civil Rights Acts.[157] In the case of the eleventh amendment, the Court held in *Ex Parte Young* that a state officer who acts unconstitutionally is no longer acting for the state, and so may be enjoined by a federal court.[158]

The existence of these broad exceptions to the anti-injunction and anti-suit rules raised the obvious potential for federal-state conflicts. Sensitive to this potential, in the interest of federal-state comity the federal courts themselves have qualified the exceptions so as to help preserve the integrity of the federal system. In *Younger v. Harris*[159] the Court established that although there may be a special exception to the anti-injunction statute for federal claims based on the Civil Rights Acts, if such claims are raised in a pending state criminal proceeding the proceeding must generally be allowed to go forward. The *Younger* rule is based on the assumption that when a good-faith state prosecution is pending, intervention by a federal court is unwarranted because the constitutional issues may be adequately addressed in the state trial. It is only when the state court defendant (becoming the plaintiff in federal court) is in "great and immediate" danger of "irreparable loss," or if the threat to his federal rights is one that cannot be eliminated by his defense in the state court, that a federal court should intervene.[160] Similarly, considerations of comity also will require dismissal of post-conviction actions brought under the Civil Rights Acts[161] or a writ of habeas corpus[162] where the federal plaintiff has had a full and fair opportunity in the state court to litigate the federal claim or issue decided by that court.

The Supreme Court's solutions to these problems of integrating a judicial system containing state and federal courts, like its solutions to commerce clause and pre-emption problems, may thus be seen to represent a compromise – or rather, a constantly evolving series of compromises – between the demands of uniformity and diversity in the federal system. Similar compromises recur frequently in the Court's jurisprudence; they represent, it is clear, an important theme in the history of American legal integration.[163]

From a comparative perspective two further observations about the American experience seem especially noteworthy. First, the need for federal trial courts was limited only so long as the Federal Government remained limited

[156] Dombrowski v. Pfister, 380 U.S. 479 (1965).
[157] Mitchum v. Foster, 407 U.S. 225 (1972).
[158] 209 U.S. 123 (1908).
[159] 401 U.S. 37 (1971).
[160] *Id.* at 45. *See also* Gibson v. Berryhill, 411 U.S. 564 (1973).
[161] Allen v. McCurry, 449 U.S. 90 (1980).
[162] Stone v. Powell, 428 U.S. 465 (1976).
[163] *See supra* § IV.A.2.b.

in the number and types of activities it regulated. With an increasing federal role in the regulation of a developing national economy, and with the creation of new federal rights enforceable as against the states, came a concomitant need for increased access to a federal forum, to ensure uniform application and enforcement of federal laws and privileges. In the United States this need was principally met by expanding the jurisdiction and remedial powers of the federal trial courts. Because this solution was available, the problem of federal rights being unequally available to citizens of different states as a result of differences among state procedures has been correspondingly reduced, as has been the need for the federal courts to strictly scrutinize the fairness of these procedures.

Second, concepts of federalism and comity still animate much contemporary Supreme Court doctrine concerning the relations of federal and state courts even though the United States might seem to have been in many ways for many years a unitary state. Why should this be so? The answer, in part, is no doubt that the federal courts recognize the constitutional restraints on the federal competence: the great bulk of American law remains state law, administered by state courts, and the federal courts consciously and willingly refrain from interfering with it. But perhaps even more important is that the goal of the federal system is not to antagonize the state courts, but to guide them and to encourage them to apply federal law on their own. There is, perhaps, a close analogy here with the continuous effort of the Community Court, since *Van Gend en Loos*,[164] to get all the courts of the Member States involved in the process of enforcement of Community law. Although not limited to one Supreme Court, the federal judiciary is aware that its resources are limited, and that it could not single-handedly enforce the federal rights of all U.S. citizens. It has therefore seen fit to use its strong powers with sensitivity and flexibility, to promote remedial measures in state courts rather than to punish for past transgressions against federal rights – the result being that in time the states and their courts have generally conformed their laws and procedures to the requirements of federal law. The process will be, of course, a continuous one, and it remains a central role of the federal judiciary to ensure that federal rights are adequately enforced in all state courts.

C. Fundamental Rights

1. The Bill of Rights and Integration

Fundamental rights, we said, present two basic problems in a federal union. On the one hand, there is the problem of conflicts between federal law and state guarantees of fundamental rights. On the other, there is the question of whether federal guarantees shall be applied to state action. The first has been no problem in the United States because the supremacy clause of the Constitu-

[164] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1 [hereinafter cited as *Van Gend en Loos*].

tion states that federal law shall be supreme, "any thing in the *Constitution* or laws of any State to the contrary notwithstanding."[165] The question of the applicability of the federal Bill of Rights to state law has, on the contrary, been one of the Supreme Court's continuing concerns. It has been on this question, moreover that the Court has made perhaps its most profound contribution to legal integration in the United States, although a contribution made at a comparatively late date.

There are essentially two ways of viewing a federal Bill of Rights. One way sees the Bill of Rights as imposing limits only on the federal government – the government, that is, established by the Constitution of which the Bill of Rights forms a part. The other way sees the Constitution, and the Bill of Rights with it, forming the supreme law of the land and thus limiting state as well as federal governments.[166] The first ten amendments, adopted in 1791 and forming the original federal Bill of Rights in the United States, do not on the whole say which is the correct way for them to be viewed. With the exception of the first and seventh amendments, these amendments do not state that they are addressed only to the Federal Government.[167] To be sure, the supremacy clause does state that the Constitution (as well as federal law generally) enjoys supremacy as against the states. Nevertheless, in an early Marshall opinion the Supreme Court held that the Bill of Rights limited only the powers of the Federal Government.[168] Under this decision, the states were left free to protect or disregard such rights as they pleased, subject to such exceptions as the prohibitions of bills of attainder and ex post facto laws, which expressly applied to state governments as well as to the Federal Government.[169] Slavery is only the most obvious example in American history of unequal protection among the states, and it, of course, proved to be a problem of such magnitude that neither the courts nor Congress could resolve it.

It was not until the first part of the twentieth century that the Supreme Court even began to enforce the Bill of Rights actively against the Federal Government; and the limited enforcement of the Bill of Rights as against the states might have prevailed until today were it not for the adoption of the so-called "Civil War Amendments." These amendments specifically prohibit state infringement of certain individual rights, and the fourteenth amendment

[165] U.S. CONST. art. VI, cl. 2 (emphasis added).

[166] A third way, of course, is one that sees the Bill of Rights as imposing rights and obligations "toward the world," *i.e.*, not only toward the government but also toward private persons. This is what the Germans call "*Drittwirkung*" of the Bill of Rights. *See generally* J. MÖSSNER, STAATSRECHT 33 (Düsseldorf, Werner-Verlag, 1977); *see also* Schwabe, *Bundesverfassungsgericht und "Drittwirkung" der Grundrechte*, 100 AöR 442 (1975).

[167] The first amendment speaks to "Congress"; the seventh, to "any court of the United States."

[168] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[169] U.S. CONST. art. 1, § 10.

in particular couches these prohibitions in very vague and general terms. It speaks against deprivations of "life, liberty, or property, without due process of law" and against denials of "the equal protection of the laws."[170] Called upon to give meaning to these vague and elusive terms, the Supreme Court in the last one hundred-odd years has gradually interpreted them to embrace an ever-expanding core of the restrictions contained in the original Bill of Rights.[171] Its earlier decision assigning a relatively limited role to the Bill of Rights has thus been largely reversed in fact, if never explicitly overruled.

Several comments on the role of the American judiciary in extending uniform standards of fundamental rights seem to be pertinent. First, fundamental rights are not necessarily an area of the law in which the value of integration per se is at its highest.[172] We may all agree that the protection of human rights is a very important judicial function, but that rights deemed fundamental in one state should also be fundamental in all others is not self-evident unless we make the mistake of equating fundamentality with universality or are prepared to return to (largely discredited) natural law theories of the rights of man. Nevertheless, as Professors Frowein, Schulhofer and Shapiro have observed, "[e]xperience seems to show that the question of common values protected by the legal system cannot be avoided if... integration is to proceed towards the creation of a union to which all citizens feel a common allegiance."[173]

Before the Civil War and no doubt for a long time afterwards, the first allegiance of many Americans was to their state and only secondarily to the United States. Today, the situation is reversed: few Americans think of themselves as being "citizens" of any state. A person living in Texas (or elsewhere) may think of himself as being a Texan, but his citizenship is American, and he is likely to think that his fundamental rights are American, too.

Whether the jurisprudence of the Supreme Court has contributed significantly to this transformation of allegiances is difficult to assess. In some areas – for example, criminal procedure and freedom of expression[174] – its influence has been strongly felt, albeit only in this century. In the area of racial discrimination, the history of the Court's jurisprudence, from an integrational or any other point of view, is decidedly mixed. Its liberty-of-contract jurisprudence has long been repudiated,[175] and it may face a similar repudiation of its view

[170] U.S. CONST. amend. XIV, § 1.

[171] A catalogue of the rights made applicable to the states may be found in Duncan v. Louisiana, 391 U.S. 145 (1968) and, as of a more recent date, in Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1027 (1977). *See also* Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective*, *supra* this vol., Bk. 1, at § III.A.2.a.

[172] *See* Frowein, Schulhofer & Shapiro, *supra* note 2, at §§ I.A & V.

[173] *Id.* at § I.A.

[174] *Id.* at §§ II–III.

[175] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

that the right to have an abortion is a constitutional right.[176] Moreover, it is clear that the main acts of nation-building in the United States – the adoption of the Constitution, the Civil War and the adoption of the thirteenth, fourteenth and fifteenth amendments, the Civil Rights Acts of 1866 and 1964, the New Deal – were all *political* acts, and in the case of the Civil War and the New Deal, these acts effectively overruled existing constitutional jurisprudence.

This history suggests that while common values are important in a federal union, these values rarely if ever have a purely judicial source. Americans, like most other peoples, rarely see as fundamental those values that they do not generally hold, and those that they do hold will generally receive deference from the political branches. This is not to deny, however, that judicial action may be forcefully instrumental both in stimulating or restraining trends in the area of fundamental rights and in making certain rights effective.

The second point to note about the experience of the United States in this area is that most fundamental rights have remained especially difficult to define and enforce. One aspect of this difficulty has been addressed in our discussion of the way in which federal court procedures have evolved to accommodate the application of constitutional rights to the states.[177] Two other aspects of this problem deserve to be mentioned here. The first concerns the problem of giving specific content to such vague ideals as due process and equal protection. The second concerns the problem of fashioning remedies for violations of constitutional rights. Three areas of continuing difficulty will illustrate these problems.

2. Procedural Due Process and Incorporation[178]

The Supreme Court has always agreed that the due process clause requires some minimal procedural safeguards in connection with criminal prosecutions,[179] but the fourteenth amendment does not itself state what these safeguards should be. A large portion of the Bill of Rights contained in the first ten amendments is, however, devoted to specific questions of criminal procedure.[180] The Bill of Rights thus represents a convenient exegetical source for

[176] Although recent jurisprudence seems to indicate that such a challenge, if it comes, will have to come from Congress or via constitutional amendment, since the Court's support of its decision in *Roe v. Wade* continues. *See* Simopolous v. Virginia, 103 S. Ct. 2532 (1983); Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983).

[177] *See supra* § IV.B.2.

[178] For a fuller discussion of incorporation *see* Frowein, Schulhofer & Shapiro, *supra* note 2, at §§ II.B & III.B.

[179] However, in the early years the Court was reluctant to give an expansive interpretation to the due process clause. *Cf.* The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), which was the original source for the restrictive interpretation of amendment XIV.

[180] *See especially* amends. IV–VIII.

the interpretation of the fourteenth amendment's due process clause. Nevertheless, the Court has never held that the fourteenth amendment "incorporates" the Bill of Rights. Rather, its jurisprudence has oscillated between an incorporation approach and what has been called the "fundamental fairness" approach,[181] each of which in its extreme form suffers from basic defects. These are more fully addressed in another study of this Project.[182]

However, for present purposes it is worth noting that the fundamental fairness approach, which dominated the Court's early jurisprudence on the fourteenth amendment, resembles in many ways the non-interpretive model of judicial review, which appeals to "general principles" of justice and which has recently appeared in the jurisprudence of the European Court of Justice and certain other Continental courts.[183] The reasons for its eventual rejection in the United States are interesting for our comparative purposes. Under the fundamental fairness approach, whether due process had been denied in particular cases was said to depend on the "totality" of the circumstances. This approach had the virtue of not imposing on the due process clause specific rules of criminal procedure having no basis in the language or history of the clause. Its defect was that it failed to set standards of police and judicial conduct, or at least standards that could be easily applied beyond the circumstances of the particular case. As has been noted,[184] this ad hoc balancing approach led to considerable diversity in the rights afforded criminal defendants by the several states. It also gave the Supreme Court great latitude in determining the meaning of due process. The fundamental fairness approach thus had little value as a tool of standardization, or of integration.

As an intellectual exercise in constitutional construction, the total incorporation approach also had its own defects. Principal among these was the historical premise that the due process clause was intended to make the restrictions contained in the Bill of Rights applicable to the states. The evidence for this premise being at best inconclusive,[185] the total incorporation approach was itself subject to the same basic criticism as the fundamental fairness approach: its application assumed the power of the Supreme Court to interpret the Constitution to suit the Court's own inclinations. It had the virtue, however, of providing specific content to the due process compromise.

In the end, therefore, the Court settled on an approach lying somewhere between these two extremes. Under this compromise, those rights contained in the Bill of Rights that, in the Court's view, are fundamental are incorporated; those that are not are excluded. In effect, this approach has left the Court free to determine those rights that are fundamental, subject to a constitutional veto if the right does not appear in the text of the Bill of Rights. As a way of im-

[181] *See, e.g.*, Betts v. Brady, 316 U.S. 455 (1942).

[182] *See* Frowein, Schulhofer & Shapiro, *supra* note 2, at § III.B.

[183] *See supra* notes 48–55 and accompanying text.

[184] *See* Frowein, Schulhofer & Shapiro, *supra* note 2, at § III.B.2.

[185] *See generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 9 (1949).

pressing upon the states the minimum standards of conduct that are required by the Constitution, the use of the selective incorporation technique has proved much more effective than the more open-ended fundamental fairness analysis.[186]

Of course, incorporation per se has not always performed the function of guaranteeing that a higher federal standard – declared by the Court to be protective of a "fundamental right" – will be enforced by the states. In at least one case the doctrine may have led to a watering down of rights at the federal level, by pushing the Court to set a minimum standard that was, arguably, too low. In the case of the sixth amendment right to trial by jury, the Court was willing to hold that the federal right to a jury in criminal cases was indeed incorporated by the fourteenth amendment;[187] but later, it held that the federal right itself only mandated conviction by a unanimous jury of six (rather than the traditional twelve) in non-capital criminal cases.[188] Arguably, the implied federal guarantee of conviction by a unanimous jury of twelve, even in non-capital criminal cases, might have been easier to sustain had the federal right not also to apply automatically to the states via the fourteenth amendment. Reluctance to impose the greater burden on the states may have helped to dilute the content of the federal right. While this sobering phenomenon may, so far, be limited to this particular federal right (to a jury trial), it should be recognized that even selective incorporation – while arguably a tool to promote integration – has the theoretical potential to prevent the guaranteeing of a higher federal standard of rights, out of deference to the ideal of a unitary standard for rights. The danger is, obviously, one to be guarded against.

3. Substantive Due Process and the New Equal Protection

The use of open-ended standards has caused even greater difficulties when the Supreme Court has tried to give substantive content to the due process and equal protection clauses. A striking example is the period from 1897 to the mid-1930's, during which time the Supreme Court struck down numerous state economic regulations – for example, of conditions of the workplace – on the grounds that they violated vague notions of "liberty," the right to property, and freedom of contract guaranteed by the due process and equal protection clauses of the fourteenth amendment.[189] Of course, all laws presuppose inequalities and restrict the liberties of some persons; yet all laws obviously do not offend concepts of due process or equal protection. Since neither clause

[186] *See* Frowein, Schulhofer & Shapiro, *supra* note 2, at § III.B.

[187] Duncan v. Louisiana, 391 U.S. 145 (1968).

[188] Williams v. Florida, 399 U.S. 78 (1970).

[189] The most infamous of these cases was Lochner v. New York, 198 U.S. 45 (1905); in it the Court struck down a law setting a maximum 60 hour work week for bakers on the ground that it violated the employee's and employer's right to contract freely. The case gave its name both to the period – referred to as "the Lochner era" – and to an extreme form of judicial intervention in the legislative process, called "Lochnerizing." *See* G. GUNTHER, *supra* note 14, at 517–23.

offers on its face any clear help in distinguishing the constitutional law from the unconstitutional, in interpreting these clauses the judge is bound to risk becoming a one-man legislature, reweighing for himself the competing individual and social interests which earlier had balanced out in the course of the legislative process.

Largely out of deference to this process, the Supreme Court in its substantive due process and equal protection jurisprudence – particularly as applied to questions of state economic regulation – has come to avoid a too flexible "proportionality" principle which would usurp the function of the legislature by weighing competing social and individual interests affected by legislative choices. Rather, the Court avoids the direct implications of the problem by assigning a constant value to state interests – that of "rationality," since through this even-handed assumption the Court can avoid any appearance of second-guessing legislative choices[190] – while individual constitutional values come generally in two varieties: fundamental and marginal, although today's marginal value may be yesterday's fundamental one.[191] While a "rational" state law might normally withstand constitutional challenges based on a host of marginal individual values, claims based on fundamental values present a much stronger challenge and may be sufficient to overturn a state law that is not only *rational*, but made in furtherance of a state interest that the court regards as "substantial." This system of weights and measures permits the court to deflect attention away from the suspect and slippery process of balancing individual and state interests to the traditional task of parsing the Constitution for those values that are fundamental, although even this task is not without its risk when the justices stray into the penumbras in search of shadowy values. It has the further virtue of limiting the scope of the Court's substantive review to discrete and generally easily identified areas, of which racial discrimination is the most obvious.

4. The Problem of Remedies

If the courts are institutionally ill-equipped to play a legislature's role, they are even more ill-suited to the executive role often required in fashioning and en-

[190] *See, e.g.*, the statement in United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938):

> [W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.... But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be known affords support for it.

[191] *Compare* Lochner v. New York, 198 U.S. 45 (1905), *with* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

forcing remedies to constitutional violations.[192] The principle of racial equality, for example, is easy to state, but difficult to apply, and in the United States the problem of adopting a suitable remedy for racial discrimination has remained a continuing problem ever since the principle was finally embraced in *Brown v. Board of Education.*

This is not to say that the American courts lack strong remedial powers. For certain kinds of constitutional litigation, their powers can be very effective. They can enjoin state officials from engaging in illegal acts and call upon federal marshalls to enforce their injunctions. Through the contempt power, they can even send recalcitrant officials to jail. These remedies were not wholly ineffective in at least opening the school door to black children.

The courts have been much less successful, however, in unraveling more subtle patterns of segregation where, for example, long-standing government policies with respect to public housing and school districting patterns have resulted in segregated schools. While many remedies against this kind of de facto segregation, including court-ordered busing and the establishment of magnet schools, have been tried, few of these remedies have been unequivocal successes.

As many writers have pointed out, the limited success of the judiciary in structuring remedies for this type of reform-oriented civil rights litigation may be traced again to the institutional limitations of the judiciary and the nature of the judicial process. Over the centuries, the adversary system used in the United States has proved relatively effective at settling disputes between private parties where the issues were easily identified and the remedies easily quantified. Reform-oriented civil rights litigation differs from this traditional litigation in numerous respects. Some of the more salient differences can be listed as follows:

(1) The party structure is not rigidly bilateral but sprawling and amorphous;

(2) The fact inquiry is not historical and adjudicative but predictive and legislative;

(3) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees;

(4) The remedy is not imposed but negotiated;

(5) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the judge;

(6) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.[193]

(7) To which we should add that, the enforcement of "new" individual rights requires – rather than a harnessing of state power, as was formerly true

[192] On the "weaknesses" of judicial law-making, but also on the limits of such weaknesses, *see Law-Making, supra* note 30, esp. at 46–51.

[193] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

– some affirmative action on the part of the state, perhaps even the creation of new state machinery to put individual rights guarantees into practice.[194]

Because of these differences, reform-oriented civil rights litigation often requires significant modifications of traditional judicial procedure. Since many people will be affected by the outcome of the litigation, the process must in some way allow for representation of their interests. Since the remedy is intended to affect future behavior (even more than to compensate for past injuries) the factual inquiry at this stage of the trial must be legislative and predictive. Nothing in the traditional trial procedure, certainly not the rules of evidence, is designed to predict the future. Lastly, the need for ongoing oversight in administering relief in the civil rights litigation calls for resources in time and administrative talent that are not always available from the judiciary.

In the United States, the courts have fashioned an array of techniques to at least partially accommodate these requirements of civil rights litigation. Rules governing standing and the right to intervene steadily expanded[195] the circle of potential parties to litigation through the early 1970's as did rules permitting class representation;[196] however, since that time the Supreme Court has been less willing to expand these rules, and may even have narrowed them somewhat.[197] Other aspects, however, remain intact. For example, during trial, judges in the United States may engage special masters and experts to help evaluate evidence, and they may call upon *amici* and public officials to develop aspects of the case not fully developed by the parties. Lastly, the courts have attempted to solve the remedial problems by relying in part upon the parties to reach a consensus on an appropriate remedy and in part on special experts, panels and advisory panels to act as mediators in the negotiations among the parties and to oversee the implementation of the relief. In short, despite the apparent retreat from an earlier trend toward ever more liberal rules conferring standing to sue, the courts have continued to search for and to provide creative solutions to the particular problems posed by litigation conducted in the public interest rather than for the sole interest of private parties.

[194] *See generally* Cappelletti & Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, 2 C.J.Q. 111 (1983).

[195] Chayes, *supra* note 193, at 1290–91.

[196] FED. R. CIV. P. 23, *reprinted in* 39 F.R.D. 94–95 (1966).

[197] Even though "the pressure to expand the circle of potential plaintiffs [was] inexorable," in the early 1970's the Supreme Court could only be said to be "struggling manfully, but with questionable success" to establish an acceptable standard for defining who may sue, particularly in the context of public interest litigation. *See* Chayes, *supra* note 193, at 1291. Early trends toward liberality have since been replaced by a more cautious approach. *Compare* Sierra Club v. Morton, 405 U.S. 727 (1972), *with* Babbitt v. United Farm Workers, 442 U.S. 289 (1979).

D. Conclusion

As this discussion has suggested, the role of the courts in the integration of the United States has not been insignificant. Two themes or aspects of this role seem especially noteworthy. The first is the theme of federalism, which is principally concerned with the apportionment of power between the federal and state governments. Dominating this theme is the tension between uniformity and diversity, between centralization and decentralization, with the former emerging most strongly in the Supreme Court's establishment of judicial review in support of the Constitution's supremacy clause; in its early broad reading of the necessary and proper and commerce clauses – making possible the later expansion of federal power thus sanctioned, but not exercised; and in the expansion of federal constitutional rights enforceable against the states. At the same time, the Court's sensitivity to the interests of decentralization and diversity appears at many points in its jurisprudence, for instance, in the development of the doctrine of concurrent powers, in its restrained interpretations of the "negative" commerce clause and the meaning of pre-emption, and in its treatment of the effects of state procedural rights on federal law.

A second theme is principally concerned with the means of enforcement of federal rights in the states, a problem which has had both procedural and substantive implications. On the procedural side, it has required the expansion of the powers and jurisdiction of the federal courts. At the same time, it has required the cooperation of the states and their courts and the evolution of doctrines, such as the abstention doctrine, which have been designed to enlist this cooperation.

If there is any one overriding impression that should be left about American federalism and the courts it is that, in many areas, the same issues which divided Federalists and Republicans two centuries ago – particularly as relate to the role of lower federal courts – are still being debated today. Few questions, indeed, are capable of easy definition or solution, as should be apparent from the discussion above. However, the continuing debate over the proper relation between the federal and state governments that emerges in the courts should not be viewed as a sign that the American federal system is in danger of collapsing; rather, it indicates that the system has retained a remarkable degree of flexibility that makes possible continued adjustments to the federal mechanism without threatening the existence of the federal structure itself.

V. Transnationalism, the Courts, and Integration in Europe – In Light of the American Experience

European legal integration in our time begins in a serious way with the foundation of the European Community. The Community, of course, differs in many and profound aspects from the United States. Its Members are subjects of international law, have their own foreign policies and national currencies,

and are ultimately responsible for the defense of their citizens.[198] Its "legislative" institutions and processes are very different from the American ones. Its most important policy-making institution, the Council, is more an intergovernmental body – a diplomatic round-table – than a true transnational institution.[199] Although in theory it can act on many issues by qualified or simple majority vote, in practice its decisions usually are adopted unanimously and consequently often reflect the lowest common denominator among the positions of the Member States.[200] The Community further has no strong executive branch, and lacks entirely an independent system of lower courts. Its policies and rules for the most part depend on Member State authorities for their enforcement.[201] The European Community is thus a much looser organization of states than the United States. In many ways, indeed, it resembles the organization of the original thirteen American states under the Articles of Confederation.[202] But, in two most important ways it differs from that short-lived con-

[198] By contrast, the U.S. Congress was initially established largely to facilitate the common defense of the 13 states during the American War of Independence. Thus, under the Articles of Confederation, Congress had no power to lay taxes or regulate commerce, while the states, on the other hand, were forbidden without congressional consent to send or receive ambassadors, to enter into agreements or treaties with foreign powers or among themselves, or to maintainn ships of war or troops (excepting a militia, which had to be provided) in time of peace. U.S. ARTS. OF CONFED. Art. VI. Neither could the states engage in war unless invaded or in immediate danger of Indian attack. *Id. See generally* A.H. KELLY & W.A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT ch. 4 (4th ed., New York, Norton, 1970).

[199] *See* Pescatore, *L'Exécutif communautaire: Justification du quadripartisme institué par les traités de Paris et de Rome*, [1978] C.D.E. 387, 395 n. 3; J. Weiler, *supra* note 6, at 36–38 (discussing the effect of the Luxembourg Accords).

[200] Prominent exceptions include the Management Committees. *See List of Council and Commission Committees*, BULL. EC, SUPP. 2/80; J. Weiler, *supra* note 6, at 41–42. It should be noted, however, that the Council formally relies on the Commission for draft legislation and that the Council can amend a Commission proposal only by unanimous vote (EEC Treaty art. 149), which in theory and perhaps in fact makes it easier to adopt than amend Commission proposals. *See, e.g.*, A. PARRY & J. DINNAGE, PARRY & HARDY: EEC LAW § 3–40 (2d ed., London, Sweet & Maxwell, 1981) [hereinafter PARRY & HARDY].

[201] The principal exception is of course Community competition law. *See* EEC Treaty arts. 87(d), 89.

[202] Probably most prominent of the frailties common to both the EC and the original 13 American states are fiscal constraints and executive weakness. The U.S. Congress under the Articles of Confederation lacked power to levy taxes and had to rely on state appropriations to fund the national debt incurred during the War of Independence (*see supra* notes 59 & 198). These appropriations were to be "supplied by the several states, in proportion to the value of all land within each state . . . estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint." Art. VIII. However, the requested revenues were frequently withheld by the states, and all attempts to amend the Articles to permit Congress to levy a direct duty on imported goods, thus assuring a reliable income, failed to receive the unanimity required for adoption of amendments. *See generally*

federation: it has one central court and it has the power to adopt rules having direct effect on the citizens of the Member States.[203] These two differences help explain in a significant way the Community's comparative success and the considerable progress it has made – as well as the great potential it retains – in the field of legal integration. The Court of Justice established by the Community has contributed greatly to European integration, and it has been able

McLaughlin, *The Articles of Confederation*, in ESSAYS, *supra* note 58, at 44, 57–59. The expenditures of the EC are theoretically funded by the Community's "own resources," but in fact an important part of the funds comes from the Member States, which have not been reluctant to protest real or perceived inequities in the allocation of Community receipts and disbursements or even to refuse to make full budgetary contributions. Community fiscal control is further weakened by the bizarre division of budgetary powers between the Council of Ministers and the European Parliament, with the Parliament seemingly intent to compensate for its weakness in other areas by trying to act vigorously on the Council's budget proposals. For details of recent disputes *see, e.g.*, Pipkorn, *Legal Implications of the Absence of the Community Budget at the Beginning of a Financial Year*, 18 C.M.L. REV. 141 (1981); Sopwith, *Legal Aspects of the Community Budget*, 17 C.M.L. REV. 315 (1980). For further comparison of the U.S. under the Articles of Confederation and the European Community, *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 § II.A.

[203] The Community also has considerable powers to regulate commerce, of which the U.S. Congress under the Articles of Confederation had none. Interestingly, the lack of this power made it extremely difficult for the U.S. to exercise such powers, particularly the treaty-making powers, as it had. *See* Stein, *supra* note 202, at § II.A.1. As one scholar has written, "[t]he failure to grant Congress complete power to regulate commerce rendered it difficult or impossible to make a commercial treaty with a foreign nation and to have assurance that the states would comply with its provisions." McLaughlin, *supra* note 202, at 54. A number of states breached even the treaty establishing peace with England at the end of the Revolution. Elkins & McKitrick, *The Founding Fathers*, 76 POL. SCI. Q. 181, 208–09 (1961). By contrast, the EC, which would seem to possess considerably more circumscribed treaty-making powers than did the American Congress under the Articles of Confederation, has managed through pre-emptive legislation and broad interpretations of its powers by the ECJ to establish credible treaty-making powers. For the expressly granted powers, *compare* U.S. ARTS. OF CONFED. Art. IX, *with* EEC Treaty arts. 113, 229–31 & 238. For the principal decisions of the ECJ expansively defining the Community's treaty-making powers, *see* Case 22/70, Commission v. Council, [1971] ECR 263 (Re the European Road Transport Agreement (ERTA)) [hereinafter cited as *ERTA*]; and the decisions discussed in Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 C.M.L. REV. 615 (1979). *See also* Wellenstein, *Twenty-Five Years of European Community External Relations*, 16 C.M.L. REV. 407 (1979).

Of course, having a court does not mean very much if its decisions are not obeyed. For some references to the record of disobedience in the U.S., *see* J. CHOPER, *supra* note 15, at 140–50.

to do so in large part because Community law operates directly on the citizens of the Member States.[204]

Perhaps not surprisingly, the areas in which the Court's contribution is most evident are frequently the same as those in which the U.S. Supreme Court has also made its greatest contributions to legal integration. However, while the issues may be similar in many respects, there are many differences as well, especially in the constitutional framework of the Community and in the institutional structure of its judicial branch. And, as will be shown, these differences have caused, and may be expected to continue to cause, significant differences also in the approach of the Court of Justice to many of the legal issues which are inherent in a federal or transnational system of government.

A. The "Constitutionalization" of the Treaties

1. Supremacy

There are perhaps no differences between the European Community and the United States more profound than the related facts that the Community was founded on the basis of international treaties, and that these treaties failed to declare clearly whether Community law would enjoy supremacy among the Member States. Thus a crucial initial task facing the Community's Court of Justice has been the "constitutionalization" of the Treaties, a process implying both the elevation of the Treaties to "higher law" status and their interpretation by techniques more appropriate to constitutions than to multipartite international agreements.[205]

Both aspects of this process have been prominent in the Court's elaboration of the doctrine of direct effect and its unflagging insistence, since its celebrated decision in 1964 in *Costa v. ENEL*,[206] that Community law, both primary and secondary, is preeminent vis-à-vis both prior and subsequent national (Member State) law (including even national constitutional law).[207] The doctrine of direct effect, first announced in 1963[208] and since much elaborated,

[204] Indeed, as one commentator writes, "Judicial review lies at the heart of the [Community] system." *See* Rasmussen, *The Court of Justice*, in COMM'N OF THE EC, THIRTY YEARS OF COMMUNITY LAW 151 (Luxembourg, Office for Official Pubs. of the EC, 1983); *see also* Waelbroeck, *Le rôle de la Cour de Justice dans la mise en œuvre du traité CEE*, 18 C.D.E. 347 (1982).

[205] *See* J. Weiler, *supra* note 6, at 8 n. 28: "'Constitutionalization' implies a combined and circular process by which the Treaties were interpreted by techniques associated with constitutional documents rather than multipartite treaties and in which the Treaties both as cause and effect assumed the 'higher law' attributes of a constitution."

[206] Case 6/64, [1964] ECR 585.

[207] *See, e.g.*, Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125.

[208] *See* Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

has come to mean that the provisions of the Treaties establishing the Communities, as well as secondary Community legislation, are capable of bestowing enforceable rights and obligations not just on the Member States, but also on their citizens.[209] The same is true for treaties concluded between the Community and third parties, which agreements automatically become part of the Community legal order, are superior both to conflicting secondary Community law and to national legislation, and are capable of creating individual, enforceable rights which courts of the Member States must protect.[210] The enforcement of Community law thus does not wholly depend on the cooperation of the Governments of the Member States. Citizens with Community-created rights can themselves directly enforce those rights in judicial proceedings, but, it should be noted, in proceedings brought in their own national courts. For, as noted above, unlike the United States the Community has no system of lower courts with "original" jurisdiction to hear cases raising issues of Community law.[211] The effectiveness of the Court of Justice in enforcing its vision of Community supremacy, and of Community law generally, must largely depend, therefore, on the cooperation of national courts.

[209] Following *Van Gend en Loos* (which held that, subject to certain conditions, provisions of the EEC Treaty bestowed enforceable rights and obligations as between individuals and Member States), the jurisprudence has branched out in many directions. *See, e.g.*, Case 127/73, Belgische Radio en Televisie v. SV SABAM & NV Fonior, [1974] ECR 51 (holding that EEC Treaty arts. 85 & 86 may create rights and duties as among private parties, *i.e.*, that they may have "horizontal" direct effect); Case 9/70, Grad v. Finanzamt Traunstein, [1970] ECR 825 (holding that even directives may create rights and duties as between private parties and the Governments of the Member States, *i.e.*, that they may have "vertical" direct effect). *See generally* D. Wyatt & A. Dashwood, The Substantive Law of the EEC ch. 3 (London, Sweet & Maxwell, 1979). As for whether directives may have "horizontal" effect, *see* Easson, *Can Directives Impose Obligations on Individuals?*, 4 Eur. L. Rev. 67 (1979); Timmermans, *Directives: Their Effect Within National Legal Systems*, 16 C.M.L. Rev. 553 (1979). For remaining differences between the effect of regulations and directives, *see id.* at 553–54; Winter, *Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law*, 9 C.M.L. Rev. 425 (1972). *See also* Stein, *supra* note 202, at § III.A.3.b.iii.*a*.

[210] *See* Joined Cases 21 to 24/72, International Fruit Co. NV v. Produktschap voor Groenten en Fruit, [1972] ECR 1219, 1227; *see also* Case 181/73, Haegeman v. Belgium, [1974] ECR 449, 459–60; Case 48/74, Charmasson v. Minister for Economic Affairs and Finance, [1974] ECR 1383; Case 87/75, Bresciani v. Amministrazione delle Finanze, [1976] ECR 129. National legislation may still be applicable, of course, where not inconsistent with a treaty between the EEC and a third party. *See* Case 270/80, Polydor Ltd. and RSO Records Inc. v. Harlequin Record Shops Ltd. and Simons Records Ltd., [1982] ECR 329 (concerning the direct applicability of a treaty between the EEC and Portugal in a suit between a British copyright holder and a British record importer).

[211] Of course, the Court of Justice itself has "original," indeed exclusive, jurisdiction in certain cases arising under the Treaties. *See, e.g.*, EEC Treaty arts. 169, 170, 173, 175, 178–83.

2. Acceptance of the Supremacy Doctrine

a) The Case of France

Not surprisingly, direct effect and supremacy present very difficult questions for national courts, threatening as they do the traditional supremacy of national parliaments and cherished concepts of national sovereignty. Nowhere, understandably, has the delicacy of these issues been more evident than in France where they have had quite different receptions from different courts. On the one hand the *Conseil d'Etat* has refused to submit subsequent French legislation to the control of previously enacted Community law,[212] while on the other hand the *Cour de Cassation* in the case of *Administration des Douanes v. Société Cafés Jacques Vabre*[213] has upheld Community supremacy in declining to give application to French legislation in conflict with the Community Treaties. One theory argued in both cases (and apparently accepted by the *Conseil d'Etat*) was that judicial non-application of subsequent French legislation because of its conflict with international treaty law (in particular, with the Treaties establishing the European Community) would be tantamount to judicial review of the constitutionality of legislation. It would in fact – so the argument went – involve the review of a possible parliamentary violation of article 55 of the French Constitution, which establishes that "the treaties or [international] accords regularly ratified or approved have, from their publication, an authority superior to that of the laws, upon reservation, for each accord or treaty, of its application by the other party."[214]

To be sure, this specter of *gouvernement des juges* was averted by the *Cour de Cassation*, which, while deciding that courts are indeed bound not to give application to French legislation if it is in conflict with international treaty law in general, and with Community law in particular, took care to proclaim, through its *Procureur Général*, that this is not a form of judicial review of the

[212] C.E. (France), Judgment of 1 Mar. 1968, Syndicat général des Fabricants de semoules de France, [1968] Rec. Leb. 149, [1970] C.M.L.R. 395. *See also* the position taken by the *Conseil* in the more recent *Cohn-Bendit* case, C.E. (France), Judgment of 22 Dec. 1978, [1978] Rec. Leb. 524, [1980] 1 C.M.L.R. 543, where it refused to follow ECJ precedents concerning the direct effect of directives (*see supra* note 209) and relying on the *"acte clair"* doctrine (*see infra* text accompanying notes 276–77) held that directives may not be invoked by the citizens of Member States against an individual administrative act. The position taken in the 1968 *Semoules* case was confirmed in C.E. (France), Judgment of 22 Oct. 1979, Union Démocratique du Travail, [1979] Rec. Leb. 383; and C.E. (France), Judgment of 22 Oct. 1979, Election des représentants à l'Assemblée des Communautés européennes, [1979] Rec. Leb. 385.

[213] Cass. ch. mixte (France), Judgment of 24 May 1975, [1975] D.S. Jur. 497, [1975] 2 C.M.L.R. 336. *See also* Cass. crim. (France), Decision of 5 Dec. 1978, Baroun Chérif, [1979] D.S. Jur. 50.

[214] "Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie." (English translation from COMPARATIVE CONST'L LAW, *supra* note 4, at 149.)

constitutionality of legislation; it is mere interpretation – the judge's typical function. It is, so the argument continued, the natural role of the judge to apply a law having a "higher authority," rather than a conflicting lower law; and Community law – or, more generally, international treaty law – is higher law, without being constitutional law.[215] It is enough to formulate such an argument, however, to see the plain, albeit so painstakingly denied, analogy to the *Marbury* doctrine. Chief Justice Marshall, too, no less than the French Court, tried to minimize – if not hide – judicial review by reducing it to terms of mere interpretation.[216]

Needless to say, the implications of this reasoning by the French Court of Cassation, were it to prevail, are extremely far-reaching.[217] To be sure, the holding is concerned with international treaty law, but this term, in the light of the authoritative submissions by the *Procureur Général*, certainly extends to Community law generally. This means that the Court's holding is not limited to "primary" Community law (the Treaties, including the very broad European Economic Community Treaty) but also includes that large and rapidly expanding body of "secondary" Community law, which is enacted by Community organs and which, by virtue of EEC Treaty article 189 and other Treaty provisions, is capable of having direct applicability and direct effect in all the Member States.[218]

[215] *See* COMPARATIVE CONST'L LAW, *supra* note 4, at 161–63, and the comments at 169.

[216] *Id.* at 169. In *Marbury*, Marshall stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity *expound and interpret* that rule. If two laws conflict with each other, the courts must decide on the operation of each .... This is of the very essence of judicial duty.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (emphasis added). The idea was already emphasized by Alexander Hamilton in THE FEDERALIST No. 78, at 467:

> The *interpretation* of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to *ascertain* its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred. ... (Emphasis added.)

[217] For other instances of French defiance suggesting that one should not be too hopeful, *see* Proposition de loi no. 917 portant rétablissement de la souveraineté de la République en matière d'énergie nucléaire, Assemblée Nationale, 2ème session extraordinaire de 1978–79; and Editorial Comments, *The Mutton and Lamb Story: Isolated Incident or the Beginning of a New Era?*, 17 C.M.L. REV. 311 (1980).

[218] For the sake of precision, it should be mentioned that direct effect is limited, naturally enough, to those Community provisions which impose clear, precise, and unconditioned obligations. *See, e.g.*, Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337, 1354 (submissions of Mayras, A.G.).

b) Acceptance in the Rest of the Community

The supremacy doctrine, despite the resistance of the French *Conseil d'Etat*, has been accepted by (at least) all of the other original Members: Germany, Italy and the Benelux countries.[219] And, it can have been no surprise to the four newer Member States of the Community – the United Kingdom, Ireland, Denmark and Greece – since the doctrine was already longstanding at the time of their accession.[220] Supremacy should prove to represent no serious problem for the latter three countries, in which, unlike in the United Kingdom, there is a tradition recognizing both a hierarchy of norms and the power of the Irish, Danish and Greek courts, or some of them, to control the conformity of lower to higher laws.[221] But the problem, not yet resolved by the decisions of the British highest courts, is very serious and hotly debated in the first of the four newer Members.[222] England's most basic constitutional principle – its "*Grund-*

[219] For a description of this development *see* E. STEIN, P. HAY, & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 214–42 (Indiana, Bobbs-Merrill, 1976) [hereinafter cited as EUROPEAN COMMUNITY LAW]. The landmark decisions of the gradual process of acceptance include: Cass. (Belgium), Minister for Economic Affairs v. S.A. Fromagerie Franco-Suisse "Le Ski," [1971] J.T. 471, No. 4750, [1972] C.M.L.R. 330; BVerfG (W. Germany), Judgment of 9 June 1971, 31 BVerfGE 145 (the "Lütticke" case); C.C. (Italy), Judgment No. 183 of 27 Dec. 1973, Frontini v. Ministero delle Finanze, 97 FORO IT. I, 314 (1974), [1974] 2 C.M.L.R. 372. The Italian Court, while accepting the supremacy of Community law, also made the observation that the powers of the EC are limited in law by its own founding Treaty; and that it is in this form that Italy, by virtue of article 11 of its Constitution, has acceded to it and consequently limited its national sovereignty. Hence, should an act of the Community pretend to threaten the fundamental principles of the Italian constitutional order, or the inalienable rights of man, then the Constitutional Court would retain jurisdiction to review the question of Italy's accession to the Community. As for Germany, *see infra* text at notes 296–98.

[220] *See* the discussion in EUROPEAN COMMUNITY LAW, *supra* note 219, at 96–102, 242–61.

[221] *See* JUDICIAL REVIEW, *supra* note 4, at 49, 59. On the acceptance of judicial review of the constitutionality of legislation in Ireland and Greece, *see* J.M. Kelly, Grafting Judicial Review onto a System Founded on Parliamentary Supremacy: The Irish Experience, Document I.U.E. 174/78 (Florence, EUI, Human Rights Colloquium, June 14–17, 1978); J.M. KELLY, *supra* note 35; Perifanaki Rotolo, *La Corte Suprema nella Costituzione greca del 1975*, 29 RIV. T. DIR. PUBB. 183 (1979). On the constitutional position of Ireland, Denmark and Greece vis-à-vis Community law, *see* Lang, *Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty*, 9 C.M.L. REV. 167 (1972); Due & Gulmann, *Constitutional Implications of Denmark's Accession*, 9 C.M.L. REV. 256 (1972); Evrigenis, *Legal and Constitutional Implications of Greek Accession to the European Communities*, 17 C.M.L. REV. 157 (1980).

[222] Past statements in dicta of the Court of Appeal have reflected an uncomfortable oscillation between opposing points of view on the question of supremacy. Lord Denning was interpreted by some as intimating that the rule of parliamentary su-

norm"[223] – has long been the unlimited supremacy of Parliament, the corollary of which is the most rigid refusal of any judicial power to control Parliamentary legislation. To be sure, the European Communities Act 1972,[224] which marked the United Kingdom's accession to the European Community, affirms that country's willingness to accept the principle of the direct applicability of Community law (section 2(1)) and, more generally, to make its own

premacy, like any other legal rule, could be overturned by a court in Blackburn v. A.G., [1971] 2 All ER 1380; but several years later he was caught saying that "once a Bill is passed by Parliament and becomes a Statute, that will dispose of all this discussion about the Treaty. These courts will then have to abide by the Statute without regard to the Treaty at all." Felixstowe Dock and Ry. Co. v. British Transport Docks Board, [1976] 2 C.M.L.R. 655, 664. He has subsequently been more circumspect, saying in Macarthy's Ltd. v. Smith, [1979] 3 All ER 325, that a court would be able to rule against the supremacy of a prior Community act vis-à-vis a subsequently enacted Act of Parliament only if the latter were enacted with the *specific intention* of overriding the Community rule.

Under this guise then, the British courts currently give supremacy to Community law: not solely on the basis of the law articulated by the Court of Justice, but on the grounds that the European Communities Act of 1972 *requires* that Community law be *supreme* – or at least, that the Act requires that subsequent British law be *interpreted* so as to give supremacy to Community law. Lord Denning suggested in *Macarthy's*, above, that the duty to interpret subsequent Acts of Parliament in line with Community law may be extreme, and indeed a recent case brought before the House of Lords has confirmed the acceptance of this view. In Garland v. British Rail Engineering, [1982] 2 All ER 402, Lord Diplock has stated, again in dicta, that the duty to interpret subsequent Acts of Parliament so as to recognize Community law supremacy – no matter how farfetched the interpretation – may be so strong that only an Act of Parliament that contains an "express positive statement" saying that parliament *intended* to legislate in breach of a treaty obligation could override an act of the Community.

The conceptual difficulty presented by maintaining the unqualified notion of Parliamentary supremacy while accepting the rule of Community law has produced much discussion. In addition to the discussion in COMPARATIVE CONST'L LAW, *supra* note 4, at 132–45, *see, e.g.*, Wintertorn, *The British Grundnorm: Parliamentary Supremacy Re-Examined*, 92 L.Q.R. 591 (1976); Warner, *The Relationship Between European Community Law and the Laws of Member States*, 93 L.Q.R. 349, 364–66 (1977); Mitchell, *Sed Quis Custodiet Ipsos Custodes?*, 11 C.M.L. REV. 375 (1974); Welsh, *European Economic Community Law Versus United Kingdom Law: A Doctrinal Dilemma*, 53 TEX L. REV. 1032 (1975); Trindade, *Parliamentary Sovereignty and the Primacy of European Community Law*, 35 MOD. L. REV. 375 (1972); Jaconelli, *Constitutional Review and Section 2(4) of the European Communities Act 1972*, 28 INT'L & COMP. L.Q. 65 (1979); and among the most recent discussions, *see* L. COLLINS, EUROPEAN COMMUNITY LAW IN THE U.K. 25–26 (London, Butterworths, 1980); J. USHER, EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE IRREVERSIBLE TRANSFER? (London, Allen & Unwin, 1981); and J. Weiler, *supra* note 6, at 18.

[223] *See* Wintertorn, *supra* note 222.

[224] European Communities Act 1972, c. 68.

the jurisprudence of the European Court of Justice (which, of course, includes the supremacy doctrine) (section 3). Also, the Act seems to make some verbal effort to bind even future English legislators to comply with Community law (section 2(4)). Yet, if the British *Grundnorm* is not abandoned, no present Parliament will be able to restrict the will of any future Parliament – which is manifestly a principle incompatible with the central idea of federalism and transnationalism, *i.e.*, the inability of state law to supersede validly-enacted federal or transnational law. The final result of this "great debate" in the United Kingdom will depend, we suppose, not so much on legal as on political developments.[225] If, on the one hand, the United Kingdom eventually accepts the supremacy doctrine, by that very fact a novel form of judicial review will have been adopted by a nation which, even more rigorously than France, has purported to reject all forms of judicial review of legislation since, at least, its "Glorious Revolution" of 1688. On the other hand, a refusal of that country to confirm the supremacy doctrine would jeopardize the country's very participation in the Community.

The acceptance of Community supremacy is, of course, an essential step in the process of legal integration. To the extent, however, that acceptance is based on the law of international treaties, unfortunate implications may follow. Most serious is the possibility that changes in municipal doctrine regarding the effect of international treaties could unilaterally reopen the question of Community supremacy. Of course, one can observe that withdrawal is similarly available to the Member that finds Community supremacy distasteful,[226] but that avenue at least will thenceforth deny the benefits of membership to the seceding nation.

B. Powers

This is not the place to compare and contrast the legislative powers conferred by the Treaties of the European Community on the institutions of the Community with those possessed by the American Congress, although, of course, the extent of such powers must ultimately determine the breadth of possible legal integration. Suffice it to say that the powers granted to the Community to establish a common market are not on their face less expansive than the American commerce clause. However, it is also true that the powers granted to the Community to establish a common market reflect their free-trade ideology more clearly perhaps than the commerce clause, and in this regard they present special problems not found in the American experience. Among the most difficult problems is that the programmatic nature of the Community's pow-

[225] On the various aspects of the "decline," in recent years, of parliamentary supremacy in the U.K. *see, e.g.*, Koopmans, *supra* note 14, at 319–22.

[226] *But see* Akehurst, *Withdrawal from International Organisations*, 32 C.L.P. 143 (1979).

ers may at times imply restrictions on the type of action that *the Community itself*, as well as the Member States, may take in regulating commerce.[227]

This potential for conflict between Community institutions and the programmed integrationist goals set out in the Treaties may place greater burdens on the Court of Justice to defend the ideals of the Community than have ever been placed on the U.S. Supreme Court, which though faced with political opposition at times throughout its history has rarely had to worry about attacks on the federal union emanating from institutions of the Federal Government itself. And, too, the European Court faces conceptual difficulties unknown in the American experience simply due to the sui generis nature of the Treaties, which are neither wholly treaties nor wholly constitution.[228] A result may be that the jurisprudence of the European Court in this area of powers – questions of implied powers, of pre-emption, and of consent – has, paradoxically, taken on a much more rigid federalist cast than has been known in the U.S. experience. But at the same time this seeming rigidity may mask a great sense of pragmatism, as the Court of Justice endeavors to find compromises that will support the spirit of the Treaties despite the best efforts of Member States, and of the organs of the Community themselves, to ignore that spirit.

1. Implied Powers

As noted above, the U.S. Supreme Court early on read the "necessary and proper" clause of the Constitution very broadly, giving birth to the so-called "implied powers" doctrine. In the U.S., of course, the doctrine acts to determine the kinds and scope of action Congress may properly undertake in the course of exercising its fairly lengthy list of enumerated powers.[229] A key difference between the U.S. experience and that of the EC in this instance is that treaties, unlike constitutions, are generally concerned more with problems than with powers. While treaties may create international institutions to solve specific problems, and grant limited powers to these institutions, such powers are not infrequently inadequate to solve the problems addressed. In these instances, rarely are the purposes of the organization then allowed to define and expand the powers granted to it by the treaty. A carefully drafted treaty will, therefore, contain procedures for expanding, if necessary, institutional powers to address unforeseen problems.

In the case of the EC, the programmatic nature of the Treaties has provided a basis for the development of an implied powers doctrine. Of course, the steps

[227] *See especially* EEC Treaty art. 3. *Cf.* the comment of Professor Waelbroeck that

> It is not likely that the Court would go as far as the U.S. Supreme Court in the *Prudential* case and recognize the Council's unlimited power to regulate intra-Community trade, which would result in the Council being able to discriminate against interstate commerce and in favour of local trade.

Waelbroeck, *supra* note 91, at 550.

[228] Many have tried to place the Community in relation to established forms of government. For a recent review of this literature, *see* J. Weiler, *supra* note 6, at 3–11.

[229] *See supra* § IV.A.2.

toward it have not been taken without some reluctance. In an early case the European Court read the Treaties very narrowly, for example, denying that ECSC Treaty article 70, paragraph 3, which requires that the "scales, rates, and all other tariff rules of every kind applied to the carriage of coal and steel within each Member State and between Member States shall be published or brought to the knowledge of the High Authority," endowed the High Authority with executive power to require trucking tariffs to be published or otherwise communicated to it.[230] But in the *ERTA* case the Court read article 210 of the EEC Treaty, which provides that "the Community shall have legal personality," to mean that the Community enjoys treaty-making powers equal in substantive scope to its internal legislative powers despite the fact that specific provisions of the Treaty had given the Community only limited treaty-making powers.[231]

To be sure, these seeming inconsistencies may be yet another reflection of the political, rather than legal, difficulties encountered by the Court of Justice in its attempt to elaborate an implied powers doctrine. For implied powers tend to be powers that are necessary for the execution of legitimate policies,[232] with a strong implied powers doctrine ensuring both legislative and executive flexibility. But in the Community, weakness in the execution of overall policy goals is, more than anything, a constitutional problem. For the most part, the Community does not execute its own policies; the Member States do.[233]

Thus in the Community the question of implied powers does not arise so often in the American sense – where a challenge is made to an act of the central government, on the grounds that it has gone beyond what is "necessary and proper" to execute one of its enumerated powers – but rather in the opposite sense, to restrain inter-governmental actions by Member States, on the grounds that an implied Community power exists over the matter in question.[234] In these cases, the defense frequently made by the Member States is that multinational action is required because the decision to be taken lies outside the competence of the Community institutions.[235] By asserting a broad implied powers doctrine, the Court is able to strike against this rationale for ignoring Community processes.

Not surprisingly given this context, those powers which the Court has implied have usually been held also to be exclusive, rather than concurrent, there-

[230] Case 20/59, Italy v. High Authority, [1960] ECR 325.

[231] Case 22/70, *ERTA*, [1971] ECR 263.

[232] In light of the activities undertaken by federal governments today, it cannot but seem quaint that one of the most controversial questions in early American constitutional law, and the question presented in the *McCulloch* case, was whether Congress had the power to establish a national bank.

[233] However, there is nothing in the Treaties that would prohibit creation of an executive branch by the Community.

[234] *See generally* J. Weiler, Supranational Law and the Supranational System: Legal Structure and Political Process in the European Community 334–45 (Florence, EUI, 1982) (unpublished thesis in the library of the EUI).

[235] *Id.* at 336.

by pre-empting entirely the Member State's action which gave rise to the issue in the first place. The implied powers doctrine, when coupled with pre-emption in this manner, is used out of necessity to defend the Community's institutions against other competing procedures for implementing transnational policy. Indeed, the breadth of the Court's implied powers doctrine is thus less a function of institutional strength than of institutional weakness.

2. Pre-Emption

Again in the case of the pre-emption doctrine, the programmatic nature of the Treaties presents a different framework for legal problems than the U.S. Constitution, although differences between the two doctrines may not be so profound as some have perceived.

The picture often presented is that in the U.S. federal system most powers are concurrent powers, and that federal power will pre-empt state power only in specific cases where Congress has made its intent to pre-empt be known. On the other hand, pre-emption in the European sense is said to involve a much more drastic line-drawing activity, with central competences clearly isolated from those retained by the Member States, and with Member State activities in the forbidden areas clearly and entirely pre-empted. This view might seem to be supported, as for the U.S., by one of the fundamental characteristics of American federalism: the interstitial nature of federal law even in areas of federal competence,[236] which leads to the necessary presumption that the constitutional enumeration of powers belonging to the Federal Government does not in general prevent the states from legislating in the same areas concurrently,[237] so long as they do not use these powers in contravention of some other specific federal law or policy. As for the Community, the argument is that the Treaties differ from a pure constitutional document, *inter alia*, in that they contain programmatic commands for "common" policies and harmonization.[238] These commands seem naturally to call into question the presumption in favor of concurrent powers. For, might not one say that, where common policies are a constitutional goal, local policies are *ipso facto* unconstitutional?

This view, however, is misleading, to some extent at least, on two important accounts. First, in the United States many key powers exercised by the Federal Government are not at all concurrent, but exclusive: for example, the postal power, the treaty-making power, or the power to coin money. Pre-emption cases arise most often in the United States in fields such as the vague overlapping area lying between the federal power to regulate interstate commerce and the states' powers to regulate their intrastate economies.[239] So the concept of *exclusivity* in the exercise of federal power is not necessarily alien to the United States system. Second, the kinds of powers wielded by the European

[236] *See generally* Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).
[237] *See supra* § IV.A.2.b.
[238] *See, e.g.*, EEC Treaty arts. 1–3.
[239] *See supra* § IV.A.2.b.i.

Community – directed to the vague end of promoting a common commercial policy and the creation of a unified common market – are, due to their general nature, not of a type that easily permit them to be entirely exclusive. The dogmatic approach of the European Court to many questions related to the common policy of the Community may be seen as a necessary propaganda device, given that responsibility for execution of the common policies still remains with the Member States. But at the same time, in many questions of pre-emption, the Court's elaboration of an alternative, "pragmatic" approach may be seen both as evidence of a willingness to be flexible when addressing serious Community problems – while all the while remaining philosophically dedicated to the federalist spirit of the Treaties – and perhaps as some indication that the rigid division of competences between Community and Member States cannot always be, and perhaps need not be, quite so neatly drawn.[240]

In effect, the Court's "pragmatic" approach to pre-emption problems bears great resemblance to the pre-emption analysis practiced by the U.S. Supreme Court. In both cases, the role of the respective Court is in effect to compare two legal norms and to see if they are indeed incompatible. In the U.S. this statutory analysis is framed in terms of a consideration of whether Congress intended a regulatory area to be pre-empted by a federal statute; in the Community practice, the question is posed in terms of whether the exercise of a certain power by a Member State will be contrary to the rules of the Community.[241]

[240] *See, e.g.*, Opinion 1/78, given pursuant to Art. 228(1) EEC (International Agreement on Natural Rubber), [1979] ECR 2871. The complex international régime for regulating markets in rubber to be set up by the agreement was, while found to be clearly within the exclusive commercial treaty power of the EC, also held to be within the competence of the Member State Governments since they were required, as individual states, to fund a key component of the commodity system thus created.

The distinction between dogmatic ("conceptualist-federalist") and "pragmatic" approaches to pre-emption in the Community is developed by Waelbroeck, *supra* note 91. Waelbroeck's distinction is, however, not absolute. Even though he cites the *Galli* case as "the clearest and most extreme expression of the conceptualist-federalist theory," he recalls that, even in that case, the ECJ expressed its sensitivity to the national concern at issue (the control of domestic inflation) by making the (somewhat gratuitous) observation that the terms of an EC price system applied only to the production and wholesale stages, leaving Member States free to take appropriate measures to regulate prices at retail and consumption stages, as long as "they do not jeopardize the aims or functioning of the common market in question." Waelbroeck, *supra* note 91, at 558–60, citing Case 31/74, Galli, [1975] ECR 47, 64–65. And indeed in subsequent cases the Court has managed to avoid the tougher language of *Galli* and has permitted Member States to set prices unilaterally, but still only as long as these actions do not offend Community policy objectives. *See especially* Case 65/75, Tasca, [1976] ECR 291 (like *Galli*, a reference made in the context of a criminal prosecution for violation of national price control legislation); and Joined Cases 88 to 90/75, Società SADAM v. Comitato Interministeriale dei Prezzi, [1976] ECR 323. *See also infra* note 245.

[241] *See* Waelbroeck, *supra* note 91, at 551.

As we have said, both the programmatic nature of the Treaties and the institutional weakness of the Community have led to the articulation of a pre-emption doctrine by the European Court that has at times been wholly unpragmatic and rigidly doctrinaire, what Michel Waelbroeck has called the "conceptualist-federalist" model of pre-emption adjudication.[242] Especially in early cases, the Court of Justice limited itself to defining the extent of the EC competence and, if such competence was found, to declaring that competence to be exclusive.[243] This brand of pre-emption was not a method of balancing transnational and national interests, aimed at deciding whether Community interests were so overriding as to require the sacrifice of Member State interests in a given area; rather, it was more properly a weapon, frequently defensive, for restricting Member State powers, or for preventing inter-governmental policy-making in areas lying within the Community's competence. While understandable in view of the nature of the Treaties and continuing encroachments by the Governments of the Member States, this approach has obvious dangers, especially given the fact that the Community's political processes result in many of its policies reflecting the lowest common denominator of positions among the Member States; the greatest danger would be that a Member State might be forced to adopt such minimum standards even in areas in which higher standards would be meritorious and desirable.[244] Subsequent articulation by the Court of the less dogmatic and formalistic, more "pragmatic" approach, referred to above, is certainly more consistent with the constitutionalization of the Treaties; and although it may be less immediately integrationist in effect, it might nevertheless in the long term promote greater institutional cooperation between the two levels of government, and thereby create closer ties between the Community and its Member States.[245] This form of cooperation has, in-

[242] *Id.*

[243] *See, e.g.*, Case 22/70, *ERTA*, [1971] ECR 263, 274 in which the Court declared

> [E]ach time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the powers to adopt legislative provisions in the field.

See also Waelbroeck, *supra* note 91, at 555–57; J. Weiler, *supra* note 6, at 20–23.

[244] This eventuality was avoided in Case 50/76, Amsterdam Bulb BV v. Produktschap voor Siergewassen, [1977] ECR 137 (a Dutch regulation on flower bulbs for export – much more detailed than a similar EC regulation of the same general subject matter – was allowed to stand, since it did not contravene the *minimum* standards of the EC regulation, but simply went beyond them to regulate the export of bulbs not covered by the EC regulation). In this case the special relevance of the flower bulb industry to the Netherlands gave that country a more particular interest in its detailed regulation than existed for the EC as a whole.

[245] The case of "mixed agreements" – treaties to which both the EC and its Member States, as individual States, are signatory parties – is one where action by both authorities within their particular areas of competence is generally *required* to realize a larger policy objective. *See supra* note 240. Another type of cooperation condoned by the Court has been in the area of price controls, where the common

deed, proved to be one of the strengths and hallmarks of American federalism.[246]

The European Court has also, however, indicated that in certain areas its pragmatism may only be transitional in nature, and that in future cases Community powers may yet be held to occupy a field entirely;[247] the result being that, despite its willingness to craft a more flexible pre-emption doctrine, the Court remains just as willing, if necessary, to defend Community competences via rigid doctrine, particularly in the face of repeated challenges to the common market attributable both to the ineffectiveness of EC institutions and the lamentable, but continuing, recalcitrance of its Member States.

3. Consent

As in the case of pre-emption doctrine, it is easy to overemphasize the differences in stands taken by the U.S. Supreme Court and the European Court of Justice on the question of consent to Member State laws or regulations that would otherwise be in violation of general constitutional or Treaty principles. Still, there are key variances. As will be recalled, the U.S. Supreme Court has generally approved the notion that Congress may consent to state laws which by themselves would violate the commerce clause, as long as Congress does not at the same time exceed the limits placed on its own powers by the Constitution.[248] While the availability of a consent device is clearly conceived in the EEC Treaty itself, the adjudicative responsibility of the Court of Justice to defend the goals of the Community does not permit of such a plainly tolerant view.[249] The Court of Justice has, in general, undertaken a fairly thorough examination of questions involving alleged Community consent to national legis-

organization of a particular market – and concomitant regulation by the EC of wholesale and production stages of the market in a particular commodity – will not preclude Member States from regulating prices at retail and consumption stages, as long as they do not jeopardize the aims or functioning of the market in question. *See* Joined Cases 95 and 96/79, Procureur du Roi v. Kefer and Demelle, [1980] ECR 103.

[246] *See* Elazar & Greilsammer, *The Federal Democracy: The USA and Europe Compared – A Political Science Perspective, supra* this vol., Bk. 1, at § III.B.2.c.

[247] This was the holding in Joined Cases 3, 4, and 6/76, Kramer, [1976] ECR 1279, in which, in the absence of a Community fisheries policy during the transitional period, the Court declared that prior international commitments by Member States relating to fishing quotas would be enforceable. Member States would still, however, be bound by their Community obligations to promote development of a common fisheries policy.

[248] *See supra* text accompanying notes 101–04.

[249] *See, e.g.*, Case 41/76, Donckerwolcke v. Procureur de la République, [1976] ECR 1921, dealing with certain permissible derogations from the common commercial policy, as provided for in EEC Treaty art. 115. These derogations are permissible only with the authorization of the Commission, and even then they "must be strictly interpreted and applied." *Id.* at 1937.

lation that would otherwise violate the Treaties,[250] approving such measures only when they have not been taken unilaterally and, even if clearly enacted with the consent of the EC, then only as long as they promote the goals of the Treaties.[251] The Court may be especially wary of political compromises made in the Council, disguised as instances of "consent" but otherwise clearly anti-Communitarian; and may, therefore, be just as concerned with the motives of the consenting party, or even more so, as with the subsequent actions of the Member State which has received the consent.

But in some instances the Court has chosen to adopt a more flexible attitude on the question of consent, in many ways a "pragmatic" approach similar to that of the pre-emption area. In these cases the Court may be wrestling with the oft-competing concerns of, on the one hand, defending the exclusivity of the Community competence in a given regulatory area, and on the other, permitting Member States enough leeway to legislate on necessary matters when for some reason the Community has not enacted specific legislation that may be required to meet pressing national (or EC) concerns.[252] The problem may be especially acute when, for some reason, despite the existence of both an exclusive Community competence and a drastic need for legislative action, the Community "legislator" (the Council) is itself unable or unwilling to adopt appropriate measures. In such a case the Court has held that Member States – while forbidden to enact new measures on the matter in question – might yet "amend" existing measures if necessary, but only after consultation with and approval by the Commission.[253] Thus again in the area of consent we see the approach of a pragmatic Court, bound both to promote the common market and to unfreeze institutional logjams – in this case, the inaction of the Council – by permitting alternative means of policy-making, while always remaining within the Community framework.

[250] *See* Stein & Sandalow, *On the Two Systems: An Overview*, in 1 COURTS AND FREE MARKETS, *supra* note 80, at 3, 31.

[251] *See, e.g.*, Joined Cases 80 and 81/77, Commissionnaires Réunis v. Receveur des Douanes, [1978] ECR 927 (invalidating parts of a regulation which had authorized the imposition of import duties on Italian wine by France).

[252] This was generally the case throughout the entire stormy period leading to formulation of a common fisheries policy. *See supra* note 247, and *infra* note 253.

[253] Case 804/79, Commission v. United Kingdom, [1981] ECR 1045 (the U.K. fisheries case). The decision of the Court to allow Member States to enact such national legislation, subject to the approval of the Commission, emerged as a major contribution to the final enactment of a Community fisheries policy, a need left unmet since the expiry of the transitional period on 31 Dec. 1978. Such national measures, thus sanctioned by the ECJ, were in fact enacted in late 1982 and early 1983 – with the provisional approval of a very cautious Commission – and formed part of the set of diverse political pressures on the sole dissenting Government (Denmark) that brought an end to the crisis in January 1983 with the unanimous agreement in the Council on a Common Fisheries Policy (CFP). *See* Editorial Comments, *De libertate maris communitatis*, 20 C.M.L. REV. 7 (1983).

4. A Comparative Conclusion

From this brief discussion of the question of powers in the Community it should be apparent that in this area the Court of Justice finds itself in a very different position from that of the U.S. Supreme Court. For, although both institutions are devoted to the defense of a system of government outlined in a central document – on the one hand, the EC Treaties and on the other the U.S. Constitution – the European Court must also deal with problems rarely experienced by the Supreme Court in its long history. First, the European Court has a duty to actively promote and encourage the *program* of the Treaties – the establishment of a common market – and to protect vigilantly that program. Second, the European Court has had to fend off attacks on the common program emanating not only from very powerful nation states, but also from institutions of the Community itself.

It is this duty to defend the Treaties – and the repeated need of the Court to do so – that has, perhaps, led to the formation of somewhat more rigid judicial doctrines in this area than have been known in the American experience. Still, the Court has also demonstrated a remarkable pragmatism and an ability to promote the aim of the common market when other Community institutions have failed to do so. It is perhaps this continued role of the Court both as a champion of a strong Community and as an increasingly pragmatic voice for its continued development, that has already made the Court a major force for integration, and laid the groundwork for more such developments.[254]

C. Judicial Procedures

Despite the many difficulties of constitutionalizing the Community Treaties, it is clear that the Court of Justice has already made profound substantive contributions to European legal integration: in declaring the supremacy of Community law, in conferring Community legal rights on the individual, and more generally in defining, in a more or less expansive manner, Community legislative powers. We now turn our attention to whether the Community has developed the procedures to make Community law, supreme in principle, uniformly applicable and available throughout the Member States. In addressing this question we will see reappear many of the issues that have arisen in the

[254] The development of these two seemingly contradictory positions in both the areas of consent and pre-emption would appear to be a functional acknowledgement of what Ralf Dahrendorf, in the Third Jean Monnet Lecture (Florence, EUI, 26 Nov. 1979), referred to approvingly as a vision of *"Europe à la carte."* A flexible use of consent, and pre-emption, in fact, may allow diversities among Member States which would otherwise be impermissible. In the view of Dahrendorf, a rigidly pro-European stance by Community institutions will tend to obstruct European integration rather than promote it; while a flexible orientation will tend to lead, more often than not, to a common policy in the end. *See* R. DAHRENDORF, A THIRD EUROPE? 19–20 (Florence, EUI, 1979).

United States from the tensions between competing federal and state court systems. Most important of these issues is, again, the access-to-justice question: to what extent does the Community possess the judicial powers to make Community rights accessible throughout the Member States?

1. The Judicial System in the Community

As the *Cafés Jacques Vabre* case discussed above illustrates,[255] the supremacy doctrine, coupled with the doctrine of direct effect, brings about a Community system of judicial review. All the many thousands of national judges in the now ten Member States are entitled, and indeed obliged, to control the conformity of national legislation to Community law and to deny application to the former whenever it is found violative of the "higher" Community law applicable in the case at hand.[256] This transnational review system, in which Commu-

[255] *See supra* § V.A.2.a.

[256] *See* Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (No. 2), [1978] ECR 629. There the ECJ ruled that in the case of a conflict between Community law and subsequent national law the national courts must apply Community law without waiting for any national procedure to determine the inapplicability of national law.

The Italian Constitutional Court had previously ruled that in conflicts of this type the Italian judge was bound to refer the question of inapplicability of national law to the Constitutional Court for decision. *See* C.C. (Italy) Dec. No. 232 of 30 Oct. 1975, 98 Foro It. II, 2661 (1975). This decision was based on a reluctance to relinquish a particular view of supremacy that has its roots deep in the constitutional law traditions of the Continental legal systems. The view of the Court was that Italy was bound, under art. 11 of the Constitution, to uphold its Community agreements, which themselves constitute "higher" law. If a subsequent Italian law should be enacted in violation of a Community obligation, then such a law would, by definition, also violate article 11 of the Constitution; and thus only the Constitutional Court – in exercise of its jurisdictional monopoly – would have the power to put things right, by annulling the offending Italian law. Such a view was contrary to the ECJ's view of Community supremacy, which, simply stated, holds that Community law is both supreme and operates directly in the Member States, and therefore no national law – prior or subsequent – may be applied or relied on against it. Every judge in the Community, being bound always to apply Community law, must consequently refuse to apply conflicting national provisions (even if this act of refusal does not have the force of *annulling* the conflicting law).

The struggle to rid Italian law of this derelict view was a long one; a partial victory was had in 1977, when the Constitutional Court held that every Italian judge was empowered to ignore conflicting national law passed *prior to* a contrary Community provision. *See* C.C. (Italy), Dec. No. 163 of 29 Dec. 1977, 101 Foro It. I, 1 (1978). But finally, in its Decision No. 170 of 8 June 1984, 109 Foro It. I, 2062 (1984), the Italian Constitutional Court openly reversed itself and declared that every Italian judge is bound to apply Community law, and to ignore conflicting national laws, whenever the latter were passed, and without the need to refer the question to the Constitutional Court. For a commentary on the problem written while the debate was still raging in Italian legal circles – and arguing in favor of the position ultimately

nity law assumes a role analogous to federal law vis-à-vis state law in the United States, or to confederal law vis-à-vis cantonal law in Switzerland, is strengthened by the possibility and, in some cases, by the obligation of the national courts to turn to the European Court of Justice at Luxembourg for a binding ruling concerning the interpretation or validity of the relevant Community provisions.[257] And, not unlike a holding of the U.S. Supreme Court, such a ruling has precedential effect – thus representing a powerful instrument for the uniform interpretation of Community law throughout the ten Member States.[258] However, the judicial system established by the Treaties differs in a number of important respects from the judicial system in the United States. As a result of the fact that, unlike the U.S. Constitution, the Treaties did not explicitly authorize the establishment of "lower" courts, the Community has had to make do with a single high court, the Court of Justice, which in turn must depend on the cooperation and good will of the courts of the Member States for the enforcement of its judgments. The Treaties, again unlike the U.S. Constitution, did not confer on the Court of Justice a broad "judicial power." As a result it does not possess the kind of equitable powers to enjoin unlawful acts and to enforce its injunctions with contempt citations that in the United States are considered to form part of the judicial power. Its judgments are, as a rule, only declaratory.

The Court's jurisdiction is also more limited than the jurisdiction (as expanded by Congress) of the Supreme Court of the United States. It extends under articles 169 and 170 of the EEC Treaty to cases between Member States or the Commission and a Member State over a Member State's failure to fulfill an obligation under the Treaty.[259] Under article 173 the Court also has the power to review the legality of acts of the Council and the Commission in ac-

adopted by the Italian Constitutional Court – *see* Cappelletti, *La Corte Costituzionale nel sistema di governo italiano e nei rapporti con l'ordinamento comunitario*, 26 RIV. DIR. PROC. 613, 624–35 (1981).

[257] EEC Treaty art. 177; Euratom Treaty art. 150; ECSC Treaty art. 41. For a brief but penetrating analysis of the parallels between U.S. federalism and Community constitutional developments *see* Casper, *The Emerging Constitution of the European Community*, 24 L. SCH. REC. – U. CHI. 5 (1978).

[258] The prevailing doctrine is that the courts of all Member States are bound either to adopt the ECJ's interpretation of Community law or to resubmit the question to the Court for a new ruling. *Cf.* Joined Cases 28 to 30/62, Da Costa en Schaake NV v. Nederlandse Belastingadministratie, [1963] ECR 31. Whether the Court's preliminary rulings under art. 177 have an *erga omnes* effect is apparently a controversial question, although it is hard to understand why, given their clear precedential value. The arguments for and against such an effect are discussed in Trabucchi, *L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes*, 10 R.T.D.E. 56 (1974), and were strenuously contested by the parties in Case 106/77, *Simmenthal*, [1978] ECR 629. The Court, however, declined to discuss the issue.

[259] Articles 169 and 170 are limited to actions alleging a failure to fulfill an obligation under the Treaty.

tions brought by a Member State, the Council or the Commission.[260] Other persons, including private individuals, may also bring direct actions before the Court under article 173, but only to challenge Community decisions directed to that person or regulations or decisions directed to others which are "of direct and individual concern" to such persons.

To be sure, it is easy to overstate the limitations of the Court's "original" jurisdiction.[261] To begin with, in some ways the procedural rules of the Court of Justice compensate for some of its lack of jurisdictional and enforcement power.[262] And the U.S. Supreme Court, too, possesses a very limited original jurisdiction. But the more important points of contrast between the two systems are, in addition, of course, to the absence in the Community of a system of trial courts with general "Community question" jurisdiction, the differences in the "appellate" jurisdictions of the Court of Justice and the Supreme Court. Unlike the Supreme Court, the Court of Justice has no appellate jurisdiction per se. Rather, under article 177 of the EEC Treaty, it has jurisdiction to give "preliminary rulings" on questions of interpretation and validity of

[260] For this purpose, the ECJ has jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.

[261] *See* Rasmussen, *Why Is Article 173 Interpreted Against Private Plaintiffs?*, 5 EUR. L. REV. 112 (1980), which indicates that these limitations may be related more to questions of judicial policy than to normative restrictions in the Treaty. *See also* Stein & Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 AJIL 219 (1976); *infra* note 288.

[262] One way is via rules permitting intervention of third parties. Under the Statute of the Court of Justice of the ECSC, private parties have a virtually unlimited right to intervene in cases before the Court in which they have a demonstrable interest, although in their intervention they may only make arguments that they would be entitled to make if they were original parties in the case. ECSC Statute of the Court of Justice art. 34. Under the Euratom and EEC Statutes, private parties may not intervene in cases between Member States, between Member States and Institutions, or between Institutions. They may, however, intervene in all other cases if they have a *demonstrable interest* in the proceeding. EEC Statute of the Court of Justice art. 37; Euratom Statute art. 38. This same standard applies to intervention by some states which are *not* Member States of the EC, as a recent ruling of the Court has indicated that such states may nevertheless be considered to be "persons" within the meaning of art. 37 of the EEC Statute of the Court. *See* Joined Cases 91 & 200/82, *Chris International Foods*, [1983] ECR 417, discussed in Plender, *Intervening in Cases Before the European Court: A New Avenue for Commonwealth Governments*, 9 COMMONWEALTH L. BULL. 1059 (1983). Institutions and Member States are *presumed* to have an interest in all matters before the Court, and may intervene at will.

In other ways, too, the Court may compensate for its weaknesses, such as through use of its broad powers to gather relevant evidence from the parties, and even from Member States and institutions not party to proceedings before it. EEC Statute of the Court of Justice art. 21. In case of witness default, the Court may impose fines but, of course, still must rely on national courts to enforce this sanction or to bring criminal proceedings. *Id.* arts. 24, 27.

Community law that are referred to it by any court or tribunal of a Member State.[263] Since the Community, like the United States, has adopted a system of decentralized control of legislative validity,[264] the effectiveness of the article 177 procedure is of vital importance to the ability of the Court of Justice to insure the uniform application of Community law throughout the Member States, and the differences between the two systems of review may be expected to set different limitations on the scope of the judicial role in promoting integration in the United States and the Community.

2. Decentralized Community Review and the "Preliminary Ruling" Procedure

Under the Community system of decentralized control every judge (from the lowest *juge conciliateur* to the highest constitutional court) in each of the ten Member States is given the power to question the Community validity of national laws; in fact, every national judge is therefore a Community judge as well. Since, however, the judges of one national legal system are not bound to follow precedents from other national legal systems, it is clear that the potential for national divergence and contradiction in interpretation is immense. The same is, of course, true in the United States. However, if we add to this the fact that several of the ten Member States also have two or more separate court systems, each with a superior (in practice supreme) court at its head,[265] we see that there is a great possibility of conflict even within a single national system. And if finally we remember that eight of the systems are Civil Law systems, with no formal doctrine of stare decisis, then it would seem that such a decentralized system of control is doomed to chaos and, ultimately, to failure.

In theory, article 177 addresses these primary problems of decentralized control through the "preliminary ruling" procedure. Under article 177, any court or tribunal of a Member State which considers that judgment in the case before it depends upon a question of interpretation or validity of Community law may refer the question to the Court of Justice for a preliminary ruling, and when a question of Community law is raised in a court or tribunal "against whose decisions there is no judicial remedy under national law" it must be referred to the Court.[266] Through this system, "Community review," although generally decentralized, is nevertheless subject to a centralized control which in theory corrects the shortcomings of the decentralized system. More importantly in light of the American experience, the Court of Justice, according to

[263] These rulings may concern the interpretation of the Treaty, the validity and interpretation of acts of institutions of the Community or the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

[264] *See supra* note 256 and accompanying text.

[265] *E.g.*, as in France and Italy, where there is both a Court of Cassation and Council of State; or in Germany, where there are five such courts (*Bundesgerichtshof, Bundesverwaltungsgericht, Bundesarbeitsgericht, Bundesfinanzhof, Bundessozialgericht*), each of which is supreme within its own jurisdiction.

[266] EEC Treaty art. 177 para. 3.

the Treaties, is the final authoritative interpreter of Communtiy law,[267] and according to the Court's own jurisprudence, its decisions (as part of "Community law") not only have precedential value within the Member States, but are also superior in effect to any national law – including the decisions of national courts.[268] Any interpretation given by the Court in any case is in theory therefore a persuasive, indeed a binding, authority on any national court. It is this central position of authority which allows the measure of success enjoyed by this system of decentralized judicial control.

3. Limitations of Article 177

The supremacy of the Court of Justice in the interpretation of Community law would thus seem to be assured. In practice, however, much more than in the United States, the Community system of review requires the cooperation and good will of the courts of the Member States. The need for this cooperation arises from two limitations of the Community system: the Community litigants' lack of standing to bring appeals from national judicial decisions to the Court of Justice, and the Court's lack of coercive powers to enforce its judgments.

a) Standing to Appeal

In theory, article 177 resolves the standing problem by *requiring* national courts of last instance to refer questions of Community law to the Court of Justice. Since the litigant is presumably free to pursue his case until it reaches a court of last instance, it should effectively be within his power to control whether issues of Community law are brought before the Court. In practice, however – and apart from the financial difficulty for many litigants to press their case until it reaches a court of last instance[269] – this power can be easily frustrated by an uncooperative national court.

[267] Such is clearly implied by the requirement that national courts from which there is no appeal are required to make referrals for preliminary rulings.

[268] *See* Joined Cases 28 to 30/62, *Da Costa*, [1963] ECR 31; *see also supra* note 258.

[269] It should be noted, however, that parties in proceedings before the ECJ may apply for legal aid if they are otherwise unable, in whole or in part, to meet the cost of prosecuting their claims before the ECJ. *See* Rules of Procedure of the Court of Justice, art. 76. Such aid may also be available according to the laws of the Member State. *See generally* L. Brown & F. Jacobs, The Court of Justice of the European Communities 229–31 (London, Sweet & Maxwell, 1983). Diversity among the national legal systems in the area of legal aid may, nevertheless, impede the effectiveness of the art. 177 procedure, for at least two reasons. First, some national legal systems offer poor legal aid services, meaning that many meritorious claims containing questions of Community law may never be brought before the court of first instance – and, therefore, never referred to the ECJ. (On the inadequacy of, and variances among national legal aid programs, *see generally* Cappelletti & Garth, *supra* note 7.) And second, even if a party has the resources to bring a case in the first instance, he may not have the resources to pursue a national appeal or a reference to Luxembourg. And, unless the possibility of receiving aid from the ECJ were assured, the

Several ambiguities in article 177 contribute to this potential frustration. There is, to begin with, a very real problem in defining "court or tribunal," particularly in light of the numerous official, semi-official, and private bodies that, in the different national legal systems, may be charged with administering rules or making decisions that may involve questions of Community law. In this case, the Court has taken a fairly flexible view of the term "court or tribunal," and has chosen to focus on several objective factors – the composition of the body, its function, the degree of state involvement or control, and the availability of alternative channels for enforcing Community rights – in deciding whether the body has standing to request a preliminary ruling.[270] Such flexibili-

party might wish to avoid making a Community law claim. Of course, if such a claim is before the national court, the discretion to refer lies with the national judge; but it seems also possible that a national judge might make his reference contingent on the granting of legal aid by the ECJ, if the parties before him would be unable to bear the financial burden of going to Luxembourg. It has been suggested that a national judge in this position should inform the ECJ that, if legal aid is not granted to the party in need, he will withdraw his request for a ruling; and that this would be a legitimate factor in the decision of the ECJ whether to grant legal aid. *See* Lang, *A Referral to Luxembourg: Legal Aid*, 75 LAW SOCIETY'S GAZETTE 37 (1978).

[270] *See* Case 246/80, Broekmeulen v. Huisarts Registratie Commissie, [1981] ECR 2311; Case 61/65, Vaasen v. Beambtenfonds voor het Mijnbedrijf, [1966] ECR 261. Whether a particular body is to be considered a "court or tribunal" under art. 177 is a question of Community law; indeed, in *Broekmeulen*, the Netherlands Government noted that the Dutch Appeals Committee for General Medicine would not have the standing of a "court or tribunal" under domestic law, but nevertheless supported the standing of the plaintiff in this case.

A more complex issue remains the position of arbitral tribunals, which of course may just as easily be called upon to apply Community law to the cases brought before them. The ECJ has recognized that certain characteristics of arbitral tribunals militate in support of their being considered "tribunals" for purposes of art. 177 references; but has found against their claimed standing, on the general grounds that the missing element is the further requirement of art. 177 that they constitute courts or tribunals *of a Member State*. Absent a legal obligation to bring a particular dispute to arbitration, and absent the participation of *state authorities* in either the decision to arbitrate, or in the arbitration process itself, the Court has found that arbitration tribunals do not have standing to refer. *See* Case 102/81, Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG *et al.*, [1982] ECR 1095; *see also* Tizzano, *Arbitrato e competenza pregiudiziale della corte comunitaria*, 23 RASS. ARB. 153 (1983). The ECJ has, however, indicated that arbitral tribunals must apply Community law; and it has placed on the Member States the duty of insuring that, in arbitral proceedings, provisions are made for the proper interpretation and enforcement of Community law, if necessary by having a national court make a reference to Luxembourg. Case 102/81, *Nordsee*, [1982] ECR 1095, 1111.

That arbitrators should be bound to apply "higher law" – in this case Community law – even to the degree of not applying conflicting national law perhaps does not appear as a problematic concept, given the repeated insistence of the ECJ that "Community law must be observed in its entirety throughout the territory of all the

ty has proved essential, given the extreme diversity in bureaucracies and administrative systems existing in the modern welfare states.

Second, there is the problem of defining those courts against whose decisions there is no judicial remedy. Are references to the Court of Justice mandatory only for those highest courts in the national judicial system whose decisions are always final, or is it mandatory for lower courts as well when the judgment in the case is in fact unappealable? Article 177 does not answer this question, although the use of the plural "*decisions*" may be taken to imply that the more limited "abstract" approach was intended. Adherence to this approach would mean, however, that in those countries where the highest court's jurisdiction is limited or discretionary, the litigant may rarely have a chance to have his Community rights decided by the Court of Justice.[271]

In such countries as France, Italy and the Netherlands, this problem of definition is of little consequence, since in principle appeals to the highest courts on points of law are always possible. In England, however, appeals to the highest courts my be seriously limited or subject, as in the case of the House of Lords, to the court's discretion. As a result, the English Court of Appeal may in fact be the court of last instance in most cases. Yet in the *English Champagne Case* Lord Denning suggested in *dicta* that only the House of Lords was required to make referrals to the Court of Justice and that consequently the Court of Appeal's discretion was unlimited.[272]

The second obstacle to a litigant's obtaining a ruling from the Court of Justice arises in part from the language of EEC article 177, and in part from the Court of Justice's own jurisprudence. Article 177, which is the basis of the Court's preliminary ruling jurisdiction, limits such jurisdiction to cases raising "questions" of "interpretation" and "validity." The Court, in stressing the

Member States; parties to a contract are not, therefore, free to create exceptions to it." *Id.* But from the point of view of the national legal orders, such a claim may recall past, analogous problems of whether arbitrators are or should be bound not to apply national laws that conflict with national constitutional provisions. Such problems are rendered even more complex in a national legal system that insists both that only the national constitutional court has the competence to rule on the constitutionality of laws, and yet which also denies arbitral tribunals the right to refer questions to the constitutional court for rulings on constitutionality (still the case of Italy). A traditional view – based on a limited concept of constitutional law "supremacy" that had as its model the Austrian constitutional system of 1920 – was that, in this case, the arbitrator was bound to apply the subsequent national law even as against the conflicting constitutional provision. But an alternative view – equivalent to the result espoused in *Nordsee* by the ECJ – was that the arbitrator, having no power to refer the constitutional question to the national constitutional court, was nevertheless *bound to apply the higher law by himself. See* M. CAPPELLETTI, LA PREGIUDIZIALITÀ COSTITUZIONALE NEL PROCESSO CIVILE 71–80 (Milan, Giuffrè, 1972).

[271] *See generally* H.G. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 350–97 (3d. ed., Deventer, Kluwer, 1983).

[272] H.P. Bulmer Ltd. v. J. Bollinger S.A., [1974] 1 Ch. 401 (C.A.). For further discussion of the position in the various Member States, *see* H.G. SCHERMERS, *supra* note 271, at 366–67.

precedential effect of its decisions, has held that even national courts of last instance, which by the terms of article 177 are required to refer questions of Community law to the Court, need not do so if the issue to be addressed has already been decided in a prior decision of the Court.[273] Article 177 and the Court's jurisprudence suggest, therefore, that dubiousness is a jurisdictional criterion – that is, there must be some doubt as to the proper interpretation of the Community law in question before a referral is required.[274]

The introduction of this concept into Community law, particularly when application of the law requires the cooperation of different legal systems, has its obvious dangers. These dangers have emerged, for example, in the application by some national courts of the "*acte clair*" doctrine, which in French law determines when a question of law must be referred by the civil to the administrative courts.[275] Under that doctrine, referral is required only if the issue raises "*une difficulté réelle... de nature à faire naître un doute dans un esprit éclairé.*"[276] The doctrine is clearly capable of abuse, and, in fact, has been relied upon by the French *Conseil d'Etat* in refusing to refer questions of Community law to the Court of Justice in situations where other national courts, faced with similar issues, have been less self-assured.[277]

b) Remedial Measures

Once the Court of Justice has been able to assert jurisdiction over a question of Community law, it may face further difficulties in enforcing its judgments.

[273] Joined Cases 28 to 30/62, *Da Costa*, [1963] ECR 31. In a recent case the ECJ affirmed its holding in *Da Costa*, but also held that a national court must refer a question of Community law "unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt." The Court went on to say that the "existence of such a possibility must be assessed in light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community." Case 283/81, Srl CILFIT *et al.* v. Ministry of Health, [1982] ECR 3415.

In the UK, the House of Lords has been even more liberal, in finding room for "reasonable doubt" where there was not "so considerable and consistent a line of case law of the European Court... as would make the answer too obvious...." *See Garland*, [1982] 2 All ER 402, 415; and J. USHER, EUROPEAN COURT PRACTICE 49–50 (London, Sweet & Maxwell, 1983).

[274] As to the requirement of "dubiousness," *see* C. MANN, THE FUNCTION OF JUDICIAL DECISION ON EUROPEAN ECONOMIC INTEGRATION 386–94 (The Hague, Nijhoff, 1972).

[275] *See id.* at 387 and n.338.

[276] The reference is to 1 M.L.J. LAFERRIÈRE, TRAITÉ DE LA JURIDICTION ADMINISTRATIVE 498 (1896).

[277] The most egregious instance being the *Cohn-Bendit* case, *see supra* note 212. The German *Bundesfinanzhof* followed this reasoning, citing *Cohn-Bendit*, in a similarly regrettable holding. *See* Judgment of 16 July 1981, reported in 16 EuR 442 (1981) and [1982] 1 C.M.L.R. 527 (English translation).

As already noted, unlike its American counterpart, the Court can effectively neither enjoin official noncompliance with its judgments nor impose sanctions on recalcitrant officials. Its powers rather are declaratory,[278] especially those under article 177, and at any rate their effectiveness depends to no small degree on the goodwill and cooperation of the Governments of the Member States and on the national courts, whose remedial tools may be very much more powerful than its own.[279]

This weakness of the Court's remedial powers has had several consequences. One has been a disproportionate emphasis on the Court's article 177 jurisdiction at the expense of its other jurisdictional bases, due *inter alia* to the fact that the article 177 proceeding enables the Court to enlist the aid of the national courts, and their broader remedial powers, in the enforcement of its judgments.

A second consequence has been to increase the Court's sensitivity to the lim-

[278] *See* especially EEC Treaty arts. 171 and 174 with respect to the effect of judgments in arts. 169–70 and 173 proceedings, respectively. *See also* H.G. SCHERMERS, *supra* note 271, at 246; PARRY & HARDY, *supra* note 200, at 118.

Under EEC Treaty art. 185, however, the Court may order the suspension of the contested act pending resolution of the main case (an order which would appear to resemble the American preliminary injunction), and under art. 186, it may similarly prescribe "any necessary interim measures." *See also infra* note 279.

The full potential of arts. 185 and 186 in preliminary proceedings may not yet have been realized. The ECJ has generally required that parties requesting interim suspension of the act contested in the main proceeding show: the *urgency* of their request (Case 61/76R, Geist v. Commission, [1976] ECR 2075); a strong *prima facie* case (Case 23/74R, Küster v. Parliament, [1974] ECR 331); that to deny the interim relief would result in irreparable damage or great expense (Case 3/75R, Johnson & Firth Brown v. Commission, [1975] ECR 1); and, lastly, that granting of interim relief will not damage *other* parties (*id.*). This set of requirements has proved a difficult burden to meet, and as a result few requests for interim relief have been successful; successful claims have been made most often in *competition* cases. *See* Gray, *Interim Measure of Protection in the European Court*, 4 EUR. L. REV. 80 (1979). But the Court has nevertheless repeatedly asserted its *right* to take interim measures, even if it then chooses not to take advantage of this prerogative. This was true in Case 61/77R, Commission v. Ireland, [1977] ECR 937, where the Court affirmed its power to suspend Irish fishing regulations pending resolution of a legal challenge to them, but deferred such action on the grounds that to do so would, in the absence of replacement regulations, only worsen the situation. Later, however, the Court ordered the suspension of the regulations within 5 days, during which time Ireland was to consult with the Commission to set up acceptable interim rules. *Id.* at 1411, 1415. Thus, while the Court has been willing to affirm the existence of its interim power to suspend challenged acts, it has also registered a preference for deferring, when possible, to the Commission for a decision. *See* PARRY & HARDY, *supra* note 200, at 114.

[279] *Cf.* EEC Treaty arts. 187 & 192, which provide that enforcement of certain judgments of the ECJ shall be governed by the rules of procedure of the Member State where the judgment is carried out. Enforcement shall be undertaken by the competent national authority. *See* H.G. SCHERMERS, *supra* note 271, at 449–51; PARRY & HARDY, *supra* note 200, at 118.

its of the judicial power and the importance of persuasion in judicial discourse. Unlike the American Supreme Court, the Court of Justice has almost no powers that are not ultimately derived from its own institutional prestige and the intellectual and moral force of its opinions. As a result, more than most other continental European courts, which despite stronger remedial powers have had much more limited law-making powers, the Court of Justice has had to develop a judicial style which explains as well as declares the law.

Related to this, the Court, more than other Civilian courts, the effects of whose decisions have always been limited by the absence of the principle of stare decisis, has had to be especially sensitive to the precedential effects of its decisions and to the large gap between this declaratory power and the Court's actual remedial powers.[280] There is perhaps no better example of principle tempered by remedy than the *Defrenne* case.[281] This type of judicial com-

[280] One consequence of which may be its cautious use of its art. 185 and 186 powers, and reliance on the Commission for assistance in meeting requests for relief made under these articles. *See supra* note 278. For a discussion of the principle of stare decisis as it applies in Community law, *see* Koopmans, *Stare Decisis in European Law*, in ESSAYS IN EUROPEAN LAW AND INTEGRATION 11 (D. O'Keeffe & H. Schermers eds., Deventer, Kluwer, 1982).

[281] Case 43/75, *Defrenne* v. *Sabena*, [1976] ECR 455 (the second *Defrenne* case). While affirming that the principle of equal pay for equal work for men and women (EEC Treaty art. 119) had been violated in this case, the Court nevertheless recognized that retroactive application of the judgment to all potential claims of persons injured by past violations of the article would create impossible burdens for both public and private institutions; and therefore, the direct effect of art. 119 was held to commence from the date of this judgment, except for those workers who had already made similar claims.

The Court's assertion and application of a power to limit the retroactive effect of its judgments is not novel in and of itself – other courts, such as the U.S. Supreme Court, have long claimed similar powers and used them with great creativity (*see infra* note 282). But what is perhaps surprising is that such a position would be taken by a Court whose teleological interpretive formulas in general have stressed that the "general spirit of the Treaties" must be enforced no matter how inconvenient the consequences. The truth is that while the Court has repeatedly claimed for itself the power to rule on the retrospective effect of its judgments, it has just as repeatedly stressed that, in general, the retroactive effect of a clarification of a point of Community law – going back to "the time of ... [the rule's] ... coming into force" – is the *rule*, and that – as the Court also recognized in *Defrenne* – it is "only exceptionally" that such retroactive effect may be limited. *See* Joined Cases 66, 127 & 128/79, Amministrazione delle Finanze v. Salumi, [1980] ECR 1237, 1260–61.

The difficulties inherent in reconciling the exercise of a power to limit the retrospective effect of judgments – even a power prudently wielded – with an interpretive method that tends to emphasize the manifest significance of legal rights created under Community law is explored in Waelbroeck, *May the Court of Justice Limit the Retrospective Operation of Its Judgments?*, 1 Y.B. EUR. L. 115 (1981). Professor Waelbroeck notes that since *Defrenne* the Court has been asked on several occasions to limit the retrospective effect of an interpretation of Community law, and has uniformly declined to do so. Waelbroeck argues against the development of doctrines

promise, or sensitivity, contrasts sharply with much of the American experience, where in some areas of human rights jurisprudence – notably, the question of racial integration in public schools – American courts have employed the full range of their powers to such a degree that remedies have sometimes seemed to outstrip substantive rights.[282] We will return to the implications of the weakness of the European Court's remedies in our discussion of the Court's evolving role in the protection of human rights.

such as those employed by the U.S. Court, and concludes that "whereas the Court may properly limit the retroactive operation of preliminary judgments declaring Community acts invalid, it probably may not do so as regards its judgments on the interpretation of Community law." *Id.* at 123.

Such a view, we may note, is based on a perception of the judicial function of interpretation as essentially limited to the "ascertainment" of legal norms; whereas it might be more useful to recognize that a certain degree of creativity characterizes any process of interpretation. Even the (conservative) Lord Diplock has written, "the rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of the legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, to reflect whether we should discard this fiction." *See Law-Making, supra* note 30, at 48.

The problem is not limited to the courts of the EC and the U.S.; particularly in the area of constitutional adjudication – where interpretation of a founding document's vague terms may demand the greatest judicial creativity – many courts have had to ponder the broader effects of their actions. For examples, *see* COMPARATIVE CONST'L LAW, *supra* note 4, at 98–112.

[282] To implement the *Brown* decision, federal courts have required the adoption of massive school busing programs in many American cities; federal judges have also taken control of school districts themselves when recalcitrant local officials have been dilatory in their efforts to comply with federally-ordered desegregation programs. But in other cases in the human rights area – notably, in cases dealing with expanding protection of rights of the criminally accused – the courts have been more pragmatic, declaring their new interpretations of constitutional rules to be retroactive in part only, or even entirely *prospective* (although, perhaps binding in the instant case). The range of techniques employed by the U.S. Supreme Court in this area is explored in Mishkin, *The High Court, the Great Writ, and the Due Process of Law*, 79 HARV. L. REV. 56 (1965). *See also* COMPARATIVE CONST'L LAW, *supra* note 4, at 105–12.

The difference in attitude between the ECJ and the U.S. Supreme Court with regard to limiting the retroactive effect of judgments may be explained in part by the different degrees of status enjoyed by the two courts; from its more secure position, the Supreme Court has the greater degree of flexibility in determining how it will apply its new interpretations, while the ECJ must fight a continuous battle for the supremacy of Community law and therefore may be less willing to compromise on principle. This difference in practice, however, should not cloud the significance of the right asserted by each court to rule on the retrospective effect of its decisions, nor should it deflect our attention from the striking, fundamental similarity between the positions of the judges on the two courts who must continually balance the requirements of doctrinal consistency with those of effective enforcement of doctrine.

4. Procedural Barriers to Access

As the foregoing discussion suggests, although the Community's system of judicial review substantially overcomes the problems of decentralization, many challenges to integration remain as a result of the crucial role played by the national courts in enforcing Community law. The importance of the national judiciaries in the Community system also creates a second set of problems, that of procedural barriers to the vindication of substantive Community rights.[283]

As we noted, these procedural problems have also been part of the American experience. There, however, the problems of state barriers to the enforcement of federal rights are greatly mitigated by the existence of lower federal courts, with broad jurisdiction to decide federal questions, as well as by the Supreme Court's development of doctrines designed to balance the competing claims of state procedural autonomy and federal rights.[284]

Since the Community has no system of independent lower courts, one might expect the Court of Justice to have been even more sensitive than its American counterpart to the inevitable tensions between procedure and substance. Instead, the Court has so far declined to encroach on national procedural prerogatives although it has begun to develop principles that may permit it to do so in the future. Thus, for example, it has declared that national procedures that cut off Community rights must be "reasonable," must not totally preclude or unduly restrict the defense of such rights, and must not discriminate against claimants of Community rights.[285]

As we have seen, the nondiscrimination principle has played an important part also in the United States in setting limitations on state court discretion to dismiss cases involving federal rights. However, the extent to which this principle suffices to insure a minimal level of uniformity of Community rights among the Member States is put in doubt by the remarkable institutional differences which distinguish the Community from the United States. In the United States, it should be remembered, a large portion of federal law is directly developed and administered by federal agencies. The actions of these agencies are generally subject, under federal law, to judicial review in the federal

While the U.S. Court may take a more flexible view on the question of retroactivity, and the ECJ a harder line, at root of both attitudes is a fundamental concern that their interpretation of the law will ultimately result in the actual enforcement of individual rights.

283 *See* J. Weiler, *supra* note 6, at 65–83.

284 *See supra* § IV.B.

285 *See* Case 33/76, Rewe-Zentralfinanz and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, [1976] ECR 1989, 1997–98; Case 68/79, Hans Just I/S v. Danish Ministry for Fiscal Affairs, [1980] ECR 501, 522–23. Such an approach is also evident in the *Simmenthal* case, discussed *supra* note 256, where the Court refused to permit national appellate procedures to interfere with the supremacy of Community law.

But the efficacy of even this "nondiscrimination" approach may be questioned; *see infra* note 290.

courts.[286] Requirements of standing, ripeness and justiciability are all governed by federal law.[287] The most important area of potential conflict between state procedures and federal rights – the area of criminal procedure – is held in tight, if cumbersome, control by the habeas corpus proceeding.

In the Community, the institutional balance is quite different. Community norms adopted in the form of directives require implementation by national legislatures and administrative agencies. In addition, the responsibility of administering Community law generally lies with the Governments of the Member States. As a result, the legislative and, even more so, the executive powers of the Community are much weaker than those of the United States. Because of these institutional weaknesses, the need for centralized review of state action is much greater in the Community, at least in a quantitative sense, than it is in the United States, while, as we have seen, the Community's judicial powers are themselves, compared to the United States, much weaker.

At one level, articles 169 and 170 address this need by permitting direct actions before the Court of Justice against Member States that fail to fulfill their Treaty obligations. As a way of controlling the textual substance of national legislation, these articles are not without value. However, as a means of controlling the actual day-to-day enforcement of Community-inspired norms they are virtually useless, since they confer no standing on the persons whose behavior the norms are intended to affect. While article 173 is more liberal in this regard, it too suffers from a miserly attitude toward individual standing,[288] and in any event applies only to the review of the legality of acts of the Council and the Commission.

As a result, meaningful review of the executive performance of the Member States depends largely on the effectiveness of article 177, and, as we have already seen, the effectiveness of article 177 in insuring the uniform application

[286] *See* 28 U.S.C. §§ 2341–2351.

[287] Each of these derives from the "case or controversy" requirement of U.S. CONST. art. III.

[288] The Member States and institutions of the Community are presumed to have an overall interest in the correct implementation of Community law; but private individuals and enterprises must *prove* their interest in order to bring an action under art. 173. The Court has construed the interest requirement laid down in the Treaty – whether the Community act challenged is "of direct and individual concern" to the private party – as involving a question "whether that [act] affects [the private party] by reason of certain attributes which are peculiar to [him] or by reason of circumstances in which [he is] differentiated from all other persons and by virtue of these factors distinguishes [him] individually just as in the case of the person addressed [by the act]." Case 25/62, Plaumann v. Commission, [1963] ECR 95, 107. While not quite apparent from this statement of the rule, the Court's interpretation of art. 173 has in fact been strict with regard to actions brought by private parties, so that opportunity to appeal directly for annulment of Community acts under art. 173 by such parties has been limited. *See* P.S. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 76 (3d ed., London, Sweet & Maxwell, 1980); *see also* Rasmussen, *supra* note 261.

of Community norms in turn depends to a large degree on the performance of the national judicial systems. The role of the national judiciaries in controlling administrative and executive action is, however, diverse. This diversity arises not only from philosophical differences over the legitimacy of judicial review, differences which we have already noted, but from differences with respect to a host of subsidiary issues which serve to define the limits of judicial review. These issues are often procedural. Among the more important ones are the issues of standing, time limitations, ripeness, the scope of review and, as we have mentioned, the proper scope of judicial remedies.

The disintegrating effect of national differences on these issues has been well analyzed by Professors Rehbinder and Stewart in their Project study on environmental law. As they there note, "[t]here are fundamental differences in the roles played by, say, West German, Dutch, French and British judges in controlling national implementation and enforcement,... [reflecting] differences in access to the court [and] the number and kind of issues taken to the court... [And this] must also necessarily affect the potential for indirect review by the European Court of Justice."[289] As they conclude, "administrative" law would seem to represent one area where there is a strong need for greater integration.

Given this need, why, one might ask, has the Court of Justice not taken a stronger role in promoting a more Communitarian approach to the problems of judicial procedure? One answer that has been suggested is that it would be unreasonable to expect the Court to "legislate" on such intricate and technical issues as, say, time limitations.[290] Yet this objection is not so easily made against, for example, judicial development of general principles of standing which would apply in cases raising issues of Community law. A more fundamental answer may be that the Court of Justice has avoided resolving these issues because of a perceived conflict of interest. The Court may believe that issues such as standing and judicial remedies so clearly affect the limits of the judicial power that they are best resolved by the other institutions of the Community which have less at stake. Lastly, the Court's deference to national procedure at the expense of Community uniformity may represent no more than a shrewd political judgment. Under the judicial system established by the

[289] *See* E. REHBINDER & R. STEWART, ENVIRONMENTAL PROTECTION POLICY ch. 8, at 239 (2 Integration Through Law Series, 1985).

[290] *See* J. Weiler, *supra* note 234, at 491. But whatever reasons the Court may have for not being more strict in its review of national procedural rules that may interfere with the enforcement of Community law rights, these reasons do not apply with equal vigor to the failure of the Community legislative organs to address the problem. Following a survey of the numerous inequities that remain in the Community law enforcement process despite the Court's articulation of the "nondiscrimination principle" (*see supra* text accompanying note 285), Professor Bridge argues that the best solution would be to enact a set of Community minimum standards for those national procedural rules that must be invoked for the enforcement of Community rights. *See* Bridge, *Procedural Aspects of the Enforcement of European Community Law Through the Legal Systems of the Member States*, 9 EUR. L. REV. 28, 39–42 (1984).

Community, national courts are indispensable to the enforcement of the Court's judgments. Only they can refer issues to the Court and apply and enforce the Court's judgments in the crucial article 177 cases. Wise sensitivity to its own weakness may therefore have convinced the Court to avoid a direct confrontation with the national courts.

D. Fundamental Rights

Fundamental rights are one subject over which a direct confrontation between the Court of Justice and at least one national court has proved impossible to avoid. For, unlike the U.S. Constitution, the Treaties creating the Community fail to resolve the status of Community law vis-à-vis Member State constitutional law. The Treaties, moreover, do not themselves include a Bill of Rights. Fundamental rights have as a result become one of the great challenges to the Court, as well as one of its great opportunities – an opportunity because the Court has perceived, rightly we think, that the only way realistically to insure the Member States' adherence to Community supremacy even as against their own constitutional guarantees is for itself to guarantee Community respect for fundamental rights.[291] The judicial resolution of this conflict between Community law and national guarantees may thus contain the seeds of the Community "Bill of Rights" the Fathers of the Community did not consider necessary to include in the Treaties.[292]

This omission is not surprising if we recall that, in arguing for the ratification of the U.S. Constitution notwithstanding the absence at that time of a Bill of Rights, Alexander Hamilton said in the *Federalist* that the limited powers of the Federal Government made such a Bill unnecessary.[293] This view was shared by James Madison who, in a letter to Thomas Jefferson, explained in 1788 that a Bill of Rights was unimportant because "the limited powers of the Federal Government and the jealousy of the subordinate Governments, afford a security which had not existed in the case of State Governments."[294] Presum-

[291] Professor Waelbroeck has recently written that

> l'affirmation de la Cour de justice selon laquelle le droit communautaire l'emporte sur les dispositions constitutionnelles nationales garantissant les droits fondamentaux aurait risqué d'aboutir à une situation profondément insatisfaisante si la Cour n'avait pas, par la même occasion, déclaré que le droit communautaire devait respecter les droits fondamentaux.

Waelbroeck, *supra* note 204, at 377.

[292] "[T]he builders of the European Communities thought too little about the legal foundations of their edifice and paid too little attention to the protection of the basic rights of the individual within the new European structure." Pescatore, *Address on the Application of Community Law in Each of the Member States*, in COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, JUDICIAL AND ACADEMIC CONFERENCE, 27–28 SEPTEMBER 1976, at VI–26 (Luxembourg, ECJ, 1976).

[293] THE FEDERALIST No. 84, at 513–14 (A. Hamilton).

[294] 5 THE WRITINGS OF JAMES MADISON (G. Hunt ed., New York, G.P. Putnam's Sons, 1904). Madison, of course, was later to change his mind and to become a leading advocate of a Bill of Rights. *See* COMPARATIVE CONST'L LAW, *supra* note 4, at 177.

ably, the Framers of the Community Treaties also believed that the scope of Community law was essentially limited to economic integration problems and that human rights issues would hardly be involved.

1. Fundamental Rights and Community Law

The expansion of Community law has, however, disproved this belief. Due to its rapid expansion into many areas of modern social and economic life, Community law has become increasingly involved with crucial issues ranging from property and labor rights to nationality and sex discrimination.[295] Thus, a problem which in the 1950's might have appeared to be merely an abstract hypothetical of little practical significance has become one of the hottest issues of both constitutional and Community law in the Europe of the 1970's and early 1980's. In May 1974 the debate took the character, and revealed the dangers, of an acute conflict between the Community and a Member State. In the clamorous *Internationale Handelsgesellschaft* decision the *Bundesverfassungsgericht*, over the strong dissent of three of its Justices, affirmed the inapplicability in Germany of Community law – at least, of secondary Community law – if this law is found to be in conflict with the fundamental human rights provisions of the *Grundgesetz*.[296]

This decision aroused a prompt and vigorous protest against Germany by the Commission of the European Community.[297] The Commission made it clear that the German Constitutional Court's decision was a challenge to the unity of Community law which, by its very nature, must be uniformly and simultaneously applied throughout the entire Community. But the most important and elaborate reaction to the dangerous, although allegedly only provisional,[298] rebellion of the German Constitutional Court has come from

[295] One obvious example is Case 43/75, *Defrenne*, [1976] ECR 455; *see supra* note 281.

[296] Judgment of 29 May 1974, 37 BVerfGE 271 (1974), [1974] 2 C.M.L.R. 540.

[297] COMPARATIVE CONST'L LAW, *supra* note 4, at 187.

[298] The German Constitutional Court declared that *as long as* the European Parliament is not democratically legitimized (*i.e.*, elected by universal suffrage), is not endowed with actual legislative powers, and has not enacted a Bill of Rights adequate in comparison with the fundamental rights contained in the *Grundgesetz*, the Court retains the power to review Community regulations for violation of basic rights guaranteed by the *Grundgesetz*. *See* [1974] 2 C.M.L.R. 551.

Subsequently, however, the Court indicated that it might reconsider its position in view of the improved protection of fundamental rights in Community law (Judgment of 25 July 1979, 52 BVerfGE 187 (1980)). Finally, in the recent *Eurocontrol* decisions (Judgments of 23 June 1981, 58 BVerfGE 1 (1982), and 10 Nov. 1981, 59 BVerfGE 63 (1982)), the Court, although not dealing directly with Community law, gave further evidence of a more receptive attitude. According to one commentator, the Court would no longer review single Community acts, but only the compatibility of the Community legal system as a *whole* with the *core* area of German fundamental rights (Schwarze, *Das Verhältnis von deutschem Verfassungsrecht und europäischem Gemeinschaftsrecht auf dem Gebiet des Grundrechtsschutzes im Spiegel der jüngsten Rechtsprechung*, 10 EuGRZ 117 (1983)).

the Community's Court of Justice itself. Indeed, the Court had not even waited for the German decision before taking a firm, clear and perfectly understandable position on the issue at stake. Already in 1969, in *Stauder v. City of Ulm*[299] the Court had stated that Community law must not "jeopardize the fundamental rights of the individual contained in the general principles of the law of the Community." This far-reaching statement was further developed in later cases, especially in *Nold v. Commision*,[300] a decision taken just a few days before the German Constitutional Court's decision. In *Nold* the European Court of Justice said, *inter alia*:

> As this Court has already held, fundamental rights form an integral part of the general principles of law which it enforces. In assuring the protection of such rights, this Court is required to base itself on the constitutional traditions common to the Member States and therefore could not allow measures which are incompatible with the fundamental rights recognized and guaranteed by the constitutions of such States. The international treaties on the protection of human rights in which the Member States have co-operated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law. It is in the light of these principles that the plaints raised by the applicant should be assessed.[301]

Thus the Court of Justice, while on the one hand accepting a conception whereby Community law, although superior to all national laws, is itself bound to respect a higher law, especially in the area of human rights, on the other hand affirmed the *transnational* character of such higher law. In the Court's doctrine, in fact, this higher law is not identifiable with any single Member State's Constitution or constitutional tradition; rather, it is itself (unwritten) Community law.[302] And, it is the role of the European Court of Justice – not of any national court – to give the final word in "finding" such a higher Community law, even though the Court's finding must be based on the constitutional traditions (not of *one*, but) of *all* the Member States, as well as on such international treaties as the European Convention on Human Rights to which all the Ten have adhered.[303]

[299] Case 29/69, [1969] ECR 419, 425.

[300] Case 4/73, [1974] ECR 491.

[301] Case 4/73, [1974] ECR 491, 507.

[302] This point was already affirmed in 1970 by the ruling in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, where the Court, after saying that "respect for fundamental rights has an integral part in the general principles of law of which the Court of Justice ensures respect," stated that: "The protection of such rights, while inspired by the constitutional principles common to the Member States must be ensured within the framework of the Community's structure and objectives." *Id.* at 1134.

[303] In a later decision, the reference to the European Convention on Human Rights, which in *Nold* was merely implicit, was made explicit. Case 36/75, Rutili v. Minister for the Interior, [1975] ECR 1219. And provisions of the European Convention have since then been discussed several times by the Court. *See* Case 44/79, Hauer v. Land Rheinland-Pfalz, [1979] ECR 3727, 3745; Case 136/79, National Panasonic (UK) Ltd. v. Commission, [1980] ECR 2033, 2056; Joined Cases 209 to 215 and 218/78, Sarl and Others v. Commission, [1980] ECR 3125, 3248.

2. The Unwritten "Bill of Rights"

The Court's delphic pronouncements that Community law must not jeopardize the fundamental rights of individuals have, as one might expect, prompted a large amount of speculation as to what these fundamental rights might be and where they might be found. The general commotion caused by this development has, however, deflected attention from the far quieter, but probably far more important, evolution promoted by the Court of a set of general principles limiting the permissible bounds of Community legislation. Significantly, these accepted and largely uncontroversial principles, of which the following are some of the more momentous, are not all that different from the core of principles applied by the U.S. Supreme Court in most civil rights litigation.

a) The Right To Be Heard

The Court of Justice has held that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This principle, founded in the general right to an *effective* hearing, has been extended toward a general guarantee of "rights of defense";[304] with very little imagination, this general principle can be seen to encompass just about every important procedural right contained in the U.S. Bill of Rights (including, perhaps with a little more imagination, the first amendment). It represents the core of what Americans call procedural due process.

b) Non bis in idem

The Court has held that this rule prohibits not only the imposition of two disciplinary measures for a single offense, but also the holding of disciplinary proceedings more than once with regard to a single set of facts.[305] This could be, in part at least, a restatement of the double jeopardy clause contained in the fifth amendment of the U.S. Constitution.

c) Legal Certainty

The principle of legal certainty is said to be one of the underpinnings of any legal system. It prohibits retroactive legislation,[306] and is certainly broad enough to encompass the contract clause and the prohibitions of bills of attainder and ex post facto laws contained in the U.S. Constitution.[307]

[304] *See, e.g.*, Case 17/74, Transocean Marine Paint Ass'n v. Commission, [1974] ECR 1063; Case 32/62, Alvis v. Council, [1963] ECR 49, 55. In a most recent development, the Court has even developed, on the basis of a comparative analysis, a Community version of the "legal professional privilege." *See* Case 155/79, AM & S Europe Ltd. v. Commission, [1982] ECR 1575.

[305] *See, e.g.*, Joined Cases 18 and 35/65, Gutmann v. EAEC Commission, [1967] ECR 61.

[306] *See, e.g.*, Case 74/74, Comptoir Nat'l Tech. Agric. S.A. v. Commission, [1975] ECR 533; Case 13/61, Bosch and Van Rijn, [1962] ECR 45, 52.

[307] U.S. CONST. art. I, § 10, cl. 1; art. I, § 9, cl. 3.

d) Equality

The Court has held that equality of treatment is one of the fundamental principles of Community law.[308] While it is true that most of the Court's attention has been directed toward preventing discrimination by the Member States against the citizens and goods of other Member States, this has not been the only application of the principle. It extends to sexual discrimination[309] and has been extended to other areas as well. We can therefore add the equal protection clause to our list, although differences in American and European social and political history have certainly placed different demands on the principle.[310]

e) Proportionality

The principle of proportionality requires that the legislative means adopted to promote a legitimate end must be no more onerous than is required to achieve that end.[311] This balancing of means and ends differs little, if at all, from the type of analysis used by the U.S. Supreme Court to promote "substantive" due process. If anything, except in the area of "suspect" classifications, the proportionality principle probably requires a tighter fit between means and ends since the Supreme Court has largely abandoned any pretense of reviewing the appropriateness of so-called economic legislation. Certainly, the Court of Justice has shown itself much more willing than the Supreme Court to reconsider the legislative facts underlying economic legislation.[312] However, much like the Supreme Court, it appears to require a stricter equilibrium between means and ends when certain fundamental interests, privacy being one, are infringed.[313]

This brief review of certain fundamental principles already adopted, to a large extent, by the Court of Justice in its jurisprudence well before the clamor of the German Constitutional Court's "rebellion" in *Internationale Handelsgesellschaft*, suggests that most fundamental rights, at least in Western democracies, are so unexceptional that most people barely even recognize them. In this view, the Court's pronouncement in *Nold* represents no new departure from established practice, although the Court, called upon to parry the challenge from the German Constitutional Court, perhaps made it seem that way.

[308] *See, e.g.*, Case 36/75, *Rutili*, [1975] ECR 1219; Case 1/72, Frilli v. Belgium, [1972] ECR 457, 466.

[309] Case 43/75, *Defrenne*, [1976] ECR 455.

[310] In the EC, the equality principle tends to play the role played by the negative commerce clause in the U.S. in preventing discrimination by the states against the citizens of other states.

[311] *See, e.g.*, Case 114/76, Bela-Muhle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG, [1977] ECR 1211; Case 9/73, Schlüter v. Hauptzollamt Lörrach, [1973] ECR 1135, 1156.

[312] *Compare id. with* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[313] *See, e.g.*, Case 136/79, National Panasonic (UK) Ltd. v. Commission, [1980] ECR 2033.

3. Integrational Effect of the Unwritten "Bill of Rights" – Incorporation in the Community

To be sure, it is not self-evident that these evolving rights will have a direct effect on *Member State* legislation. To extend the view of John Marshall,[314] fundamental rights protected by the Community would limit only Community action, while Member State legislation (as well as other Member State action) would be subject only to such rights as are guaranteed in the Constitutions of the respective Members. Under this conception of the constitutional role of a federal or transnational Bill of Rights, the European Court's fundamental rights jurisprudence could have an integrative impact only through *indirect* "incorporation," as Community legislation, respecting these fundamental guarantees, pre-empts new areas of the Member State legal order.

The operation of this form of incorporation, which is quite different from incorporation in American constitutional law, can be perceived, for example, in *Rutili v. Minister for the Interior*,[315] where the Court used fundamental principles to interpret article 48 of the EEC Treaty (concerning the free movement of workers) as well as the Community's implementing regulations and directives in order to determine if French administrative law was in compliance therewith. In that case, the Court first concluded that the freedom of movement and equality of treatment demanded by the first two clauses of article 48 were "fundamental principles." From this conclusion, the Court reasoned that any derogation from these rights by Member States "on the grounds of public policy," as permitted by clause (3) of that article, must be "interpreted strictly."[316] The Court of Justice thus did not directly require French law to observe fundamental Community rights; rather, the result was reached indirectly in the process of interpreting the Treaty and the secondary legislation thereunder. Nonetheless, to an American observer, the parallels with Supreme Court analysis of suspect legislative classifications, requiring "strict scrutiny" under the equal protection clause of the fourteenth amendment, surely will be striking.[317]

[314] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); *see supra* note 168 and accompanying text.

[315] Case 36/75, [1975] ECR 1219.

[316] *Id.* at 1231.

[317] *See generally* Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

Recently, the Court of Justice has moved somewhat beyond *Rutili*, while not yet reaching a position that would be the equivalent of the American "incorporation" solution. In Case 77/81, Zuckerfabrik Franken GmbH v. Federal Republic of Germany, [1982] ECR 681, the Court indicated that general principles may operate as an *independent* standard of Member State execution of Community acts, that is, even when such principles cannot be read into a specific provision of Community law (as was the case in *Rutili*). *Id.* at 695. *See* Schermers, *Algemene Rechtsbeginselen als bron van Gemeenschapsrecht*, 31 SEW 514, 527 (1983).

While, as *Rutili* demonstrates, the use of fundamental principles of Community law as a means of strictly scrutinizing Member States legislation is not unimportant, this technique is obviously somewhat limited because it is, as it were, essentially parasitic. Before it can operate, it requires a specific Treaty provision or piece of Community legislation on which the fundamental principle may be hung. As a result, this type of judicial review of Member State legislation is effectively limited to the areas of the Community's own competence, and Community fundamental rights would have no *general* binding effect upon Member State action.

This is not to say that uniform standards of human rights among the Member States, enforced by judicial review at the Community level, will never be realized. Rather, it is to say that at this point in the Community's sociopolitical development it is at best speculative (and probably pointless) to predict the likelihood of the Court of Justice alone developing and enforcing such standards. Judging from the American experience, the prospect of the Court of Justice sitting in judgment of Member State legislation on the basis of vague concepts of fundamental justice will remain a faint one until the Community reaches a higher level of integration, on the political and social levels as well as on the level of the Court's jurisprudence, than it has reached today. And enforcement of such rights would, quite probably, require a system of Community courts with ample jurisdiction and powers to enforce these Community rights in cases when they are violated by the Member States and ignored by their courts. Even then, though, American history suggests that a great degree of legal integration may still leave much room for disagreement and diversity on questions of fundamental rights. What was important in the American integrationist experience was the ability to agree initially on a basic charter of rights and to create institutions capable of interpreting that charter through time. Ironically enough, while Europeans could probably agree on the components of such a charter,[318] they would not at all likely be willing at the present time to endow a European Court with the power to interpret and directly apply its provisions in the Member States. The necessary change in attitude will have to await the day when the Frenchman and the Englishman and all the others regard themselves as being citizens of the Community, with rights as such. This revolution is obviously not within the powers of the Court of Justice alone to produce.

[318] Indeed, such a document may be said to exist in the form of the European Convention on Human Rights, which has been ratified by all 10 Member States of the EC.

VI. The "Mighty Problem" in European Integration

A. Statement of the Problem

The "mighty problem" in the Community today (or at least one mighty problem) is whether Community law, even secondary Community law, is superior to the constitutional guarantees of fundamental rights of the Member States. There is no definitive answer to this problem, only arguments and counterarguments. Perhaps as a concluding remark on the role of the judiciary in legal integration in the Community, some comment, however provisional, on this subject is due.

In order to limit the debate, it may help to define what the problem is not about. Quite simply, it is neither about the legitimacy of judicial review nor about the acceptability of supremacy of Community law vis-à-vis ordinary national legislation. Even the position of the German Constitutional Court presupposes the legitimacy of judicial review as well as the supremacy of Community law, but would exclude supremacy vis-à-vis the national Bills of Rights and would ascribe the review power in the last instance, at least vis-à-vis Community secondary legislation and its conformity with national Bill of Rights, to the national constitutional courts. To the Court of Justice, on the contrary, the last word on the validity of Community legislation lies exclusively within its own jurisdiction, and supremacy shall not suffer limitations. Given this agreement of the adversaries on the necessity and legitimacy of judicial review, the problem is similar to the so-called mighty problem in the United States in name only.[319] Rather, the debate is quite simply over the limits of the supremacy of Community law.

Two principal arguments favor the German position. The first is a legalistic argument; the second a more fundamental constitutional argument. The legalistic argument derives from the idea of sovereignty. The Community, so the argument goes, was formed through the delegation of sovereignty by the Member States to the Community institutions. However, only those powers actually possessed by the Member States could be granted to the Community. A power which a Member State had no constitutional right to exercise could not be delegated to the Community. Hence, the Community's legislative powers cannot override the constitutional rights retained by the citizens of the Member States.

The constitutional argument focuses on the nature of the Community's legislative institutions, their lack of democratic legitimacy and, in particular, on the Community's lack of guarantees of fundamental rights. As put by the majority of the German Constitutional Court:

> [T]he present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a cod-

[319] *See supra* note 15 and accompanying text.

ified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution.... As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of further integration of the Community,... the [German] Constitution applies.[320]

The arguments *contra* the *Handelsgesellschaft* position are likewise twofold. Again there is a legal argument and a constitutional one. The legal argument is based on article 177 of the EEC Treaty, which, as noted, also gives the Court of Justice jurisdiction to determine the validity of acts of the institutions of the Community. While article 177 would appear to give lower courts the option to consider an act of the Community invalid on their own, without asking for a preliminary ruling, strong arguments have been made for the proposition that this option applies only insofar as the matter is appealable to a higher court which, for its part, is bound to request a ruling on the question of European law; or, only insofar as the question is a firmly settled one in the law of the Communities.[321] By either route of authority, then – either via its mandatory referral jurisdiction or via its already established legal doctrines – the Court of Justice retains the ultimate control over questions of validity (and, of course, of interpretation) of acts of Community institutions. Accordingly, although a Community act may in theory violate a constitutional provision of one of the Member States, the courts of the Member States as such have no jurisdiction to adjudicate such a claim.

The constitutional argument is less sterile although no more conclusive. It is that the uniform application of Community law – which is central to the Community's own *Grundnorm* – would be seriously threatened if Community law can be controlled by the constitutional courts of the various Member States.

To state these arguments and counterarguments is to realize that the problem presented by the conflict of Community law and fundamental rights cannot be resolved by reason alone. The democracy deficit in the Community admittedly argues for some judicial control of Community legislation, but it in no way favors conferring that control on courts of the Member States. Moreover, the idea that all constitutional rights are ipso facto fundamental rights which must be protected against Community violation is simply absurd. The seventh amendment to the U.S. Constitution, for example, provides a right to a jury trial in all civil suits at common law, whenever the amount in controver-

[320] BVerfG (D), Judgment of 29 May 1974, 37 BVerfGE 271 (1974), [1974] 2 C.M.L.R. 540, 550–51.

[321] H.G. SCHERMERS, *supra* note 271, at 232–33, 365–66. T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 266–72 (Oxford, Clarendon Press, 1981). Some have argued that the duty to refer a question to the European Court is even greater in cases involving challenges to the *validity* of acts of the Community, rather than mere problems of interpretation. *See* BROWN & JACOBS, *supra* note 269, at 154.

sy exceeds $20.[322] There is obviously nothing fundamental about this right, apart from its appearance in the Constitution, and indeed it has never been "incorporated" by the Supreme Court into the due process clause of the fourteenth amendment. Moreover, to the extent that Member State constitutions can be amended, even by simple act of parliament or some other more or less facile procedure, Community law would be subject to an extra right of veto by the Member States.

On the other side, the argument that constitutional review of Community law by the courts of the Member States is impermissible because it leads to disintegration is only persuasive if one assumes that the value of integration outweighs the values of the national Bill of Rights. This argument, in effect, is a *petitio principii*; it assumes what it seeks to prove. The argument must be particularly unpersuasive, therefore, in those Member States, such as Germany, where against the haunting background of past violations, the national Bill of Rights has assumed a very important role in guaranteeing the fundamental liberties of the people, and this is especially so in view of the Community's democracy deficit and its lack of a written Bill of Rights.

B. A Possible Compromise

Given this impasse, it may be useful to think about ways of seeking a compromise between these two opposing positions, which as solutions to the problem of conflicts between Community law and Member State constitutional law represent the either/or extremes.

One potentially fruitful way of reducing conflicts between the Court of Justice and the Member State courts, at least until the Community has developed the democratic institutions and jurisprudence which would provide clear protection of fundamental rights, is through application of the abstention doctrine,[323] which as we have seen in U.S. constitutional law acts as a provisional limitation on the jurisdiction of the federal courts. The doctrine exists in various forms, but each form is concerned with identifying those cases in which a decision by the federal court would require an unnecessary or unseemly incursion into the jurisdiction of the state courts. This self-restraint is premised on the duty of state courts and governments to respect the federal rights of their citizens, and on the belief of the federal judiciary that state courts and governments can generally be expected to fulfill such a duty – indeed, that they will tend to be more respectful of federal rights if federal courts are, in turn, more respectful of good-faith state efforts to enforce them.

Observance of similar principles by the courts in the Community would seem to offer real possibilities for diminishing the potential for conflict between the Court of Justice and the national constitutional courts. Of course in the European context application of the doctrine would act as a restraint

[322] U.S. CONST. amend. VII.

[323] *See supra* text accompanying note 150.

on the national courts rather than on the Court of Justice. The role of the doctrine would be, therefore, a reversal of its role in the United States. Nevertheless, the applicable principles are the same in both contexts. The national high courts should not assume, as implicitly did the *Bundesverfassungsgericht*, that the Court of Justice will not adequately review Community law for violations of fundamental rights. In our view, in cases such as the *Handelsgesellschaft* case, the national courts should abstain from reviewing Community legislation at least until the Court of Justice has been given an opportunity to consider any fundamental principles of Community law that might serve to limit or mitigate the potentially unconstitutional effects of the laws at issue. The procedure under article 177 offers ample possibility to the national courts to give the Court at Luxembourg such an opportunity.

VII. Conclusion

The tremendous difficulties experienced by the European Court of Justice in the attempted constitutional evolution of the European Community are obvious enough. Everybody appreciates that Europe is not like, say, the American Union. Differences are more profound, they involve cultures and languages as well as political and social mores, and, not least, economic structures and conditions. Nor are the Treaties of the European Community like the U.S. Constitution. Thus, in profound ways, the task undertaken by the European Court has been, and will continue to be, much more controversial and difficult than that, itself controversial and difficult enough, of its American counterpart. It has had to define the powers and limits of a new, unique legal order with minimal constitutional guidance. It has had no clear supremacy clause and no Bill of Rights. It has had no support from a strong central government: not from the European Parliament, for this Parliament, even with the blessing of election by universal suffrage, still possesses only advisory and supervisory, not legislative powers; not from the Council of Ministers, for the Council is notoriously the least Community-oriented of all the Community organs; and not from the Commission, since for almost twenty years this organ's powers have been drastically reduced by national, or nationalistic, interests and rivalries.

There is, of course, a risk that, ironically, the Court's daring vision of a strong Community may have subtly contributed to the Community's very difficulties in developing strong political institutions.[324] For it seems reasonable

[324] *See* J. Weiler, *supra* note 6, at 45 *et passim*. The author notes that during its first 30 years the ECJ has made remarkable contributions to the constitutional framework of European integration, while at the same time the political institutions, perhaps most notably the Council, as a result of the Luxembourg Accords, have shifted power back to the individual Member States. He speculates that these opposing trends may be causally linked.

to conjecture that the Member States might, for example, have permitted the Council to adopt policy more frequently by majority or qualified majority voting if there had been developed no such sweeping doctrines as those of the direct effect, supremacy, and pre-emption of Community law. If so, the Council might have become more than the diplomatic round-table that it is today. On the other hand, it is hard to imagine the Court's jurisprudence developing in any other way or at a less rapid pace than it has, given the Court's vision of a strong Community. Questions such as direct effect, supremacy and human rights have been simply too important to await a later day when the Council and Commission too might have shared this vision. There might be such a thing as incremental integration, but there is no such thing as incremental supremacy. The issue once given away could not, under normal circumstances at least, have been regained.

Thus, it is partly because of the absence of strong political institutions that the Court's bold undertaking – from supremacy to human rights – has been and remains so necessary.[325] The question, of course, could be asked once again – why should such a formidable task be left to a court? While we have tried elsewhere to answer that old and abstract question in its more general terms,[326] in its most real terms the problem is not one of abstract legitimacy; rather, it is a very concrete problem of whether the European Court of Justice will have enough time, firmness and imagination, and will command enough respect, to be able to develop, in connection with cases and controversies brought to its jurisdiction, such a coherent body of decisions as can eventually be looked upon as authoritative in the Community, even in such sensitive areas as human rights.[327] No abstract answer can be given to this problem, since the answer depends on the infinite imponderables of the political life of peoples and communities. Ours can only be a hope, not a certainty – and a belief that Europe's best future, indeed perhaps the *only* future, lies in integration.

It is, however, an educated hope – supported by many arguments, by strong pressures, and by clear indications of converging trends. Let us conclude by mentioning a few of them.

First, even if it is true that Europe today is much more diverse than the American Union, it seems unlikely that diversity is more profound in the Old

[325] *Cf.* Calabresi, *Incentives, Regulation and the Problem of Legal Obsolescence*, in NEW PERSPECTIVES, *supra* note 14, at 291.

[326] *See Mighty Problem, supra* note 4; Cappelletti, *Nécessité et Légitimité de la Justice Constitutionnelle*, 33 REV. INT. DR. COMP. 625 (1981); *Law-Making, supra* note 30.

[327] It will not be possible fully to meet all that is said against judicial review. Such is not the way with questions of government. We can only fill the other side of the scales with countervailing judgments on the real needs and the actual workings of our society and, of course, with our own portions of faith and hope. Then we may estimate how far the needle has moved.

A.M. BICKEL, THE LEAST DANGEROUS BRANCH 24 (Indiana, Bobbs-Merrill, 1962).

Continent today than it was not only two centuries ago,[328] but even less than one hundred years ago in a country of continental size with many races and religions, the combination of enormous wealth and striking misery, the wounds of civil war and slavery, and with a European-like, refined, industrialized East, a colonial-like Deep South, an agrarian Middle West, and an adventurous Far West.

Second, social and economic pressures toward integration in Europe, which call for legal interventions, are great and lasting. Such pressures come from millions of Southern Europeans who live as migrant workers in the North, as well as from the many and powerful multinational corporations which are but the reflection of the necessarily multinational character of modern economic processes and structures. They come from the increasingly integrated culture of individuals and groups throughout Europe. They come from the growing awareness that the achievement of a transnational dimension, political, economic, and legal, is the most natural solution to the bizarre, untenable situation of the present division of a relatively small continent into more than twenty allegedly "sovereign" states,[329] as well as from the awareness that, by universalizing fundamental values, peoples will grow closer, the increasingly unbearable risks of conflicts and wars will diminish, and new enriching syntheses will emerge from divergent customs, cultures, races and traditions.[330]

These syntheses, in Europe as in America, are born of pluralism. In the legal order, national statutory law, once virtually the only "law of the land" at least in continental Europe, now has many companions and competitors: the "higher law" of the constitutions; the laws of the Community, which also claim a "higher law" status, higher even than that of national constitutions; written and unwritten "general principles," both national and transnational; national and multinational Bills of Rights – not to speak of the emerging regional laws, regionalism being indeed a phenomenon which, long discouraged by national centralism, can find in a transnational Community its natural ally. And with all that a new role for adjudicators naturally emerges, because the adjudicators' role is always enhanced and magnified by pluralism and competition of law-making sources. Pluralism and competition demand comparison and control; they demand judicial review.

At the highest level of transnational constitutional adjudication, pluralism and competition require the synthesis of common norms, of fundamental

[328] As John Adams noted in his diary during the First Continental Congress of 1774, "Tedious, indeed is our Business. Slow, as Snails.... Fifty Gentlemen meeting together, all Strangers, are not acquainted with each others' Language, Ideas, Views, Designs. They are therefore jealous of each other – fearfull, timid, skittish." LETTERS OF DELEGATES TO CONGRESS 1774–1789 (U.S. Gov't Printing Office, 1978), *reprinted in* Int'l Herald Tribune, 24 May 1978.

[329] This is counting only the nations of Western Europe.

[330] Indeed, the most glorious eras of European civilization have emerged as a result of such great syntheses. *See generally Mighty Problem, supra* note 4, at nn.95–103 and accompanying text.

values applicable to all the Member States, a synthesis that comparative analysis can best stimulate. As put by a noted German commentator,

> To evolve common principles from the various constitutional systems of the member states a comparative method is needed. What does this mean? It is not possible to transfer definite formulations or details from the one or the other national order. . . . The general principles observed in the Community must be uniform, they cannot vary from case to case according to the nationality of the parties concerned. The comparative analysis cannot cling to particular details, but must follow the general trend of the evolution of legal prescriptions; it must lead to a result acceptable in all member states. Its object must be to find the rules best suited to express a common tradition and compatible with the structure of the Community.[331]

Common principles and traditions are clearly not the mechanical sum, but rather the selective choice of the "best" and "most suitable" principles and traditions found in the Member States.

The search for such principles and traditions clearly requires great discretion, wisdom, and restraint. The nature of the judicial process, we think, peculiarly suits this search and enables the judiciary, perhaps more than the political branches, to discover and articulate common values in a pluralistic society.

[331] Scheuner, *Fundamental Rights in European Community Law and in National Constitutional Law*, 12 C.M.L. Rev. 171, 185 (1975). *See also* P. Pescatore, The Law of Integration 75–77 (Leiden, Sijthoff, 1974); Constantinesco, in Dix ans de jurisprudence de la Cour de Justice des Communautés européennes 205 (Paris, Sirey, 1965).

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