

# PROTECTING MEMBER STATE AUTONOMY IN THE EUROPEAN UNION: SOME CAUTIONARY TALES FROM AMERICAN FEDERALISM

ERNEST A. YOUNG\*

*The European Union's ongoing "Convention on the Future of Europe" must tackle a fundamental issue of federalism: the balance between central authority and Member State autonomy. In this Article, Ernest Young explores two strategies for protecting federalism in America—imposing substantive limits on central power and relying on political and procedural safeguards—and considers their prospects in Europe. American experience suggests that European attempts to limit central power by enumerating substantive "competences" for Union institutions are unlikely to hold up, and that other substantive strategies such as the concept of "subsidiarity" tend to work best as political imperatives rather than judicially enforceable doctrines. Professor Young then examines the "political safeguards" of Member State autonomy in the EU as currently constituted. He argues that the balance between the center and the periphery is likely to be affected by how the EU resolves basic separation-of-powers questions at the center. Efforts to address perceived deficiencies of the Union government in its resource base, lawmaking efficiency, and democratic legitimacy likewise will have a fundamental impact on federalism. Finally, Professor Young touches on two broader themes. He first asks whether Europeans, given their cultural distinctiveness, would prefer a stronger form of federalism than America has been able to maintain; if so, the American experience is relevant primarily as a cautionary tale. He then considers how Europe's institutional experience and current debate can inform the American discourse on federalism by helping Americans break free of ideological and historical preconceptions and offering insights into emerging issues at the intersection of domestic constitutions and supranational institutions.*

INTRODUCTION .....	1613
I. EUROPE'S GREAT EXPERIMENT .....	1621
A. <i>The Tale of the Treaties</i> .....	1623
B. <i>The Community Institutions</i> .....	1625

---

\* Assistant Professor of Law, The University of Texas at Austin. B.A., 1990, Dartmouth College; J.D., 1993, Harvard Law School; eyoung@mail.law.utexas.edu. I presented earlier versions of this paper at St. John's College, Oxford, and the University of Siena, and I am indebted to Paul Craig and Francesco Francioni for their hospitality and insightful observations on those occasions. I am also grateful to Hans Baade, Lynn Baker, Daniel Halberstam, Mattias Kumm, Doug Laycock, Jonathan Pratter, Steve Ratner, Larry Sager, Russell Weintraub, and Allegra Young for helpful comments on drafts, as well as to the participants in the UT Faculty Colloquium. Finally, I appreciate the helpful research and editorial assistance of William Ashworth, Kelli Baxter, and Beth Youngdale, as well as Gerald Neugebauer, Jason Padgett, and the other editors of the *New York University Law Review*.

- C. *Allocating Power Between the Member States and the Union* ..... 1633
- D. *Three Challenges* ..... 1636
- II. FEDERALISM AND THE PROBLEM OF DOCTRINAL AND INSTITUTIONAL DESIGN ..... 1640
  - A. *Federalism and Comparability* ..... 1641
  - B. *Three Approaches to Federalism Doctrine*..... 1645
    - 1. *Power Federalism* ..... 1645
    - 2. *Process Federalism*..... 1649
      - a. *Clear Statement Rules* ..... 1651
      - b. *Anticommandeering*..... 1653
      - c. *The Federal Separation of Powers*..... 1655
      - d. *Cross-Jurisdictional Relationships* ..... 1659
    - 3. *Immunity Federalism*..... 1660
- III. POWER FEDERALISM IN EUROPE ..... 1663
  - A. *The Trouble with Categories: Dual Federalism in America* ..... 1664
  - B. *Enumeration and Competences* ..... 1670
  - C. *Subsidiarity* ..... 1677
- IV. THE POLITICAL SAFEGUARDS OF MEMBER STATE AUTONOMY ..... 1682
  - A. *Safeguards Against What? Of Vertical and Horizontal Aggrandizement* ..... 1683
  - B. *Council, Commission, and Parliament*..... 1689
    - 1. *The Two Councils* ..... 1689
    - 2. *The European Commission* ..... 1694
    - 3. *The European Parliament*..... 1697
  - C. *Enforcement, Resources, and Efficiency* ..... 1705
  - D. *Statutory Interpretation and Teleology*..... 1712
  - E. *Amendment, Entrenchment, and Judicial Review* .... 1718
- V. BROADER LESSONS ALL ROUND ..... 1723
  - A. *Federalism or Federalism Lite?*..... 1723
  - B. *Europe, Federalism, and Time* ..... 1726
  - C. *America’s Federal Conversation*..... 1730
- CONCLUSION ..... 1735

INTRODUCTION

Since March of this year, some 100 delegates from the member nations of the European Union have been meeting in Brussels to begin a “Convention on the Future of Europe.” In calling the convention, the European Council’s Laeken Declaration asserted that “the Union stands at a crossroads, a defining moment in its existence. The

unification of Europe is near.”<sup>1</sup> The declaration charged the convention to redefine and reallocate the division of functions between the Union and its Member States, to simplify the Union’s constitutive instruments, and to bring “[m]ore democracy, transparency, and efficiency” to the Union.<sup>2</sup> Many hope the convention will replace the EU’s complex web of constitutive treaties with a definitive constitution.<sup>3</sup> Former French President Valéry Giscard d’Estaing, whom the Council selected to head the convention, has said that the deliberations “recall[ ], in some respects, the famous convention of Philadelphia of 1787.”<sup>4</sup>

The European convention, like the Philadelphia Convention before it, confronts a basic problem of federalism: how to create a set of central institutions strong enough to pursue common ends effectively at home and exert influence abroad, while at the same time preserving the autonomy of the Member States. Many Europeans have traditionally shied away from the term “federalism,” which is often equated with the creation of a European “super-state.”<sup>5</sup> Peter Hain, the British Minister for Europe, recently warned of “creeping federalism” in the EU, complaining that “[t]he powers have all been going towards Brussels and away from nation states.”<sup>6</sup> But issues of federalism exist whenever a society seeks to divide power between a central government and its component units. Prominent Europeans, moreover, have become willing to use the term in recent years. German Foreign Minister Joschka Fischer, in a famous speech two years ago, called for a “European Federation.”<sup>7</sup> And European academics and

---

<sup>1</sup> European Council, Laeken Declaration on the Future of the European Union, Dec. 15, 2001, in *Presidency Conclusions: European Council Meeting in Laeken 14 and 15 December 2001*, annex I at 19, <http://ue.eu.int/pressData/en/ec/68827.pdf> [hereinafter *Laeken Declaration*].

<sup>2</sup> *Id.*

<sup>3</sup> See Daniela Spinant, *Historical Convention on EU Future to Kick Off*, Feb. 28, 2002, at <http://www.euobserver.com/index.phtml?aid=5368>.

<sup>4</sup> Valéry Giscard d’Estaing, *Letters to the Editor*, *The European Convention*, *Int’l Herald Trib.*, Dec. 27, 2001, at 7. For more skeptical assessments, see, e.g., In Search of “Good Europeans,” *Economist*, Jan. 26, 2002, at 45; Robert Kagan, *Postcard from Belgium*, *Wash. Post*, Dec. 21, 2001, at A45; Flora Lewis, *Europe: The Euro Is Fine, But Where Are the Big Decisions?*, *Int’l Herald Trib.*, Jan. 4, 2002, at 6.

<sup>5</sup> See, e.g., Klaus von Beyme, *Fischer’s Move Towards a European Constitution* (Iain L. Fraser trans.), in *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* 73, 78 (Christian Joerges, Yves Mény & J.H.H. Weiler eds., 2000), <http://www.iue.it/RSC/pdf/J.%20FISCHER%20text%20.pdf> [hereinafter *What Kind of Constitution*] (observing that “Britain, in particular, would tolerate no echo of federal vocabulary” in Maastricht Treaty).

<sup>6</sup> Andrew Grice, *Hain Warns of “Creeping Federalism” in EU*, *Indep.*, July 22, 2002, at 1.

<sup>7</sup> Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Speech at the Humboldt University in Berlin (May 12, 2000) (trans. of

jurists are increasingly discussing the European future in federalist terms, notwithstanding profound differences about what sort of federalism they want to see.<sup>8</sup> The “F word”<sup>9</sup> is in the air.

“F word” jitters may have intensified this September when the EU Observer, an on-line news service, somewhat breathlessly reported that “[m]embers of the European Parliament suspect Valéry Giscard d’Estaing, president of the Convention on EU future, of taking too much interest in the American institutional system, with a view to introducing it in the European Union.”<sup>10</sup> Despite the report’s suggestion that the very enterprise of comparative scholarship ought to be grounds for suspicion, the new constitutional convention seems bound to give further impetus to an already burgeoning cottage industry in comparative federalism scholarship.<sup>11</sup> James Madison, after all, is well known to have prepared for the Philadelphia Convention by studying the experience of other confederations throughout history.<sup>12</sup> In like manner, the EU Observer’s exposé revealed that Mr. Giscard

---

advance text), in *What Kind of Constitution*, supra note 5, at 19, 25. Giuliano Amato, one of the vice presidents of the current convention, described Fischer’s speech as “a relaunch, in grand style, of the guiding principles of the federalist tradition.” Giuliano Amato, *A Strong Heart for Europe* (Iain L. Fraser trans.), in *What Kind of Constitution*, supra note 5, at 119, 119.

<sup>8</sup> See, e.g., Tanja A. Börzel & Thomas Risse, *Who Is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System*, in *What Kind of Constitution*, supra note 5, at 45, 45 (urging “a further exploration of federalist concepts in a framework of multi-level governance”); Larry Siedentop, *Democracy in Europe*, at x (2001) (arguing that the reforms initiated by the Maastricht Treaty “amount to a major step towards creating a federal state in Europe”).

<sup>9</sup> Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 *Harv. Int’l L.J.* 1, 3 (2000). As Stephen Gardbaum recounts, the Maastricht Treaty’s initial draft “stated in the preamble that it ‘marks a new stage in the process leading gradually to a Union with a federal goal.’ The United Kingdom rejected use of ‘the F word’ and prevented the adoption of this amendment to the original preamble in the Treaty of Rome.” Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex. L. Rev.* 795, 831 n.140 (1996).

<sup>10</sup> Daniela Spinant, *Giscard Suspected of Taking Interest in USA System*, Sept. 3, 2002, at <http://www.euobserver.com/index.phtml?aid=7425>.

<sup>11</sup> See, e.g., *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Kalypso Nicolaidis & Robert Howse eds., 2001) [hereinafter *The Federal Vision*]; David McKay, *Designing Europe: Comparative Lessons from the Federal Experience* (2001); Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 *Colum. J. Eur. L.* 173 (2001); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 331 (1994); Patrick R. Hugg, *Transnational Convergence: European Union and American Federalism*, 32 *Cornell Int’l L.J.* 43 (1998).

<sup>12</sup> The fruits of Madison’s comparative labors are evident in *The Federalist Nos. 18* (discussing ancient Greek confederacies), *19* (Germany), and *20* (the Netherlands). See also *The Federalist No. 17* (Alexander Hamilton) (discussing experience of feudal baronies in Scotland and elsewhere).

“allegedly spent the summer reading books about the making of the constitution of the United States of America.”<sup>13</sup>

Mr. Giscard’s people were quick to deny these potentially damaging allegations.<sup>14</sup> Nonetheless, such comparisons seem likely to grow in importance as Europe moves toward an “ever closer union.” As David McKay has observed, “[c]laims that the EU . . . is *sui generis* and can be explained only in terms of its unique structure and evolution look inappropriate given the increasingly state like status of the Union” and the expanding scope of its responsibilities.<sup>15</sup> Whether or not America is the *right* comparison, some comparisons will have to be made.

The sort of comparative scholarship that might meet this hour, however, presents a problem for most scholars. To do it right, one would want to have three distinct kinds of expertise: general experience with the enterprise and potential pitfalls of comparative law; intimate familiarity with European law; and equal familiarity with whatever system one is using for comparison. Few academics do all three of these things. The present comparative literature dealing with problems of federalism in Europe and the United States, as a result, seems dominated by comparativists and Europeanists. While many writers are evidently familiar with the American system, they generally are not regular participants in ongoing domestic debates about American federalism. Those debates, of course, have been especially vigorous in recent years on account of the Rehnquist Court’s efforts to revive judicial enforcement of the United States Constitution’s federalism guarantees.<sup>16</sup>

This Article endeavors to identify some lessons learned from these debates that may be relevant to the issues of institutional design confronting Europe as it embarks upon the latest revision of the EU structure. I write, as the last paragraph suggests, not as an experienced comparativist or Europeanist, but rather as a participant in debates about American federalism. The usefulness of the American experience for Europe does not depend on any illusion that American

---

<sup>13</sup> Spinant, *supra* note 10.

<sup>14</sup> See *id.* (reporting that “high officials close to the Convention’s president are seeking to play down Mr[.] Giscard’s interest in the USA institutional model”).

<sup>15</sup> McKay, *supra* note 11, at 3.

<sup>16</sup> See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2213 (1998) (describing “federalist revival” in Supreme Court’s jurisprudence); see also Symposium, *The Constitution in Exile*, 51 Duke L.J. 1 (2001); Symposium, *New Voices on the New Federalism*, 46 Vill. L. Rev. 907 (2001); Symposium, *Reflections on United States v. Lopez*, 94 Mich. L. Rev. 533 (1995).

federalism has “all the answers.”<sup>17</sup> As I will suggest, American federalism may well have *failed* to protect state autonomy in the ways that may be most important to Europeans. But failures are often even more interesting than successes from the perspective of lessons learned.

Even an ideal set of federalism doctrines for America, of course, would not be right for the different circumstances of Europe; as our own Founders understood, context is everything in framing a government.<sup>18</sup> But the history of American federalism does provide a laboratory for testing different strategies for maintaining a balance between the center and the periphery. At various times in our history we have relied, for example, on enumeration of specific subject-matter competences for each level of government, on shielding the institutions of subnational government from obligations to enforce national law (or from having that law enforced against *them*), and on narrow rules of construction for national legislation. We have tried both judicial enforcement of federalism and reliance on “political safeguards.” To the extent that all of these strategies are “in play” as possible ways to structure the relationship of the European Union to its Member States, the American experience may offer some useful points of reference.

The way in which American federalism is relevant to Europe’s ongoing debate depends in large part on what one wants federalism to accomplish. One might want federalism to protect the subunits of a polity in a strong sense—to maintain those subunits as viable political communities in their own right, with a high degree of citizen self-identification, separate cultures, and political autonomy. If that is the test, then America is a failed model. On the other hand, one more modestly might hope that federalism would provide some degree of regulatory variation and experimentation across jurisdictions and maintain

---

<sup>17</sup> Nor do I mean to suggest that America is the only—or even the best—analogy. Other federal systems will offer their own lessons to Europe. See, e.g., McKay, *supra* note 11, at 143-53 (concluding that Swiss example is best analogy for European Union). I focus on America for two reasons. First, many Europeans have expressed interest in American comparisons. See, e.g., Siedentop, *supra* note 8, at xi (“The ‘compound’ republic which Madison sought to create, and did finally help to create, provides the crucial point of reference for the attempt to create a European federal state today. Any evaluation of the prospects of that enterprise should begin with American federalism.”). Second, America’s is the federal system that I happen to know something about.

<sup>18</sup> See, e.g., 3 *The Records of the Federal Convention of 1787*, at 153 (Max Farrand ed., 1911) (statement of James Wilson) (rejecting British model as contrary to “[o]ur manners, our laws [and] the whole genius of the people”); Garry Wills, *Explaining America: The Federalist 179* (Penguin Books 2001) (1981) (explaining that Framers followed Montesquieu in holding that structure of government must be accommodated to “natural genius” of “a people”).

a mild form of political checks on the center—for example, by providing opportunities for opposition politicians to gain experience and credibility before seeking to achieve change at the national level. By that standard, America has done well. Whichever model is closer to European aspirations, however, the failures and successes of American federalism seem likely to be instructive.

Whether or not the American example proves useful to Europe's ongoing constitutional debate, the comparative exercise also serves a second purpose for a second audience. That purpose is to inform and enlarge our own public dialogue at home in America. Americans ought to pay attention to the current constitutional foment in Europe for at least two quite different sets of reasons. First, America is bound to Europe by ties of history, philosophy, trade, and military alliance. We need to understand the transformation affecting our long-time partners, especially at a time when Americans and Europeans increasingly appear to be talking past one another.<sup>19</sup>

Second, I think a comparative focus can contribute to our own conversation about federalism on this side of the Atlantic. Despite the Supreme Court's attempt to breathe new life into constitutional federalism in recent years, American academic discourse on federalism remains curiously stilted. Many, if not most, American scholars seem to view any attempt to deviate from the constitutional settlement of 1937—which appeared to cede plenary power to the center—as profoundly illegitimate.<sup>20</sup> Considering issues of federalism in the context of Europe, however, helps us shed some of the historical baggage hindering present debate, and it demonstrates that any number of different federal settlements may be workable and legitimate.<sup>21</sup> Moreover, the European debate—with its longstanding focus on issues of intergovernmentalism versus supranationalism and the relationship of domestic and international institutions—seems well suited to prepare Americans to address any number of similar questions on

---

<sup>19</sup> See, e.g., Robert Kagan, *Power and Weakness*, *Pol'y Rev.*, June/July 2002, at 3, 4, available at <http://www.policyreview.org/JUN02/kagan.html> (“When it comes to setting national priorities, determining threats, defending challenges, and fashioning and implementing foreign and defense policies, the United States and Europe have parted ways.”); see also *You Can Be Warriors or Wimps; Or So Say the Americans*, *Economist*, Aug. 10, 2002, at 43.

<sup>20</sup> See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 221 (2000); Peter M. Shane, *Federalism's “Old Deal”*: What's Right and Wrong with Conservative Judicial Activism, 45 *Vill. L. Rev.* 201 (2000).

<sup>21</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (urging attention to federal systems in other countries to resolve difficult questions in American system); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 *Duke L.J.* 223 (2001) (encouraging cautious attention to other federal systems while noting difficulties in comparison).

our own soil. Such questions include the relationship between U.S. federal structures and supranational organizations like the World Trade Organization, the “direct effect” of international norms in domestic law, and the role of subnational units in a globalized legal environment.<sup>22</sup> These sorts of issues, in my view, seem likely to be the “next big thing” in American federalism over the next couple of decades.

A final caveat: I attempt no normative defense of federalism or Member State autonomy in this Article. In the American literature, of course, the normative value of “states’ rights” is hotly contested.<sup>23</sup> The European debate, on the other hand, seems mostly to take as given that the Member States ought to enjoy some meaningful level of autonomy; discussion centers around how *much* autonomy, how such autonomy is best preserved, and how Member State autonomy can be reconciled with effective governance at the European level. In any event, the more basic normative defense of federalism has been ably undertaken elsewhere,<sup>24</sup> and I have no desire to reinvent that particular wheel.

This Article proceeds in five parts. Because I hope that the comparative enterprise can inform both European and American debates about federalism, Part I is a brief exposition of the European Union’s basic history and structure designed for American readers who may be encountering it for the first time. Part II ventures a broad definition of “federalism” for purposes of comparative analysis and addresses some of the difficulties inherent in the comparative exercise, especially when comparing federal systems. I then lay out a general typology of federalism strategies—that is, institutional and doctrinal

---

<sup>22</sup> See, e.g., Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *Minn. L. Rev.* 71 (2000) (supranational organizations); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815 (1997) (international norms in domestic federal courts); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 *Ohio St. L.J.* 649 (2002) (role of subnational units in foreign affairs).

<sup>23</sup> See, e.g., David L. Shapiro, *Federalism: A Dialogue* (1995) (collecting arguments on both sides of states’ rights debate); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 909 (1994) (arguing that states “do not embody any important normative principle”).

<sup>24</sup> For introductions to the literature in the American context, see, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1 (1988); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *Duke L.J.* 75, 133-62 (2001) (arguing that normative arguments against state autonomy rest on faulty assumptions). For discussions with particular reference to Europe, see Siedentop, *supra* note 8; Bermann, *supra* note 11, at 339-44.

approaches to reaching the desired level of autonomy for subunits within a polity. Some federalism strategies attempt to limit the *power* of the central government directly; others seek to shore up the *process* safeguards for subnational units within the structure of the national political arena; and still others endeavor to wall off the subnational units by providing them with *immunity* from centralized norms. I illustrate each of these strategies with examples from American doctrine and offer some observations on which approaches have proven useful in America and which have not.

Part III focuses on “power federalism” as it has been employed in the European Union. This strategy has taken two distinct forms: the early attempt to confine the powers of the EU government through specific enumeration of its objects and the later adoption of the principle of subsidiarity. The American experience offers reasons to doubt the efficacy of both approaches. Specific enumeration harkens back to the failed American doctrine of “dual federalism,” which sought to identify and police exclusive spheres of state and federal authority. Subsidiarity, on the other hand, turns on judgments that seem so intrinsically political as to raise the specter of the *Lochner* Court’s attempt to protect laissez-faire economic policy through the medium of federalism. This hardly means that subsidiarity is a useless or unworkable principle; it suggests, rather, that it probably will have to be enforced primarily through political channels.

In Part IV, I turn to “process federalism.” I have argued elsewhere that an American strategy for protecting state autonomy should rely primarily on process approaches.<sup>25</sup> That, I suspect, is also true of the European Union; federal structures tend to work best if they are self-enforcing. Because the institutional structure of the EU is still evolving, however, it is difficult to evaluate the efficacy of “political safeguards” for Member State autonomy within the EU system. Instead, I attempt only to identify some respects in which federalism concerns ought to be considered in shaping the evolution of EU institutions.

Three general observations stand out. First, the viability of “political safeguards” for federalism generally depends on ensuring that most law at the central level is made through processes in which the subnational units are represented. Consequently, “separation of powers” problems concerning the relationships among the Community’s lawmaking branches—the Council, the Commission, and the Parlia-

---

<sup>25</sup> See, e.g., Ernest A. Young, Two Cheers for Process Federalism, 46 *Vill. L. Rev.* 1349, 1384-86 (2001). I have insisted, however, that some substantive backstop is necessary to limit national power. See *id.* at 1367-73.

ment—are also federalism problems. Second, the use of traditional lawmaking procedures at the federal level in the United States may protect the states not so much because the states are represented in those processes, but because the processes themselves are cumbersome, limiting the output of federal law and therefore leaving large areas open to state policy choices. This observation suggests that efforts to streamline or “unblock” lawmaking processes at the center may undermine the regulatory autonomy of the Member States. Third, American federalism has always involved at bottom a competition between the national government and the states for the loyalty and support of the People. To the extent that a similar dynamic evolves within the EU, much will depend on the ability of the Community institutions to present themselves as viable and legitimate objects of loyalty. Measures that increase, for example, the democratic accountability of the Community institutions may enhance their viability in this regard and therefore affect the balance of federalism over the long term.

Part V offers some more general observations on the relevance of the American model for Europe, and of the European model for America. I suggest that Europeans may want stronger guarantees of Member State autonomy than we have been able to preserve in the United States. I inquire, however, whether federalism’s very success in allowing different communities to live together tends, over time, to break down the loyalties and associations that give force to the autonomy of the decentralized units. To be sure, the EU is divided by language, religion, and culture; it will be a long time before any general tendency toward homogeneity can come to fruition. But surely, in designing a constitution, one should take a *very* long view. I conclude by proposing some ways in which both the history and current debates over European integration may be relevant to America’s own federal conversation. We could all do much worse than to be suspected, like Mr. Giscard, of knowing too much about the system of government across the Atlantic.

## I

### EUROPE’S GREAT EXPERIMENT

This introductory Part offers a brief survey of the European Union’s history and institutions.<sup>26</sup> I make no attempt at comprehensiveness. In fact, one of the observations I will press later on—and that has been pressed by many others—is that the EU’s present institutions and founding documents are so complex, so difficult to sum-

---

<sup>26</sup> Readers already familiar with the EU may wish to jump straight to Part II.

marize in simple terms, that they present a real problem of legitimacy.<sup>27</sup> In America, the basic workings of our central government can be learned from three-minute cartoon spots aired on television for children on Saturday mornings.<sup>28</sup> It is hard to imagine a European version of "I'm Just a Bill"—the animated cartoon that taught an entire generation of American children how federal statutes are enacted—that would comprehensibly explain, for instance, the codecision procedure for enacting Community law.<sup>29</sup> What follows is thus only a sketch of a much more complex reality. I conclude with a brief section outlining the fundamental challenges facing the Union as it begins yet another process of institutional reform and, perhaps, reinvention.

It is necessary at the outset to distinguish between the European "Union" and the European "Community." The Community, originally known as the European Economic Community (EEC), is a set of supranational institutions created by the Treaty of Rome in 1957.<sup>30</sup> The broader European *Union*, created by the Maastricht Treaty in 1992,<sup>31</sup> added two additional "pillars" to the preexisting Community institutions. Those pillars—which are more intergovernmental in character than the Community<sup>32</sup>—cover the development of a common foreign and security policy, and cooperation on home affairs and

---

<sup>27</sup> Cf. Joseph Goldstein, *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand* 19 (1992) ("That the Constitution be intelligible and accessible to We the People of the United States is requisite to a government by consent . . .").

<sup>28</sup> See, e.g., Videotape: *Schoolhouse Rock: America Rock* (ABC Home Video 1995) [hereinafter *Schoolhouse Rock*]. The *America Rock* shorts include "Three-Ring Government" (separation of powers) and "I'm Just a Bill" (federal legislative process). These cartoon descriptions (pun intended) obviously fail to capture many complex aspects of our system. They make no reference to administrative agencies or—a spectacular omission—to federalism. Nonetheless, they are able to capture many of the fundamentals in terms that even a child can understand.

<sup>29</sup> See, e.g., John McCormick, *The European Union: Politics and Policies*, 150 box 8.2 (2d ed. 1999) (commenting that "[t]he tension between intergovernmentalism and supranationalism in the EU has produced a legislative process of mind-numbing complexity").

<sup>30</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. Actually, there are three European "Communities": the European Coal and Steel Community, the European Atomic Energy Community, and the European Community (EC), which succeeded the old European Economic Community. See David Galloway, *The Treaty of Nice and Beyond: Realities and Illusions of Power in the EU* 15 (2001). Because the EC is by far the most important of these three, I do not discuss the others further here. I refer to the amended version of the Treaty of Rome hereinafter as the EC Treaty. See Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 173 (1997) [hereinafter *EC Treaty*].

<sup>31</sup> Treaty on European Union, Feb. 7, 1992, O.J. (C 191) 1 (1992).

<sup>32</sup> See, e.g., Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 *Colum. L. Rev.* 628, 652 (1999). Professor Lindseth observes that

justice.<sup>33</sup> Although the Community institutions remain the focus of current governance and institutional debate, I have adopted for purposes of this Article the general practice of referring to both the Union and the Community by the generic term, “European Union.”

### A. *The Tale of the Treaties*

As currently established, the European Union’s “constitution” resides in a series of treaties concluded among the Member States over a period of almost fifty years.<sup>34</sup> The Treaty of Paris,<sup>35</sup> concluded among France, West Germany, Italy, and the Benelux countries in 1951, created the European Coal and Steel Community. Although focused on removing internal trade barriers in two particular industries, the Coal and Steel Community was envisioned by its proponents as “a first step in the federation of Europe.”<sup>36</sup> The next step came with the two Treaties of Rome, concluded among the same six nations in 1957,

---

only the first pillar—the European Community—can make a claim to being a truly supranational body with a reasonably autonomous institutional existence of its own. In so far as the second and third pillars are concerned, the EU has historically been essentially an intergovernmental body, requiring the consent of each Member State before common action can be taken.

Id. Actions under the second and third pillars occur outside the framework of Community law, “meaning outside the principles of Community law primacy and direct effect, outside the legal forms of Community law (regulations, directives, decisions), outside the scope of the Commission’s enforcement powers as such, and outside the ambit of judicial review by the European Court of Justice and Court of First Instance.” George A. Bermann, Roger J. Goebel, William J. Davey & Eleanor M. Fox, *Cases and Materials on European Union Law* 17 (2d ed. 2002).

<sup>33</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 17; Galloway, *supra* note 30, at 15; McCormick, *supra* note 29, at 72 box 4.2. Although the Treaty on European Union does not define the meaning of “justice and home affairs,” it at least includes the following: “asylum policy, immigration policy, combat against drug addiction and international fraud, judicial cooperation in civil and criminal matters, cooperation in customs affairs, and police cooperation in regard to terrorism, drug trafficking and other serious international crimes.” Bermann, Goebel, Davey & Fox, *supra* note 32, at 17.

<sup>34</sup> See, e.g., Opinion 1/91, 1991 E.C.R. I-6102, [1992] 1 C.M.L.R. 245, 269 (1991) (describing EC Treaty as “constitutional charter of a Community based on the rule of law”). But see Lindseth, *supra* note 32, at 655-56 (noting difficulties with, and serious debate about, viewing treaties as “constitution”). Current versions of the treaties discussed in this Part, reflecting amendments in subsequent instruments, are available online at <http://europa.eu.int/eur-lex/en/treaties/index.html>. Some commentators define Europe’s “constitution” more broadly to include “a set of treaties, a rapidly expanding body of laws, and a growing body of traditions and legal precedents that together amount to something like a constitution.” McCormick, *supra* note 29, at 83 box 5.1. For a good brief summary of the treaties’ development, see Bermann, Goebel, Davey & Fox, *supra* note 32, at 4-27.

<sup>35</sup> Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

<sup>36</sup> See McCormick, *supra* note 29, at 48 (quoting Robert Schuman, Foreign Minister of France from 1948-1953, Robert Schuman, Declaration of 9 May 1950, reprinted in *The Origins and Development of the European Community* 58, 59 (David Weigall & Peter Stirk eds., 1992)).

which established the European Economic Community<sup>37</sup> and the European Atomic Energy Community (Euratom).<sup>38</sup> The EEC treaty, which committed its signatories to work toward creation of a common market and to harmonize their economic policies, also created the basic institutional structure that characterizes the Union today: the Council of Ministers, the Commission, a parliamentary assembly (albeit one possessing little power at the outset and initially appointed by the Member States), and a Court of Justice charged with interpreting the founding documents and enforcing obligations under them.<sup>39</sup>

Between the Treaties of Rome and the Single European Act (SEA),<sup>40</sup> signed in Luxembourg in 1986, the Community saw significant advances in economic and monetary integration as well as the admission of Britain, Denmark, Ireland, Greece, Portugal, and Spain. The SEA was designed to remove most remaining barriers to a truly common market by 1992; it also extended the Community's responsibilities to new policy areas, reformed and restructured the Community institutions in various ways, and encouraged political cooperation on foreign policy, defense, and security issues.<sup>41</sup> The Maastricht Treaty of 1992 achieved further consolidation by transforming the Community into one of three "pillars" making up a broader "European Union." Maastricht once again extended the Community's policy "competences" to new areas, enhanced the institutional role of the European Parliament (EP), and set a timetable for introduction of a single European currency.<sup>42</sup>

Two remaining treaties complete the story. The Treaty of Amsterdam,<sup>43</sup> which was signed in 1997 and came into force in 1999, confirmed the timetable for introducing a common currency, approved the Union's potential expansion to the East, and expanded the Union's responsibilities in areas such as immigration, social policy, the environment, and foreign affairs; the Member States were not, however, able to agree on substantial changes to the Community institu-

---

<sup>37</sup> See EC Treaty.

<sup>38</sup> Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169.

<sup>39</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 34; McCormick, *supra* note 29, at 52 box 3.2.

<sup>40</sup> Single European Act, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 (1987).

<sup>41</sup> See McCormick, *supra* note 29, at 66, 67 box 4.1; Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 314-15 (1998).

<sup>42</sup> See McCormick, *supra* note 29, at 72 box 4.2; Moravcsik, *supra* note 41, at 379.

<sup>43</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter *Treaty of Amsterdam*].

tions.<sup>44</sup> The Amsterdam Treaty also recognized the principles of “variable geometry” and “closer cooperation.”<sup>45</sup> These principles allowed some Member States to opt out of EU decisions on certain issues, while contemplating that, in other circumstances, some subset of the Member States might choose to integrate “further” and “faster” on certain issues.<sup>46</sup>

The Treaty of Nice,<sup>47</sup> which has just been approved by the Irish after an earlier referendum rejected its terms,<sup>48</sup> revised the Community’s institutional structure in ways designed to accommodate the admission of a significant number of new members.<sup>49</sup> The Nice Treaty did not, however, undertake a thoroughgoing reappraisal of that structure or a reassessment of the balance of responsibility between the Union and its Member States.<sup>50</sup> That task would remain for the “constitutional convention” that began in Brussels in March 2002.

### B. *The Community Institutions*

At the Union level, the current structure divides legislative power between three primary actors: the Council of Ministers, the European Commission, and the European Parliament. A fourth primary institution, the European Court of Justice (ECJ), exercises the judicial power of the Community.<sup>51</sup> With the exception of the Court of Justice, it is hard to map these institutions onto traditional American concepts of separation of powers in which each institution has a virtual monopoly over a particular *function*—e.g., legislation, execution, interpretation. As Volker Roben has observed, “[e]ach of these [Community institutions] is thought to represent a certain *constituency*, the Commission the common interest, the Council the Member States and

---

<sup>44</sup> See McCormick, *supra* note 29, at 71-72; Lindseth, *supra* note 32, at 670; see also Agustín José Menéndez, *Another View of the Democratic Deficit: No Taxation Without Representation*, in *What Kind of Constitution*, *supra* note 5, at 125, 125 (observing that “[t]he agreement reached at the Amsterdam summit in 1996 was sufficient to postpone big thinking”).

<sup>45</sup> Treaty on European Union as amended by the Treaty of Amsterdam, Nov. 10, 1997, O.J. (C 340) 145 (1997), tit. VII (ex tit. VIa) [hereinafter TEU].

<sup>46</sup> See Lindseth, *supra* note 32, at 670-71.

<sup>47</sup> Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C 80) 1 (2001).

<sup>48</sup> See Alan Cowell, *Irish Vote for a Wider Union, and Europe Celebrates*, N.Y. Times, Oct. 21, 2002, at A3.

<sup>49</sup> See Galloway, *supra* note 30, at 13; Volker Roben, *Constitutionalism of Reverse Hierarchy in the European Union 8* (Apr. 19, 2001) (unpublished manuscript, on file with author).

<sup>50</sup> See Galloway, *supra* note 30, at 182.

<sup>51</sup> See EC Treaty art. 7 (ex art. 4) (identifying Community institutions).

the Parliament the peoples.”<sup>52</sup> The picture is thus closer to the notion of “mixed government” in classical political theory.<sup>53</sup>

The way in which these institutions interact in the legislative process defies easy description. The Commission proposes EU legislation, although the Council and Parliament may ask that it consider particular subjects for potential lawmaking. The Council then may approve the Commission proposal with or without amendments, acting in conjunction with the European Parliament. The precise role of the Parliament varies according to the subject matter of the proposed legislation. Most subjects are now governed by the “codecision” procedure, which grants the Parliament a virtually coequal role with the Council.<sup>54</sup>

The Council of Ministers, which traditionally has held the primary responsibility for accepting or rejecting proposals for new Community legislation, is comprised of individual seats for each Member State.<sup>55</sup> John McCormick has pointed out, however, that “the Council actually consists of several different councils, depending on the topic under discussion. For example, foreign ministers will meet to deal with foreign affairs, transport ministers to discuss new proposals for transport policy and law, and so on.”<sup>56</sup> Initially, most decisions by the Council had to be made unanimously; over time, however, there has been a strong tendency toward “qualified majority” voting—that is, a system where each state receives multiple votes weighted roughly by

---

<sup>52</sup> Roben, *supra* note 49, at 11 (emphasis added); see also Gráinne de Búrca, *The Institutional Development of the EU: A Constitutional Analysis*, in *The Evolution of EU Law* 55, 60 (Paul Craig & Gráinne de Búrca eds., 1999).

<sup>53</sup> See P.P. Craig, *Democracy and Rule-making Within the EC: An Empirical and Normative Assessment*, 3 *Eur. L.J.* 105 (1997). On mixed government, see generally Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 197-255, 446-53 (1969) (recounting transition from British notions of mixed government to American structure of separation of powers). The essential characteristic of mixed government was that it rested on institutions representing different social *interests*—e.g., king, nobles, commons—as opposed to governmental functions—e.g., legislation, enforcement, and interpretation. See Bernard Bailyn, *The Ideological Origins of the American Revolution 70-73* (enlarged ed. 1992).

<sup>54</sup> See, e.g., McCormick, *supra* note 29, at 150-52 & box 8.2 (describing “consultation,” “cooperation,” and “codecision” procedures).

<sup>55</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 35 (“The Council . . . resembles in some degree a head of state in status, a legislature in function and an assembly of constituent states in structure.”).

<sup>56</sup> McCormick, *supra* note 29, at 119; see EC Treaty art. 203 (ex art. 146) (providing that Council is to be composed of representatives “at ministerial level” from Member States). Day-to-day operations, however, are conducted by the Committee of Permanent Representatives (COREPER), comprised of permanent delegates from each of the Member States. See McCormick, *supra* note 29, at 119-20, 123-25.

population and approval requires approximately seventy-one percent of the total votes.<sup>57</sup>

The presidency of the Council rotates among the Member States, with each state holding the office for six months. Holding the presidency may be important for a number of reasons. The presidency sets the agenda for Council meetings, represents the Council in relations with the other EU institutions, mediates and promotes cooperation among the Member States, and acts as the EU's "face" on the international level by overseeing and coordinating the EU's foreign policy.<sup>58</sup> The present "constitutional convention," for example, gained at least some of its momentum from the enthusiastic support of Guy Verhofstadt, the Belgian Prime Minister who hosted the Laeken Summit during the recently completed Belgian presidency.<sup>59</sup>

Because it represents the Member State governments directly and because those governments are in turn democratically elected, the Council of Ministers is designed both to protect the Member States' interests and to lend democratic legitimacy to the overall structure.<sup>60</sup> The European Commission, on the other hand, is designed to be independent of "parochial" Member State interests. While its members are appointed by the Member States (subject to approval as a body by the Parliament), the Treaty Establishing the European Community (EC Treaty) states that candidates must be chosen "on the grounds of their general competence" as persons "whose independence is beyond doubt."<sup>61</sup> The Treaty likewise directs the commissioners' home states "not to seek to influence the Members of the

---

<sup>57</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 37 ("[E]very major Treaty amendment starting with the Single European Act . . . has expanded the scope of application of [qualified majority voting] to the point that it is now the decidedly preponderant voting formula in the Council."); McCormick, *supra* note 29, at 130-31. From the mid-1960s to the 1980s, the effects of qualified majority voting were mitigated by the Luxembourg Accords, a loose agreement that objections to a measure by individual states on the basis of very important interests would be respected by the rest of the Council. That agreement generally has gone by the boards with the dramatic expansion of qualified majority voting in more recent years. See Bermann, Goebel, Davey & Fox, *supra* note 32, at 39-40.

<sup>58</sup> See McCormick, *supra* note 29, at 126.

<sup>59</sup> See From the Sublime to the Cantankerous, *Economist*, Dec. 22, 2001, at 57, 57; Robin Oakley, EU Summit: Terror Pledge, and Clashes, Dec. 13, 2001, at <http://www.cnn.com/2001/WORLD/europe/12/13/eu.summit.preview/index.html>.

<sup>60</sup> See, e.g., European Council, Report of the Council on the Functioning of the Treaty on European Union, Brussels 1995, at 16 para. 18 (arguing that Council contributes to legitimacy of system by way of its political responsibility to Member State parliaments for positions taken at Community level); Craig, *supra* note 53, at 117.

<sup>61</sup> EC Treaty art. 213 (ex art. 157). Moreover, the appointments by individual states "are made in consultation with the president of the Commission, and appointees also usually must be acceptable to the other commissioners, other governments, the major political parties at home, and the European Parliament." McCormick, *supra* note 29, at 102. Parliament must approve the College of Commissioners as a group at the outset of their terms,

Commission in the performance of their tasks,"<sup>62</sup> and prevents commissioners from being removed by their home governments during their five-year terms.<sup>63</sup> The Commission is led by a president, appointed by the Member States, who wields considerable power through his authority to distribute portfolios among his fellows and represent the Commission externally.<sup>64</sup> The Commission's president, according to John McCormick, is "the person who comes closest to being able to claim to be the leader of the EU."<sup>65</sup>

The European Commission "has no direct equivalent in the United States."<sup>66</sup> In many respects, the Commission's role is similar to that of the administrative agencies that make up the bulk of the American executive branch.<sup>67</sup> It is charged with overseeing the implementation of EU law, most often by the Member States but sometimes by the Commission directly.<sup>68</sup> In two critical respects, however, the Commission enjoys considerably broader authority and autonomy than American administrative agencies. The first is its power of legislative initiative. The EC Treaty charges the Commission with responsibility for turning the principles enshrined in the treaties into actual laws and regulations; as a result, it has the sole power to initiate legislation.<sup>69</sup> Legislative proposals then must be approved by the Council of Ministers and may be blocked, as I discuss further below, by the European Parliament. Legislative proposals fall into two categories: *regulations*, which are self-executing and bind both public and private actors, and *directives*, which bind the Member States in terms of their

---

and it also may remove the College as a whole if it can muster a two-thirds majority to do so. *Id.*

<sup>62</sup> EC Treaty art. 213 (ex art. 157). Article 213 also requires that commissioners be "completely independent in the performance of their duties" and "neither seek nor take instructions from any government or from any other body." *Id.*

<sup>63</sup> See McCormick, *supra* note 29, at 102.

<sup>64</sup> See EC Treaty art. 219 (ex art. 163); Bermann, Goebel, Davey & Fox, *supra* note 32, at 43-44.

<sup>65</sup> McCormick, *supra* note 29, at 105; see also Galloway, *supra* note 30, at 51-53 (describing changes agreed to in Treaty of Nice that will enhance president's powers).

<sup>66</sup> McCormick, *supra* note 29, at 99.

<sup>67</sup> See, e.g., Michelle Egan & Dieter Wolf, Regulation and Comitology: The EC Committee System in Regulatory Perspective, 4 Colum. J. Eur. L. 499, 500 (1998) ("In some respects, the European Commission plays a similar role to that of a national bureaucracy. The need to enact more detailed and specialized law has led to increased authority for the Commission to formulate administrative and technical rules."); see also Bermann, Goebel, Davey & Fox, *supra* note 32, at 42 (describing the Commission as resembling "a Government in the usual European sense of the term" that "performs tasks commonly identified with the executive").

<sup>68</sup> See *infra* Part IV.C (discussing implementation and enforcement of EU law).

<sup>69</sup> See McCormick, *supra* note 29, at 111-12; see also Craig, *supra* note 53, at 117 (observing that "control over the legislative agenda gives the Commission the power to set priorities for the Community").

goals and objectives but leave implementation up to the individual member governments.<sup>70</sup> The Commission also may issue nonbinding recommendations and opinions interpreting existing law or proposing changes for comment.<sup>71</sup>

The second difference between the Commission and American agencies is that the Commission has no direct democratic accountability at the top of the executive hierarchy. Much of the power ceded to administrative agencies in the American system has been justified at least in part because the President provides this sort of accountability.<sup>72</sup> Some proposals for reform of the Commission would address this issue by directly electing a president to head the EU executive.<sup>73</sup> Others focus on enhancing legitimacy by increasing the transparency and responsiveness of the Commission's decisionmaking processes.<sup>74</sup>

The third major Community institution—the European Parliament—traditionally has been the weakest by far.<sup>75</sup> The widespread perception that EU institutions as a whole are undemocratic, however, has produced pressure for a steady expansion of the Parliament's role. Members of the Parliament have been elected directly by the people of the Member States since 1979.<sup>76</sup> Recent revisions to the

---

<sup>70</sup> See EC Treaty art. 249 (ex art. 189); McCormick, *supra* note 29, at 112 box 6.2; Lindseth, *supra* note 32, at 653 n.98. Professor Lindseth points out that, although directives generally leave implementation up to the Member States, “the ECJ has long held that a directive can have direct effect in a Member State if the deadline for implementation has passed and the directive is unambiguous in its legal terms.” Lindseth, *supra* note 32, at 653 n.98 (citing Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337, 1348 para. 12, [1975] 1 C.M.L.R. 1, 16 para. 12 (1976)). Moreover, in at least some cases, citizens may file suit against a Member State complaining of its failure to implement a directive. See Joined Cases C-6 & 9/90, Francovich v. Italy, 1991 E.C.R. I-5357, I-5406 para. 7, [1993] 2 C.M.L.R. 66, 108-09 para. 7 (1991); Swaine, *supra* note 9, at 3; see also *infra* Part IV.C.

<sup>71</sup> See McCormick, *supra* note 29, at 112 box 6.2.

<sup>72</sup> See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984); Michael A. Fitts, *Retaining the Rule of Law in a Chevron World*, 66 Chi.-Kent L. Rev. 355, 356-57 (1990). See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 8-9 (1994) (explaining that different accounts of Framers' view of executive authority all place considerable value on accountability of executive officials through an elected president). A different justification focuses on democratic accountability through congressional oversight. See Fitts, *supra*, at 357. The principle of legislative oversight also seems considerably weaker in the EU, at least in the form of oversight by the European Parliament (EP). The Council of Ministers might be thought of as exercising that function, but it in turn is democratically accountable only indirectly through the Member State governments.

<sup>73</sup> See, e.g., Fischer, *supra* note 7, at 26.

<sup>74</sup> See, e.g., Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 Eur. L.J. 5, 14-15 (1998).

<sup>75</sup> See EC Treaty art. 137 (as in effect 1992) (now art. 189) (describing Parliament's powers as advisory and supervisory); see also Bermann, Goebel, Davey & Fox, *supra* note 32, at 51 (noting “increased authority” from former advisory and supervisory role).

<sup>76</sup> For many years, the Member States established electoral procedures individually. Since 1999, the Parliament has been elected through a uniform system of multimember

treaties, moreover, have extended the use of the “codecision” procedure—whereby laws may not be adopted by the Council without the approval of the Parliament<sup>77</sup>—to virtually all Community legislation.<sup>78</sup> Paul Craig has observed that “[i]f the co-decision procedure is indeed generalised to all Community legislation then the EP will come close to attaining co-equal status in the legislative process with the Council.”<sup>79</sup>

Despite this expansion of its role, however, the Parliament continues to suffer from several substantial weaknesses. Voter turnout is low (for Europe) in Parliamentary elections, and there tends to be little popular interest in its activities.<sup>80</sup> Perhaps more importantly, the EU has failed to develop strong transnational political parties that might transform the EP into a viable forum for vindicating the popular will.<sup>81</sup> The ongoing constitutional convention seems likely to feel more pressure to increase the Parliament’s role; that, in turn, may have important effects on the relationship between the Union and the Member States.

The function of the last major “branch” of the EU government, the European Court of Justice, is probably the most familiar to American eyes.<sup>82</sup> Like the U.S. Supreme Court, the ECJ is a “judicial review court”—that is, a judicial body with the power to invalidate the acts of its coordinate governmental branches. As such, the ECJ has

---

constituencies, the members for which are allocated by proportional representation. See Bermann, Goebel, Davey & Fox, *supra* note 32, at 51. Representation is roughly weighted by population, but the system overrepresents small Member States and underrepresents large ones. See *id.* at 52.

<sup>77</sup> See EC Treaty art. 251 (ex art. 189); Bermann, Goebel, Davey & Fox, *supra* note 32, at 97-99.

<sup>78</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 99; McCormick, *supra* note 29, at 152.

<sup>79</sup> Craig, *supra* note 53, at 116.

<sup>80</sup> See, e.g., Galloway, *supra* note 30, at 16; McCormick, *supra* note 29, at 145-46. As Professor McCormick notes, however, turnout for EP elections does tend to be significantly higher than in American congressional elections. *Id.* at 145. Nonetheless, the comparison to turnout rates for internal elections in the Member States does suggest that the Parliament “still seems anonymous and distant to most” EU voters. *Id.* at 146. The Economist, for example, recently began a column on the impending election of the EP’s president by asking, “What if the European Parliament elects a new president and nobody notices?” Europe’s Forgotten President, *Economist*, Jan. 12, 2002, at 49, 49.

<sup>81</sup> The Treaty of Nice includes provisions designed to encourage and set rules for the development of political parties operating at the European level. See Galloway, *supra* note 30, at 126. And some parties have begun efforts to coordinate their platforms and campaigns on a Europe-wide basis. See Bettina Berg, Green European Platform for EP Election in 2004, July 31, 2002, at <http://www.euobserver.com/index.phtml?aid=7136&sid=9>.

<sup>82</sup> The Community’s judicial branch also includes a single lower court, the Court of First Instance. See EC Treaty art. 225 (ex art. 168a).

the responsibility for resolving boundary conflicts between those branches as well as between the central government and the periphery.<sup>83</sup> And as with the U.S. Supreme Court, the ECJ's rulings on EU law bind the national courts of the Member States.<sup>84</sup>

The Court of Justice is composed of fifteen judges, with each Member State having the right to make one appointment.<sup>85</sup> Judges serve six-year terms, although reappointments are not uncommon.<sup>86</sup> The appointments must be approved by common accord of the Member State governments, and, as with the Commission, the judges are bound by both their oath of office and informal norms not to function as representatives of their home countries.<sup>87</sup> Notwithstanding the civil-law traditions of most of the Member States and the ECJ's adoption of particular structures from national courts, the ECJ seems to function primarily as a common-law court.<sup>88</sup> In particular, its line of decisions establishing the direct effect and supremacy of EU law, as well as a set of unenumerated human rights, is largely a body of judicial precedent existing apart from textual provisions in the treaties.<sup>89</sup>

---

<sup>83</sup> See Martin Shapiro, *The European Court of Justice*, in *The Evolution of EU Law*, supra note 52, at 321.

<sup>84</sup> Compare Bermann, Goebel, Davey & Fox, supra note 32, at 354 ("Article 234 rulings constitute binding precedents for national courts in later cases."), with *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that federal Supreme Court has right to review state court judgments on federal law issues). Most of the European Court of Justice's (ECJ's) significant structural rulings have come through the preliminary reference procedure whereby national courts confronting an issue of European law in a case before them can request a ruling on it from the ECJ. See EC Treaty art. 234 (ex art. 177). After deciding the question, the ECJ then sends the case back to the national court for resolution of any remaining issues. See, e.g., Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 *Am. J. Comp. L.* 421, 425-26 (1996) ("The rule that has been accepted in principle by all Member States is that a preliminary ruling by the European Court is a supreme rule of decision for the courts of Member States, sufficiently authoritative to invalidate (more precisely, to empower a national court to disapply) national legislation.").

<sup>85</sup> See EC Treaty art. 221 (ex art. 165); McCormick, supra note 29, at 161-62.

<sup>86</sup> See Bermann, Goebel, Davey & Fox, supra note 32, at 59.

<sup>87</sup> See EC Treaty art. 223 (ex art. 167) (requiring that judges should "be chosen from persons whose independence is beyond doubt"); McCormick, supra note 29, at 162-63.

<sup>88</sup> See McCormick, supra note 29, at 167 ("The overall goal of the Court is to help build a body of common law for the EU that is equally, fairly, and uniformly applied throughout the member states."); Shapiro, supra note 83, at 326 ("Although the ECJ's . . . general mode of operation clearly follows a French model, its style has become more discursive over time, particularly when one takes account of how much the reports of the Advocates General have come to be treated as a major part of the case law.").

<sup>89</sup> Cf. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 39-40 (Amy Gutmann ed., 1997) (observing that judicial decisionmaking that focuses on prior precedent rather than interpretation of text is hallmark of common-law method). Unlike Anglo-American common-law courts,

This developing body of judge-made law has played a critical role in defining the relationship between EU law and the Member States, mostly in the direction of enhancing the authority of norms articulated at the European level.<sup>90</sup>

Several additional institutions complement—or *complicate*, depending on how you look at it—the quadripartite structure just described. The most important by far is the European Council, a collective term for the heads of government of each Member State, their foreign ministers, and the president of the Commission meeting at short summits to provide strategic direction for the Union.<sup>91</sup> The treaties accord the European Council little formal role; nonetheless, because these actors represent the Member States at the highest levels—and therefore, as a practical matter, have the authority to amend the underlying treaties that define the structure in the first place—they obviously wield a great deal of power.<sup>92</sup> The institutionalization of regular meetings among this group thus has tended to shift leadership away from the Council of Ministers and the Commission.<sup>93</sup> Less important, but interesting nonetheless from the perspective of federalism, is the Committee of the Regions representing various local and regional groups within the individual Member States.<sup>94</sup> Finally, the agreements leading up to monetary union created a European Central Bank, vested with considerable institutional independence to set interest rates and ensure monetary stability for the countries participating in the euro.<sup>95</sup>

---

however, the ECJ does not report the positions of individual judges and “concurring or dissenting opinions remain unknown.” Bermann, Goebel, Davey & Fox, *supra* note 32, at 60.

<sup>90</sup> See Shapiro, *supra* note 83, at 333 (“The ECJ’s Marshallian task was to convert the treaties into something like a constitution and itself from an international court of international law into a constitutional court. It did so in the famous cases declaring the supremacy and direct effect of EC norms.”); Christoph Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 *Wis. Int’l L.J.* 153, 179 (2001) (concluding that “[t]he European Court of Justice has been and remains a major integration force for the European Communities”). Indeed, Professor Shapiro argues that the original rule of unanimity voting in the Council of Ministers—a feature generally thought to protect Member State autonomy—actually promoted centralization by hamstringing the Council’s ability to overrule the ECJ’s centralizing doctrines. See Shapiro, *supra* note 83, at 329.

<sup>91</sup> See TEU art. 4 (ex art. D); McCormick, *supra* note 29, at 174.

<sup>92</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 41-42.

<sup>93</sup> See McCormick, *supra* note 29, at 181 (suggesting that “[a]ny hopes the Commission might have held for developing an independent sphere of action and power have largely disappeared with the rise of the European Council”).

<sup>94</sup> See *id.* at 183.

<sup>95</sup> See *id.* at 183-84.

Two caveats must qualify the foregoing discussion. First, describing the EU's formal structure fails to capture much of the way in which the institutions actually function in practice. A number of important institutions—such as the network of policy committees that assist the Council and Commission in the “comitology” process<sup>96</sup>—are not to be found in the treaties but nevertheless play an important role.<sup>97</sup> Likewise, the formal relationships among institutions set out in the treaties do not tell the whole story. As Gráinne de Búrca has observed, “[n]on-legal or ‘soft’ legal measures such as the Luxembourg Accords and the various interinstitutional agreements such as those on the budgetary and comitology procedures often contain information which is more important . . . than the provisions of the Treaty which formally allocate and define functions and powers.”<sup>98</sup>

Second, all these institutional arrangements are subject to alteration by an “intergovernmental conference”—a meeting of the Member States to revise and amend the EU's founding treaties. David Galloway has explained that “[a]lthough the Union's institutions are politically involved in this process to varying degrees, it is, formally speaking, a diplomatic negotiation among member governments, the outcome of which is enshrined in a treaty amending the existing treaties.”<sup>99</sup> To the extent that the Convention on the Future of Europe results in a “constitution,” it may replace this international law model with a more conventional amendment process. At present, however, “the member states remain the ‘masters of the Treaties.’”<sup>100</sup>

### C. *Allocating Power Between the Member States and the Union*

The treaties explicitly allocate power and responsibility between the Union and the Member States in two ways. First, they assign “competence” to the Community institutions to regulate various areas, much as Article I of the American Constitution enumerates congressional power to regulate certain subject matters, such as interstate commerce.<sup>101</sup> The Union's responsibilities have expanded from coal and steel only in the original European Coal and Steel Community, to a broad range of topics including not only the common market and currency, but also immigration, the environment, education, and social

---

<sup>96</sup> See de Búrca, *supra* note 52, at 71; Egan & Wolf, *supra* note 67, at 511.

<sup>97</sup> See de Búrca, *supra* note 52, at 61.

<sup>98</sup> *Id.*; see also Börzel & Risse, *supra* note 8, at 51.

<sup>99</sup> Galloway, *supra* note 30, at 24.

<sup>100</sup> *Id.*

<sup>101</sup> The allocation of competences is important not only to the allocation of authority between the Member States and the Union as a whole, but also to the decision as to which Union institutions may act and which of several distinct lawmaking procedures must be employed.

policies.<sup>102</sup> This expansion of formal competences has occurred alongside aggressive use of Article 235 of the Treaty of Rome—the Treaty’s “necessary and proper” provision—to extend Community competence beyond the limits of explicit enumeration.<sup>103</sup>

This allocation of authority has also been critically affected by innovative decisions by the European Court of Justice. Since the landmark *van Gend & Loos* decision in 1963,<sup>104</sup> the Court has held that at least some Community law has “direct effect”: “Community legal norms that are clear, precise, and self-sufficient (not requiring further legislative measures by the authorities of the Community or the Member States) must be regarded as the law of the land in the sphere of application of Community law.”<sup>105</sup> The Court reinforced this principle by asserting the supremacy of Community law over national legal norms.<sup>106</sup> Despite the absence of any specific “supremacy clause” in the European treaties,<sup>107</sup> the Court has held that “any Community norm, be it an article of the Treaty . . . or a minuscule adminis-

<sup>102</sup> See, e.g., EC Treaty tit. IV (visas, asylum, and immigration); id. tit. XI (social policy, education, vocational training, and youth); id. tit. XIX (environment).

<sup>103</sup> See Lindseth, *supra* note 32, at 665; J.H.H. Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403, 2443-47 (1991). Article 235 provides that

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

EC Treaty art. 235 (as in effect 1992) (now article 308). I discuss the effects of this expansion *infra* in Part III.B.

<sup>104</sup> Case 26/62, *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v. Nederlands Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963).

<sup>105</sup> Weiler, *supra* note 103, at 2413.

<sup>106</sup> See, e.g., Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594, [1964] C.M.L.R. 425, 455 (1964); see also Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134 para. 3, [1972] C.M.L.R. 255, 283 para. 3 (1972) (“[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”).

<sup>107</sup> Compare U.S. Const. art. VI, cl. 2, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

As Professor Lindseth points out, the EC Treaty simply “required the Member States to ‘ensure . . . the obligations arising out of [the] Treaty’ and otherwise prohibits them from taking ‘any measure which could jeopardize [its] objectives.’” Lindseth, *supra* note 32, at 703 n.351 (quoting EC Treaty art. 10); see also Henkel, *supra* note 90, at 171 (“[T]he failure by the founding Member States to include an explicit Supremacy Clause in the Community Treaties did not prevent the Court from inferring one.”).

trative regulation enacted by the Commission, ‘trumps’ conflicting national law whether enacted before or after the Community norm.”<sup>108</sup>

The ECJ also has developed its own “implied powers” jurisprudence that seems independent of the textual warrant in Article 235.<sup>109</sup> As part of this jurisprudence, the Court has held that Community competence is *exclusive* in certain areas, foreclosing Member State action even when the Community has not itself acted.<sup>110</sup> Likewise, the Court has developed a *preemption* doctrine holding that, in some areas, Community action preempts the field and therefore bars even Member State action not directly in conflict with the Community measure.<sup>111</sup> Finally, the ECJ has developed its own set of doctrines concerning fundamental human rights and has asserted the power to review Community measures for violations of those rights.<sup>112</sup> In undertaking this project, the Court has been undeterred by the absence from the treaties of any Bill of Rights or explicit mention of judicial review in this area.<sup>113</sup> Taken together, according to Joseph Weiler, these four doctrines—direct effect, supremacy, implied powers, and fundamental human rights—“fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states.”<sup>114</sup>

---

<sup>108</sup> Weiler, *supra* note 103, at 2414. Moreover, the Court’s jurisprudence strongly suggests that, in its view, it has the final say on whether national legal norms have, in fact, come into conflict with Community law. Professor Weiler refers to this final say as “Kompetenz-Kompetenz.” See *id.*

<sup>109</sup> See, e.g., Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, [1971] C.M.L.R. 335 (1971) (holding that grant of internal competence in given subject matter implies power to make treaties externally concerning that subject).

<sup>110</sup> The areas of exclusive Community power identified by the Court as of 1999 included “trade policy, the supervision of aid, monetary policy, . . . parts of the common fisheries policy,” customs policy, and “the free movement of goods, persons, services, and capital” in the Common Market. Reimer von Borries & Malte Hauschild, *Implementing the Subsidiarity Principle*, 5 *Colum. J. Eur. L.* 369, 376 (1999) (citations omitted). Moreover, the ECJ has suggested that the Community has exclusive competence to negotiate externally concerning any area in which it has legislated internally. See *id.* Finally, the Commission has taken an even more extensive position, asserting exclusive Community competence over aspects of agriculture and transportation policy. See *id.* at 376-77.

<sup>111</sup> See Weiler, *supra* note 103, at 2416-17.

<sup>112</sup> The ECJ’s assertion of the power of judicial review has led it to require national courts to offer effective remedies for violations of Community law, even where the national judiciary historically has lacked any preexisting power of judicial review. See, e.g., Case C-213/89, *The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433, [1990] 3 C.M.L.R. 375 (1990) (holding that British courts must strike down acts of Parliament that violate Community law).

<sup>113</sup> See Weiler, *supra* note 103, at 2417-18.

<sup>114</sup> *Id.* at 2413.

Partly in response to the expansion of Community competences and the ECJ's aggressive promotion of Community law, the Maastricht Treaty introduced a new principle for limiting Community powers.<sup>115</sup> Article 3(b)(2) of the EC Treaty now articulates a principle of "subsidiarity," under which "the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore by reason of the scale or effects of the proposed action, be better achieved by the Community."<sup>116</sup> At Amsterdam, the Member States added a "Protocol on the Application of the Principles of Subsidiarity and Proportionality" to the EC Treaty.<sup>117</sup> Nonetheless, the precise meaning of the concept—and the institutional role that it will play in the system—remains to be worked out.<sup>118</sup>

#### *D. Three Challenges*

Like the Philadelphia Convention to which it has been compared, the European convention is motivated, at least in part, by the perceived inadequacies of the existing structure in facing current challenges. Just two years ago, Giuliano Amato lamented that "Europe seems to be floundering in the midst of the uncertainties about the euro exchange rate, the prospect of a major enlargement of its frontiers, and the initial signs of a crisis of confidence among its citizens."<sup>119</sup> Three sets of challenges seem paramount.

The first set arises out of the EU's aggressive enlargement plans, which contemplate the addition of up to a dozen new Member States in the next several years.<sup>120</sup> At the time of this writing, negotiations between the EU and the applicant countries proceed apace, and EU officials continue to adhere to a January 1, 2004, target date for admitting many of the new applicants.<sup>121</sup> However, a number of issues have

---

<sup>115</sup> See Swaine, *supra* note 9, at 5.

<sup>116</sup> EC Treaty art. 5 (ex art. 3b).

<sup>117</sup> See Treaty of Amsterdam; see also von Borries & Hauschild, *supra* note 110, at 373-79 (discussing Amsterdam protocol).

<sup>118</sup> See generally Bermann, *supra* note 11; von Borries & Hauschild, *supra* note 110; *infra* Part III.C.

<sup>119</sup> Amato, *supra* note 7, at 119; see also David P. Calleo, *Rethinking Europe's Future 183* (2001) ("The 1990s . . . saw a sharp rise in public criticism of the EU for its inadequacies, as well as a very considerable erosion of public support.").

<sup>120</sup> The potential entrants are Poland, Romania, the Czech Republic, Hungary, Bulgaria, Slovakia, Lithuania, Latvia, Slovenia, Estonia, Cyprus, and Malta. Turkey is also a candidate, although negotiations seem to be proceeding on a somewhat slower timetable. See *The European Union Decides It Might One Day Talk Turkey*, *Economist*, Dec. 18, 1999, at 42, 42.

<sup>121</sup> See Daniela Spinant, *Commission Denies Talks on Delaying Enlargement*, July 29, 2002, at <http://www.euobserver.com/index.phtml?aid=7114>.

cast doubt on this timetable—and perhaps on the prospect of radical enlargement in general. Public support for enlargement is questionable, as reflected in a rash of recent electoral victories by political parties hostile to or at least suspicious of the EU, as well as in the Irish rejection of the Nice Treaty in 2001.<sup>122</sup> Difficult issues remain to be resolved, moreover, concerning the extent to which new entrants will be entitled to EU subsidies, particularly for agriculture.<sup>123</sup>

At present, however, it appears to be the timing, not the eventuality, of substantial enlargement that is most in doubt. The EU is thus unlikely to avoid the difficult institutional issues posed by expansion. The question that formed the focus of the intergovernmental conference at Nice in 2000 is how to maintain the balance and efficiency of the existing Community institutions in the face of the potential addition of up to a dozen new Member States. Enlargement on such a scale has the potential to render the present institutions unwieldy unless substantial changes are made.<sup>124</sup> The Nice Treaty, for example, agreed in principle to cap the total membership of the European Commission, thereby abandoning the privilege of each Member State to appoint at least one commissioner, although the details of the new system remain to be worked out at the constitutional convention or subsequent summits.<sup>125</sup> Enlargement also raises difficult issues of eq-

---

<sup>122</sup> See *id.*; Ian Black, *Europe Braces for Continental Drift to Right*, *Guardian Unlimited*, Apr. 23, 2002, at <http://www.guardian.co.uk/france/story/0,11882,689053,00.html>. As this Article goes to press, the Irish have approved the Nice Treaty in a second referendum. See Cowell, *supra* note 48, at A3.

<sup>123</sup> See Spinant, *supra* note 121; To Get Them In, Cut the Costs, *Economist*, Feb. 2, 2002, at 48, 48 (“The biggest snag is that the would-be newcomers are poor, and have a great many farmers. Since today’s EU devotes 80% of its budget to aiding farmers or poor regions, simply extending its current policies eastwards would cost existing members huge sums.”).

<sup>124</sup> See, e.g., Jean-Luc Dehaene, Richard von Weizsäcker & David Simon, *The Institutional Implications of Enlargement: Report to the European Commission 6 (1999)* (“A significant increase in the number of participants automatically increases problems of decisionmaking and management.”), available at [http://www.europa.eu.int/igc2000/repoc99\\_en.pdf](http://www.europa.eu.int/igc2000/repoc99_en.pdf); Fischer, *supra* note 7, at 23-24 (worrying that “enlargement to include twenty seven or thirty members will hopelessly overload the EU’s ability to absorb, with its old institutions and mechanisms,” and urging “decisive, appropriate, institutional reform so that the Union’s capacity to act is maintained”). It may be precisely this threat to the EU’s capacity to act that motivates some countries’ *support* for enlargement. See Calleo, *supra* note 119, at 263 (“British motives were transparent. The bigger and more diverse the membership, the more diluted integration was likely to be.”). But see Bernard Steunenberg, *Enlargement and Institutional Reform in the European Union: Separate or Connected Issues?*, 12 *Const. Pol. Econ.* 351, 365 (2001) (suggesting that enlargement *per se* will not substantially decrease ability of EU institutions to agree on policies, but that it does provide occasion for Member States to renegotiate institutional arrangements so as to achieve outcomes more to their liking).

<sup>125</sup> See Galloway, *supra* note 30, at 57. The cap proposal contemplated that each state would appoint at most one commissioner on a rotating basis, so that no state would remain

uity among the Member States, especially since the candidates for admission—all of which are located either in Eastern Europe or the Mediterranean—tend to be substantially less wealthy than the existing membership.

The second set of challenges involves the EU's "democratic deficit"—that is, the exercise of considerable governmental power by the EU institutions without any direct grounding (except for the Parliament) in the electorate.<sup>126</sup> The problem reflects the EU's diplomatic and technocratic—and not populist—origins; the initial institutional impetus, after all, was an attempt to rationalize particular industrial sectors (coal and steel) by establishing a coordinating bureaucracy.<sup>127</sup> As David Calleo has observed, "[e]arly Brussels federalists tended to be benevolent technocrats who disliked the mass democracy of the modern nation state. They deplored its complications for rational policymaking and feared the opportunities it offered for evil manipulation."<sup>128</sup> The European political tradition probably reflects a greater belief in and tolerance for "apolitical" technocratic decision-making than one generally sees in America; nonetheless, the EU's technocratic structure has come under increasing pressure as its responsibilities have ventured further into the inevitably political core functions of government.<sup>129</sup>

The "democratic deficit" problem may take a number of forms. Some critics have focused on the relative weakness of the European Parliament—the only directly elected body in the EU structure.<sup>130</sup>

---

without a commissioner indefinitely. See *id.* at 49-51 (describing so-called "deferred capping" solution).

<sup>126</sup> See, e.g., Lindseth, *supra* note 32, at 633 (defining "democratic deficit" as "the transfer of normative power to agents that are not electorally responsible in any direct sense to the 'people' whose 'sovereignty' . . . the agents are said to exercise"); see also Paul Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy*, in *The Evolution of EU Law*, *supra* note 52, at 1, 23-24; Majone, *supra* note 74, at 7; Weiler, *supra* note 103, at 2466-67.

<sup>127</sup> See William Wallace & Julie Smith, *Democracy or Technocracy? European Integration and the Problem of Popular Consent*, 18 *W. Eur. Pol.* 137, 139 (1995) (stating that in early days of Coal and Steel Community, "[p]roponents of an integrated Europe retreated from federation into functional organisation, from political accountability to technocratic administration").

<sup>128</sup> Calleo, *supra* note 119, at 139; see also Lindseth, *supra* note 32, at 637 n.31 (noting "original understanding of European integration as, fundamentally, an executive-technocratic entity").

<sup>129</sup> See Wallace & Smith, *supra* note 127, at 152-54.

<sup>130</sup> See, e.g., Case 138/79, *SA Roquette Frères v. Council*, 1980 E.C.R. 3333, 3360 para. 33, [1979-1981 Transfer Binder] *Common Mkt. Rep. (CCH)* ¶ 8703, ¶ 8704 (1980) (asserting that EP's growing importance arises from "fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly"). But see Craig, *supra* note 126, at 25 ("It is . . . by no means self-evident that the EP has less power over the content of legislation than do national parliaments.").

Others seek democratic legitimation in the Council of Ministers on the European Council, which is at least made up of delegates from directly elected national governments. On this view, the problem is the comparative strength of the Commission vis-à-vis the Council or, with the advent of qualified majority voting in the Council, the prospect that a given Member State will be outvoted and subjected to policies never consented to by the State's own voters.<sup>131</sup> Finally, as Giandomenico Majone has pointed out, the "democratic deficit" sometimes refers to "a set of problems—technocratic decision-making, lack of transparency, insufficient public participation, excessive use of administrative discretion, inadequate mechanisms of control and accountability—[arising] whenever important policy-making powers are delegated to bodies operating at arm's length from government, such as independent central banks and regulatory authorities."<sup>132</sup> From this perspective, the problem is not so much one of electoral control as it is the procedures by which government operates.

Finally, the EU confronts a continuing problem of balance between its central institutions and the Member States. As I discuss in the next Part, this is a problem of *federalism* broadly construed. Thus far, the history of the EU has been true to the slogan of "ever closer union" enshrined in the preamble to the EC Treaty. That slogan, however, begs the question: How much integration is too much? According to David McKay, "[M]ost commentators agree that the changes wrought by the [Single European Act] and Maastricht have moved the EU into a position closer to that of [a] developed federation than a mere supranational organization."<sup>133</sup> Some have argued, however, that Europe has not had the kind of self-conscious and serious debate about federalism that ought to accompany such a transformation.<sup>134</sup> As Joschka Fischer noted in his famous speech, past efforts at integration in Europe have been based on the "Monnet method," which focused on incremental institutional change and eschewed broader debates on a "blueprint for the final state."<sup>135</sup> Further mo-

---

<sup>131</sup> See, e.g., Roben, *supra* note 49.

<sup>132</sup> Majone, *supra* note 74, at 14-15.

<sup>133</sup> McKay, *supra* note 11, at 143.

<sup>134</sup> See, e.g., Sidentop, *supra* note 8, at 27 (complaining that "Europe [has] failed to generate a debate which approaches, in range and depth, the debate which developed around the drafting of a Federal Constitution for the United States" and asking "Where are our Madisons?"). Obviously, the current convention and its accompanying "Debate on the Future of Europe" are designed to fill that gap. The EU has set up an official website to provide information and opportunities for public input on the debate at [http://europa.eu.int/futurum/index\\_en.htm](http://europa.eu.int/futurum/index_en.htm).

<sup>135</sup> Fischer, *supra* note 7, at 27.

tion forward, however, will depend on a “deliberate political act”<sup>136</sup> founded on forthright debate about federalism of the sort that Herr Fischer has sought to provoke.

The Laeken Declaration offered the delegates meeting in Brussels several options in confronting these problems. They may present one proposal or several alternatives; their proposals, moreover, may take the form of “one coherent Treaty, a constitution, or amendments to existent Treaties.”<sup>137</sup> Despite this flexibility, however, convention chairman Valéry Giscard d’Estaing and others have pledged “to write a European constitution to make a qualitative leap in the European Union.”<sup>138</sup> Whatever form this “leap” ultimately takes, the federalism question seems likely to push to the forefront of the convention’s deliberations. As one reporter has observed, expectations on this issue

are high and contradictory: the federalists urge the Convention to complete a drive to a federal state by writing a European constitution and by ending the national right to veto Treaties, while the Euroscepticals expect the Convention to clarify the distribution of powers by giving back powers to national states.<sup>139</sup>

I focus on this question of federalism in this Article. As I will argue, however, its resolution may depend critically on the way in which the first two challenges of expansion and democracy are addressed.<sup>140</sup>

## II

### FEDERALISM AND THE PROBLEM OF DOCTRINAL AND INSTITUTIONAL DESIGN

This Part assembles some tools for the comparative exercise undertaken in the remainder of the Article. Section A adopts a broad definition of “federalism” for purposes of starting the discussion. I also address some of the difficulties involved in comparing federal systems. Section B identifies three approaches to federalism prevalent in American law. Two of these approaches—federalism as imposing solid limits on central *power* and federalism as a *process* for ensuring state representation and for slowing the production of centralized norms—structure my analysis of the EU in Parts III and IV.

---

<sup>136</sup> *Id.* at 30.

<sup>137</sup> Spinant, *supra* note 3.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Calleo, *supra* note 119, at 255-56 (suggesting that while each of “the EU’s three major constitutional issues[—]membership, scope, and governing structure[—]has its own vocabulary and theoretical framework and poses its own choices,” nonetheless “failure or success with one issue is likely to impact significantly on the others”).

### A. *Federalism and Comparability*

Any attempt to approach the European Union in terms of federalism doctrine implicates a vigorous debate about whether the EU is properly described as “federal” at all. Some see the EU as a primarily intergovernmental body, with the Member States preserving the essential attributes of sovereignty and relating to one another by treaty; others prefer to view the EU institutions as forming a supranational entity with autonomous authority of its own.<sup>141</sup> The “federal” form is then frequently discussed as one of a range of options within this supranationalist category.<sup>142</sup> A more restrictive view holds that “federalism essentially refers to the structure of a nation-state,” so that “federalism” connotes a movement to a single “United States of Europe.”<sup>143</sup>

I want to sidestep this debate by employing a broader definition of federalism. Judge Koen Lenaerts of the European Communities Court of First Instance has argued that “[f]ederalism, as a means of structuring the relationship between interlinked authorities, can be used either within or without the framework of a nation-state.”<sup>144</sup> Used in this broader sense, federalism’s “basic tenet is that power will be divided between a central authority and the component entities of a nation-state or an international organization so as to make each of them responsible for the exercise of their own powers.”<sup>145</sup> A wide

---

<sup>141</sup> See, e.g., Craig, *supra* note 126, at 3-50 (discussing range of possible institutional models for EU); McCormick, *supra* note 29, at 14, 81 (describing this tension).

<sup>142</sup> See, e.g., McCormick, *supra* note 29, at 11-12.

<sup>143</sup> See, e.g., Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 *Fordham Int’l L.J.* 746, 747 (1998). Some Member States have resisted official references to “federalism” for this reason. See *id.* at 746. Judge Lenaerts observes that “[o]n the basis of such an understanding of federalism, the European Union is not federal.” *Id.* at 747. For an example of British concerns equating “federalism” with a “super-state,” see *Here We Go Again*, *The Sunday Telegraph* (London), Dec. 16, 2001, [http://www.telegraph.co.uk/opinion/main.jhtml?xml=%2Fopinion%2F2001%2F12%2F16%2Fd11601.xml&secureRefresh=true&\\_requestid=48358](http://www.telegraph.co.uk/opinion/main.jhtml?xml=%2Fopinion%2F2001%2F12%2F16%2Fd11601.xml&secureRefresh=true&_requestid=48358).

<sup>144</sup> Lenaerts, *supra* note 143, at 748; see also T. Koopmans, *Federalism: The Wrong Debate*, 29 *Common Mkt. L. Rev.* 1047, 1050 (1992) (arguing that federalism should be “dissociated from the notion of the State”).

<sup>145</sup> Lenaerts, *supra* note 143, at 748. Judge Lenaerts had said earlier, in a much-quoted formulation, that “[f]ederalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution and umpired by the supreme court of the common legal order.” Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *Am. J. Comp. L.* 205, 263 (1990). As will become apparent in this Article, however, the role of judicial enforcement of federalism is very much in dispute.

range of divided-power systems<sup>146</sup> may count as “federal” under this broad definition.<sup>147</sup>

Societies may choose to divide power for any number of reasons, and they may choose wildly different proportions for its division. The choice to divide power at all, however, necessarily places some importance on preserving the role of each level of government.<sup>148</sup> Federal systems are thus centrally concerned with balance. As Judge Lenaerts observes,

federalism searches for the balance between the desire to create and/or to retain an efficient central authority that can find its origin in historic, social, or other considerations, and the concern of the component entities to keep or gain their autonomy so that they can defend their own interests.<sup>149</sup>

A key difference between federal systems and merely decentralized ones, moreover, is that at least some aspects of this balance are enforceable as a matter of legal right rather than existing simply as a policy choice.<sup>150</sup>

To say that a federal balance is a matter of right rather than policy, however, raises more questions than it answers. To what extent, for example, should limits on central authority be hard-wired into the constitutional structure? What form should such limits take? The identification of legal rights for subunits in a written constitution, moreover, does not resolve the further question of whether those rights ought to be enforced through judicial review.<sup>151</sup> And even if we

<sup>146</sup> See generally Eric Stein, *On Divided-Power Systems: Adventures in Comparative Law*, 1983 *Legal Issues of Eur. Integration* 27.

<sup>147</sup> See, e.g., Börzel & Risse, *supra* note 8, at 53 (“[T]he European Union today looks like a federal system, it works in a similar manner to a federal system, so why not call it an emerging federation?” (emphasis omitted)). For a brief survey of different theoretical approaches to federalism in the European context, see Ben Rosamond, *Theories of European Integration* 23-31 (2000). One potential source of confusion is that “while the American notion of federalism is often associated with states’ rights, European critics not infrequently use the ‘F’ word to connote centralization.” Swaine, *supra* note 9, at 2-3.

<sup>148</sup> See Koopmans, *supra* note 144, at 1052 (“It is, of course, necessary that some real and effective powers will be in the hands of the component states as well as in those of the union, since it is the interplay between the exercise of powers at the different levels which characterizes federal systems.”).

<sup>149</sup> Lenaerts, *supra* note 143, at 748.

<sup>150</sup> See Michael Burgess, *Federalism and Federation in Western Europe*, in *Federalism and Federation in Western Europe*, 15, 19 (Michael Burgess ed., 1986) (defining “federation” as having “a distinctive organizational form or institutional fact which exists to accommodate the constituent units of a union in the decision-making procedure of the central government *by means of constitutional entrenchment*” (emphasis added)); Rubin & Feeley, *supra* note 23, at 911-12.

<sup>151</sup> See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *Duke L.J.* 1, 17 (noting that “even in [Chief Justice] Marshall’s time (and to a great extent today), a number of nations maintained written constitutions and yet gave national legisla-

concede that courts should be involved in enforcing federalism—by no means an uncontroversial point<sup>152</sup>—we still confront difficult questions of institutional and doctrinal design. How *much* should courts be involved and to what extent should they defer to political actors? What sort of doctrines should courts construct for protecting federalism?

This Article is obviously motivated by a belief that comparative analysis can help Europeans answer these questions. Any such analysis, however, encounters the difficulties inherent in translating one nation's experience into a quite different political, historical, and cultural context. Comparativists have insisted that "comparisons can be useful only if the legal institutions under investigation are naturally or functionally comparable."<sup>153</sup> Comparisons of federal systems may be particularly difficult. As Vicki Jackson has observed, a federal structure "typically constitutes an interrelated 'package' of arrangements. No one element of the package can be compared to a similar-seeming element in a different federal system without more broadly considering the comparability of the whole 'package' and the role of the particular element within that federal package."<sup>154</sup>

Daniel Halberstam has illustrated this difficulty with respect to the institution of "commandeering"—that is, the notion that the central government may require the subnational units to enforce and administer central policies.<sup>155</sup> As I discuss further below, the U.S. Supreme Court has rejected mandatory commandeering of state legislative and executive branches.<sup>156</sup> Dissenting from one of these holdings, Justice Breyer suggested that other federal systems, including those of Switzerland, Germany, and the EU, all regularly provide for enforcement of central directives by their constituent states on the be-

---

tive acts the full force of positive law without providing any constitutional check to guarantee the compatibility of those acts with their constitutions").

<sup>152</sup> Compare, e.g., *United States v. Morrison*, 529 U.S. 598, 649-50 (2000) (Souter, J., dissenting) (contending that federalism concerns should be left exclusively to political process), and Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 171-259 (1980) (same), with Baker & Young, *supra* note 24 (arguing for judicial enforcement), and Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 *Tex. L. Rev.* 1459 (2001) (same).

<sup>153</sup> 1 Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 4 (Tony Weir trans., 1977) (quoted in Stein, *supra* note 146, at 27).

<sup>154</sup> Jackson, *supra* note 21, at 273-74.

<sup>155</sup> See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *The Federal Vision*, *supra* note 11, at 213.

<sup>156</sup> See *Printz v. United States*, 521 U.S. 898 (1997) (denying federal government power to commandeer state executive officials); *New York v. United States*, 505 U.S. 144 (1992) (holding that federal government may not commandeer state legislatures); see also *infra* Part II.B.2.b (discussing the anticommandeering doctrine in American jurisprudence).

lief “that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government.”<sup>157</sup> Professor Halberstam shows, however, that the role of commandeering in the German and EU systems cannot be considered apart from the framework nature of many central directives, the corporate representation of the Member States and the *Länder* at the center, and the central government’s dependence on the financial and administrative resources of the component units in those systems.<sup>158</sup> In a system like the American one, without these specific constraints on central power, the ability to commandeer may play a different role that is more threatening to state autonomy.<sup>159</sup>

These cautions about comparability need not mean that all aspects of the contexts in which institutions operate must be similar; if it did, we could do precious little comparing. It may be enough for comparisons to have some utility that the two systems face common problems, so that the experience of one may shed light on the questions confronting the other.<sup>160</sup> The important point is that difficulties of comparability should counsel a healthy skepticism about exporting particular *solutions* to those problems. As Eric Stein has observed, “[w]e must not . . . expect to find that either system has developed ‘solutions’ that are readily transferable to the other.”<sup>161</sup>

Certainly this is an appropriate caution for one writing—as I do—from an expertise on the American end of the comparison. As I have suggested, that perspective is a necessary element of a robust comparative literature; Europeans seeking to learn from the Ameri-

---

<sup>157</sup> *Printz*, 521 U.S. at 976 (Breyer, J., dissenting). But cf. *id.* at 921 n.11 (Scalia, J.) (rejecting international comparisons and asserting that “[t]he fact is that our federalism is not Europe’s. It is ‘the unique contribution of the Framers to political science and political theory’” (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring))).

<sup>158</sup> See Halberstam, *supra* note 155, at 249-50 (concluding that “in the EU and in Germany, commandeering is embedded within a system of consensus-forcing governance with structural limitations on the expansion of the central government”).

<sup>159</sup> See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813 (1998).

<sup>160</sup> See, e.g., Jacques Delors & Joseph Nye, *Preface to The Federal Vision*, *supra* note 11, at xiv. Delors and Nye posit:

So what do the two sides of this trans-Atlantic dialogue have to say to each other if they are not addressing a single federal model? The answer is that both these leading post-modern societies are wrestling with the same set of issues related to appropriate levels of centralization and decentralization and with designing political systems with enduring legitimacy in the eyes of their citizens.

*Id.* at xv.

<sup>161</sup> Stein, *supra* note 146, at 29.

can experience need to make sure they get that experience right, and they have not always done so in the past.<sup>162</sup> But students of American federalism face a severe disadvantage when they try to tell Europeans how the American experience should cash out into specific institutional measures in the EU structure. I have tried, for the most part, to avoid that sort of thing here. In particular, I have focused on *negative* examples—for instance, the failure of subject-matter categories as a means of dividing state and federal authority<sup>163</sup>—and on more general structural principles such as the intimate relationship of separation of powers at the center to the allocation of authority between the center and the periphery.<sup>164</sup>

### B. Three Approaches to Federalism Doctrine

This Section introduces the American experience by considering three different approaches to federalism employed by the Framers of the U.S. Constitution and the U.S. Supreme Court in its federalism jurisprudence. These approaches, I hope, will in turn shed light on the options confronting Europe as it tries to strike its own balance.

#### 1. Power Federalism

The first of these approaches is also the most straightforward. “Power” federalism doctrines hold that the central government simply lacks power to act in certain situations.<sup>165</sup> In the absence of such power, regulatory authority is reserved to the states. This, of course, is the basic structure established by Article I of the U.S. Constitution, which enumerates specific powers for Congress, and the Tenth Amendment, which clarifies that all power not enumerated is reserved to the People or to the States. The most obvious examples in recent American jurisprudence are the Supreme Court’s decisions in *United States v. Lopez*<sup>166</sup> and *United States v. Morrison*.<sup>167</sup> The 1995 decision in *Lopez* marked the first time in over fifty years that the Court had

---

<sup>162</sup> Compare, e.g., Börzel & Risse, *supra* note 8, at 54 (describing “dual federalism” as contemporary model of American federalism), with Edward S. Corwin, *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1 (1950) (reporting demise of “dual” model in American federalism circa 1950).

<sup>163</sup> See *infra* Parts III.A & III.B.

<sup>164</sup> See *infra* Part IV.B; see also Stein, *supra* note 146, at 39 (“American experience may indicate a line of thought or a particular technique which may be considered by the Community institutions; but it may also suggest what Europe should avoid, as for example mechanistic formulas in judicial interpretation or excesses of the separation-of-powers doctrine.”).

<sup>165</sup> See generally Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 *Sup. Ct. Rev.* 1, 26-29.

<sup>166</sup> 514 U.S. 549 (1995) (rejecting federal Gun Free School Zones Act as outside limits of Congress’s commerce power).

struck down an act of Congress as exceeding the limits of federal power to regulate interstate commerce. The Court's follow-up decision in *Morrison* held that the federal Violence Against Women Act exceeded not only the commerce power but also Congress's power to enforce the Reconstruction Amendments.

Power-federalism decisions like *Lopez* and *Morrison* have the virtue of straightforwardly addressing the question of balance between the center and the periphery. They announce to the central government: "Thus far may you go, but no further." But these lines always have been exceptionally difficult to draw. Indeed, the history of American federalism provides ample reason to be cautious about power-federalism strategies.

Much of that history involves the doctrine of "dual federalism." Dual federalism was a system that divided the world into "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."<sup>168</sup> "Dual federalism" should not be confused with "dual sovereignty," a more capacious term referring to the American Founders' effort to reconcile the separate authority of the states with the axiom of political theory that each government must possess a unitary sovereign.<sup>169</sup> In the American scheme, that unitary sovereign is the People; as a practical matter, however, "[t]he People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit."<sup>170</sup> Dual sovereignty does not itself take a strong position on how sovereign power should be allocated; dual federalism is thus one form, but not the only one, of dual sovereignty.<sup>171</sup>

As I discuss further in Part III, the American experience with dual federalism as a strong limit on federal power generally has been unsatisfactory.<sup>172</sup> American law now recognizes that, in most areas, the federal government and the states have concurrent authority to

---

<sup>167</sup> 529 U.S. 598 (2000) (striking down federal Violence Against Women Act as outside limits of Congress's power under Commerce Clause and Section 5 of Fourteenth Amendment).

<sup>168</sup> Alpheus Thomas Mason, *Federalism: Historic Questions and Contemporary Meanings, The Role of the Court*, in *Federalism: Infinite Variety in Theory and Practice* 8, 24-25 (Valerie Earle ed., 1968); see also Corwin, *supra* note 162, at 4; Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 *Geo. Wash. L. Rev.* 139, 143-46 (2001).

<sup>169</sup> See generally Wood, *supra* note 53, at 524-32.

<sup>170</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 151-52 (1996) (Souter, J., dissenting).

<sup>171</sup> See Young, *supra* note 168, at 143-44.

<sup>172</sup> See *infra* Part III.A.

regulate.<sup>173</sup> Power-federalism rules in such a regime might take one of at least two forms.

First, the Court might do what it in fact has done in cases like *Lopez* and *Morrison*: impose narrow, formal rules—such as the requirement that the regulated activity be “commercial” in nature—while accepting that such a test will map imperfectly onto the values that federalism is designed to protect.<sup>174</sup> This sort of narrow formalism would be designed not to protect a meaningful scope for state autonomy in its own right but as a way to reinforce the political and institutional safeguards that also operate to protect federalism.<sup>175</sup> I have argued elsewhere that even a federalism regime that heavily emphasized nonpower approaches should incorporate some rules of this kind.<sup>176</sup>

Second, the Court might try to enforce doctrines that, while flexible in the sense that they do not wall off particular “spheres” of exclusive state authority, nonetheless significantly constrain the ability of Congress to act in a substantial range of cases. Some American scholars, for example, have suggested that the Supreme Court should strike down acts of Congress that cannot be justified as responding to a unique need for federal action rather than action at the state level. Ann Althouse, for example, has argued that

We should begin a reconstruction of Commerce Clause jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard, why it is good for some things to remain under the control of the various states, and what effect these choices will have on the federal courts.<sup>177</sup>

Similarly, Donald Regan has contended that the Court should uphold federal Commerce Clause legislation so long as it is designed to ad-

---

<sup>173</sup> See Young, *supra* note 168, at 150-52.

<sup>174</sup> See *id.* at 163-67; see also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 197 (“Realist limits can never effect effective judicial limits on governmental power . . . If limits are to be found, . . . they will be made only with the tools of a sophisticated formalism.”). Professor Lessig believes that the commercial/non-commercial test adopted in *Lopez* does not fit this bill, see *id.* at 196-97, a contention that I have addressed elsewhere. See Young, *supra* note 168, at 163-65 & 164 n.161.

<sup>175</sup> See, e.g., Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 191-95 (1982) (discussing “cueing function” of judicial review in encouraging political branches to respect constitutional limits on their own power); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1484 (1995) (suggesting that Court’s *Lopez* decision may have played such role); see also Young, *supra* note 168, at 166 (arguing that narrow imposition of “power federalism” limits on Congress may make it more difficult for Congress to preempt entire fields of previously concurrent regulatory jurisdiction).

<sup>176</sup> See Young, *supra* note 25, at 1367-73.

<sup>177</sup> Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 Ariz. L. Rev. 793, 817 (1996).

dress collective action problems or other difficulties that render independent state initiatives inadequate to address a given problem.<sup>178</sup>

Such an approach, as Stephen Gardbaum has pointed out, is quite similar to the European concept of “subsidiarity.”<sup>179</sup> Any effort to reconstruct American federalism jurisprudence along these lines confronts two major difficulties. First, we have not generally recognized a requirement like subsidiarity in this country at any time in our history.<sup>180</sup> The decision to act at the federal rather than state level frequently has not been shaped by any requirement of necessity.<sup>181</sup> As a result, any subsidiarity-like standard at the present time would have to be carefully limited in order to avoid asking federal courts to strike down a goodly portion of the United States Code. Second, as I discuss further in Part III, the direct value-application involved in a doctrine like subsidiarity is likely to take courts into areas where the line between law and politics is hard to discern. This is not in itself a conclusive argument against this approach; as Lynn Baker and I have argued elsewhere, the federal courts have gone at least as far in limiting governmental authority under the Constitution’s individual rights provisions, and there is no a priori reason for the courts to be more reticent in constructing constitutional doctrine pertaining to federalism.<sup>182</sup> Nonetheless, the political nature of direct value-application ought to counsel at least some degree of judicial caution.

The failure of dual federalism, the limited and formal nature of the Court’s more recent essays in power federalism, and the general American uneasiness about tests that more directly incorporate federalism values are all relevant to the issues currently confronting Eu-

---

<sup>178</sup> Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich. L. Rev. 554 (1995); see also Gardbaum, *supra* note 9, at 831-38 (proposing similar approach).

<sup>179</sup> Gardbaum, *supra* note 9, at 831-32.

<sup>180</sup> See Bermann, *supra* note 11, at 403 (“[N]ot only would the Europeans not have found subsidiarity in the lexicon of U.S. constitutional law, but they would not have found it to be a central feature of U.S. constitutional practice.”); Regan, *supra* note 178, at 561-62 (“What is important to notice [about present Commerce Clause doctrine] is that none of the propositions adverts to the question whether there is any reason why the regulation under consideration should come from the federal government.”).

<sup>181</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-21 (1819) (rejecting strict necessity as test of Congress’s implied powers under Necessary and Proper Clause). Herbert Wechsler did assert in 1954 that federal officials viewed federal action as “exceptional” and requiring special justification. See Herbert 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, 544-45 (1954). Even if this was true in 1954, it has become considerably less plausible in recent decades. See, e.g., Kramer, *supra* note 20, at 221.

<sup>182</sup> See Baker & Young, *supra* note 24, at 133-62.

rope. I discuss these aspects of the Court's experience in Part III. Before doing so, however, it will help to canvass two additional types of federalism strategies: "process" and "immunity" federalism.

## 2. Process Federalism

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court declared that constitutional restraints on federal power "inhere[ ] principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."<sup>183</sup> "State sovereign interests," the Court concluded, "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."<sup>184</sup> This conclusion is the *locus classicus* of contemporary notions of "process federalism."<sup>185</sup> "[W]e are convinced," Justice Blackmun wrote for the Court, "that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."<sup>186</sup> While the Court did not rule out judicial enforcement of federalism altogether, it insisted that "[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"<sup>187</sup>

The most immediate intellectual forbears of the *Garcia* Court's rejection of power federalism were Professors Herbert Wechsler<sup>188</sup> and Jesse Choper,<sup>189</sup> although the idea of "political safeguards" for federalism can be traced all the way back to James Madison's essays in *The Federalist*.<sup>190</sup> The basic idea is that the states' interests are protected through the "composition and selection of the national government"—that is, states control the process of election to Congress; their Senators and Representatives in that body are there to represent state interests; and the states participate in the selection of the Presi-

---

<sup>183</sup> 469 U.S. 528, 552 (1985) (upholding federal power to regulate wages and hours of state government employees).

<sup>184</sup> *Id.*

<sup>185</sup> See generally Young, *supra* note 165, at 21-25.

<sup>186</sup> *Garcia*, 469 U.S. at 554.

<sup>187</sup> *Id.* (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)).

<sup>188</sup> See Wechsler, *supra* note 181.

<sup>189</sup> See Choper, *supra* note 152; see also D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U. L.Q. 779 (1982).

<sup>190</sup> *The Federalist* Nos. 45, 46 (James Madison); *infra* notes 260-64 and accompanying text (outlining Madison's argument); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

dent through the Electoral College.<sup>191</sup> As Madison explained, "each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them."<sup>192</sup>

The Court's adoption of the "political safeguards" thesis in *Garcia* was widely viewed as the death knell for American federalism.<sup>193</sup> But what is sometimes overlooked about *Garcia* is that Justice Blackmun's approach to federalism contains seeds of a meaningful theory of judicial review.<sup>194</sup> *Garcia* shifts the focus of federalism doctrine from "result"—that is, regulatory outcomes which may intrude on state sovereignty—to "process"; rather than disavowing judicial review altogether, Justice Blackmun simply insisted that restrictions on Congress's power "must be tailored to compensate for possible failings in the national political process."<sup>195</sup> Much as John Hart Ely has argued that judicial review is best justified by the need to correct for defects in the political process as it bears on individuals,<sup>196</sup> *Garcia* leaves the door open to a federalism jurisprudence focused on "representation reinforcement" for state governmental institutions.<sup>197</sup>

The fact that Professor Ely was able to justify most of the Warren Court's far-reaching individual rights jurisprudence in terms of representation reinforcement strongly suggests that process-based approaches need not be "weak" theories of judicial review. Two sorts of process approaches, clear statement rules and the anticommandeering

---

<sup>191</sup> See, e.g., *Garcia*, 469 U.S. at 550-51; Wechsler, *supra* note 181, at 311.

<sup>192</sup> The Federalist No. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>193</sup> See, e.g., William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709, 1720 (1985).

<sup>194</sup> See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341 (positing that *Garcia*'s process-based approach was not abandonment of judicial review altogether).

<sup>195</sup> *Garcia*, 469 U.S. at 554. Although Professor Choper had advocated that the Supreme Court hold federalism issues nonjusticiable, Choper, *supra* note 152, at 175, Professor Wechsler only went as far as to observe that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress." Wechsler, *supra* note 181, at 559. Indeed, Wechsler denied that "the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation . . ." *Id.*

<sup>196</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980).

<sup>197</sup> Whether Justice Blackmun and the other nationalist Justices that joined his majority opinion in *Garcia* really envisioned meaningful protection for states under a process approach is, of course, open to question. The important point, however, is that what the majority actually wrote in *Garcia* provides usable tools for maintaining a meaningful balance between state and nation.

doctrine, have so far proven important in American federalism doctrine; two others, attention to the federal separation of powers and to cross-jurisdictional relationships among governing entities, have the potential to be equally significant.

*a. Clear Statement Rules*

The first process strategy is the use of canons of statutory construction to protect federalism values without going so far as to invalidate federal legislation. In *Gregory v. Ashcroft*,<sup>198</sup> for example, a reconstituted Court revisited the issue of Congress's ability to subject state governments to generally applicable legislation—the same question that was at issue in *Garcia*. Rather than overruling *Garcia*, however, Justice O'Connor's opinion for the majority relied on a "clear statement" rule of statutory construction to conclude that Congress had not sought to subject the state judges in the suit to a general statutory prohibition on mandatory retirement requirements.

[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."<sup>199</sup>

Because Congress's intent to regulate state judges was not clear on the face of the federal statute, the *Gregory* Court was able to conclude that the statute did not apply.<sup>200</sup>

The Court has employed this "clear statement" strategy in any number of different federalism contexts in the years since *Garcia*. Congress must speak clearly when it seeks to subject the states to statutory liability,<sup>201</sup> override state sovereign immunity from suit,<sup>202</sup> impose conditions on the receipt of federal funds by state governments,<sup>203</sup> or push the limits of the federal commerce power.<sup>204</sup> Perhaps most important of all, the Court has imposed—at least some of the time—a "presumption against preemption," requiring that am-

---

<sup>198</sup> 501 U.S. 452 (1991).

<sup>199</sup> *Id.* at 464 (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)).

<sup>200</sup> See *id.* at 470.

<sup>201</sup> See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-82 (2000); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-65 (1989).

<sup>202</sup> See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

<sup>203</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>204</sup> See *Jones v. United States*, 529 U.S. 848, 857-59 (2000); *United States v. Bass*, 404 U.S. 336, 348-49 (1971).

biguous federal statutes be construed *not* to preempt concurrent state regulatory authority unless Congress makes clear its intent to oust state law.<sup>205</sup> All of these rules have the effect of minimizing intrusions on state sovereignty without declaring federal statutes unconstitutional.<sup>206</sup>

Clear statement rules have valuable advantages over a federalism strategy that relies entirely on delimiting exclusive zones of federal and state authority. I have described clear statement rules elsewhere as “resistance norms” of constitutional law—that is, constitutional rules that make governmental action more difficult, but do not categorically exclude it.<sup>207</sup> A clear statement requirement raises the bar for legislative enactments by forcing proponents of a measure to incur increased costs, both in terms of additional drafting and by making explicit commitments that may cost them political support.<sup>208</sup> To the extent that actors in the federal political process *are* concerned with protecting the institutional interests of state governments, moreover, a clear statement of Congress’s intent to intrude on state sovereignty puts those potential defenders on notice and facilitates opposition to the measure.<sup>209</sup> As a practical matter, clear statement rules may prevent federal action that intrudes on state interests quite effectively despite the fact that they do not prohibit such action categorically.<sup>210</sup>

On the other hand, clear statement rules tend to ease the difficulties associated with categorical limits on federal power. While some such rules—such as the presumption against federal regulation of a state’s traditional governmental functions<sup>211</sup>—are triggered by federal intrusion into a special state “sphere” in much the same way that dual federalism’s categorical prohibitions were, the clear statement approach takes much of the pressure off the judicial line-drawing exer-

---

<sup>205</sup> See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>206</sup> On the Court’s clear statement cases, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593 (1992).

<sup>207</sup> See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *Tex. L. Rev.* 1549, 1593-99 (2000).

<sup>208</sup> See *id.* at 1596-97; see also Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 *Vand. L. Rev.* 743, 747 (1992).

<sup>209</sup> See Young, *supra* note 25, at 1359.

<sup>210</sup> See *id.* at 1381-86 (describing how faithful application of clear statement rule disfavoring preemption of state law would have flipped results in several recent cases that interpreted federal law to make substantial inroads on traditional state regulatory authority).

<sup>211</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 463-64 (1991); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 *Harv. L. Rev.* 1959, 1973 (1994) (arguing that “*Gregory* fell back on a concept of a protected sphere of state activity similar to the one contemplated by” *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

cise by lowering the stakes. If the courts protect state sovereignty too broadly, after all, Congress can still override that protection by speaking clearly.<sup>212</sup> Most of these rules, moreover, do *not* involve an effort to define state or federal “spheres of influence”—rather, they can exist in a world where jurisdiction to regulate is largely concurrent. Indeed, rules like the presumption against preemption are designed precisely to preserve state regulatory authority in a context where federal authority is itself subject to very few categorical limits.<sup>213</sup> Finally, to the extent that the Framers anticipated that the ultimate balance between states and the nation would be settled politically,<sup>214</sup> clear statement rules facilitate a dialogue between the courts and the political branches, with the latter having the final say.

*b. Anticommandeering*

A second process federalism approach employed by the Court in recent years is the “anticommandeering” doctrine of *New York v. United States*<sup>215</sup> and *Printz v. United States*.<sup>216</sup> In *New York*, the Court held that Congress may not “commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>217</sup> In *Printz*, the Court extended this principle to state executive officials, holding that Congress may not require state executive officers to enforce federal law.<sup>218</sup> Although the an-

---

<sup>212</sup> See Young, *supra* note 207, at 1606-07.

<sup>213</sup> See Stephen A. Gardbaum, The Nature of Preemption, 79 Cornell L. Rev. 767, 806 (1994) (recounting how presumption against preemption developed in response to New Deal Court’s dramatic expansion of federal regulatory jurisdiction). The Court recently has suggested that the presumption against preemption is triggered only in fields of traditional state regulatory authority. See, e.g., *United States v. Locke*, 529 U.S. 89, 108 (2000). Although the Court had employed similar language off-and-on for a long time, see, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that presumption applies when federal government intrudes into “field[s] which the States have traditionally occupied”), this seeming restriction was largely meaningless because it is possible to link virtually any initiative to some traditional field of state regulatory concern. The Court thus had seemed to abandon this limit prior to *Locke*. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that presumption applies “[i]n all pre-emption cases” (emphasis added)). In any event, introducing a concept of “traditional state regulatory authority” into the doctrine invites a reprise of all of the line-drawing and overlap problems associated with dual federalism. See *infra* Part III.A.

<sup>214</sup> See, e.g., The Federalist No. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>215</sup> 505 U.S. 144 (1992).

<sup>216</sup> 521 U.S. 898 (1997).

<sup>217</sup> 505 U.S. at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)). Although the Court articulated this principle in *Hodel*, it did not actually apply it until *New York*.

<sup>218</sup> 521 U.S. at 933. The Court has made clear, however, that this principle does not extend to the third branch of state government; state courts remain obligated to enforce federal law, at least so long as they hear analogous claims under state law. See *Testa v. Katt*, 330 U.S. 386 (1947); see also *Printz*, 521 U.S. at 928-29 (distinguishing *Testa*).

ticommandeering doctrine is framed as a categorical limit on Congress's power—Congress simply *cannot* commandeer state legislatures or executive officers, no matter how clearly it expresses its intent to do so—the doctrine limits the *means* that Congress may employ rather than the regulatory objectives that it may pursue. For that reason, and because the doctrine's restriction on federal means is designed to reinforce political checks, the doctrine is primarily a form of process federalism.

The anticommandeering doctrine reinforces political checks on federal authority in two ways. First, it is designed to clarify lines of political accountability, particularly in the case of unpopular regulatory programs.<sup>219</sup> Both *New York* and *Printz* involved potentially unpopular government action: In *New York*, a federal program required states to designate disposal sites for radioactive waste; in *Printz*, federal law denied former felons the right to purchase a gun. In each case, the effect of the federal commandeering was to make a *state* entity the bearer of the unpleasant federal news. Citizens who found out that they could not purchase a gun or that a radioactive waste site was to be located in their neighborhood might well blame the state officials responsible for the implementation of the federal program rather than the federal politicians who enacted it.<sup>220</sup> When the lines of political accountability are blurred in this way, the political safeguards of federalism are unlikely to function properly.

The second way in which anticommandeering reinforces political checks is that it forces the federal government to internalize the costs of its regulatory programs. Enforcement and implementation costs are an important aspect of any regulatory program. Proponents of federal regulation ordinarily must convince their constituents and the potential members of an enacting coalition that the measure is not only desirable but also worth the expenditure of federal resources given the burdens that such expenditures impose on the taxpaying electorate and the potential resource tradeoffs with other programs.

---

<sup>219</sup> Both the *New York* and *Printz* Courts, of course, justified the anticommandeering doctrine on historical as well as functional grounds. Without denigrating the importance of the historical justification, I focus on the Court's functional justifications here. As an interpretive matter, one might well think that strong functional justifications for federalism doctrines are a necessary—but not sufficient—condition in the absence of textual or historical support. On the other hand, different historical circumstances may justify a different approach to federalism doctrine than what the Framers had in mind, all in the service of maintaining a roughly similar balance. See Lessig, *supra* note 174, at 129-30 (arguing that *Lopez* was most defensible as effort to “translate” presuppositions of Framers' constitutional regime into modern context, rather than as compelled reading of Constitution's text); Young, *supra* note 165, at 73 & n.317 (arguing that “translation” is best way to understand *Printz*).

<sup>220</sup> See *Printz*, 521 U.S. at 930; *New York*, 505 U.S. at 168-69.

To the extent that Congress can impose the implementation and enforcement costs on nonfederal actors, however, this important political constraint on federal action vanishes.<sup>221</sup> Moreover, the diversion of state and local government resources to federal priorities may well undermine the ability of those governments to pursue their own policy priorities, and thereby threaten those governments' ability to compete with the federal government for the loyalty of their mutual constituents.<sup>222</sup>

*c. The Federal Separation of Powers*

Both the anticommandeering doctrine and the clear statement rules are well developed in the Rehnquist Court's federalism jurisprudence.<sup>223</sup> A third element of process federalism, however, is not generally thought of as an aspect of federalism at all—that is, the insistence that when federal law is made, it is made through the channels, and within the limits, established by the federal separation of powers. It should not be surprising that separation of powers at the federal level, or “horizontal” separation of powers, works in concert with the “vertical” separation of powers between the national government and the states. James Madison, after all, argued that the two concepts of separation would operate together to create a “double security” for the rights of the people.<sup>224</sup>

Federal separation of powers is centrally concerned with the means of adopting, enforcing, and interpreting federal law. And as Brad Clark has demonstrated, “[t]he Founders understood that the means established for adopting federal law would have a direct impact on federalism.”<sup>225</sup> The federal legislative power can be exercised, according to Article I, only through action by both houses of Congress

---

<sup>221</sup> See La Pierre, *supra* note 189, at 988-89; Young, *supra* note 25, at 1360-61.

<sup>222</sup> As Roderick Hills has demonstrated,

When the government conscripts specific types of private services . . . , it can inefficiently discourage private persons . . . from investing resources in the production of such services . . . . [T]hese same considerations suggest that the federal government ought not to conscript services . . . from nonfederal governments. . . . [O]ne would expect such demands inefficiently to discourage involvement in state and local politics.

Hills, *supra* note 159, at 819-20 (1998).

<sup>223</sup> However, one could wish for a more consistent application of the most important clear statement rule, the presumption against preemption. See Young, *supra* note 25, at 1377-80.

<sup>224</sup> See *The Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>225</sup> Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1323 (2001).

and presentment to the President.<sup>226</sup> Likewise, the federal treaty-making power is to be exercised solely upon ratification by two-thirds of the Senate.<sup>227</sup> Only federal norms created “in Pursuance” of these procedures constitute the “supreme Law of the Land” under the Supremacy Clause.<sup>228</sup> This exclusivity principle has important implications for federalism: According to Professor Clark, “[t]he negative implication of the Clause is that these sources of law establish the exclusive grounds for displacing state law.”<sup>229</sup>

The exclusivity of the Constitution’s federal lawmaking procedures, however, has come under pressure in the modern administrative state. Federal statutes now exist alongside both judge-made federal common law and administrative rules and regulations as sources of federal norms.<sup>230</sup> In fact, it may be fair to say that administrative regulations make up the bulk of federal law for most purposes.<sup>231</sup> While it is probably too late in the day to “roll back” the administrative state, any number of open questions remain regarding such issues as the scope of permissible delegations to nonlegislative actors,<sup>232</sup> the interpretive rules governing lawmaking by such actors,<sup>233</sup> and the interaction of nonlegislative federal norms with state law.<sup>234</sup>

Insisting that these open questions be resolved in favor of *congressional* responsibility for lawmaking and against, for example, agency discretion protects federalism in at least two ways. First, and most obviously, it channels federal lawmaking decisions into the part of the federal government in which the “political safeguards of federalism” can be expected to operate.<sup>235</sup> States are represented in Con-

---

<sup>226</sup> U.S. Const. art. I, § 7; see also, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (striking down legislative veto procedure on ground that it allowed legislative power to be exercised by one house of Congress, acting alone and outside Article I procedure).

<sup>227</sup> U.S. Const. art. II, § 2.

<sup>228</sup> U.S. Const. art. VI, cl. 2.

<sup>229</sup> Clark, *supra* note 225, at 1338.

<sup>230</sup> See *id.* at 1323 (observing that, “[d]uring the last century, courts and commentators have accepted various forms of unconventional federal lawmaking” such as “administrative rules adopted pursuant to broad delegations of legislative power, non-treaty agreements, and federal common law”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1237-41 (1994).

<sup>231</sup> See, e.g., *Chadha*, 462 U.S. at 985-86 (White, J., dissenting).

<sup>232</sup> See, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001) (upholding Clean Air Act against delegation challenge, but refusing to abandon doctrine).

<sup>233</sup> See, e.g., Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 *Geo. L.J.* 263 (1998) (discussing open questions concerning deference accorded to administrative agency determinations of preemption).

<sup>234</sup> See, e.g., Ernest A. Young, *Preemption at Sea*, 67 *Geo. Wash. L. Rev.* 273 (1999) (discussing preemptive effect of federal common law in admiralty).

<sup>235</sup> See Clark, *supra* note 225, at 1342-43.

gress; they have no special role, however, in the federal administrative agencies or in the federal courts. To be sure, state governments have similar rights of access in those fora as are possessed by other interested parties; under the Administrative Procedure Act,<sup>236</sup> for example, states may file comments on proposed regulations just as any other affected party can. But the presupposition of federalism is that state governments have unique sovereign interests, deserving of special protection.<sup>237</sup> It is one thing to say, as the *Garcia* Court did, that the states get that sort of privileged access through the structure of federal representation in Congress and quite another to hold that federalism is satisfied by representation on the same terms as any other interest in society.<sup>238</sup>

A preference for congressional lawmaking also protects federalism precisely because the Article I process is cumbersome and difficult to navigate. As Professor Clark explains,

The lawmaking procedures prescribed by the Constitution safeguard federalism in an important respect simply by requiring the participation and assent of multiple actors. These procedures make federal law more difficult to adopt by creating a series of veto gates. Under these procedures, a federal proposal will fail if *any* of the veto players specified in the Constitution withholds its consent. Multiple veto gates establish, in effect, a supermajority requirement. . . . In short, the imposition of cumbersome federal lawmaking procedures suggests that the Constitution reserves substantive lawmaking power to the states and the people *both* by limiting the powers assigned to the federal government *and* by rendering that government frequently incapable of exercising them.<sup>239</sup>

It's hard, in other words, to make federal law. And in a world of concurrent regulatory jurisdiction, the failure to make federal law—through “gridlock” or benign neglect—leaves the field open to the states. Indeed, the most important “reserved power” possessed by

---

<sup>236</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>237</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (“The true ‘essence’ of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme.” (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971))).

<sup>238</sup> One problem is that the right of a state government to participate in agency decision-making under the Administrative Procedure Act or some similar scheme is a matter of legislative grace, whereas the states’ representation in Congress is constitutionally guaranteed. No matter how broad statutory participation rights are, they are likely for this reason to be an insecure substitute for access to Congress.

<sup>239</sup> Clark, *supra* note 225, at 1339-40 (internal quotation marks and footnotes omitted); see also Young, *supra* note 25, at 1361-64. For a simpler explanation of multiple “veto gates” in the federal lawmaking process, see I’m Just a Bill, in Videotape: Schoolhouse Rock, *supra* note 28.

state governments may simply be the power to regulate when the central authority cannot get its act together.<sup>240</sup>

“Process federalism” thus includes any number of doctrines designed to push federal policy decisions—and particularly those decisions that affect the regulatory interests of state governments—into the cumbersome congressional lawmaking procedures where the states are directly represented. The most obvious such doctrine, of course, is the principle of nondelegation.<sup>241</sup> While the Court has not proven willing to strike down a federal statute on nondelegation grounds since 1935,<sup>242</sup> that doctrine survives in a number of different forms. As Lisa Bressman has observed, “[t]he Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine” in many contexts.<sup>243</sup> In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,<sup>244</sup> for example, the Court avoided the question of whether a Corps of Engineers’ regulation—the “Migratory Bird Rule”—exceeded the scope of the federal commerce power. Instead, the Court noted that the Clean Water Act, which the Corps was implementing when it promulgated the rule, itself contained no explicit language supporting the regulation.<sup>245</sup> Because Congress had not clearly stated an intent to push the limits of its commerce authority, the Court refused to defer to the administrative agency and invalidated the rule.<sup>246</sup>

<sup>240</sup> As Professor Clark points out, this inertia-based check on federal power will operate even if federal representatives are no longer politically responsive to the interests of state governmental institutions. See Clark, *supra* note 225, at 1370-71.

<sup>241</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Field v. Clark*, 143 U.S. 649, 692 (1892).

<sup>242</sup> See *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 542; *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). The best explanation of the Court’s recent decision invalidating the line-item veto, however, may be that the statute delegated excessive discretionary power to the President to decide which parts of a bill to cancel. See *Clinton v. City of New York*, 524 U.S. 417 (1998); Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law* 369 (4th ed. 2001) (asking whether line-item veto case “pre-empt[s] a revival of the nondelegation doctrine”).

<sup>243</sup> Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *Yale L.J.* 1399, 1409 (2000); see also Cass R. Sunstein, *Nondelegation Canons*, 67 *U. Chi. L. Rev.* 315, 316-17 (2000) (arguing that “a set of seemingly disparate cases that rely on [canons of statutory construction] . . . actually constitute a coherent and flourishing doctrine, amounting to the contemporary nondelegation doctrine”). Professor Bressman sees a version of the nondelegation doctrine at work when the federal courts reject an agency’s interpretation of a federal statute as “unreasonable” under step two of the *Chevron* analysis. See Bressman, *supra*, at 1431-38.

<sup>244</sup> 531 U.S. 159 (2001).

<sup>245</sup> See *id.* at 174.

<sup>246</sup> The Court observed that “[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* As a result, the Court elected to “read the statute as written to avoid the significant consti-

*d. Cross-Jurisdictional Relationships*

A final variant of process federalism emphasizes the role of institutions that operate at both the state and federal level. Such institutions may tie the interests of actors at each level together, encouraging each to be more solicitous of the institutional prerogatives of the other. Many of these relationships are informal or at least extraconstitutional. Nonetheless, their proponents insist that these linkages play an important role in preserving the autonomy of the states.

The most prominent example in the literature is political parties functioning on both the state and federal levels. According to Larry Kramer,

the decentralized American party systems . . . protect[ ] the states by making national officials politically dependent upon state and local party organizations. These organizations provide[ ] the institutional framework for managing politics at every level of government, and, by linking the fortunes of officeholders at different levels, they foster[ ] a mutual dependency that induce[s] federal lawmakers to defer to the desires of state officials and state parties.<sup>247</sup>

Professor Kramer and others have made similar arguments about joint administration of federal regulatory programs; when officials at the state and federal levels share responsibility over implementation of a federal regulatory scheme, the argument goes, they develop relationships and common interests that lead to some measure of protection for state power.<sup>248</sup>

These sorts of arguments have been rigorously critiqued elsewhere, particularly insofar as cross-jurisdictional relationships are advanced as a *substitute* for judicial enforcement of constitutional limitations on central power.<sup>249</sup> They may be useful if viewed more modestly as part of a mix of institutional safeguards that may work, under the right circumstances, to protect state autonomy. Institutional linkage is likely a double-edged sword, however; just as the common interests of national and state officials sometimes may prompt them to work together on behalf of state autonomy, those shared interests may in other circumstances lead state officials to sac-

---

tutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference." *Id.*

<sup>247</sup> Kramer, *supra* note 20, at 278.

<sup>248</sup> See Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1543-46 (1994); see also Morton Grodzins, *The American System: A New View of Government in the United States* 269-74 (Daniel J. Elazar ed., 1966).

<sup>249</sup> See, e.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 *Vill. L. Rev.* 951, 966-72 (2001); Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 *Vill. L. Rev.* 1069 (2001); Prakash & Yoo, *supra* note 152, at 1480-89.

rifice state prerogatives. Which direction the sacrifice runs in the majority of cases is, of course, a difficult and perhaps unanswerable empirical question.

As I have argued elsewhere, process federalism doctrines are unlikely to be a complete answer to the problem of maintaining a meaningful federal balance.<sup>250</sup> They nonetheless have a great deal of promise as a partial and even primary approach to preserving state autonomy.<sup>251</sup> Before turning to the lessons of American federalism doctrine for Europe, however, I consider the third and least helpful aspect of the Supreme Court's current approach to federalism.

### 3. *Immunity Federalism*

Although the Court's Commerce Clause and anticommandeering cases seem to receive the lion's share of attention, it seems fair to say that the centerpiece of the Rehnquist Court's approach to federalism is its radical expansion of state sovereign immunity. The Court has decided more cases on state sovereign immunity grounds than on any other federalism ground<sup>252</sup> and it has pushed federalism further in the direction of state sovereignty in this area than in any other.<sup>253</sup> Whether or not these cases meaningfully further the values of federalism, however, is a difficult question.

The central thrust of the Court's recent state sovereign immunity cases is to extend the states' constitutional immunity from suit beyond the relatively narrow textual confines of the Eleventh Amendment to cover suits brought to enforce federal law.<sup>254</sup> Protecting the states in

---

<sup>250</sup> See Young, *supra* note 25, at 1367-73.

<sup>251</sup> See *id.* at 1384-86; see also Young, *supra* note 165, at 39-42.

<sup>252</sup> See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). There are only two commandeering cases (*Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)) and two cases invalidating federal statutes under the Commerce Clause (*United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)), although several additional cases clearly have been influenced by the latter pair of holdings. See, e.g., *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001); *Jones v. United States*, 529 U.S. 848 (2000).

<sup>253</sup> See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 *U. Chi. L. Rev.* 429, 432-33 (2002); Young, *supra* note 165, at 67-68.

<sup>254</sup> The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Most interpreters agree that the best reading of this text is to bar only state-law cases against state governments in which federal jurisdiction is based on diversity of citizenship. See, e.g., *Seminole Tribe of Fla.*, 517 U.S. at 54; *id.* at 110-14 (Souter, J.,

this way has been thought to preserve the states' dignitary interests from the affront of being hauled into court at the behest of a private individual<sup>255</sup> and to preserve state autonomy over budgeting decisions from interference by judicial damage awards.<sup>256</sup> Sovereign immunity does *not*, however, protect state autonomy in the broader sense of relieving the states from their obligation to comply with federal law. States remain subject to the requirements of federal law, and those requirements may be enforced against them through private suits for injunctive relief<sup>257</sup> and suits by the United States itself for money damages.<sup>258</sup> Congress retains, moreover, a variety of other means for abrogating state immunity or inducing the states to waive that immunity in exchange for federal benefits.<sup>259</sup> Although sovereign immunity

---

dissenting); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983). In extending the states' constitutional immunity to federal question suits—that is, suits to enforce rights created by federal law—the Court has insisted that “the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.” *Alden*, 527 U.S. at 729; see also *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *Hans v. Louisiana*, 134 U.S. 1, 12-15 (1890). The Court’s extension of the states’ immunity has been widely criticized. See, e.g., Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 Sup. Ct. Rev. 1; Ernest A. Young, *Alden v. Maine* and the Jurisprudence of Structure, 41 Wm. & Mary L. Rev. 1601 (2000). For a thorough review of the relevant history, see *Seminole Tribe of Fla.*, 517 U.S. at 101-68 (Souter, J., dissenting).

<sup>255</sup> See, e.g., *Alden*, 527 U.S. at 749; *Coeur d’Alene Tribe*, 521 U.S. at 268 (plurality opinion). But see Gerald Neuman, Human Dignity in United States Constitutional Law, in *Zur Autonomie des Individuums: Liber Amicorum Spiros Smitis*, 249, 271 (Dieter Simon & Manfred Weiss, eds., 2000) (criticizing Court’s reliance on states’ dignitary interests to uphold state sovereign immunity in *Alden*); Young, *supra* note 165, at 52-56 (same).

<sup>256</sup> See *Alden*, 527 U.S. at 750.

<sup>257</sup> See *Seminole Tribe of Fla.*, 517 U.S. at 71 n.14; *Ex parte Young*, 209 U.S. 123 (1908).

<sup>258</sup> See *United States v. Texas*, 143 U.S. 621, 646 (1892). It is clear, moreover, that the United States can bring suit to enforce not only its own rights but also the rights of private individuals injured by state conduct. See *United States v. Raines*, 362 U.S. 17, 27 (1960); Jonathan R. Siegel, Congress’s Power to Authorize Suits Against States, 68 Geo. Wash. L. Rev. 44, 67 (1999).

<sup>259</sup> Congress may abrogate the states’ immunity when validly exercising its power to enforce the Reconstruction Amendments (i.e., the Thirteenth, Fourteenth, and Fifteenth), see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), and it may, within limits that remain largely undefined, condition federal funding or other benefits on the states’ waiver of immunity from suit, see *Alden*, 527 U.S. at 755; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-87 (1999); cf. *South Dakota v. Dole*, 483 U.S. 203 (1987) (indicating broad view of Congress’s ability to impose conditions on receipt of federal funds that limit state autonomy). For a comprehensive exploration of Congress’s options for overcoming or circumventing state sovereign immunity in one particular statutory context, see Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, State Accountability for Violations of Intellectual Property Rights: How to “Fix” *Florida Prepaid* (And How *Not* To), 79 Tex. L. Rev. 1037 (2001).

makes enforcement of federal norms against states somewhat more difficult, state governments can hardly afford to ignore them.

More importantly, sovereign immunity does nothing to protect the states' authority to regulate in their own right. It does not limit federal norm-creation in any way or protect state regulation from preemption by rules enacted at the federal level. This is a serious drawback for immunity as an approach to federalism, for it is the ability to regulate private conduct that lies at the heart of the balance between the states and the nation. The Founders envisioned a system in which the states and the national government would compete for the loyalty of the People,<sup>260</sup> and they understood—anticipating modern political science—that loyalty or political support is given in exchange for the provision of beneficial regulation and government largesse.<sup>261</sup> Madison argued that the states would win any such competition easily<sup>262</sup> because “[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.”<sup>263</sup> To the extent that federal regulation takes over these central functions, popular loyalty is likely to flow to Washington, D.C.<sup>264</sup>

---

<sup>260</sup> Madison wrote:

[T]he ultimate authority . . . resides in the people alone; and . . . it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.

The Federalist No. 46, at 315-16 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>261</sup> See, e.g., Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 Va. L. Rev. 265 (1990); Robert F. Nagel, Federalism as a Fundamental Value: *National League of Cities* in Perspective, 1981 Sup. Ct. Rev. 81, 100; Young, *supra* note 165, at 43-46. Under the “economic theory of regulation,” politicians obtain political support from interest groups and individuals in exchange for providing regulation that benefits those constituencies. See Macey, *supra*, at 269.

<sup>262</sup> See The Federalist No. 46, at 316 (James Madison) (Jacob E. Cooke ed., 1961) (“Many considerations . . . seem to place it beyond doubt, that the first and most natural attachment of the people will be to the governments of their respective States.”).

<sup>263</sup> The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961); see also The Federalist No. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (observing that because state governments “regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake,” states are assured of possessing “affection, esteem and reverence” of their citizens).

<sup>264</sup> According to Andrzej Rapaczynski:

Naturally, the vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states. Should the federal government preempt them from most fields that touch directly on the life

The Rehnquist Court, in choosing to focus on an immunity strategy to preserve the federal balance, seems to have lost sight of this basic insight of the Founders. State sovereign immunity does little to preserve state regulatory authority and it actually may be counter-productive for state autonomy.<sup>265</sup> Fortunately, the European Union seems to have avoided any flirtation with an immunity strategy; indeed, the European Court of Justice has gone so far as to hold that the Member States may be sued for money damages arising from their failure to implement Community directives.<sup>266</sup> Nonetheless, the central importance of an authority to provide beneficial regulation to its constituents is relevant in assessing the viability of other federalism strategies as well. I consider different approaches to federalism in the European Union in the next two Parts.

### III

#### POWER FEDERALISM IN EUROPE

The preceding account of America's federalism doctrine suggests a number of points of departure for assessing the prospects for Member State autonomy in an evolving Europe. These are, of course, points of departure only; as I have discussed already, it is difficult to draw firm conclusions about how particular institutions or doctrines will function in one context based on their history in a quite different regime.<sup>267</sup> When we consider an approach that has encountered difficulties in America, however, it at least makes sense to ask whether some of the factors that engendered those difficulties on this side of the Atlantic are also relevant to Europe. Likewise, Europeans ought to at least be aware of approaches that have been successful in American federalism when constructing their own doctrinal toolbox.

Power federalism seems likely to play an important role in future debates about the allocation of power in Europe. Martin Shapiro has observed that "the most politically pressing issue on the ECJ's agenda is whether the Court will become involved in limiting the reach of Union competencies by some combination of a less sweeping interpretation of various provisions of the earlier treaties and the new treaty

---

of local communities, the states would become but empty shells within which no meaningful political activity could take place.

Rapaczynski, *supra* note 194, at 404; see also Young, *supra* note 25, at 1368-70.

<sup>265</sup> I have argued elsewhere that state sovereign immunity in fact may harm federalism values to the extent that it trades off with more fruitful federalism strategies, prompts retaliatory measures from Congress, or deters Congress from devolving federal regulatory functions to the states. See Young, *supra* note 165, at 58-65.

<sup>266</sup> See Joined Cases C-6 & 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5406 para. 7, [1993] 2 C.M.L.R. 66, 108-09 para. 7 (1991); Swaine, *supra* note 9, at 3.

<sup>267</sup> See *supra* Part II.A.

language of subsidiarity.”<sup>268</sup> Likewise, the Laeken Declaration specifically called for a “better division and definition of competence” to clarify the allocation of responsibility between the EU and its Member States.<sup>269</sup>

In this Part, I consider how the American experience with power federalism may be relevant to the European project. Like the American Constitution, the founding documents of the European Union began with a commitment to enumerated powers as the organizing principle of European federalism. Also as in America, that commitment has eroded substantially, and European politicians, judges, and lawyers are in the process of trying to replace it with something else. Although the proposed European solution, subsidiarity, is different from anything we have tried in the United States, the American experience with power federalism more generally suggests that open-ended concepts like subsidiarity are most effective as *political* principles. Their effectiveness, as a result, turns on the political and institutional structures available to give them force. I discuss ways to reinforce subsidiarity with process-based strategies in Part IV.

#### A. *The Trouble with Categories: Dual Federalism in America*

The history of “power federalism” in the United States is dominated by the doctrine of “dual federalism.”<sup>270</sup> That history is not a happy one. For 150 years, the Supreme Court struggled to define and police separate and exclusive spheres of state and federal authority. Chief Justice John Marshall’s seminal opinion in *Gibbons v. Ogden*, for example, suggested that federal authority over interstate commerce was exclusive, while the states had exclusive sovereignty over “that commerce, which is completely internal . . . and which does not extend to or affect other States.”<sup>271</sup> That distinction could not stand alone, however. Acknowledging the need for state health and safety legislation that impacts interstate commerce, Chief Justice Marshall immediately added a divide between “police” regulation—an exclusive concern of the states—and commercial power reserved to the federal government.<sup>272</sup> The commerce/police divide soon became unsatisfactory as well, and the Court switched to distinguishing between regulatory subjects that “are in their nature national, or admit

---

<sup>268</sup> Shapiro, *supra* note 83, at 345.

<sup>269</sup> Laeken Declaration, *supra* note 1, at 21.

<sup>270</sup> See *supra* Part II.B.1.

<sup>271</sup> 22 U.S. (9 Wheat.) 1, 194 (1824).

<sup>272</sup> *Id.* at 203; see also *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding New York statute requiring arriving ship captains to provide information on passengers on ground that it was “not a regulation of commerce, but of police”).

only of one uniform system,” on the one hand, and those that are inherently local on the other.<sup>273</sup>

By the late nineteenth century, the Court had realized that all commerce is connected, at least to some extent. The effort to maintain dual federalism thus turned to two new distinctions. The first sought to distinguish between those effects on the national economy that were “direct”—and therefore exclusive subjects of federal regulation—and those that were “indirect.”<sup>274</sup> A second distinction sought to define “commerce” itself narrowly to include only buying and selling as opposed to activities like agricultural production or manufacturing products for later sale.<sup>275</sup> Although these distinctions began life as limitations on state authority to regulate the national market, the Court soon employed them to limit federal authority to intrude on the states’ reserved powers.<sup>276</sup>

It is in the latter guise that dual federalism came to be identified with the pre–New Deal Court’s resistance to the modern regulatory state. Decisions like *Hammer v. Dagenhart*, which used the Commerce Clause to protect an exclusive zone of state regulatory authority from federal child labor legislation,<sup>277</sup> are now viewed in exactly the same light as *Lochner v. New York*,<sup>278</sup> which struck down state wage and hour legislation as a violation of individual freedom of contract.<sup>279</sup> Justice Souter thus opposed the Court’s recent revival of Commerce Clause review in *United States v. Lopez* by invoking this history:

The fulcrums of judicial review in these cases [e.g., *Lochner*] were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was

---

<sup>273</sup> *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

<sup>274</sup> See, e.g., *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927) (striking down state licensing law governing travel agents on grounds of direct effect on foreign commerce); *Smith v. Alabama*, 124 U.S. 465 (1888) (upholding state regulation of railroad engineers on ground that effect on interstate commerce was “indirect”).

<sup>275</sup> See, e.g., *Kidd v. Pearson*, 128 U.S. 1 (1888) (upholding state prohibition on manufacture of liquor on ground that it did not regulate “commerce”).

<sup>276</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) (“The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.”); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (construing Sherman Act not to reach monopolies over “manufacturing,” on ground that effect of such monopolies on interstate commerce is only “indirect”).

<sup>277</sup> 247 U.S. 251 (1918).

<sup>278</sup> 198 U.S. 45 (1905).

<sup>279</sup> See, e.g., Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483 (1997) (regarding both Commerce Clause cases and economic substantive due process cases as promoting Court’s vision of uniform, deregulated economy).

ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.<sup>280</sup>

When the Court finally realized the error of its ways, Justice Souter continued, its "adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments."<sup>281</sup> None of the Court's attempts to define exclusive zones of state and federal authority, in other words, were sufficiently convincing to persuade observers that it was engaged in the principled application of constitutional law, rather than mere imposition of the Justices' policy preferences.

Why not? Part of the problem, I think, stemmed from the fact that the supposedly exclusive spheres developed by the Court always turned out to overlap in practice. In *United States v. E.C. Knight Co.*, for example, the Court held that the Sherman Act's prohibition on monopolization could not be applied to a merger that would concentrate ninety-eight percent of the nation's sugar-refining in the same hands.<sup>282</sup> However persuasive it might be to define "manufacturing" as separate from "commerce" in the abstract, it does not take a great deal of economic sophistication to see that such a monopoly over refining would have an effect on the price charged for sugar in commercial transactions. The Court, of course, was not unaware of this reality; rather, the Court seems to have chosen simply to draw a formal line in order to maintain a sphere of state autonomy.<sup>283</sup> But this formal distinction could not succeed even on its own terms. After all, why wasn't the acquisition of the competing refineries by the monopolist—the transaction that the Sherman Act actually sought to regulate—itself an instance of interstate commerce?

In other areas, the formal definitions of exclusive zones of sovereignty were even less persuasive. I already have recounted how the core distinction between inter- and intrastate commerce had to be augmented by a further distinction between direct and indirect effects. During the Court's most infamous period of activism, it was willing to recognize "direct" effects in any number of cases so as to facilitate

---

<sup>280</sup> 514 U.S. 549, 606 (1995) (Souter, J., dissenting).

<sup>281</sup> *Id.* at 607.

<sup>282</sup> 156 U.S. 1 (1895).

<sup>283</sup> See *id.* at 12 (recognizing that "the power to control the manufacture of a given thing involves in a certain sense the control of its disposition," but concluding that "this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly").

national regulation. The *Shreveport Rate Cases*, for example, upheld federal regulation of purely intrastate railroad traffic where that regulation was necessary to prevent differential intrastate pricing from undermining federal regulation of interstate routes.<sup>284</sup> The problem, of course, is that “direct” and “indirect” effects are hardly self-defining, and it is difficult to distinguish in a principled way the federal regulations that the Court upheld in this period from the regulations that it struck down.

The Court thus faced a dilemma. While bright-line distinctions might be available—such as that between “manufacturing” and “commerce”—enforcing such distinctions in cases like *E.C. Knight Co.* opened the Court up to charges of excessive formalism and ignoring economic reality. The flexibility offered by more amorphous distinctions like “direct” and “indirect” effects, on the other hand, left the Court vulnerable to criticism that it was upholding the legislation that it favored on policy grounds and striking down that which it did not. When the New Deal crisis came, the Court’s doctrines of dual federalism were not sufficiently persuasive on their own terms to enable the Court to resist accusations of obstructionism.<sup>285</sup>

It is not surprising that, by 1950, Edward Corwin could report that the “entire system of constitutional interpretation” embodied in dual federalism lay “in ruins.”<sup>286</sup> In terms of “dormant” Commerce Clause limitations on state regulatory authority over commerce,<sup>287</sup> the Court’s modern cases “have generally abandoned any attempt to apply categorical distinctions between exercises of ‘police’ and ‘commerce’ powers, between ‘local’ and ‘national’ subject matters, or between ‘indirect’ and ‘direct’ effects.”<sup>288</sup> The shift has been even more dramatic in terms of the Court’s willingness to limit federal authority under the Commerce Clause. Between the Court’s “switch in

---

<sup>284</sup> *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914).

<sup>285</sup> Of course, the Court ultimately was able to resist attacks on its institutional independence. But it felt compelled—whether for political or intellectual reasons—to abandon most forms of judicial protection for federalism for over half a century.

<sup>286</sup> Corwin, *supra* note 162, at 17.

<sup>287</sup> The American doctrine of the “dormant” Commerce Clause holds that state regulation of interstate commerce is sometimes invalid even though Congress has not acted on the relevant subject simply because the state regulation either discriminates against, or imposes an excessive burden on, interstate commerce. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>288</sup> Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 245 (14th ed. 2001). Modern dormant Commerce Clause doctrine focuses almost exclusively on a general prohibition of state regulation that discriminates against out-of-state business, regardless of subject matter. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (noting that state laws discriminating against interstate commerce are “virtually per se invalid”).

time” in 1937<sup>289</sup> and the *Lopez* decision in 1995, the Court failed to invalidate—or even seriously question—a single federal statute as outside the reach of the federal commerce power.<sup>290</sup> Indeed, several broadly written opinions suggested that the Court had given up Commerce Clause review (except for the dormant kind) altogether.<sup>291</sup>

That all changed in 1995 with *Lopez*, which struck down the federal Gun Free School Zones Act as outside the commerce power. After an initial panic, most American academics seemed to conclude that *Lopez* was more in the vein of a “shot across Congress’s bow” than a major effort to rebalance the constitutional structure.<sup>292</sup> The Court’s follow-up decision in *United States v. Morrison*, striking down the federal Violence Against Women Act,<sup>293</sup> suggests that the Court is, in fact, serious about enforcing *some* limit on federal enumerated powers; nonetheless, nothing in either *Lopez* or *Morrison* suggests that this limit will be very constraining at the end of the day. As I have argued at length elsewhere,<sup>294</sup> in most cases *Lopez* and *Morrison* require that Congress must regulate activity that can be characterized as “economic” in some way.<sup>295</sup> These decisions accept, however, the reality of an integrated national market, and they seem unlikely to place any particular field of regulatory concern off-limits to federal intervention.<sup>296</sup> The Rehnquist Court is not, in my view, attempting to revive dual federalism.<sup>297</sup>

---

<sup>289</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act against Commerce Clause challenge).

<sup>290</sup> In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court did strike down provisions of the Fair Labor Standards Act governing the wages and hours of state employees. But the short-lived doctrine created in that case only limited Congress’s ability to regulate state governments themselves, not the scope of its Commerce Clause authority to regulate private actors. In any event, the *National League of Cities* doctrine died quickly, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985), and the current Court, notwithstanding its general sympathy for federalism claims, has not attempted to revive it.

<sup>291</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942); *United States v. Darby*, 312 U.S. 100, 113-22 (1941).

<sup>292</sup> See, e.g., *Bednar & Eskridge*, *supra* note 175, at 1484; *Meltzer*, *supra* note 254, at 63.

<sup>293</sup> 529 U.S. 598 (2000).

<sup>294</sup> See *Young*, *supra* note 168, at 157-63.

<sup>295</sup> See *Morrison*, 529 U.S. at 612-13 (2000); *United States v. Lopez*, 514 U.S. 549, 563, 567 (1995).

<sup>296</sup> In *Lopez*, for instance, all the Justices appeared to agree that family law is an area of core state concern. And yet it is easy to see how one could justify, for example, federal regulation of child support payments within the limits of *Lopez*’s holding. See Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified as amended at 18 U.S.C. § 228 (2001)); *United States v. Bailey*, 115 F.3d 1222, 1226 n.1 (5th Cir. 1997) (observing that every circuit to consider issue had upheld Child Support Recovery Act as valid exercise of commerce power). Child support, after all, involves transfers of money.

<sup>297</sup> Cf. *Judith Resnik*, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *Yale L.J.* 619, 626 (2001) (asserting that *Morrison* “provides a vivid instance of and insis-

Because the Rehnquist Court's current project is so modest, however, it may not seem like much of a safeguard for federalist values. It will be easy in most instances to find some aspect of the regulated activity that is "economic" in nature. The Court, after all, has extended "commerce" to cover nonprofit activity<sup>298</sup> and it has said that even *noncommercial* activity may be regulated so long as that regulation is part of a regulatory scheme directed, in the aggregate, at "commerce."<sup>299</sup> All of the post-1937 precedents that upheld the New Deal's expansion of the welfare state have been reaffirmed in *Lopez* and similar cases.<sup>300</sup> If this is a judicial "revolution" in federalism doctrine, it is an exceedingly modest one.

Given the Court's willingness to develop innovative limitations on government action in *other* areas—for instance, in the sphere of individual rights<sup>301</sup>—one could surely justify a more intrusive level of judicial review for federalism issues.<sup>302</sup> One possibility is to try to come up with a limiting principle that more directly incorporates the values—such as local experimentation, efficiency, and participatory democracy on the state side and the ability to solve collective action problems on the national side—that a federal balance is supposed to protect.<sup>303</sup> The weighing of these sorts of values unavoidably has political overtones, however, and the Court's experiences with more flexible versions of dual federalism that tried to leave room for such values were generally unsuccessful. Even Justice O'Connor—the most enthusiastic exponent of open-ended balancing in other contexts<sup>304</sup>—has not advocated such a test as a limit on federal power.

Both the unhappy story of dual federalism and the perceived difficulty of a nonformal, value-based standard seem relevant to the in-

---

tence upon a categorical [i.e., dual] conception of federalism"); Shane, *supra* note 20, at 215 (interpreting *Lopez* in dual federalism terms).

<sup>298</sup> See *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583-88 (1997).

<sup>299</sup> See, e.g., *Lopez*, 514 U.S. at 561; *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981). Compare Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects?, 46 *Vill. L. Rev.* 1325, 1330 (2001) (maintaining that regulatory-scheme exception may be broad indeed), with Young, *supra* note 25, at 1392-95 (arguing that exception can be confined).

<sup>300</sup> See, e.g., *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 555-59.

<sup>301</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing right of marital privacy despite little textual basis in Constitution).

<sup>302</sup> See *Baker & Young*, *supra* note 24, at 133-62 (rejecting "double standard" that would call for judicial restraint on federalism issues but not on issues of individual rights).

<sup>303</sup> See *supra* notes 177-78 and accompanying text.

<sup>304</sup> See, e.g., *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); see also Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 *Harv. L. Rev.* 22, 115-21 (1992) (describing Justice O'Connor's commitment to standards over bright-line rules).

stitutional choices confronting Europe. Dual federalism's failure suggests the limited potential of formal, subject-matter categories as the organizing principle of a federal balance. There is no evidence that dual federalism failed in the United States because of the particular categories employed; rather, our experience suggests that life is simply too interconnected for law to divide it up in this way. Education always influences commerce; domestic regulation influences foreign policy; the most intimate, domestic relationships can become multistate transactions when people are mobile. If this judgment is correct, then efforts to guard the autonomy of the European Member States through a revised enumeration of EU competences face an uphill battle. I develop this argument in Section B below.

The U.S. Supreme Court's experience with more flexible standards, and its unwillingness to embrace anything so open-ended as the European notion of subsidiarity, suggest a more complicated inference for Europe. The point is not that such principles are doomed to fail. Rather, it is that we should be reluctant to entrust their enforcement to courts, at least as a first resort. I discuss this point in Section C as a bridge to Part IV's discussion of process-based safeguards.

### *B. Enumeration and Competences*

According to Joseph Weiler, "the 'original' understanding [of the various European agreements] was that the principle of enumeration would be strict and that jurisdictional enlargement . . . could not be lightly undertaken."<sup>305</sup> Although the European Community's founders expected to govern certain matters—such as tariffs and customs—comprehensively, they expected Community legislation to be exclusively limited to subjects set forth in the Community treaties.<sup>306</sup> This expectation strikes an American observer as quite close to the idea of dual federalism; indeed, the "exclusive and separate spheres" conception of federalism seems to have survived into the late-twentieth century outside the United States in a way that it rather clearly did not in this country.<sup>307</sup>

---

<sup>305</sup> Weiler, *supra* note 103, at 2433-34. Professor Weiler goes on to observe that "[t]his understanding was shared not only by scholars, but also by the Member States and the political organs of the Community, as evidenced by their practices, as well as by the Court of Justice itself." *Id.* at 2434 (citations omitted).

<sup>306</sup> Bermann, *supra* note 11, at 355.

<sup>307</sup> In 1980, for example, a Canadian governmental memorandum declared:

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

Just as dual federalism failed in the United States, however, so too enumeration failed to check the dramatic expansion of Community powers. "In the 1970's and early 1980's," Professor Weiler writes, "the principle of enumerated powers as a constraint on Community *material* jurisdiction (absent Treaty revision) substantially eroded and in practice virtually disappeared. Constitutionally, no core of sovereign state powers was left beyond the reach of the Community."<sup>308</sup> Much of this expansion of Community power had taken place under the auspices of the European Court of Justice, which had employed two principal mechanisms. First, it characterized the allocations of subject-matter jurisdiction to the Community broadly and chose the characterization that would uphold Community competence in areas of overlap.<sup>309</sup> Second, the Court went beyond the Community's enumerated powers altogether by aggressively using Article 235's provision for implied Community powers.<sup>310</sup>

None of this should be surprising, especially given the parallel experience of American federalism. The problem of overlapping spheres is familiar from the era of *Gibbons v. Ogden*, in which the Court struggled to characterize regulation as "commercial" or "police."<sup>311</sup> The *Casagrande* case, decided by the European Court of Justice in 1974, presents a similar problem.<sup>312</sup> Community law plainly conferred competence on the Community to provide for freedom of movement among the Member States; competence concerning education policy, however, was reserved to the Member States. These supposedly separate spheres collided when a Bavarian law excluding most

---

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

2 House of Commons Foreign Affairs Comm., First Report from the Foreign Affairs Committee Session 1980-81: British North America Acts: The Role of Parliament 102, 108 (1981) (memorandum and statement of H.R.W. Wade, Professor, Gonville and Caius College, Cambridge). One could hardly ask for a better definition of dual federalism.

<sup>308</sup> Weiler, *supra* note 103, at 2434-35; see also Lenaerts, *supra* note 145, at 220 ("There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.").

<sup>309</sup> See Lindseth, *supra* note 32, at 665 ("In the 1970s, Community legislation also quietly extended, with ECJ approval, the reach of Community competences, effectively breaking down the limits on delegated powers set forth in the Treaty.").

<sup>310</sup> See *supra* note 109 and accompanying text. For the text of Article 235, see *supra* note 103. "Through the use of Article 235," according to Peter Lindseth, "the original limits on the Community's delegated powers were rendered effectively meaningless, and the EC adopted rules in such areas as environmental policy and consumer protection long before these areas were explicitly added to Community jurisdiction." Lindseth, *supra* note 32, at 665.

<sup>311</sup> See *supra* notes 271-73 and accompanying text.

<sup>312</sup> Case 9/74, *Casagrande v. Landeshauptstadt München*, 1974 E.C.R. 773, [1974] 2 C.M.L.R. 423 (1974). For further discussion of the case, see Weiler, *supra* note 103, at 2438-41.

non-Germans from educational grants came into conflict with a Community regulation providing that Member States must admit children of citizens from other Member States to education and training programs on the same bases as their own nationals.<sup>313</sup> The local Bavarian authorities, of course, saw the situation as an education case, outside Community competence; the Commission, equally obviously, saw it as a case about freedom of movement. What to do?

The ECJ responded by ruling, effectively, that otherwise valid Community legislation trumps Member State policies when their spheres of jurisdiction overlap. Although the Court acknowledged that "educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions,"<sup>314</sup> it did not find that fact dispositive. "[I]t does not follow," the Court said, "that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect [national] measures taken in the execution of a policy such as that of education and training."<sup>315</sup> When spheres of competence overlap, in other words, regulatory jurisdiction is concurrent and the principle of Community law's supremacy controls in the event of a conflict.<sup>316</sup>

The actual result in *Casagrande*, of course, does not seem particularly unfair or threatening to core Member State sovereignty. But perhaps a more extreme example will illustrate the potential of this sort of analysis. The core of Community competence lies in the control over the external commercial relations of the Community; Member States, by contrast, have jealously guarded their exclusive control over their own security and defense policies. But what happens when the Community decides to confer most-favored-nation status on China, while a more security-minded Member State wishes to restrict any transfers of militarily sensitive technologies by its own nationals to China? Is this a trade case or a security case? It is obviously both. But under the reasoning of *Casagrande*, the fact that the case had implications within the Member State's sphere of security policy would

---

<sup>313</sup> Article 12 of Council Regulation 1612/68 provided:

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Council Regulation 1612/68 of 15 October 1968 on Freedom of Movement of Workers Within the Community, 1968 O.J. (L 257) 475, 478.

<sup>314</sup> *Casagrande*, 1974 E.C.R. at 779 para. 12, [1974] 2 C.M.L.R. at 432.

<sup>315</sup> *Id.*

<sup>316</sup> See Weiler, *supra* note 103, at 2441 (observing that "the language of the Court suggests a simple application of the principle of supremacy").

not matter, so long as the case also fell within the Community's trade-based competence. Under the principle of supremacy, Community law would control.<sup>317</sup>

In his discussion of *Casagrande*, Professor Weiler discerns an important limitation on the principle of "absorption"—that is, the pre-eminence of Community law when spheres of competence turn out to overlap. "Although absorption extends the effect of Community legislation outside the Community jurisdiction," he argues, "it, critically, does not give the Community original legislative jurisdiction (in, for example, the field of education). The Community could not, in light of *Casagrande*, directly promulgate its own full-fledged educational policy."<sup>318</sup> But it is hard to see why not, especially when we take into account the Court of Justice's second tool—the principle of *implied* Community powers under Article 235. One certainly can imagine, for instance, a situation in which disparities in educational quality create substantial distortions in emigration patterns within the Community. Member States with excellent educational systems might become "education magnets," drawing a disproportionate share of families from other Member States who are, owing to their native State's policies, unable to obtain a comparable education for their children at home. A classic collective action problem might arise, in which the better educational systems within the Community would come under increasing strain while other States "free ride" off their fellow Member States' expenditures.

Such a situation seems like a fairly straightforward case for implied powers, in which the Community responsibility for regulating movement of citizens might require intervention in educational policy per se—for instance, a requirement of minimum educational standards in all Member States. Certainly, similar arguments have been made with a straight face in the context of American federalism. Justice Breyer, dissenting in *Lopez*, argued that the federal Commerce Clause's concern with economic competitiveness justified regulating the conditions of education within the several states;<sup>319</sup> similarly, the Court has held that Congress may regulate noncommercial activity and wholly intrastate commerce where necessary to pro-

---

<sup>317</sup> One answer is that the Community is highly unlikely to promulgate any such trade policy so long as a Member State has fundamental security objections to it. But that rejoinder simply highlights the importance of political safeguards; as a matter of power federalism, *Casagrande* leaves little shelter for Member State preferences in such cases.

<sup>318</sup> Weiler, *supra* note 103, at 2441.

<sup>319</sup> See *United States v. Lopez*, 514 U.S. 549, 619-23 (1995) (Breyer, J., dissenting).

tect and further a broader regulation of interstate commerce.<sup>320</sup> Where regulatory issues outside the formal confines of the Community's enumerated subject-matter jurisdiction begin to interfere with the Community's core concerns, it is hard not to see Article 235 taking on the breadth of the American "Necessary and Proper" Clause.<sup>321</sup> Indeed, this transformation may have already come to pass. According to Professor Weiler, the 1970s saw the development of a "wide reading" of Article 235 under which "it would become virtually impossible to find an activity which could not be brought within the 'objectives of the Treaty.'"<sup>322</sup> The result, he concludes, is not only that "no core activity of state function could be seen any longer as still constitutionally immune from Community action . . . , but also that no sphere of the material competence could be excluded from the Community acting under Article 235."<sup>323</sup>

The notion of limited Community competence arguably found its *Lopez* in the *Tobacco Advertising* case,<sup>324</sup> decided by the Court of Justice in 2000. The case concerned a directive—enacted under Articles 57<sup>325</sup> (facilitating self-employment activities), 66<sup>326</sup> (applying same provisions to services), and 100a<sup>327</sup> (establishing the internal market)—banning advertising of tobacco products throughout the Community. The Court of Justice found that none of these legal bases was applicable and annulled the directive.<sup>328</sup> Observers hailed the decision as evidence that the Court of Justice has become "serious about the limits of competences."<sup>329</sup> As such, the ruling arguably moves the

---

<sup>320</sup> See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress may regulate crops grown for home consumption, rather than for sale, in order to facilitate regulation of national agricultural markets).

<sup>321</sup> See Weiler, *supra* note 103, at 2443 ("Article 235 is the 'elastic clause' of the Community—its 'necessary and proper' provision."); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("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.").

<sup>322</sup> Weiler, *supra* note 103, at 2445-46.

<sup>323</sup> *Id.* at 2446.

<sup>324</sup> Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, 2000 E.C.R. I-8419, [2000] C.M.L.R. 1175 (2000).

<sup>325</sup> EC Treaty art. 57 (as in effect 1997) (now article 47(2)).

<sup>326</sup> *Id.* art. 66 (as in effect 1997) (now article 55).

<sup>327</sup> *Id.* art. 100a (as in effect 1997) (now article 95).

<sup>328</sup> *Tobacco Advertising*, 2000 E.C.R. paras. 115-16, [2000] C.M.L.R. at 1270 paras. 115-16. See generally John A. Usher, Case C-376/98, *Germany v. European Parliament and Council (Tobacco Advertising)*, 38 Common Mkt. L. Rev. 1519 (2001) (summarizing the Court's judgment and reasoning).

<sup>329</sup> Editorial Comments, Taking (the Limits of) Competences Seriously, 37 Common Mkt. L. Rev. 1301, 1303 (2000).

Court “a step closer to fulfilling an explicit role as a constitutional court for the European Union.”<sup>330</sup>

While the result in *Tobacco Advertising* ought to be welcome to anyone concerned about a federal balance in Europe, it will take more than one decision to establish the judicial enforcement of competences as a viable strategy for limiting Community power. For one thing, the Court’s decision turned in part on Article 129(4)’s<sup>331</sup> specific exclusion of Community power to harmonize health regulations.<sup>332</sup> It is not surprising that where the treaties specifically carved out a particular power as *not* granted to the Community, the Court was more willing to enforce that denial of authority. One should be cautious about inferring, from such a decision, a willingness to enforce the limits of power grants stated in affirmative terms—a situation that seems likely to occur far more frequently than the reverse.

The Court’s more general discussion of the limits of Community power to establish the internal market under Article 100a<sup>333</sup> is likely to have a more far-reaching impact. Importantly, the Court rejected the notion that Article 100a conferred “a general power to regulate the internal market”; such a power, the Court said, would be “incompatible with the principle embodied in Article 3b of the EC Treaty<sup>334</sup> that the powers of the Community are limited to those specifically conferred on it.”<sup>335</sup> The problem lies in the nature of the inquiry to which the Court seems to have committed itself. To determine whether a Community measure is valid internal market legislation, the Court found it “necessary to verify whether the Directive actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition.”<sup>336</sup> The facts of *Tobacco Advertising* presented an appealing case for a negative answer to this question: The directive was a *ban* on a particular form of trade (tobacco ads); it was manifestly not designed to eliminate national barriers because it specifically exempted *more rigorous* forms of national regulation; and any concerns

---

<sup>330</sup> Tamara K. Hervey, Community and National Competence in Health after *Tobacco Advertising*, 38 Common Mkt. L. Rev. 1421, 1441-42 (2001).

<sup>331</sup> EC Treaty art. 129(4) (as in effect 1997) (now article 152(4)(c)).

<sup>332</sup> See *Tobacco Advertising*, 2000 E.C.R. paras. 77, 79, [2000] C.M.L.R. at 1265 paras. 77, 79 (noting that “Article 129(4) . . . excludes any harmonization of laws and regulations of the Member States designed to protect and improve human health,” and that “[o]ther articles of the Treaty may not . . . be used as a legal basis in order to circumvent the express exclusion of harmonization laid down in Article 129(4)”).

<sup>333</sup> EC Treaty 100a (as in effect 1997) (now art. 95).

<sup>334</sup> Id. art. 3b (as in effect 1997) (now art. 5).

<sup>335</sup> *Tobacco Advertising*, 2000 E.C.R. para. 83, [2000] C.M.L.R. at 1265 para. 83.

<sup>336</sup> 2000 E.C.R. para. 95, [2000] C.M.L.R. at 1267-68 para. 95.

about distortions to competition were dwarfed by the Community's primary purpose to protect health. Nonetheless, the Court of Justice appears unlikely to second-guess legislative judgments about competition and the free movement of goods and services very often.

Finally, while the Court's decision seems to require that "a distortion of competition should be appreciable in order to justify Community internal market legislation," it leaves in place the doctrine that "a national measure does *not* have to have an appreciable effect on trade in order to be regarded as an unlawful barrier to trade."<sup>337</sup> As such, the decision may do more to create a regulatory vacuum than to preserve the authority of Member States to legislate at the national level. The result may be a transfer of power from the Community level to the free market rather than to the Member States.<sup>338</sup>

The U.S. Supreme Court's decision in *Lopez*, which delivered an analogous rebuke to virtually unlimited assertions of federal power under the Commerce Clause, generally has not been seen as a return to rigorous judicial enforcement of the enumerated powers doctrine in American law. It has had a relatively modest impact in the lower courts,<sup>339</sup> and most commentators have viewed it primarily as a reminder to Congress that *some* (albeit broad) limits on federal power exist.<sup>340</sup> True protection for state autonomy must be sought elsewhere.

Nonetheless, we continue to hear calls for clarification of competences as an antidote to fears about the expansion of EU power. These calls emanate not only from the EU's advocates<sup>341</sup> but also from those most worried about excessive centralization.<sup>342</sup> *Lopez* and *Tobacco Advertising* notwithstanding, the American experience suggests that renewed efforts to tighten the enumeration of community powers are unlikely to succeed. Although some scholars have expressed confidence that the "new precise delimitation of Community powers was a major result of the Treaty of European Union" so that

---

<sup>337</sup> Usher, *supra* note 328, at 1536.

<sup>338</sup> Cf. Gardbaum, *supra* note 279 (observing that Supreme Court's invalidation of federal regulatory legislation on federalism grounds, combined with its restriction of state regulatory legislation on due process grounds, created regulatory vacuum to benefit of free market rather than boon to state sovereignty).

<sup>339</sup> See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 *Wis. L. Rev.* 369, 371.

<sup>340</sup> See *supra* note 175 and accompanying text.

<sup>341</sup> See, e.g., Laeken Declaration, *supra* note 1, at 21 (pledging "better division and definition of competence in the European Union"); Fischer, *supra* note 7, at 27.

<sup>342</sup> See, e.g., Siedentop, *supra* note 8, at 231 (arguing that "one of the pre-conditions of successful federalism is a consensus on which areas of decision-making belong to the centre and which ought to be reserved for the periphery").

“the continuous accretion of powers to the Community is no longer on the political agenda,”<sup>343</sup> it is hard to see any new bulwarks holding for long. The world seems likely to grow more interconnected, rather than less, so that fields of regulatory concern that once seemed separate—such as education policy and international trade<sup>344</sup>—will continue to converge. And where “precise delimitation” stands in the way of policies that the Community considers vital, Article 235 will continue to provide ample means for justifying the necessary expansion of jurisdiction.

One might, of course, try to draw a firm line *somewhere*, simply for the purpose of having one. That, it seems to me, is what the U.S. Supreme Court has tried to do in cases like *Lopez* and *Morrison* by insisting that the activity addressed by Commerce Clause legislation in fact be “commercial” in nature. The upside of such a line is that it may buttress *political* checks on central power.<sup>345</sup> As I have argued, however, such a line is not much of a limit of its own force on centralized power; it places no meaningful “field” of regulatory concern off-limits to federal intervention, and it serves primarily to remind members of Congress of their *own* responsibility to consider the limits of their power before they act.<sup>346</sup> Given the failure of enumeration to provide a more meaningful limit on Community power, Europeans might well wish for a limiting principle that more directly reflects the substantive concerns of European federalism. That would be the principle of subsidiarity, which I consider in the next Section.

### C. Subsidiarity

Both the American experience of dual federalism and the ECJ’s jurisprudence on Community competences suggest that relying solely on enumeration to protect Member State autonomy would be a mistake. Defining exclusive spheres of competence, however, is not the only form of “power” federalism; as Larry Kramer has observed, “just because it’s no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it’s not necessarily impossible to maintain a *fluid* one.”<sup>347</sup> Subsidiarity attempts to do exactly that by setting out necessary preconditions for Community action without categorically fore-

---

<sup>343</sup> Majone, *supra* note 74, at 9.

<sup>344</sup> See *supra* note 319 and accompanying text (discussing Justice Breyer’s linkage of the two in *Lopez*).

<sup>345</sup> See Young, *supra* note 168, at 165-67.

<sup>346</sup> See *supra* note 175 and accompanying text; Young, *supra* note 168, at 160-63.

<sup>347</sup> Kramer, *supra* note 248, at 1498.

closing action in any particular field.<sup>348</sup> It attempts to do so, moreover, in a way that directly implicates the reasons for both centralizing and dividing powers in the first place.

The Maastricht Treaty on European Union provides the following definition for the principle of subsidiarity:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>349</sup>

As Edward Swaine has observed, “[s]ubsidiarity is a critical reaction not only to the gradual shift in legislative authority from the Member States-dominated Council to more autonomous Community institutions, but also to the Court of Justice’s expansive interpretation of Community powers against the apparent interest of Member States.”<sup>350</sup>

Subsidiarity as an organizing principle for the European Union is still a work in progress; it is, moreover, a principle for which American experience offers no direct analogs. A number of American scholars, however, have proposed that the U.S. Supreme Court adopt something very much *like* subsidiarity as a means for securing a rational division of labor between the states and the national government. Donald Regan has argued, for example, that courts reviewing a federal assertion of power “should ask what special reason there is for the federal government to have that power. What reason is there to think the states are incapable or untrustworthy? . . . [Is there] any reason why the regulation under consideration should come from the federal government[?]”<sup>351</sup> This sort of approach has the advantage of actually turning on the reasons we care about federalism in the first place. In essence, the test simply *is* those values, applied directly to the facts at hand.

Tests like this, however, inevitably raise a second line of inquiry: “What reason is there to think that the courts are better able than Congress to determine whether the states are incapable or untrustworthy?”<sup>352</sup> One possible answer to this question, drawn from the

---

<sup>348</sup> Although the Maastricht Treaty’s introduction of subsidiarity seemed to be the Member States’ primary strategy for protecting their autonomy, the same Treaty also made efforts to strengthen the principle of enumeration. See Lenaerts, *supra* note 143, at 785-86.

<sup>349</sup> EC Treaty art. 5 (ex art. 3b).

<sup>350</sup> Swaine, *supra* note 9, at 5 (footnotes omitted).

<sup>351</sup> Regan, *supra* note 178, at 557, 561-62; see also Althouse, *supra* note 177, at 817.

<sup>352</sup> Stone, Seidman, Sunstein & Tushnet, *supra* note 242, at 157.

American Constitution's central concern with governmental self-dealing,<sup>353</sup> is that the Community legislative bodies should not be the judge in their own case. It is very difficult, after all, for even the most conscientious politician, confronted with a regulatory concern that seems highly pressing or attractive on its own merits, not to convince herself that the subject falls within her legitimate jurisdiction.

The European Court of Justice, of course, is also a Community institution, and one may, without disrespect for the impartiality of the individual judges, expect its decisions to reflect its institutional affiliation at least to some extent. Several commentators have observed, in the American context, that federalism disputes are typically decided "before a group of courts that are agencies of the federal government" with institutional incentives to protect that government's interests.<sup>354</sup> Certainly the behavior of the ECJ in the Community's early years suggests that it views itself as a force for integration rather than a guardian of Member State interests.<sup>355</sup> The U.S. Supreme Court's changing role in enforcing federalism over the past century, however, demonstrates that an institution that is formally part of the central government may nonetheless be willing—sometimes—to check the central political branches in favor of the periphery.<sup>356</sup>

The more serious objection, of course, is that enforcement of a principle like subsidiarity involves the sort of political judgments that courts have no business making. American debates about Professor Regan's proposal and others like it suggest that any doctrine of federal power derived directly from the values associated with a federal system is likely to require delicate and highly political judgments from courts.<sup>357</sup> When is a "race to the bottom" problem so severe as to require federal intervention? How do we weigh the value of state-by-state diversity against a need for federal uniformity? The Court's ex-

---

<sup>353</sup> See Wills, *supra* note 18, at 149.

<sup>354</sup> Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. Rev. 1304, 1314 (1999); see also Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752, 807-08 (1995) (arguing that federal judges have ample institutional incentives, as officials of federal government, not to over-protect federalism).

<sup>355</sup> See, e.g., Weiler, *supra* note 103, at 2413-19 (recounting ECJ's development of doctrines of supremacy, preemption, direct effect, and human rights).

<sup>356</sup> The most active period in the Court's review of federalism issues, however, seems to have been based on the Justices' desire to restrict regulation of business at both the state and federal levels, rather than on any special solicitude for states' rights. See Gardbaum, *supra* note 279, at 506.

<sup>357</sup> Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.").

perience with more flexible standards in the past, such as the “direct” and “indirect” effect rule, suggests that it would have a hard time making such judgments seem like commands of law rather than choices of policy.

Not surprisingly, American students of the European Union have tended to raise similar objections to subsidiarity. George Bermann, for example, has observed:

The same characteristics that make the inquiry difficult for the political branches to conduct—namely, uncertainty about how much localism really matters on a given issue, the heavy reliance on prediction and the probabilities of competing scenarios, the possibility of discretionary tradeoffs between subsidiarity and proportionality, and the sheer exercise of political judgment entailed—make the inquiry even more problematic for the Court.<sup>358</sup>

Subsidiarity thus appears vulnerable for the same reasons that the U.S. Supreme Court’s efforts to develop more flexible limits on federal power faltered—that is, the criteria did not seem sufficiently “law like” to justify their imposition by courts over the objections of the political branches.

European courts generally have, in fact, been reluctant to interpret subsidiarity as a strong limit on Community power. In the *Working Time* case,<sup>359</sup> for example, the Court of Justice rejected British arguments that the treaty articles should be interpreted narrowly in light of the subsidiarity principle,<sup>360</sup> and that the Community institutions should have to prove the superior effectiveness of action at the Community level over action by the Member States.<sup>361</sup> Much litigation seems to have focused on subsidiarity as a *procedural* principle—that is, a requirement that the Community institutions actively and explicitly consider the subsidiarity issue in the legislative process. As I discuss further below, subsidiarity has some potential as a “process forcing” principle. Thus far, however, European courts appear largely unwilling even to enforce this procedural side of subsidiarity.<sup>362</sup>

In some cases, moreover, the Court seems to have interpreted subsidiarity in such a way as to minimize its distinctiveness as an ap-

---

<sup>358</sup> Bermann, *supra* note 11, at 391.

<sup>359</sup> Case C-84/94, *United Kingdom v. Council (Working Time Directive)*, 1996 E.C.R. I-5755, [1996] 3 C.M.L.R. 671 (1996).

<sup>360</sup> See 1996 E.C.R. at I-5808-09 paras. 46-47, [1996] 3 C.M.L.R. at 685-86 paras. 46-47.

<sup>361</sup> See 1996 E.C.R. at I-5810-11 paras. 54-55, [1996] 3 C.M.L.R. at 687 paras. 54-55.

<sup>362</sup> See, e.g., Case C-233/94, *Germany v. Parliament and Council (Directive on Deposit-Guarantee Schemes)*, 1997 E.C.R. I-2405, I-2453 para. 28 (rejecting requirement of “express reference” to subsidiarity in legislation).

proach to power federalism. *Netherlands v. Parliament and Council*<sup>363</sup> involved a Community directive specifying rules for the patentability of biotechnological innovations. Rejecting a subsidiarity challenge to the directive, the Court stated:

The objective pursued by the directive, to ensure the smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various member states in the area of the protection of biotechnological inventions, could not be achieved by action taken by the member states alone. As the scope of that protection has immediate effects on trade and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.<sup>364</sup>

The upshot of the Council's reasoning is that, in an integrated European economy, anything with "immediate effects on trade" is better dealt with at the Community level. The subsidiarity inquiry thus becomes basically identical to the American requirement, under the Commerce Clause, of a "substantial effect" on interstate commerce.

If *Netherlands* becomes the Court's standard approach to subsidiarity, then that principle seems no more likely to act as a significant check on central power than the American Commerce Clause. In any event, the inherently political nature of comparing the probable efficacy of action at the Community and Member State levels makes subsidiarity an unpromising tool of judicial review.<sup>365</sup> Professor Bermann thus concludes that "the Court should not in any event conduct a de novo inquiry into the comparative efficacy of Community and Member State action in achieving the Community's objectives."<sup>366</sup> Instead, he advocates a process-oriented examination of "whether the [Community] institutions themselves examined the possibility of alternative remedies at or below the Member State level."<sup>367</sup> While the Court of Justice has been reluctant so far to impose such procedural requirements on its own initiative, the Community has taken some steps to incorporate them in the operating procedures of the political branches themselves.<sup>368</sup>

---

<sup>363</sup> Case C-377/98, *Netherlands v. Parliament and Council*, 2001 E.C.R. I-7079, [2001] 3 C.M.L.R. 1173 (2001).

<sup>364</sup> 2001 E.C.R. at para. 32, 3 C.M.L.R. at 1237 para. 32.

<sup>365</sup> See von Borries & Hauschild, *supra* note 110, at 374 ("The passing of a legal act by the Community legislator implies that the majority of the Council agrees that the act conforms to the subsidiarity principle, and the Court will have difficulty in overturning such an assessment.").

<sup>366</sup> Bermann, *supra* note 11, at 393.

<sup>367</sup> *Id.* at 391.

<sup>368</sup> See, e.g., von Borries & Hauschild, *supra* note 110, at 381-82 (discussing Commission's practice of issuing annual report on application of subsidiarity principle); cf.

The American experience suggests that judicial review works best in a process-forcing role designed to augment the functioning of “political safeguards” for Member State autonomy. That sort of role presupposes an institutional context in which the political safeguards exist and can protect Member State interests in a meaningful way. Whether that context exists in the European Union involves a host of broader structural issues examined in the next Part.

#### IV THE POLITICAL SAFEGUARDS OF MEMBER STATE AUTONOMY

The American debate over judicial review of federalism issues has focused mostly on whether there should be *some* judicial enforcement or none at all;<sup>369</sup> most participants seem to concede, at least implicitly, that the system works best when structural values are also enforced through political and institutional checks.<sup>370</sup> *Substantive* judicial review—that is, judicial review that tries to set hard limits on central power—will be necessary to prevent erosion of the federal balance precisely to the extent that these political and institutional checks fail.<sup>371</sup> Indeed, Joseph Weiler has suggested that the Member States of the European Union accepted the European Court of Justice’s refusal to enforce substantive limits on Community competence—and indeed, the Court’s substantial expansion of both Community competence and the effect of Community law—precisely because they were confident in the existence of political checks on threats to their autonomy.<sup>372</sup> It is thus worth investigating the extent

---

Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *Duke L.J.* 1277 (2001) (suggesting that procedures for assessing constitutionality of proposed legislation should be built into legislative process as alternative to exclusive reliance on judicial enforcement). The German national government likewise has established a subsidiarity review procedure that produces reports to the Bundesrat on EU compliance with the principle. See von Borries & Hauschild, *supra* note 110, at 379-81.

<sup>369</sup> See Young, *supra* note 25, at 1350-51.

<sup>370</sup> See *id.* at 1351-52 (arguing that horizontal and vertical separation of powers in U.S. Constitution were intended to be self-enforcing to greatest degree practical).

<sup>371</sup> That is, if preventing such erosion is in fact a value. One might take the position, of course, that power shifts arising “naturally” from operation of the political process over time ought to be accepted as legitimate and that courts should not try to counteract them. Resolving the debate between these two positions would require a substantive argument about whether state (or Member State) autonomy is in fact worth preserving—a question I have bracketed in this Article.

<sup>372</sup> See Weiler, *supra* note 103, at 2429 (“Had no veto power existed, . . . it is not clear to my mind that the Member States would have accepted with such equanimity what the European Court of Justice was doing. They could accept the constitutionalization because they took real control of the decisionmaking process, thus minimizing its threatening features.”).

to which political and institutional aspects of the European Union protect the sovereignty and autonomy of the Member States, as well as the extent to which process-based judicial review might operate to enhance the operation of the political and institutional checks that exist.

This Part is concerned primarily with examining the political safeguards for Member State autonomy in the European Union. It is concerned not only with the extent to which such safeguards currently exist but also with the potential impact on those safeguards of efforts to solve *other* institutional problems confronting the EU, such as the “democratic deficit” and the perceived need to improve the efficiency of the lawmaking process in preparation for expansion. Before I address those issues, however, it will help to focus on the different sorts of threats to Member State autonomy that we might wish political safeguards to counteract. Section A begins with that issue, as illustrated by the debates about Herbert Wechsler’s “political safeguards” thesis in American federalism. Section B turns to the EU, beginning with the Community’s tripartite division of authority between Council, Commission, and Parliament. Section C examines the European model of enforcing Community norms through the Member States rather than creating an extensive enforcement bureaucracy at the Community level. Section D then explores different approaches to judicial review of Community and Member State action. Finally, Section E considers the extent to which political safeguards are likely to remain stable over time.

### *A. Safeguards Against What? Of Vertical and Horizontal Aggrandizement*

We hardly can evaluate “political safeguards” without a clear idea of what they are guarding *against*. Lynn Baker and I have identified two distinct classes of threats to state autonomy that we might describe as “vertical” and “horizontal” aggrandizement, respectively.<sup>373</sup> Vertical aggrandizement occurs when the center seeks to expand its own power and responsibility at the expense of the periphery. This may include assuming regulatory responsibility over traditional state functions, preempting state sources of revenue, or imposing regulatory burdens on state governments. The key fact is that the impetus

---

<sup>373</sup> See Baker & Young, *supra* note 24, at 107-11. The vertical aspect has dominated the American legal literature on federalism; for Professor Baker’s pioneering work on the horizontal problem, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 *Colum. L. Rev.* 1911 (1995) [hereinafter Baker, *Conditional Spending*], and Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 *Chap. L. Rev.* 195 (2001).

for the expansion of central power comes from the central government itself; hence the “vertical” label.<sup>374</sup>

Horizontal aggrandizement, by contrast, originates in the differing preferences of the several states. When preferences differ, one state, for whatever reason—moral fervor, selfish advantage, or the need to avoid collective action barriers to its own preferred internal policy—may wish to impose its preferred policy on another state. If a sufficient number of states share this preference, they might find the central government a convenient instrument for achieving their desire. The end result may *look* just like vertical aggrandizement: The central government incorporates the aggressive states’ preference into national law, preempting the contrary preference of the minority states. But the impetus for this action comes not from the central government itself but from a coalition at the state level.<sup>375</sup>

The American constitutional law literature on federalism has focused almost exclusively on the vertical problem. Debate has centered on whether the institutional mechanisms cited by Herbert Wechsler and others—most importantly, representation of the states in Congress—are sufficient to stave off vertical aggrandizement. The most important criticism distinguishes between political representation of interests *in* the states and representation of the interests of state governments themselves.<sup>376</sup> Prior to the Seventeenth Amendment, for example, Senators were chosen directly by state legislatures and could be expected to represent the institutional interests of the state government, although it is unclear to what extent they did so.<sup>377</sup> In a world of direct election, however, a Senator may well be beholden to interests geographically concentrated in his state but *not* to the state government itself.<sup>378</sup> A Senator from Texas, for example, might be very solicitous of the interests of the oil industry; she also might have an interest, however, in ensuring that the important regu-

---

<sup>374</sup> See Baker & Young, *supra* note 24, at 112-17.

<sup>375</sup> See *id.* at 117-28.

<sup>376</sup> See, e.g., Kramer, *supra* note 20, at 222 (recognizing that goal of federalism is to “preserve the regulatory authority of state and local institutions to legislate policy choices,” not to make federal government sensitive to private interests organized along state or local lines); Young, *supra* note 25, at 1358 n.42 (arguing that “[t]he emphasis on the institutional interests of state governments is critical because virtually all the important benefits of federalism stem from the existence of the states as self-governing entities”).

<sup>377</sup> See, e.g., Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 *Vand. L. Rev.* 1347, 1354-55 (1996) (observing that variety of institutional and political changes had undermined extent to which state institutions could control their Senators, even before Seventeenth Amendment was ratified).

<sup>378</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting); Amar, *supra* note 377, at 1379-80.

lation of that industry takes place at the *federal* level so that she can claim credit for regulation that benefits the industry. The Senator thus might have little interest in protecting the regulatory prerogatives of the *state* government because she will gain no credit for regulatory (or *deregulatory*) initiatives undertaken in Austin rather than Washington.

State and federal representatives, in other words, often may find themselves *competing* for the right to provide beneficial regulation and government largesse to the same set of constituents. As Larry Kramer has observed,

Federal politicians will want to earn the support and affection of local constituents by providing desired services themselves—through the federal government—rather than to give or share credit with state officials. State officials are rivals, not allies, a fact the Framers understood and the reason they made Senators directly beholden to state legislators in the first place.<sup>379</sup>

To be sure, federal representatives will have countervailing incentives to cooperate with state politicians in a variety of circumstances—perhaps most importantly when they are members of the same political party.<sup>380</sup> Nonetheless, the incentive of federal representatives to maximize their own power even at the expense of their colleagues in state government undermines the thesis that those federal representatives can be relied upon to protect the institutional interests of state government.

The “Gun Free School Zones Act” invalidated in *Lopez* provides a good example of this sort of competition. Even before the Columbine tragedy, the problem of children bringing guns to schools was a highly visible one in American society. It is hard to think of any intrinsic reason the problem cannot be regulated at the state level; in fact, more than forty states had done so already at the time that Congress acted.<sup>381</sup> One suspects that the only fault with the states’ laws on the subject was that there was no way for federal Senators and Representatives to garner any political credit from them. The federal statute thus became a means for shifting political credit for addressing a

---

<sup>379</sup> Kramer, *supra* note 248, at 1510-11; see also Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 Va. L. Rev. 1347, 1357 (1997) (“Where central representatives are popularly elected, they may have a stake in reelection that induces them to favor central intervention whenever they can thereby be perceived as addressing an issue of interest to constituents, regardless of whether centralized attention to the issue is required or authorized.”).

<sup>380</sup> See Kramer, *supra* note 20, at 279; *supra* notes 247-48 and accompanying text (discussing Professor Kramer’s argument).

<sup>381</sup> See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

salient issue from state representatives to their federal counterparts.<sup>382</sup>

Whether or not the representation of the states in Congress protects state governments from vertical threats, it does nothing to protect them from horizontal ones. In fact, that representation is the mechanism by which horizontal aggrandizement occurs. American society is presently divided, for example, over the issue of physician-assisted suicide for terminally ill patients. Different states have taken radically different positions on the issue; Oregon, for example, permits the practice while other states prohibit it.<sup>383</sup> If states wishing to outlaw the practice find themselves with a majority of votes in Congress, they can impose their preferences on the rest of the country by enacting a uniform ban at the federal level.<sup>384</sup> This strategy would be viable precisely to the extent that federal representatives are in fact responsive—as the political-safeguards argument supposes—to the preferences of state governments and/or interests concentrated at the state level.<sup>385</sup>

Despite the low profile of horizontal aggrandizement in the literature, American history provides any number of examples of the phenomenon. At the 1787 Convention, the Southern states were able to get a Fugitive Slave Clause included in the document.<sup>386</sup> That Clause, along with federal implementing legislation later enacted at the behest of the slave states, enabled them to impose their preferences for broadly protecting the rights of slaveholders on Northern states that would have preferred to give broader protection to escaped slaves and free blacks.<sup>387</sup> Similarly, the overwhelming majority of states that opposed polygamy in the nineteenth century were able to impose that view on Utah and other states with substantial Mormon populations;

---

<sup>382</sup> See, e.g., Jerome L. Wilson, Letter, High Court Did Well in School-Guns Case, N.Y. Times, May 5, 1995, at A30 (suggesting that “the Gun-Free School Zones Act was little more than a press release from Congress that it cared”).

<sup>383</sup> Compare, e.g., Oregon Death with Dignity Act, Or. Rev. Stat. §§ 127.800-.995 (2001) (permitting the practice), with *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (holding that Dr. Jack Kevorkian could be prosecuted under Michigan law for helping terminally ill patient to end his life).

<sup>384</sup> Individual states might wish to impose their preferences on other states for any number of reasons. If they think that the practice of physician-assisted suicide is profoundly immoral, they may not be satisfied with prohibiting it within their own borders. More practically, a state might wish to prevent the possibility that a more permissive regime in another state would undermine its policy by making it possible for its terminally ill citizens to obtain the prohibited assistance simply by traveling to the other state.

<sup>385</sup> See generally Baker & Young, *supra* note 24, at 117-18.

<sup>386</sup> See U.S. Const. art. IV, § 2, cl. 3.

<sup>387</sup> See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); Baker & Young, *supra* note 24, at 121-24 (discussing *Prigg* and fugitive slave laws as examples of horizontal aggrandizement).

as a condition of admission to the Union, those states were required to prohibit the practice in their state constitutions.<sup>388</sup> While these examples may be unappealing, one certainly can imagine more attractive examples. A coalition of states suffering damage from acid rain, for example, might use the federal government as an instrument to impose their preference for lower air pollution emissions on upwind states that do not share that preference.<sup>389</sup>

It is easy to see both horizontal and vertical pressures at work in the contemporary European Union. However, the horizontal concerns seem most salient for the moment. The most obvious examples concern finances. To the extent that the EU budget is used to redistribute wealth and promote development in the poorer Member States, that system—whether or not it makes sense on other grounds—would demonstrate the capacity of some States to use the center to secure direct benefits at the expense of other States.<sup>390</sup> Expansion of the EU to encompass the generally less-developed states of Eastern Europe is bound to add further horizontal pressures of this type.<sup>391</sup> Similarly, the terms of the Stability and Growth Pact, which forbid members of the euro-zone from running a budget deficit of more than three percent of Gross Domestic Product, can be seen as a successful effort by more fiscally conservative states to impose that preference on states with a history of freer spending.<sup>392</sup>

Other horizontal pressures implicate political and social preferences more directly. When Austria elected a parliamentary coalition that included the right-wing faction of Jörg Haider, the other EU nations imposed sanctions by freezing bilateral political contacts with

---

<sup>388</sup> See Utah Const. art. III, § 1; Utah Enabling Act, ch. 138, 28 Stat. 107, 108 (1894); Baker & Young, *supra* note 24, at 118-19.

<sup>389</sup> See Baker & Young, *supra* note 24, at 124-26 (elaborating point that horizontal aggrandizement may take both normatively attractive and unattractive forms).

<sup>390</sup> Cf. McCormick, *supra* note 29, at 209-10; Gerald L. Neuman, *Subsidiarity, Harmonization, and Their Values: Convergence and Divergence in Europe and the United States*, 2 *Colum. J. Eur. L.* 573, 578 (1996) (noting “the European Union’s commitment to promote economic and social cohesion by reducing disparities between levels of development of the various regions”).

<sup>391</sup> See, e.g., *To Get Them In, Cut the Costs*, *supra* note 123, at 48 (discussing current controversy over plans to decrease regional and agricultural aid available to new admittees). Current members have expressed concern, for example, that “once countries like Poland are in the club, and are put on ‘the drug of direct payments’, they will block farm reform—and countries like Germany, Britain and the Netherlands will have to pick up the bill.” *Id.*

<sup>392</sup> It is a widely remarked irony, of course, that Germany—which had insisted on this aspect of the Pact—has been one of the first states to feel the “bite” of this restriction. See, e.g., *Could the Euro’s Nuclear Option Ever Be Used?*, *Economist*, Feb. 2, 2002, at 47, 47. But see *Promises, Promises, Fudge, Fudge*, *Economist*, Feb. 16, 2002, at 47, 47 (reporting that Germany most likely will escape sanctions under Pact).

Austria.<sup>393</sup> Various European officials similarly threatened Italy with retaliation prior to its election of the center-right government of Silvio Berlusconi.<sup>394</sup> More broadly, the potential for uniform EU-level legislation on welfare establishments and other aspects of social policy present all sorts of opportunities for coalitions of Member States with particular preferences to impose them—for good or ill—on Member States with a different view.

Vertical concerns in Europe tend to be more general. At present, they tend to take the form of vague worries about the overbureaucratization of Europe at the behest of technocrats in Brussels.<sup>395</sup> Such concerns seem likely to increase, however, if the trend toward “ever closer union” continues. The functionalist theory that has been influential in designing and promoting European institutions, for example, posited a textbook example of vertical aggrandizement by envisioning that “the Commission itself would be a decisive force in the integration process, being able to orchestrate, manipulate and maximize the drive towards Community integration, even when this did not accord with the wishes of some Member States.”<sup>396</sup> Likewise, functionalist theory seeks to encourage the formation of interest groups active at the European level, which would then press for further expansion of EU regulatory authority in pursuit of their own interest.<sup>397</sup> Functionalism is not, of course, the only theory of integration, and its descriptive and predictive power is greater in some instances than in others.<sup>398</sup> But to the extent that “[n]eofunctionalism was the early,

---

<sup>393</sup> See *The Union Expects Europe's Voters to Fit Its Political Space*, *Economist*, Mar. 11, 2000, at 53, 53. Because the sanctions were technically imposed by each of the fourteen other Member States and did not reach Austria's normal dealings with the EU institutions, this is not technically an instance of horizontal aggrandizement. The other States were not, after all, using the institutions of the central government to impose their preference on Austria. Nonetheless, the example certainly indicates the potential for such aggrandizement within the EU framework itself. See, e.g., *A Conundrum for Austria—and for Europe*, *Economist*, Feb. 5, 2000, at 45, 45 (suggesting that Austrian sanctions set dangerous precedent as “the first time that EU countries have sought to interfere in the domestic politics of a fellow member”).

<sup>394</sup> See, e.g., James Blitz, *EU Leaders Play Down Threat of Italy Boycott*, *Fin. Times*, Mar. 1, 2001, at 9; Blake Evans-Pritchard, *Italy May Face Censure if Berlusconi Wins Election*, Feb. 28, 2001, at <http://www.euobserver.com/index.phtml?aid=1593>.

<sup>395</sup> See, e.g., *Euromyths: Fact and Fiction in EU Law*, at <http://www.cnn.com/SPECIALS/2000/euunion/story/laws/index.html> (last visited Sept. 21, 2002).

<sup>396</sup> Craig, *supra* note 126, at 3.

<sup>397</sup> See *id.* at 4.

<sup>398</sup> See, e.g., *id.* at 1-2 (describing variety of theories in integration literature); Moravcsik, *supra* note 41 (arguing that functionalism is not most plausible descriptive account of most critical leaps forward in history of European integration).

dominant ideology of Community integration,”<sup>399</sup> it suggests that the structure was *designed* to produce vertical pressures.

These different kinds of pressures typically give rise to different countervailing institutional strategies. Horizontal pressures are normally addressed by voting rules, such as the equal representation of each American state in the Senate or the former unanimity rule for most decisions in the EU Council of Ministers. Vertical pressures, on the other hand, generally raise issues of representation; in the absence of hard constitutional limits on the expansion of central power, states or Member States can protect themselves from vertical aggrandizement only if their institutional interests are represented in the central government. American literature focusing on the Senate as a protection for federalism often conflates these two different sorts of threats. The equal voting rule in the Senate, after all, does nothing to prevent the general expansion of federal power if Senators are, in fact, *competitors* to politicians at the state level.

With these general ideas in mind, the next three Sections examine the current extent of “political safeguards” for Member State autonomy in the European Union. A concluding Section then addresses the issue of those safeguards’ durability over time.

### *B. Council, Commission, and Parliament*

In America, the “horizontal” separation of powers at the federal level also has important implications for “vertical” separation of powers between the national government and the states. It makes sense, then, to start an analysis of the political safeguards for Member State autonomy in the European Union with the Community’s tripartite structure of Council, Commission, and Parliament.

#### *1. The Two Councils*

Historically, the representation of each Member State on the Council of Ministers has been the primary institutional guarantee of Member State autonomy in the EU structure. From a “process federalism” standpoint, that representation is clearly superior to any safeguards provided to the states in the American Constitution. Much like American Senators prior to the Seventeenth Amendment, ministers on the Council are appointed directly by the Member State government; indeed, aside from the permanent representatives to the Council, the ministers on the different subject-matter councils generally *are* the home governments. And while American Senators always have been expected, at least to some extent, to “rise above” the paro-

---

<sup>399</sup> Craig, *supra* note 126, at 3.

chial interests of their home states and consider the greater good of the nation,<sup>400</sup> “[t]he minister’s acknowledged responsibility is to look after the State’s interests in the matter before the Council and to cast a vote accordingly.”<sup>401</sup>

One need only look at the astonishing pace of centralization in the EU, however, to see that the Council has been a less-than-perfect guardian of Member State autonomy. The American experience offers some clues toward explaining why the Council might fail to protect the institutional interests of the Member States.

The first is a pervasive problem with political-safeguards arguments: Substantive policy commitments on particular issues often will overwhelm concerns about the *institutional* interests of the state or Member State governments that representatives are supposed to represent.<sup>402</sup> In the United States, for example, recent Republican majorities in Congress entered office with a strong ideological commitment to federalism and “states’ rights.” Congress did, in fact, pass some measures designed to protect and enhance state regulatory autonomy,<sup>403</sup> and these measures were in turn hailed as examples of the “political safeguards of federalism” at work.<sup>404</sup> Even for this ideologically sympathetic Congress, however, substantive policy commitments quickly trumped preferences about institutional design. Subsequent legislation, enacted by significant Republican majorities, intruded into state authority to regulate contentious social issues such

---

<sup>400</sup> See, e.g., John F. Kennedy, *Profiles in Courage* 12-14 (1956).

<sup>401</sup> Bermann, *supra* note 11, at 395. To be sure, there has long been a similar school of thought pertaining to the Council. West German Chancellor Konrad Adenauer, for instance, argued in 1952 that “[w]hile [the Council] must safeguard the national interests of the member States, it must not regard this as its paramount task . . . [which is] to promote the interests of the Community.” McCormick, *supra* note 29, at 134 (quoting Konrad Adenauer, quoted in Jean Monnet, *Memoirs* 381 (Richard Mayne trans., 1978)).

<sup>402</sup> Cf. Weiler, *supra* note 103, at 2433 (noting that division of power between federal and state governments in the United States “was sacrificed” “[t]o the extent that the division became an obstacle for the achievement of [national] aims”).

<sup>403</sup> See, e.g., The Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified at 2 U.S.C. § 1501 (2001)); see also Recent Legislation, *Unfunded Mandates Reform Act of 1995*, 109 Harv. L. Rev. 1469 (1996) (describing function of legislation).

<sup>404</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 958-59 (1997) (Stevens, J., dissenting) (arguing that passage of Unfunded Mandates Reform Act “demonstrates that unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances”).

as euthanasia and gay marriage<sup>405</sup> and prescribed rules to govern private state-law lawsuits in state court.<sup>406</sup>

Similar concerns have been voiced about the Council of Ministers. As George Bermann has observed, “A particular policy may be so economically or politically favorable to a Member State that it wins the State’s support in the Council, despite the fact that the policy’s underlying objective could adequately be accomplished by action taken at or below the Member State level.”<sup>407</sup> In many contexts, the Member States’ long-term interests in regulatory autonomy might seem to pale in comparison with the accomplishment of an immediate policy objective.<sup>408</sup> Thus, while direct Member State representation on the Council may well prevent radical intrusions into State autonomy, it may be a less reliable safeguard against gradual erosion.<sup>409</sup>

A second and related problem arises from the incentives that Member State governments might have to favor Community-level action in order to circumvent political barriers at the national level. American representatives whose party is in the minority at the state

---

<sup>405</sup> See Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419-20 (1996) (codified at 1 U.S.C. § 7 (2001)). While the Defense of Marriage Act purports only to prescribe a traditional definition of marriage for purposes of federal law, it is likely to have a restrictive effect on state law as well owing to the substantial difficulties that arise in areas such as taxation and family law when states attempt to depart from the federal norm. See generally Kristian D. Whitten, Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?, 26 *Hastings Const. L.Q.* 419 (1999). Similarly, Republicans have proposed legislation to preempt Oregon’s policy of allowing physician-assisted suicide for terminally ill patients. See Lethal Drug Abuse Prevention Act of 1998, H.R. 4006, 105th Cong. (1998).

<sup>406</sup> See generally Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 *Yale L.J.* 947 (2001); see also E.J. Dionne Jr., *States’ Rights Isn’t the Issue*, *Wash. Post*, June 22, 2001, at A25 (concluding, based on debate about state court lawsuits against health maintenance organizations in which Republicans attacked state courts, that “the real debate in our country is only occasionally about local power. It is usually about economic power”); Editorial, *The Boy Scout Amendment*, *N.Y. Times*, June 20, 2001, at A22 (noting Republican support for federal attempt to coerce local governments into permitting Boy Scouts to use local facilities, despite Scouts’ position condemning homosexuality).

<sup>407</sup> Bermann, *supra* note 11, at 396; see also Craig, *supra* note 53, at 118 (observing that “[t]he members of the Council will often be swayed by relatively short-term considerations relating to the needs of their own Member State”).

<sup>408</sup> Cf. Moravcsik, *supra* note 41, at 485-89 (concluding that Member State governments have agreed to pool and delegate sovereignty in order to further particular substantive policies); Calleo, *supra* note 119, at 202-03 (reaching similar conclusions about French and German acceptance of monetary union).

<sup>409</sup> Moreover, some Member States seem to have concluded—even as an institutional matter apart from particular substantive outcomes—that their long-term interests are furthered by ceding sovereignty to a supranational entity. For this reason, as Paul Craig has observed, “certain of the Member States themselves may be in favour of changes which push the Community in a more federal direction and are willing to use their position in the Council and the European Council to press for such developments.” Craig, *supra* note 53, at 112.

level may well prefer federalizing issues where they stand a better chance of achieving their desired outcome in Washington, D.C. In the European context, the decision to resolve an issue at the EU level likewise might help avoid restrictions on a Member State government's freedom of action at home. The Council of Ministers is made up of representatives from the *executive* branch of national governments. Community-level action allows these Member State executives to exercise *legislative* power in a way that might be impossible at home due to domestic institutional or political constraints.<sup>410</sup> As Giandomenico Majone has observed, "because of the supremacy of European law over national law, the governments of the Member States, meeting in the Council, can control their own parliaments rather than being controlled by them."<sup>411</sup> This enhancement of the Member State executive's power may hold true even in parliamentary systems where the executive branches can largely control the legislative process. Such governments might be able to insulate their preferred policies against future political reversals at home by enshrining them in Community law;<sup>412</sup> moreover, governments may be able to avoid blame for unpopular policies by shifting responsibility to Brussels.<sup>413</sup>

Finally, it appears that the Council of Ministers' role is under pressure. According to Professor McCormick, "its role will almost inevitably change as public demands for accountability and closure of the democratic deficit grow. . . . The Council must at least become more open and less secretive, and it will likely be transformed at some

---

<sup>410</sup> Cf. Weiler, *supra* note 103, at 2430 (noting that "the Treaty itself laid the seeds for the Democracy Deficit by making the statal executive branch the ultimate legislator in the Community"). As Professor Weiler observes, a similar dynamic helps explain the acceptance of the supremacy of Community law by Member State judicial systems. Judiciaries that previously had lacked the power of judicial review suddenly acquired it, in the sense of being able to review national legislation for conformity to Community law; judiciaries that already had possessed some reviewing authority typically saw it expanded. The result was that, "for courts at all levels in all Member States, the constitutionalization of the Treaty of Rome, with principles of supremacy and direct effect binding on governments and parliaments, meant an overall strengthening of the judicial branch vis-a-vis the other branches of government." Weiler, *supra* note 103, at 2426.

<sup>411</sup> Majone, *supra* note 74, at 7; see also Calleo, *supra* note 119, at 270 ("National politicians complain that their governments regularly invoke intergovernmental agreements in Brussels to override or ignore parliamentary opposition at home.").

<sup>412</sup> See Weiler, *supra* note 103, at 2430.

<sup>413</sup> Bermann, *supra* note 11, at 396; Lindseth, *supra* note 32, at 666. In this sense, delegation to the Community raises similar political accountability questions to those raised about delegation to administrative agencies in the United States. See Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States 92-126* (2d ed. 1979); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation 3-21* (1993).

point into a directly elected body . . . .”<sup>414</sup> If that were to occur—and it is frankly hard to imagine the Member States making such a broad concession any time soon—that would fundamentally change the Council’s role as an institutional safeguard for Member State autonomy. A directly elected Council would raise similar issues to that of the directly elected Parliament, which I discuss below.<sup>415</sup>

The role of the Council of Ministers in safeguarding Member State interests may have become less important, however, in light of the rise of the European Council. Volker Roben has argued that the European Council—comprised primarily of the European heads of state meeting in periodic summits—“has become the central player in the decision-making process of the Union.”<sup>416</sup> Because the European Council is the most clearly intergovernmental aspect of the EU, because the heads of state are the most politically accountable incarnations of their Member State governments, and because the European Council proceeds by unanimity rather than by qualified majority voting, Professor Roben argues that its rise provides an answer to both the EU’s problems of federalism and democratic legitimacy.<sup>417</sup>

There is no doubt that the European Council has offset, at least to some extent, the centralizing tendencies of the Commission. Its structure does not obviate, however, some of the concerns already expressed about the Council of Ministers—for example, the tendency of substantive policy preferences to swamp concerns for preserving institutional autonomy at the subnational level, as well as the incentive for Member State executive branches to circumvent domestic legislative opposition by moving decisions to the Community level. Given the ambiguous grounding of the European Council’s authority in the treaties, furthermore, one legitimately might worry that its present prominence may prove ephemeral, especially in light of the present constitutional convention and widespread calls for more direct forms of political accountability.

The European Council’s efficacy as a safeguard for Member State autonomy, moreover, would seem to depend on its ability to exercise meaningful supervision over the day-to-day activities of the Commission. The European Council meets infrequently—its members are busy national politicians with a lot on their plates at home—and it can act only by consensus. As a result, much will turn on the placement of the burden of overcoming institutional inertia. If the inability of the European Council to act on a question means that EU-level action

---

<sup>414</sup> McCormick, *supra* note 29, at 134-35.

<sup>415</sup> See *infra* Part IV.B.3.

<sup>416</sup> Roben, *supra* note 49, at 16.

<sup>417</sup> See *id.* at 15-18.

cannot go forward, then the European Council may prove a more effective instrument of process federalism than the cumbersome American legislative process enshrined in Article I. If European Council inaction means that the Community institutions are left to their own devices, however, then the Council seems likely to be only a sporadic check on centralizing tendencies.

## 2. *The European Commission*

The European Commission has an even greater “democratic deficit” problem than the Council. Under one version of the argument, the problem is twofold:

First, the executive (the Council of Ministers and the Commission) rather than parliament, is responsible for legislation; and, second, within the executive, the bureaucratic branch (the Commission) is unusually strong with respect to the political branch (the Council) whose members are subject, at least in principle, to the control of national parliaments.<sup>418</sup>

This second aspect of the democratic deficit—the relative strength of the Commission vis-à-vis the Council—is also a federalism problem. Just as the American states are not directly represented in the structure of federal administrative bureaucracies, the Commission’s structure includes little in the way of built-in protections for Member State autonomy. “The Commission,” according to Professor Bermann, “does not even purport to act in the interests of the States . . . . Commissioners are in fact expressly barred by the Treaty from doing so.”<sup>419</sup>

It is not surprising that the Commission has come to be regarded as “the Community’s primary engine of integration.”<sup>420</sup> Following Maastricht, the Commission took a number of steps to implement the

---

<sup>418</sup> Majone, *supra* note 74, at 7; see also Weiler, *supra* note 103, at 2467 (making similar argument). A different version of the democratic deficit argument relies on “social standards;” on this view, “the Community lacks legitimacy . . . primarily because of its failure to provide sufficient equality and social justice.” Majone, *supra* note 74, at 7. Other versions stress the lack of public deliberation underlying major “constitutional” aspects of the Union, such as the Maastricht Treaty. See McCormick, *supra* note 29, at 124 box 7.1. This Article focuses on the version of the “democratic deficit” discussed in the text.

<sup>419</sup> Bermann, *supra* note 11, at 398 (citing EC Treaty art. 157 (as in effect 1994) (now art. 213)). To be sure, the twenty posts on the College of Commissioners are appointed by the national governments of the Member States. But the process seems designed to minimize the propensity of commissioners to act as national representatives; indeed, commissioners take an oath to be “completely independent in the performance of their duties” and not to “seek nor take instructions from any Government or from any other body.” Even more important, perhaps, commissioners cannot be removed by the home government during their term. McCormick, *supra* note 29, at 102 (quoting EC Treaty art. 213(2) (ex art. 157)).

<sup>420</sup> Bermann, Goebel, Davey & Fox, *supra* note 32, at 44.

subsidiarity principle, including promising to review existing legislation for conformity to the principle and the withdrawal of a number of then-pending legislative proposals.<sup>421</sup> Likewise, the Commission is required by interinstitutional agreement to include along with any proposed legislation “a justification of the proposal under the principle of subsidiarity.”<sup>422</sup> Nonetheless, concerns persist that the Commission plays a strongly centralizing role. Peter Hain, the British Minister for Europe, recently complained that “[t]he powers have all been going towards Brussels and away from nation states. We have no means of enforcing subsidiarity. It’s like passing a law and having no police force to enforce it.”<sup>423</sup>

One implication of American process federalism doctrine, then, is that to the extent possible, the legislative role of the Council should be maximized vis-à-vis the Commission.<sup>424</sup> As I have discussed,<sup>425</sup> the allocation of authority between Congress and federal administrative agencies—nominally a separation-of-powers issue—has important implications for American federalism. The analogy suggests that Member State autonomy in the European Union will suffer if key lawmaking prerogatives shift from the Council to the Commission. These concerns are relevant both to the ex ante ability to initiate legislation and to the ex post delegation by the Council to the Commission of authority to shape implementation. Other changes, such as the switch from unanimity to qualified majority voting on the Council, may raise similar concerns. According to Peter Lindseth, the Commission’s autonomy and authority were greatly enhanced by qualified majority voting in that its rulemaking authority “was freed from the requirement of formal approbation by the democratically-accountable executives in each Member State.”<sup>426</sup>

---

<sup>421</sup> See Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM(93)545 final at 3; Bermann, Goebel, Davey & Fox, supra note 32, at 121-22. Since 1993, the Commission has filed annual reports on the subject of subsidiarity. For the most recent such report, see Commission Report to the European Council, Better Lawmaking 2001, COM(01)728 final, available at [http://europa.eu.int/eur-lex/en/com/rpt/2001/com2001\\_0728en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2001/com2001_0728en01.pdf).

<sup>422</sup> Interinstitutional Agreement Between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity, Bull. EC 10-1993, point 2.2.2, at 119. Professor Bermann has described this requirement as a “subsidiarity impact analysis.” Bermann, supra note 11, at 379.

<sup>423</sup> Grice, supra note 6, at 1.

<sup>424</sup> It is thus problematic that the Commission “has a virtual monopoly on proposing new laws and policies,” although the power of the Council and Parliament to instruct the Commission to investigate an issue and submit proposals should ease this difficulty somewhat. McCormick, supra note 29, at 129. But see Bermann, Goebel, Davey & Fox, supra note 32, at 36 (noting that Council rarely utilizes this power).

<sup>425</sup> See supra Part II.B.2.c.

<sup>426</sup> Lindseth, supra note 32, at 667.

A second implication has to do with the way in which the Commission's authority is legitimized—that is, with the proper response to concerns about a “democratic deficit.” One response to this problem has been to rely on “procedural legitimacy” by enhancing the deliberative quality and transparency of Commission activity.<sup>427</sup> A second and related response has been to legitimize the Commission's activity in terms of both its expertise and its ability to represent the collective interest of the Community as a whole.<sup>428</sup> The important thing to note about each of these responses, however, is that they offer no solution to the *federalism* problem that is distinct from the democratic deficit.<sup>429</sup> Enhancing transparency and access to the regulatory process in the United States has done nothing to preserve the special status of the states as sovereigns; the State of Texas has no more influence at the Federal Communications Commission, for example, than does AT&T (and in fact, probably less). And justifications that focus on the Commission's representation of Community interests as a whole see the Commission as a *counterweight* to political representation of the Member States at other points in the Community lawmaking process.<sup>430</sup> Professor Majone, for example, has argued that “the Commission has never subscribed to the view that there is no conception of the Community public interest which is independent of the competition between individual state preferences. On the contrary, it has always seen itself as the guardian of that interest.”<sup>431</sup>

Whatever the persuasiveness of these theories in terms of their central concern—that is, to legitimize the Commission's lack of direct accountability to the public—they offer cold comfort for Member State autonomy. From the latter perspective, one would prefer what Elizabeth Fisher has called a “rational-instrumentalist paradigm” of justification:<sup>432</sup> The Commission should be seen as an agent of the Council and Parliament, formulating legislative proposals at their direction (or the direction of the treaties themselves) and implementing

---

<sup>427</sup> See Majone, *supra* note 74, at 20-22 (advocating “an Administrative Procedure Act for the EC”); Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism*, ch. 2 (Sept. 2002) (unpublished manuscript, on file with the *New York University Law Review*) (noting possibility of “deliberative-constitutive” model for administrative decisionmaking in EU).

<sup>428</sup> See Majone, *supra* note 74, at 21 (stating that expertise and problem-solving capacity provide legitimacy); *id.* at 23 (arguing that Commission represents general interests of EC).

<sup>429</sup> See *supra* notes 126-36 and accompanying text.

<sup>430</sup> See, e.g., Majone, *supra* note 74, at 23 (“[T]he Commission's right of legislative initiative . . . is best understood as a way of ensuring that EC policies are directed towards the advancement of the general interests of the Community . . . as opposed to national or sectoral self-interests.”); Craig, *supra* note 53, at 18 (making similar point).

<sup>431</sup> Majone, *supra* note 74, at 23.

<sup>432</sup> See Fisher, *supra* note 427, ch. 2.

their wishes as expressed in legislation. Alternatively, a current British proposal would create a “subsidiarity watchdog” committee composed of national parliamentarians to monitor both the Commission and Council.<sup>433</sup> Whatever its other virtues and demerits, this proposal at least seeks to tackle the democracy and federalism problems together. Absent some attention to both, the Commission’s broad authority seems likely to undermine whatever political and institutional safeguards Member State autonomy may enjoy elsewhere in the system.

### 3. *The European Parliament*

The primary response to concerns about a “democratic deficit” has been a call to enhance the role of the European Parliament—the only directly elected institution in the Community system.<sup>434</sup> Parliament’s role and stature has increased steadily over the years, first through the introduction of direct election and more recently through the wide use of the codecision procedure for EU legislation.<sup>435</sup> By the Amsterdam Treaty in 1997, “giving Parliament a co-equal legislative voice had . . . come widely to be seen as a democratic imperative.”<sup>436</sup>

The structure of the Parliament in one sense closely parallels that of the American Congress; it is directly elected by the citizenry, and representation is apportioned (roughly) according to the population of Member States.<sup>437</sup> To that extent, the operation of “political safeguards” for federalism in the European Parliament ought to be substantially similar to and raise many of the same issues as federalism in the United States. Three central sets of questions, however, suggest a substantially different dynamic. The first has to do with the European

---

<sup>433</sup> See Grice, *supra* note 6, at 1 (“A committee of national parliamentarians, with powers to make the Commission and Council of Ministers think again when they were overlegislating, would make a real contribution to democratic legitimacy.” (quoting Peter Hain, British Minister for Europe)).

<sup>434</sup> See, e.g., Lindseth, *supra* note 32, at 673 (“The official strategy [concerning the democratic deficit] has centered on a further increase in the role of the . . . European Parliament—in effect, to make it the legitimate, hierarchical political superior in the Community system.”); Wallace & Smith, *supra* note 127, at 154 (arguing that “any reconciliation . . . between popular consent and European integration . . . will have to include both greater visibility and greater authority” for European Parliament).

<sup>435</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 51-56; *id.* at 98 (noting that “[u]nder codecision, . . . a text cannot become law unless it is approved in the same terms by both the Council and Parliament”).

<sup>436</sup> *Id.* at 99.

<sup>437</sup> Some Member States further subdivide their European Parliament delegation among their own subnational units. German members, for example, are elected from the various *Länder*. See McCormick, *supra* note 29, at 143 (“Most member states treat their entire territory as a single electoral district, while Belgium, Ireland, and Italy have four or five ‘Euro-constituencies’ and Germany treats its states as separate constituencies.”).

Parliament's self-conceived relation to the Member States; the second concerns the existence and role of political parties; and the third raises the broader question of whether the EU can be considered a "real" state. The current constitutional convention has seen calls for further expansions of Parliament's role.<sup>438</sup>

Process federalism presupposes that political officials at the center represent the interests and concerns of the subnational interests. This supposition, in its American version, has always depended on a combination of formal institutional dependence, such as the election of national politicians by their subnational electorates and informal attitudes and self-identification by politicians at the center. Madison anticipated that "[t]he prepossessions which the members themselves will carry into the Fœderal Government, will generally be favorable to the States."<sup>439</sup> Similarly, Herbert Wechsler spoke of a "mood" or a political "tradition" shared by national politicians that imposes "a burden of persuasion on those favoring national intervention."<sup>440</sup>

The continued existence of these pro-states "prepossessions" and "traditions" at the national level in America is open to question.<sup>441</sup> The striking thing about Europe to an American observer, however, is the extent to which institutions like the Commission and the Parliament have made efforts to head off any similar self-identification of politicians at the center with the Member States that appointed or elected them. I have discussed already the EC Treaty's express bar on Commission members from acting in the interest of their Member States.<sup>442</sup> While no parallel treaty provision governs the allegiance of the Parliament, that body is likewise thought to represent "the people in their capacity as citizens of the Union," rather than constituting "an assembly of representatives of the Member States."<sup>443</sup>

---

<sup>438</sup> See, e.g., Jo Leinen & Justus Schönlaue, *The Convention on the Future of Europe—The Stakes Are High*, European Policy Centre, June 6, 2002, at [http://www.theepc.be/europe/strand\\_one\\_detail.asp?STR\\_ID=1&TWSEC=Commentary&TWDOSS=&REFID=818](http://www.theepc.be/europe/strand_one_detail.asp?STR_ID=1&TWSEC=Commentary&TWDOSS=&REFID=818) (proposing, as Member of European Parliament, that Commission should be made "more directly answerable" to Parliament and that "[t]he EP should also get full co-decision power with the Council in all areas of legislation and the budget, and it must be the Parliament's role to elect the head of the European executive").

<sup>439</sup> *The Federalist No. 46*, at 317-18 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>440</sup> Wechsler, *supra* note 181, at 544-45.

<sup>441</sup> See, e.g., Kramer, *supra* note 20, at 220-21 (acknowledging continued hesitation of Congress to displace state law but observing that this tradition is "not self-sustaining").

<sup>442</sup> See *supra* note 419 and accompanying text.

<sup>443</sup> Lenaerts, *supra* note 143, at 754, 763; see also Bermann, Goebel, Davey & Fox, *supra* note 32, at 53 (Members of European Parliament "are supposed to represent the European people rather than a Member State government as such"). Interestingly, the factors most often cited to illustrate the pan-European nature of the Parliament is the seating of its members along political party lines rather than as Member State delegations. See, e.g., *id.*

The Parliament's reaction to the principle of subsidiarity reflects this orientation. Following the introduction of that principle in the Treaty of European Union, the Commission adopted the slogan of "legislate less to act better."<sup>444</sup> Parliament responded with considerable skepticism. In a resolution responding to the Commission's report,<sup>445</sup> Parliament emphasized that "the principle of subsidiarity is one political principle among others and that, in particular, it should not be invoked in order to restrict Community action aimed at ensuring solidarity between regions in accordance with the objective of economic and social cohesion."<sup>446</sup> The Parliament likewise urged that "the principle of proportionality should not be to the detriment of the adoption of Directives establishing precise objectives and creating legal obligations for the Member States."<sup>447</sup> Moreover, the resolution "[n]otes with satisfaction" that subsidiarity is not "a one-way principle working systematically to the detriment of the Community" but is instead "a 'dynamic concept' allowing 'Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.'"<sup>448</sup> Parliament, in other words, hardly seems to have embraced subsidiarity as a guiding principle to help it exercise its own powers to protect Member State autonomy. Rather, Parliament appears to view subsidiarity primarily as a threat to its own goals; it seems able to muster enthusiasm for the principle only to the extent that it might be used to justify further centralization in certain situations.

The European Parliament thus seems to have little present disposition to function as a Wechslerian "political safeguard" of sub-

---

at 53; Lenaerts, *supra* note 143, at 754. The U.S. Congress, of course, is organized along similar lines, yet this fact is not generally thought to settle the ongoing debate about whether federal politicians really represent their states. This disparity in the inference drawn by European and American observers from similar phenomena suggests, on the one hand, that the jury may still be out on the extent to which the European Parliament will represent the Member States over the long term and, on the other, caution about the "political safeguards" thesis in the American context.

<sup>444</sup> Better Lawmaking, Bull. EU 5-1998, point 1.8.3, at 113-14.

<sup>445</sup> Better Lawmaking 1997: Commission Report to the European Council, COM(97)626 final (Nov. 26, 1997).

<sup>446</sup> Resolution on the Commission's Report to the European Council—'Better Lawmaking 1997,' 1999 O.J. (C 98) 500, 502.

<sup>447</sup> *Id.* at 500.

<sup>448</sup> *Id.* at 501 (quoting Treaty of Amsterdam, Protocol on the Application of the Principles of Subsidiarity and Proportionality, 1997 O.J. (C 340) 105, 105-06 para. 3); see also von Borries & Hauschild, *supra* note 110, at 374-75 (observing that Commission and Parliament, as well as some Member States, see subsidiarity "as an instrument for extending the Community's powers").

sidiarity.<sup>449</sup> This attitude may be attributable, in part, to the Parliament's relative newness as a major legislative player in the Community scheme. In the years when Parliament was primarily advisory, one would have expected prospective legislators dedicated to the institutional prerogatives of the Member States to seek careers in domestic politics or, perhaps, in the Council staff, leaving Parliament to be dominated by enthusiasts for supranationalism.<sup>450</sup> There may be any number of institutional advantages to a parliament that self-consciously identifies itself with the people as a whole rather than the people of particular Member States. Such an institution, however, is less obviously equipped to safeguard Member State autonomy than the U.S. Congress is often thought to do.<sup>451</sup>

The viability of the EP as a solution to the democratic deficit may well turn on the development of viable political parties within that body.<sup>452</sup> Such parties might ease the deficit in two respects. Parties, of course, serve a number of valuable functions from the standpoint of

---

<sup>449</sup> Proposals for increasing the Union's democratic accountability to the people of individual Member States accordingly have focused on democratizing the *Council*. See, e.g., Lenaerts, *supra* note 143, at 763-64 (discussing Treaty of Amsterdam's protocol on role of national parliaments).

<sup>450</sup> See Wallace & Smith, *supra* note 127, at 142 (noting that, in early days of European Parliament, "[t]hose nominated by national parliaments were partly self-selected: the most enthusiastic for European cooperation were happy to volunteer, the most skeptical saw little point in coming forward").

<sup>451</sup> See *supra* notes 191-92 and accompanying text. Interestingly, the chairman of the current constitutional convention has tied the Parliament's present failure to represent the Member States to the EU's "democratic deficit." Mr. Giscard recently wrote that "the democratic legitimacy of the Union will not be fully accepted by its citizens until a forum is created to bring together the two elements of legitimacy in the Union—the national and the European one." Daniela Spinant, Giscard Proposes EU Peoples' Congress, July 22, 2002, at <http://www.euobserver.com/index.phtml?aid=7065> (quoting Giscard). The chairman proposed a new "People's Congress" combining members of national parliaments and the European Parliament to serve in an advisory capacity to the other institutions. See *id.*

<sup>452</sup> See, e.g., McKay, *supra* note 11, at 135 (suggesting that "the absence of genuinely European parties places limits on the legitimacy of EU government measured whether in terms of its scope, its activities, or its moral authority"); Wallace & Smith, *supra* note 127, at 154 (noting that Parliament "is hobbled by the looseness of its constituent parties"). Even where national parties share the same general ideological orientation, they have had a hard time coordinating their positions at the European level. See, e.g., Honor Mahony, Socialists Unable to Agree [to] Fundamental EU Changes, Oct. 3, 2002, at <http://www.euobserver.com/index.phtml?sid=9&aid=7782>.

Observers seem to disagree about the relative importance of political parties in the EP. Compare, e.g., Galloway, *supra* note 30, at 116 (observing that "while [Members of the EP] do not represent governments, there is still a marked tendency for divisions in the Parliament to occur along national rather than party political lines"), with Bermann, *supra* note 11, at 399 (asserting that "parliamentarians sit, and vote, according to broad cross-national party affiliations, not according to national or subnational geographic criteria"). No one seems to suggest, however, that the parties operating in the EP are particularly strong.

the individual voter. In particular, they reduce information costs for voters by serving as a proxy for positions on particular issues—if I know that the Republican Party's views are generally more consistent with my own than the Democratic Party's, I need not invest so much time in researching the views of individual candidates on every issue. Political parties thus make it realistic for voters to cast relatively informed votes without giving over their lives to watching political talk shows. Given the complexity and range of issues facing the EU, some such informational shortcut seems essential in order for the electorate to have legitimate democratic choices.

The second crucial function of parties is to ease the accountability problems that plague systems of separated and divided powers. In such systems, it is easy for particular actors to avoid accountability for outcomes by pointing to other actors in the system.<sup>453</sup> President Ronald Reagan was able to avoid much of the blame for increased budget deficits in the 1980s, for example, by pointing to Congress's failure to cut spending; Congress, on the other hand, could point to Reagan's repeated requests for increases in the defense budget. When actors controlling the various institutions are members of the same political party, however, the party becomes a means by which voters can hold the actors accountable.<sup>454</sup>

This dynamic becomes important when we recognize that, despite the name, the European Parliament is *not* part of a parliamentary system. It is virtually impossible to identify who the head of the EU government really is; what is clear, however, is that it is *not* the head of the majority party in the European Parliament. The EU has, instead of a parliamentary system, a highly complex system of divided powers. To the extent that viable European political parties could bridge the gaps among the various EU institutions, they might increase the democratic accountability of the system as a whole.

How would the Member States fare in such a world? In the American context, Larry Kramer has argued that organized national political parties are the saving grace of the political safeguards of federalism.<sup>455</sup> Parties must operate, campaign, and raise funds at both the state and national level, and candidates at the national level are

---

<sup>453</sup> See, e.g., Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. Chi. L. Rev. 1479, 1479 (1994).

<sup>454</sup> See *id.* at 1480; Lloyd N. Cutler, *Now Is the Time for All Good Men . . .*, 30 Wm. & Mary L. Rev. 387, 398 (1989). This kind of accountability works best, of course, when the same party controls both the legislative and executive branches—a fact that has led to some proposals for reforms that would strengthen the parties and make “divided government” less likely. See *id.* at 400-02.

<sup>455</sup> See Kramer, *supra* note 20, at 278-82; Kramer, *supra* note 248, at 1522-42.

usually drawn from—or at least got their start at—the state level. As a result, the political parties tend to tie the fortunes of national and state-level politicians together, encouraging them to work together toward common goals and reducing the natural competition between them.<sup>456</sup> Professor Kramer argues that this interdependence ensures that national politicians respect the institutional interests of state governments; indeed, he claims that the parties do such a good job protecting state autonomy that judicially enforced safeguards are unnecessary and illegitimate.<sup>457</sup> If Kramer is correct, then political parties might provide a means of enhancing the democratic legitimacy of the EU while at the same time safeguarding the Member States within the new structure.

There are a number of problems with Professor Kramer's argument, however.<sup>458</sup> One is that the stature and role of American political parties has changed drastically and repeatedly over the course of our history, such that reliance upon them to protect federalism seems a poor substitute for limitations on central authority that are part of the constitutional structure itself.<sup>459</sup> Another problem is that, while the party system may operate in the way that Kramer suggests in some circumstances, it seems equally plausible that national party imperatives often will prompt state officials to support initiatives at the federal level that may be counterproductive to the long-term interests of their state institutions.<sup>460</sup> As David McKay points out, parties can "serve as the vehicles for the accumulation of central power and the transformation of federations from decentralized to centralized structures."<sup>461</sup>

That centralizing dynamic seems particularly likely if, as appears to be the case in Europe, the extant political parties are largely defined in terms of political ideologies that place no central importance on federalism.<sup>462</sup> If the European Parliament were to develop the sort

---

<sup>456</sup> See Kramer, *supra* note 20, at 279; see also McKay, *supra* note 11, at v (noting that political parties provide "the main means whereby dissident states and regions can express their disquiet at central power").

<sup>457</sup> See Kramer, *supra* note 20, at 286-87.

<sup>458</sup> See *supra* note 249 and accompanying text.

<sup>459</sup> See Baker & Young, *supra* note 24, at 115-16; *infra* notes 545-49 and accompanying text.

<sup>460</sup> During the 2000 presidential election, for example, some Texas state officials who were members of the Democratic party were willing to assist national party officials in attacking their own state in order to discredit Governor Bush, the Republican presidential candidate. See, e.g., Clay Robison, *Texas Dems Ready to Tell Their Story*, *Houston Chron.*, Aug. 13, 2000, at 26A.

<sup>461</sup> McKay, *supra* note 11, at v.

<sup>462</sup> One would also want to think hard about the impact of proportional representation—which most Member States employ in selecting their EP delegations, see

of strong party systems that exist at the national level, moreover, then the relatively strict party discipline that usually characterizes such systems might make it difficult for individual members of the EP to protect the interests of their Member States.<sup>463</sup> Even in a weak party system, it is hard to tell *ex ante* whether the incentives Kramer describes would outweigh the countervailing incentives encouraging EU politicians to compete with their Member State colleagues for the right to provide beneficial regulation and services to their constituents back home.<sup>464</sup> Perhaps significantly, the EC Treaty itself views parties as an “important . . . factor for integration within the Union”<sup>465</sup>—not as a political safeguard for Member State autonomy. Such parties “contribute to forming a European awareness and to expressing the political will of the citizens of the Union.”<sup>466</sup>

Professor Kramer’s thesis assumes, moreover, that the parties operating at the national (or supranational) level are the same ones that exist in the states. The critical point, for Kramer, is that the fortunes of politicians at each level of government are tied together by their attachment to the *same* political parties; hence, a candidate for the

---

McCormick, *supra* note 29, at 143—on the incentives of political parties at the center to protect the institutional interests of the periphery. To the extent that proportional representation empowers parties that could not secure majority status in their Member States, those minority parties may have incentives to seek coalitions at the EU level and, if successful, push for the transfer of responsibilities to the center.

<sup>463</sup> In the Canadian context, for example, Katherine Swinton has observed that “The parliamentary nature of our institutions . . . imposes obstacles to the representation of regional interests nationally. . . . [M]inisters are hampered in their ability to act as strong regional spokesmen by . . . Cabinet solidarity and party discipline . . . which make it impossible for them to speak independently on regional issues or to form coalitions on regional issues with their counterparts in the other parties. Backbench members are also constrained from working with other parties on regional issues, for party loyalty is a requirement for those seeking party advancement.”

Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years 47-48* (1990). For discussion of a similar argument concerning Australia, see Stephen Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, 17 *Fed. L. Rev.* 162, 195 n.219 (1987).

<sup>464</sup> See *supra* notes 376-80 and accompanying text. To the extent that the Parliament continues to play a relatively weak role—at least in comparison to national legislatures—the institutional dynamics seem likely to be different. To the extent that a candidate for the Parliament presently can garner little real influence, one might presume her to be motivated more by enthusiasm for more general goals of supranationalism rather than by the incentives confronting, say, a member of Congress. Similarly, to the extent that turnover in Parliament is high, one might expect the conduct of Members to be less motivated by concerns about reelection and the corresponding need to curry favor with constituents. In any event, one would expect that the incentive structure facing a Member of Parliament would come to look more and more like that facing a member of a national legislature as the Parliament itself grows to have more real governing power.

<sup>465</sup> EC Treaty art. 191 (ex art. 138a).

<sup>466</sup> *Id.*

U.S. Senate will rely upon, and be able to expect the support of, the overwhelming majority of politicians in his state that depend on the same party for their own success.<sup>467</sup> Presently, that situation *does* seem to exist in Europe—but that is part of the problem with the European Parliament. According to Professor McCormick, “most voters still feel European elections are a poll on their national governments rather than an opportunity to influence EU policies, about which many voters are still confused and uncertain.”<sup>468</sup> The result is that the Parliament includes over seventy parties, reflecting the varied political divisions that exist in each of the Member States.<sup>469</sup> In order to get down to a number of parties that reasonably could structure debate in the Parliament, Europe would have to develop strong transnational political groups. And absent fundamental political change at the Member State level, those transnational parties would be different from—and not directly linked to—the parties operating in national politics.

The last point is that for party politics to provide democratic accountability in a divided system like the EU, we would have to see not only the development of strong political parties in the European Parliament, but also the reorganization of the Council of Ministers, the Commission, and possibly the European Council along party lines. Professor Kramer’s argument about political parties is designed for a polity like the United States, which already has decided to centralize a great deal of power and cut off direct representation of its constituent units. Under those circumstances, political parties indeed may play a role in staving off the total collapse of state sovereignty.<sup>470</sup> But such parties are hardly a substitute for direct representation of the Member States in the Council of Ministers and the European Council. While an expansion of Parliamentary authority and a concomitant increase in the role of political parties may not leave the Member States entirely without protection, such protection would be considerably less than what they currently enjoy.

This last observation points to a more general and diffuse set of concerns. The American Founders saw federalism as ultimately a competition between the different levels of government for the loyalties of the People. In a democratic system, popular loyalty is the ulti-

---

<sup>467</sup> Kramer, *supra* note 20, at 279.

<sup>468</sup> McCormick, *supra* note 29, at 146.

<sup>469</sup> See *id.* at 147.

<sup>470</sup> To admit this much is emphatically not to concede that the existence of political parties is a sufficient safeguard for federalism—the position that Professor Kramer takes. See Kramer, *supra* note 20, at 286-87. But see Baker & Young, *supra* note 24, at 115-17 (rejecting Kramer’s position).

mate currency of political power, and the Founders expected that loyalty to go to the level of government most responsive to the people's concerns.<sup>471</sup> That analysis leads to the somewhat counterintuitive suggestion that the Community's "democratic deficit" may itself function as a "political safeguard" for Member State autonomy. To the extent that the Community institutions are perceived as distant and unresponsive, they are unlikely to succeed in redirecting citizens' primary allegiance away from the Member States.

Correspondingly, a compelling solution to the "democratic deficit"—such as a directly elected European Parliament with the full powers of a traditional national legislature—might well exert a powerful gravitational pull on popular loyalty.<sup>472</sup> It would be much more difficult in those circumstances to justify a strong Council of Ministers with members appointed by the Member State governments; one would expect pressures for direct election of much the same kind that led to the Seventeenth Amendment in the United States. As long as the Member State governments retain a superior claim to democratic legitimacy, on the other hand, they will have a correspondingly strong claim to popular support.<sup>473</sup>

### *C. Enforcement, Resources, and Efficiency*

To an American observer, the European Union looks a great deal like the American Articles of Confederation. In particular, the central government during the Confederation period depended upon the constituent states for revenue and for enforcement of Congressional mandates. Likewise, the EU has relied on a "pattern of 'indirect rule', according to which rule-making is located at transnational level but the overwhelming majority of implementation and enforcement activity is allocated to and embedded within established national structures of law and administration."<sup>474</sup> In other ways, of course, the EU diverges sharply from the Confederation, and on the whole the Commu-

---

<sup>471</sup> See *supra* notes 260-64 and accompanying text.

<sup>472</sup> There are other obstacles, of course, such as the absence of a common European "demos." See generally J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 *Eur. L.J.* 219 (1995).

<sup>473</sup> A parallel argument can be made from the postulate that a second hallmark of democratic legitimacy—in addition to popular accountability—is the protection of individual rights. Here the outlook is less sanguine for the Member States. To the extent that the European Court of Justice already has established itself as a primary guarantor of individual human rights, see, e.g., Weiler, *supra* note 103, at 2417, one would expect that fact to be a powerful force for attracting popular loyalty to the Community.

<sup>474</sup> Stephen Weatherill, *Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market*, in *The Law of the Single European Market: Unpacking the Premises* 41, 66 (Catherine Barnard & Joanne Scott eds., 2002).

nity seems a substantially stronger government. But the two points of similarity I have identified were perceived by the Founders as key elements of the Confederation's weakness, and that fact suggests that they may be important institutional factors tending to prevent aggrandizement of the Community at the expense of the Member States.

American observers familiar with the Supreme Court's recent decisions in *New York v. United States*<sup>475</sup> and *Printz v. United States*<sup>476</sup> might well see the European Community system as one of exclusive commandeering: Community law is enforced *only* by the Member States—precisely the inverse of the system that the Court held to be mandated by the American Constitution in *Printz* and *New York*. Indeed, Justice Breyer's dissent in *Printz* explicitly invoked the European example to demonstrate that “such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government, and helps to safeguard individual liberty as well.”<sup>477</sup> Justice Breyer's point was met with a caustic footnote in Justice Scalia's majority opinion, noting that the Framers had explicitly considered—and rejected—European models similar to the ones that Justice Breyer had invoked.<sup>478</sup> The Framers did not have to look to foreign examples for the idea of commandeering however; they had lived through that sort of regime themselves under the Articles of Confederation. In *Federalist No. 15*, Alexander Hamilton emphatically dismissed the idea of a central government dependent on the states for enforcement of federal law. “The great and radical vice in the construction of the existing Confederation,” he argued, “is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist.”<sup>479</sup>

Hamilton rejected commandeering for two distinct reasons. One was the probability that federal law would not be enforced at all: “The consequence of [the Confederation arrangement] is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations, which the States observe or disregard at their option.”<sup>480</sup> The second problem was that federal attempts to force the

---

<sup>475</sup> 505 U.S. 144 (1992).

<sup>476</sup> 521 U.S. 898 (1997).

<sup>477</sup> *Id.* at 976-77 (Breyer, J., dissenting).

<sup>478</sup> *Id.* at 921 n.11 (quoting *The Federalist No. 20*, at 128-29 (James Madison) (Jacob E. Cooke ed., 1961)).

<sup>479</sup> *The Federalist No. 15*, at 93 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>480</sup> *Id.*; see also Clark, *supra* note 225, at 1346 (“The Congress of States organized under the Articles of Confederation lacked the ability to implement its own decisions, and was

issue might lead to armed conflict with the recalcitrant state. "In an association where the general authority is confined to the collective bodies of the communities that compose it," Hamilton reasoned, "every breach of the laws must involve a state of war, and military execution must become the only instrument of civil obedience."<sup>481</sup> A third possibility—that "a sense of common interest . . . would beget a full compliance with all the constitutional requisitions of the Union"—Hamilton dismissed out of hand as "betray[ing] an ignorance of the true springs by which human conduct is actuated" and ignoring the "impatience of controul" that lies "in the nature of sovereign power."<sup>482</sup>

This analysis, while no doubt a fair portrayal of the behavior of the American states under the Confederation,<sup>483</sup> seems wholly out of step with current affairs in the European Union. While Member State compliance with Community directives and regulations is not perfect, no one seems to view the Member States as routinely defiant or the Community institutions as ineffectual. Nor has civil war broken out as a result of attempts by the Community to enforce its will on a recalcitrant Member State by brute force. Why not?

I cannot pretend to have a complete answer to this question. At least two factors, however, may be relevant. The first is that, for much of its existence, the Council of Ministers has operated on a unanimity principle, so that the issue of a Member State's obligation to enforce a rule that it previously did not approve should not have arisen.<sup>484</sup> This approach reflected the diplomatic, treaty-like character of the Community's early years. By the time the Council switched to qualified majority voting, norms of Member State compliance with Community law may have become entrenched.<sup>485</sup> Second, the Community has a judicial enforcement mechanism that the American Confederation

---

dependent upon the cooperation of the individual states for requisitions and supplies. This deficiency left the Confederation essentially at the mercy of delinquent states.").

<sup>481</sup> The Federalist No. 15, at 95-96 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>482</sup> *Id.* at 96.

<sup>483</sup> See, e.g., Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution*, ch. 1 (2002) (unpublished manuscript, on file with author) (recounting abysmal record of the states in complying with directives from Confederation Congress).

<sup>484</sup> Cf. Halberstam, *supra* note 155, at 238 (noting more generally that direct representation of Member States at EU level eases burdens of commandeering). My observation oversimplifies somewhat. One certainly can imagine a Member State being asked to enforce a rule which had been interdicted by Community institutions in a way that the Member State did not foresee or approve.

<sup>485</sup> Cf. Weatherill, *supra* note 474, 72 (discussing Commission's efforts "to create culture of compliance").

lacked.<sup>486</sup> In this sense, the European Court of Justice's rejection of immunity federalism in the *Francovich* case takes on critical significance; not only can Member States be sued by the Commission to enforce their obligation to implement Community law,<sup>487</sup> but they may also be sued by private individuals, who are entitled to recover any damages accruing from the Member State's failure.<sup>488</sup>

In any event, it seems clear that the Community's exclusive commandeering structure has not left Member States without adequate reasons to actually carry out their implementation and enforcement obligations. Under these circumstances, it becomes possible to think of those obligations not so much as threats to the stability of the system, but rather as an institutional safeguard of Member State autonomy. Hence, George Bermann has observed: "Arguably, the real institutional safeguard of subsidiarity in the Community is that, in most areas, the implementation of Community policy ultimately lies in the hands of Member State and local officials."<sup>489</sup> This argument parallels assertions by Larry Kramer and others that, although the American states cannot be *compelled* to enforce federal law, their ability to play that role when they choose to is an important safeguard of federalism.<sup>490</sup> As any student of administrative law knows, the power to control implementation of a program is hardly insubstantial, even if the impetus for the program comes from on high. Moreover, the dependence of national institutions on enforcement by the states tends to create linkages and channels of communication that might enhance the voice of state governments in the formulation of federal norms.<sup>491</sup> Community reliance on Member State enforcement thus may bind the two levels of government together in a fashion similar to the argument sketched earlier regarding political parties.<sup>492</sup>

---

<sup>486</sup> See The Federalist No. 15, at 95 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("It is evident, that there is no process of a court by which [a state government's] observance of the laws can in the last resort be enforced.").

<sup>487</sup> See McCormick, *supra* note 29, at 115 tbl.6.4 (indicating that European Court of Justice hears between seventy and 120 cases per year involving failures of Member States to comply with various aspects of Community law).

<sup>488</sup> See Joined Cases C-6 & 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5406 para. 7, [1993] 2 C.M.L.R. 66, 108-09 para. 7 (1991); Swaine, *supra* note 9, at 3-4 (detailing remedies available against Member States for failure to implement Community law); *supra* Part II.B.3 (discussing *Francovich*).

<sup>489</sup> Bermann, *supra* note 11, at 399; see also Koopmans, *supra* note 144, at 1048 (observing that "the operation of the Community itself compelled the States to expand their activities, as most of the Community's work can only be done properly if national administrations, national courts and national legislatures translate general rules into concrete action").

<sup>490</sup> See Kramer, *supra* note 248, at 1542-46.

<sup>491</sup> See *id.* at 1545.

<sup>492</sup> See *supra* Part II.B.2.d.

On the most basic level, the lack of an independent enforcement bureaucracy may prevent the Community from seeming like a “real” government.<sup>493</sup> It might be that in government, size does matter: The sheer institutional *weight* of the United States federal government, with its two and a half million employees, dwarfs the analogous European Community institutions in a way that a comparison of the two government’s regulatory jurisdiction simply fails to capture.<sup>494</sup> Madison, after all, offered a similar argument about the American arrangement, in which he expected the state governments to have far more extensive enforcement bureaucracies than would the federal government. He thus placed the ability of the states to offer more extensive employment and patronage opportunities right alongside their regulatory jurisdiction over close-to-home issues as a key political safeguard for federalism.<sup>495</sup>

The Community’s lack of a substantial independent resource base amplifies its inability to create a governmental establishment to compete with those of the Member States. Like the Confederation Congress, the Community institutions depend on contributions from the Member States for a significant part of their revenue.<sup>496</sup> And although the Community does have its own sources of revenue, those sources are not extensive in absolute terms; critically, the Community lacks authority to preempt the sources of revenue enjoyed by the Member States.<sup>497</sup> To the extent that these limited resources check

---

<sup>493</sup> See, e.g., Jean-Claude Piris, Does the European Union Have a Constitution? Does It Need One? 24 Eur. L. Rev. 557, 565 (1999) (suggesting that Union’s lack of enforcement means and resources keep it from constituting “a complete system of governance”); Weatherill, *supra* note 474, at 67 (concluding that, due to lack of enforcement bureaucracy, “[t]here is a (developing) European market, but there is to be no replacement European State”).

<sup>494</sup> See Weatherill, *supra* note 474, at 67 (describing Community bureaucracy, “judged by the size of its own staff and direct expenditure,” as “simply tiny”).

<sup>495</sup> See The Federalist No. 45, at 312 (James Madison) (Jacob E. Cooke ed., 1961) (“The number of individuals employed under the Constitution of the United States, will be much smaller, than the number employed under the particular States. There will consequently be less of personal influence on the side of the former, than of the latter.”).

<sup>496</sup> See McCormick, *supra* note 29, at 207 (finding that roughly forty percent of Community’s budget comes from Member State contributions).

<sup>497</sup> See, e.g., Piris, *supra* note 493, at 565-66. By way of comparison, Lynn Baker has observed in the American context:

Since the adoption in 1913 of the Sixteenth Amendment, which granted Congress the power to tax income “from whatever source derived, [and] without apportionment among the several States,” the states implicitly have been able to tax only the income and property remaining to their residents and property owners after the federal government has taken its yearly share.

Lynn A. Baker, Conditional Federal Spending and States’ Rights, 574 Annals Am. Acad. Pol. & Soc. Sci. 104, 107 (2001) (quoting U.S. Const. amend. XVI); see also Lino A. Graglia, From Federal Union to National Monolith: Mileposts in the Demise of American

the ability of the Community to expand its power at the expense of the Member States, any expansion of the resources available to the Community should be evaluated carefully in terms of its impact on federalism.

Despite the importance of the enforcement and implementation authority retained by the Member States, as well as their material advantage in terms of institutional size and resources, these factors may turn out to be an incomplete check on central power. One would not want to rely on enforcement and implementation entirely; a Member State with control over norm enforcement but not norm articulation might end up as a mere "field office" of the Community government.<sup>498</sup> The failure of limits on the Community's regulatory jurisdiction thus raises cause for concern, even if the Member States retain a monopoly over implementation. Moreover, I have already sketched the argument, frequently raised in the American context, that denying the power of mandatory commandeering to the central government can itself act as a restraint on the scope of its regulatory authority.<sup>499</sup> If the central government must be prepared to expend its own resources to implement and enforce the laws that it enacts, then the constraints on those resources will function as *de facto* constraints on the scope of the central government's powers. Hence, if the Community always can mandate implementation and enforcement of the norms it promulgates at the expense of the Member States, the Community's lack of an independent resource base assumes a lesser significance.

There is also reason to question the stability of the current arrangement coupling far-reaching prescriptive power at the center with broad reliance on Member State enforcement. Stephen Weatherill has argued that enforcement by Member States is likely to vary according to the sort of community rules at issue. Where businesses operate across borders, for example, Community law often will preempt State A's ability to regulate activities conducted or goods imported into its territory by companies based in State B.<sup>500</sup> Such regulation may well be replaced by Community-wide regulations hammered out in Brussels. But Community law typically relies on a company's *home*

---

Federalism, 16 Harv. J.L. & Pub. Pol'y 129, 130-31 (1993) ("The Sixteenth Amendment, establishing the income tax, effectively gave the national government unlimited control of the nation's wealth and, consequently, a virtually unlimited spending power.").

<sup>498</sup> Cf. Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993).

<sup>499</sup> See *supra* Part II.B.2.b.

<sup>500</sup> See Weatherill, *supra* note 474, at 43-46; see also Case 120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979).

state (State B here) to enforce such regulations against it,<sup>501</sup> and home states may have little incentive to strictly enforce such regulations against their own corporate citizens for the benefit of consumers or other regulatory beneficiaries in State A. The result may be rigorous enforcement of Community law in situations where the beneficiaries of that law are within the state with enforcement responsibility or where the law creates private rights readily enforced through litigation by private parties, but considerably laxer enforcement where regulatory beneficiaries are either foreign or diffuse.<sup>502</sup> To the extent that this dynamic creates a “race to the bottom” at the enforcement stage,<sup>503</sup> it also may generate pressure to transfer more enforcement responsibility to the center.

Furthermore, the current pattern of enforcement might change in the future as a result of enlargement. While all new entrants to the EU will be required to accept the *acquis communautaire*—the established body of preexisting EU law—they obviously will vary greatly in the capabilities, integrity, and energy of their enforcement institutions. Again, perceptions in some states that Community law is not being enforced on an equal basis by their neighbors may well create pressure to centralize enforcement responsibilities in Brussels. That, in turn, would undermine substantially the current balance between broad prescriptive powers and weak implementation powers, and, as a result, would require a significant reevaluation of the EU’s current strategy for protecting Member State autonomy.

It is worth remembering what has become of Madison’s argument about institutional heft on this side of the Atlantic. Although state officials continue to outnumber federal ones, the gap has narrowed over time.<sup>504</sup> The expenditure gap has likewise narrowed substan-

---

<sup>501</sup> See Case C-5/94, *Regina v. Ministry of Agriculture, Fisheries and Foreign Affairs, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, I-2611 para. 19, [1996] 2 C.M.L.R. 391, 446 para. 19 (1996) (refusing to allow Member States to restrict free movement of goods based on concerns about enforcement of Community Law in other states: “Member States must rely on trust in each other to carry out inspections on their respective territories”). Stephen Weatherill asserts that

the dominant legislative preference is for a system . . . [in] which it is assumed that “home States” will subject firms based on their territory to the agreed Community rules while “host States”, in which target consumers of the firm are based, are excluded from actively applying not only domestic rules, but even in some circumstances the agreed Community rules.

Weatherill, *supra* note 474, at 41.

<sup>502</sup> See Weatherill, *supra* note 474, at 67-68.

<sup>503</sup> See *id.* at 69 (warning of “a corrosive spiral of inter-State competitive under-implementation”).

<sup>504</sup> According to the Census Bureau, state governments employed 4,173,400 people in March 2001. U.S. Census Bureau, U.S. Dep’t of Commerce, State Government Employment Data: March 2001, at <http://www.census.gov/govs/apes/01stus.txt> (last visited Oct. 18,

tially.<sup>505</sup> And few would say that the state governments, on balance, continue to hold the center of gravity in American politics. Patterns of resources and enforcement authority are important, but there is no guarantee that they will hold up over time.

A final point concerns the related question of efficiency. The prospect of enlargement has raised new concerns about the unwieldiness of the Community's lawmaking and enforcement procedures,<sup>506</sup> but similar worries date back at least as far as the era of "Eurosclerosis" in the 1980s.<sup>507</sup> American experience suggests, however, that the difficulty of making and enforcing law at the center can actually be a boon to autonomy at the periphery.<sup>508</sup> Most failures to enact law at the Community level, after all, will have the effect of leaving the relevant field clear for action by the Member States. To the extent that current efforts to streamline Community lawmaking and enforcement procedures succeed, however, the practical scope of Member State autonomy may well shrink.

#### D. *Statutory Interpretation and Teleology*

The last set of "political safeguards" I want to consider take the form of interpretive rules employed by courts in the adjudication of potential conflicts between Community law and the sovereignty of the Member States. These sorts of conflicts are, of course, endemic to divided power systems; indeed, in American political theory, institutional conflict plays a fundamental role in checking governmental aggrandizement.<sup>509</sup> And as Martin Shapiro has observed, most divided power systems expect courts to play a role in mediating these disputes.<sup>510</sup> The problem, as I discussed in Part III, is that courts confront severe limits in their ability to resolve such boundary conflicts

---

2002). The federal government employed 2,411,630. U.S. Census Bureau, U.S. Dep't of Commerce, Federal Government Civilian Employment by Function: March 2001, at <http://www.census.gov/govs/apes/01fedfun.txt> (last visited Oct. 18, 2002). The federal government spent \$233.4 billion to compensate its employees in 2000, while state and local governments spent \$670.7 billion. U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2001, at 260 tbl.417 (121st ed. 2001) [hereinafter U.S. Census Bureau, Statistical Abstract]. In other words, the gap is still large, but the federal government offers far more opportunities for advancement and patronage in both absolute and comparative terms than it did in Madison's time.

<sup>505</sup> Total government consumption expenditures and gross investment in 2000 amounted to \$590.2 billion for the federal government and \$1.15 trillion for state and local governments. U.S. Census Bureau, Statistical Abstract, *supra* note 504, at 260 tbl.417.

<sup>506</sup> See *supra* notes 124-25 and accompanying text.

<sup>507</sup> See, e.g., Lindseth, *supra* note 32, at 666.

<sup>508</sup> See Clark, *supra* note 225, at 1339-42; *supra* Section II.B.2.c.

<sup>509</sup> See The Federalist No. 51 (James Madison).

<sup>510</sup> See Shapiro, *supra* note 83, at 321.

definitively without intruding on the “political” functions of the other branches of government.

One important insight of American process federalism, however, is that the choice between resolving boundary disputes “politically” or through judicial review is, in many instances, a false dichotomy. In this Section, I discuss the potential relevance for Europe of means that American courts have developed for promoting balanced outcomes in federal/state conflicts without directly confronting the federal political branches. The most important sort of means involve conventions employed to interpret ambiguous statutes. As I have discussed already, American courts have formulated a number of “clear statement” rules to mediate conflicts between federal and state sovereignty, especially in areas of concurrent regulatory jurisdiction.<sup>511</sup> The Supreme Court, for example, has held that statutes will not be read to push the limits of Congress’s commerce power or to impose financial liability on state governments when another plausible construction is available.<sup>512</sup> Such rules have the effect of resolving potential clashes between state and federal authority at the level of statutory construction rather than constitutional power. And although Congress retains the authority to force the constitutional issue by clarifying its intent, clear statement rules nonetheless may effectively constrain federal action as a practical matter.<sup>513</sup>

This sort of approach ought to have some appeal in Europe for several reasons. First, it is designed for problems of *concurrent* jurisdiction, in which both the center and the periphery have important interests and neither has exclusive regulatory prerogatives. Given the difficulty of drawing lines around exclusive areas of Community or Member State competence, most boundary conflicts are likely to take place in this sort of concurrent power environment. A regime of clear statement rules would take some of the line-drawing pressure off European courts by minimizing the number of cases in which the limits of Community or Member State power must be defined.

Second, the process-forcing aspect of clear statement rules has important affinities with the design of the EU’s legislative process. The various legislative procedures historically have been typified by the ability of one branch to force the others to review their proposals, and possibly to overcome heightened voting hurdles, even where the dissenting branch may not have an absolute veto over the measure. Under the parliamentary cooperation procedures, for example, Parlia-

---

<sup>511</sup> See *supra* Part II.B.2.a.

<sup>512</sup> See *supra* notes 201-05 and accompanying text.

<sup>513</sup> See *supra* notes 207-10.

ment was able to compel the Council to review proposals to which the Parliament objected and to enact them by unanimity, rather than qualified majority.<sup>514</sup> Likewise, under codecision, the Council may choose to amend Commission proposals; if it does so, it must surmount a more difficult voting hurdle (unanimity) than if it accepts the Commission's view "as is."<sup>515</sup> "Clear statement" decisions share a similar structure: They can be overridden by reenactment of a clarified measure, but the political branches must overcome significant legislative inertia in order to do so.

Third, European courts seem to be relatively comfortable with the "teleological" approach that a regime of clear statement rules arguably entails. Such a rule encourages courts to systematically lay a thumb on the interpretive scales in favor of particular public values, such as federalism, lenity toward criminal defendants, or protection of particular individual rights.<sup>516</sup> That notion is controversial in American legal circles, where many authorities on statutory construction insist that the interpretive enterprise should focus on reconstructing the intent of the enacting legislature.<sup>517</sup> As I have discussed already, however, the European Court of Justice has long been willing to construe Community law with a clear view toward furthering the public value of integration.

Likewise, national courts in the United Kingdom have demonstrated the potential of a clear-statement approach to mediate the difficult issue of whether national law can derogate from Community law. An affirmative answer to that question would, of course, set up a constitutional clash between the principle of parliamentary sovereignty and the supremacy of Community law. In these circumstances, British courts have held that "[i]f Parliament does wish to derogate from its Community obligations then it will have to do so expressly and unequivocally."<sup>518</sup> As Paul Craig has observed, "[t]he attractions of this approach are self-evident. Clashes between EC law and na-

---

<sup>514</sup> See Bermann, Goebel, Davey & Fox, *supra* note 32, at 86.

<sup>515</sup> See *id.* at 97.

<sup>516</sup> See, e.g., Eskridge & Frickey, *supra* note 206, at 599-605; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 468-502 (1989).

<sup>517</sup> See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 *U. Chi. L. Rev.* 800, 817 (1983); see also Rodriguez, *supra* note 208, at 744 (observing that "substantive form of canonical construction raises a . . . central concern . . . that judicial policymaking through the guise of statutory interpretation is illegitimate").

<sup>518</sup> Paul Craig, *Constitutional and Non-Constitutional Review*, 54 *Current Legal Probs.* 147, 162 (2001).

temporary state of flux creates a strong incentive for rival cartels to engage in violent turf wars, thus increasing the number of casualties attributable to the drug trade.<sup>25</sup>

Violence also may flare up as a result of efforts to enforce “contracts” in an environment where uncertainty encourages actors to abandon former business partners and align themselves with competitors.<sup>26</sup> Furthermore, authorities’ efforts to use apprehended suspects to pursue “bigger fish” prompt an intensification of violence designed to frighten potential informants from cooperating with police and prosecutors.<sup>27</sup> As Stephen Schulhofer neatly puts it, the aggravation of collateral crimes caused by the top-down approach creates a “pernicious catch-22 in which each enforcement success makes our drug problem worse than ever.”<sup>28</sup> From a perspective of violent crime reduction, top-down enforcement efforts that raise the price of illicit drugs cannot be considered an unequivocal success.<sup>29</sup>

Moreover, it is not only violence that tracks the enforcement successes of top-down strategies. The higher drug prices rise, the greater

---

ers of drug cartel kingpins “stand ready to step in” should existing leaders be removed by law enforcement).

<sup>25</sup> See, e.g., Skolnick, *supra* note 2, at 150-51 (reporting “multiple murders, high speed chases, daytime assassinations . . . and scores of other shootings” in competition over territory opened up by successful prosecution of three leading drug dealers in Oakland area). One study of New York City homicides found that “territorial disputes” were the most common cause of drug-related murders in 1988. Goldstein et al., *supra* note 23, at 115-22 & tbl.6-3; cf. Caulkins & Reuter, *supra* note 19, at 603 (remarking that “the physical risks of selling drugs could decline if the markets stabilized and the risk of being killed declined”).

<sup>26</sup> See Reuter & Kleiman, *supra* note 12, at 305 (highlighting recourse to violence by “drug-market firms” for purpose of “settling business disputes and enforc[ing] contracts in the absence of recourse to courts”). A study of New York City homicides in 1988 classified murders traceable to four types of contract enforcement: debt collection, punishment of subordinates, disputes over drug theft, and disputes over the quality of drugs. Together, these illicit purposes played a role in somewhere between thirty-five percent and forty-five percent of all drug-related homicides. Goldstein et al., *supra* note 23, at 119 tbl.6-3 (providing data through which percentage estimate may be calculated).

<sup>27</sup> See Reuter & Kleiman, *supra* note 12, at 304 (noting variation in extent to which drug-dealing organizations “use violence to silence potential or suspected employee informants” and reasoning that “optimal level of violence,” from organizations’ perspective, will rise in tandem with enforcement pressure); Schulhofer, *supra* note 12, at 220 (“Because drug lords need to protect their organizations against infiltration by rival gangs and the police, the intimidation and even murder of informants, as well as suspected informants, become important tools.”).

<sup>28</sup> Schulhofer, *supra* note 12, at 216; see also Skolnick, *supra* note 2, at 143 (identifying “Darwinian Trafficker Dilemma” in which “successful” interdiction simply “undercuts the marginally efficient drug traffickers and their operations, while the fittest—the best organized, the most corrupting of authorities, the most ruthless and efficient[—]survive”).

<sup>29</sup> Cf. Caulkins & Reuter, *supra* note 19, at 606 (“Policies that suppress use by driving up price will tend to have a less beneficial effect on drug-related crime and corruption (in percentage terms) than they have on drug use.”).

the incentive for users—at least those for whom drugs are sufficiently important—to resort to property crimes as a means of financing their habits.<sup>30</sup>

Bottom-up enforcement strategies such as street busts and drug testing of former offenders differ from top-down enforcement in several ways. To the extent such tactics are effective, they function by causing an increase in what Peter Reuter and Mark Kleiman have termed the “nonmonetary” component of a drug’s full price.<sup>31</sup> Among the elements of this nonmonetary component are the risk of apprehension and the hassle encountered by those seeking to locate willing sellers or buyers—what economists refer to as “search costs.”<sup>32</sup> If successful, buy-and-bust stings force retailers to operate more discreetly.<sup>33</sup> Likewise, strict drug testing of probationers and parolees discourages some buyers from using drugs during time periods within the detection capacities of this testing.<sup>34</sup> Both of these phenomena make it more difficult for sellers and buyers to connect with each other, thereby raising the full price of drug transactions.<sup>35</sup>

This increase in full price also may prompt an effect directly opposite the primary aim of top-down enforcement: a decrease in drug prices. To the extent that street-level enforcement lowers the quantity of drugs demanded, it puts downward pressure on price.<sup>36</sup> Bottom-up enforcement therefore promises to reduce the profitability of drug dealing. This outcome lessens the incentive for dealers to engage in

---

<sup>30</sup> See Schulhofer, *supra* note 12, at 218-19, 221-22 (concluding that drops in drug price reduce predatory crime by users seeking to finance purchases, while increases in price “creat[e] increased need for those who do buy to commit predatory crime to support their purchases”). While caution should be taken in estimating the extent to which drug users finance their purchases through crime proceeds, a correlation has consistently been found between frequent drug use and property crimes. See, e.g., Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, *J. Econ. Persp.*, Fall 1995, at 175, 180 (citing studies finding that increases in drug price and/or degree of enforcement prompt higher rates of property crime); cf. Jan M. Chaiken & Marcia R. Chaiken, *Drugs and Predatory Crime*, in 13 *Crime and Justice*, *supra* note 18, at 203, 211-12, 235 (reviewing literature to conclude that while drug abuse does not cause individuals to take up crime, there is “strong evidence that predatory offenders who persistently and frequently use large amounts of multiple types of drugs commit crimes at significantly higher rates over longer periods than do less drug-involved offenders”).

<sup>31</sup> Reuter & Kleiman, *supra* note 12, at 329.

<sup>32</sup> See Schulhofer, *supra* note 12, at 232.

<sup>33</sup> Cf. *id.* at 233 (stating that street enforcement has not been successful in combating discreet drug sales).

<sup>34</sup> See *supra* note 17 and accompanying text.

<sup>35</sup> See Reuter & Kleiman, *supra* note 12, at 328-29 (“As street-level enforcement increases, the typical user will not have to pay more for a given quantity of drugs but will have to search longer for a connection. This constitutes an increase in the nonmonetary costs of the drug.”).

<sup>36</sup> *Id.* at 329.

tional law can be reconciled while preserving the formal veneer of legal sovereignty.”<sup>519</sup>

Both the ECJ’s and the British practice demonstrate that European courts are willing to give substantial weight to structural imperatives in statutory interpretation. The problem, of course, is that those imperatives generally have been inimical to Member State autonomy. In interpreting the treaty documents themselves, the European Court of Justice has employed a “preference for Europe,” that is, a teleological approach geared to maximizing the integrative effects of the Community agreements.<sup>520</sup> Similarly, in construing Community legislation, the Court of Justice seems uninterested in anything like the American “presumption against preemption”; according to Professor Bermann, “the Court commonly finds that, in enacting a piece of legislation, the Council or Commission meant to regulate a matter comprehensively and to preclude the States from addressing it[, even] . . . on a very meager showing of implied preclusion.”<sup>521</sup>

As Stephen Gardbaum has recounted, a broad rule of federal field preemption was the norm in American law prior to the New Deal. When Congress had legislated in a particular area, courts were prone to hold that all state regulation in that area was preempted by the federal act.<sup>522</sup> Interestingly, however, this regime coincided with strict subject-matter limits on substantive federal regulatory authority under dual federalism and it disappeared at precisely the same time that the Court expanded the scope of federal regulatory jurisdiction after 1937.<sup>523</sup> This history suggests that a broad preemption rule cannot coexist comfortably with broad regulatory jurisdiction at the federal level; if virtually any activity is subject to federal regulation, *and* any federal action will broadly preempt the field, then the scope of preemption becomes intolerably broad.<sup>524</sup> To the extent that the Court of Justice pursues a similarly broad approach to preemption of Member State law at the same time that subject-matter limits on Com-

---

<sup>519</sup> *Id.* at 163. Professor Craig observes that, where the nonconflicting construction of national law is implausible, the insistence on a clear statement of intent to derogate effectively takes on the character of a “priority rule” that “serves to blur the line between constitutional review *stricto sensu* and non-constitutional review.” *Id.* at 164. Similar concerns have been voiced in this country concerning the judicial practice of construing statutes to avoid constitutional doubts. See, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71.

<sup>520</sup> Lindseth, *supra* note 32, at 701.

<sup>521</sup> Bermann, *supra* note 11, at 359; see also António Goucha Soares, Pre-emption, Conflicts of Powers and Subsidiarity, 23 Eur. L. Rev. 132, 136-37 (1998) (summarizing ECJ’s broad use of field preemption).

<sup>522</sup> See Gardbaum, *supra* note 213, at 801-05.

<sup>523</sup> See *id.* at 805-07.

<sup>524</sup> See *id.* at 806.

munity jurisdiction have broken down, the Community may encounter like difficulties.

The ECJ has been equally aggressive with respect to what Americans would call "conflict" preemption—that is, preemption not of an entire field of regulatory concern, but of particular Member State measures thought to conflict with Community law. Conflict preemption can be narrow or broad, depending on what counts as a conflict. Here, too, however, the teleological "preference for Europe" has played a role. According to António Soares, "the chances that national rules will be considered to have blocked the effect of the provisions on the Community order seem to have clearly increased" in light of the Court's "great propensity to interpret the provisions of Community law in an extensive and teleological manner."<sup>525</sup>

The Court's decision in the *Pigs Marketing* case<sup>526</sup> is a useful example of conflict preemption construed so broadly as to amount to preemption of the field. In that case, national legislation in Great Britain established a local board empowered to regulate price and other conditions of sale. An individual, who was charged with transporting pigs without board authorization, claimed that the scheme was preempted by Community legislation providing for a common organization of the market in pigs' meat. The Court's analysis began by suggesting that Member States might legislate in a market sector subject to common organization so long as the legislation did not "undermine or create exceptions" to Community law.<sup>527</sup> That sounds like conflict preemption. The Court's view of a "conflict," however, turned out to be exceedingly broad:

Any intervention by a Member State or by its regional or subordinate authorities in the market machinery apart from such intervention as may be specifically laid down by the Community regulation runs the risk of obstructing the functioning of the common organization of the market and of creating unjustified advantages for certain groups of producers or consumers to the prejudice of the economy of other Member States or of other economic groups within the Community.<sup>528</sup>

Nor was the Court interested in Britain's reasons for enacting the scheme. "Any action of this type," the Court said, "cannot be justified by the pursuit of special objectives of economic policy, national or

---

<sup>525</sup> Soares, *supra* note 521, at 138.

<sup>526</sup> Case 83/78, *Pigs Mktg. Bd. v. Redmond*, 1978 E.C.R. 2347, [1979] 1 C.M.L.R. 177 (1978).

<sup>527</sup> 1978 E.C.R. at 2371 para. 56, [1979] 1 C.M.L.R. at 202 para. 56.

<sup>528</sup> 1978 E.C.R. at 2372 para. 60, [1979] 1 C.M.L.R. at 203 para. 60.

regional.”<sup>529</sup> Rather, “the common organization of the market . . . is intended precisely to attain such objectives on the Community scale in conditions acceptable for the whole of the Community and taking account of the needs of all its regions.”<sup>530</sup>

The Court of Justice’s broad use of preemption is unfortunate from the standpoint of Member State autonomy. As Candice Hoke has observed, “a ruling of federal preemption is inherently ‘jurispathic;’ it kills off one line, perhaps even an entire scheme, of a particular community’s law.”<sup>531</sup> To the extent that Member State regulatory authority over private conduct is the key to the ability of Member States to compete with the Community government for popular loyalty,<sup>532</sup> broad doctrines of field and conflict preemption strike at the heart of any regime of political safeguards for Member State autonomy. Broad preemption doctrines represent, moreover, a missed opportunity to construct meaningful protections for the Member States that do not depend on indeterminate boundaries of Community and national “competence.”

Notwithstanding the current state of Community law on preemption and similar issues, the potential exists for a regime of interpretive rules that would be substantially more friendly to Member State autonomy. Because the Court of Justice’s preemption doctrine is judge-made,<sup>533</sup> the Court retains freedom to narrow the doctrine as the evolving needs of the Community may require. Moreover, the introduction of the principle of subsidiarity into the EU treaties at Maastricht provides substantial support for a shift in interpretive principles.<sup>534</sup> If anything, the underlying legal texts offer firmer support for an interpretive “presumption against preemption” in the EU than exists in the United States.

The ECJ’s teleological interpretation cases suggest, however, that for the Community courts to use interpretive rules as a form of process federalism would require a significant shift in the courts’ perception of their own role. They would have to see themselves, in other words, as guardians of a balance rather than engines of integration. Whether the courts are willing to make this shift remains to be seen; if they do not, however, their agency will tend to undermine whatever

---

<sup>529</sup> 1978 E.C.R. at 2371-72 para. 59, [1979] 1 C.M.L.R. at 203 para. 59.

<sup>530</sup> 1978 E.C.R. at 2372 para. 59, [1979] 1 C.M.L.R. at 203 para. 59.

<sup>531</sup> S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 694 (1991) (footnote omitted) (quoting Robert M. Cover, *The Supreme Court*, 1982 Term—Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 40 (1983)).

<sup>532</sup> See supra notes 260-64 and accompanying text.

<sup>533</sup> See supra note 111 and accompanying text.

<sup>534</sup> See Soares, supra note 521, at 139-45.

other political safeguards for Member State autonomy exist elsewhere in the system.

*E. Amendment, Entrenchment, and Judicial Review*

All I have said in this Part so far must be qualified by a recognition that we are looking at a snapshot of a highly dynamic system. This dynamism, as Larry Catá Backer has observed, “suggests that, like the American federal constitutional character between 1789 and 1860, the fundamental boundaries of European constitutionalism have yet to be determined.”<sup>535</sup> One problem is that many of the particular institutional arrangements that I have discussed are relatively new, and it is hard to assess the extent to which they may or may not safeguard Member State autonomy without more of a track record concerning how those institutions interact in practice. The usual cautions about institutional predictions are worth emphasizing here; it is instructive (and humbling) to note how many of James Madison’s specific predictions about the operation of the structure he helped create—a structure which has held up remarkably well overall—turned out to be dead wrong.<sup>536</sup>

A second source of uncertainty obviously stems from the ongoing convention in Brussels. The Laeken Declaration envisioned that the convention would submit its proposals in 2003,<sup>537</sup> and those proposals may well prompt changes in the governing structure with important implications for the analysis in this Article.<sup>538</sup> Debate in the convention has focused recently, for example, on increasing the role of national parliaments in European deliberations—a move with obviously profound implications for the political safeguards of Member State autonomy.<sup>539</sup> If the convention results in the adoption of a written constitution, moreover, such a constitution might make *future* changes to the structure more difficult and infrequent than under the present system of intergovernmental conferences. I focus on this latter issue—the rules concerning amendment of the governing structure—in

---

<sup>535</sup> Backer, *supra* note 11, at 229.

<sup>536</sup> See, e.g., Wills, *supra* note 18, at 266 (demonstrating that Madison based his expectations about political operation of federal structure on absence of political parties and noting that such prediction held up for less than one decade); see also Kramer, *supra* note 20, at 269-70 (discussing unexpected emergence of political parties in American federalism).

<sup>537</sup> See Laeken Declaration, *supra* note 1, at 25.

<sup>538</sup> Parallel discussions about institutional change are taking place outside the Brussels Convention in the more traditional settings of the Council of Ministers and the European Council. See, e.g., Honor Mahony, Member States Wrangle Bitterly over Institutions, Oct. 1, 2002, at <http://www.euobserver.com/index.phtml?aid=7739&sid=9>.

<sup>539</sup> See Peter Karlsen, Proposal to Move Balance of Power Within the EU, Sept. 20, 2002, at <http://www.euobserver.com/index.phtml?aid=7630&sid=18>.

this Section. At present, the striking mutability of European institutions under the intergovernmental-conference system warrants separate attention as a critical feature of Europe's federal balance.

As I have discussed, the present absence of a formal European constitution means that the basic institutional framework is subject to change each time the Member States meet to amend the treaties in an intergovernmental conference.<sup>540</sup> The result, as McCormick has observed, is that the institutional structure "keeps changing. Just as we think we've begun to understand it, a new treaty comes along that gives it new powers, or its leaders agree to a new set of goals that give it a different character and appearance."<sup>541</sup> This lack of structural entrenchment highlights the importance of political safeguards for Member State autonomy. While the difficulty of formal constitutional amendment has ensured an important role for judicial interpretation in the development of American federalism, "the interaction of the federal and national governments through the political institutions of both the European Union and of the Member states remains an important source of both the creation and policing of federalism in Europe."<sup>542</sup>

Political safeguards for Member State autonomy, however, often operate indirectly. I have suggested that to the extent that the law-making process at the EU level is arduous, this indirectly promotes Member State autonomy by leaving the field clear for regulation by national governments.<sup>543</sup> This sort of indirect safeguard, however, is vulnerable to unintended consequences of reforms that are not meant to affect the federal balance at all. To the extent that an unentrenched institutional structure invites frequent tinkering with the system, the problem of unintended consequences is likely to gain increased significance.

An example from the ongoing American debate may help illustrate the point. Recently, some influential opponents of judicial enforcement of federalism have conceded that Professor Wechsler's reliance on the direct representation of state governments in Congress was misplaced, given the shift from appointment of Senators by state

---

<sup>540</sup> See *supra* notes 99-100 and accompanying text. Notwithstanding the lack of a "constitution," the unanimity rule for treaty amendment under the intergovernmental-conference system is not obviously less strenuous than the supermajorities of states required for constitutional amendment under America's Article V. And yet each successive intergovernmental conference is able to churn out any number of important institutional changes to the Community structure. This may, of course, become more difficult as the number of Member States involved increases as a consequence of enlargement.

<sup>541</sup> See, e.g., McCormick, *supra* note 29, at xiii; see also Backer, *supra* note 11, at 229.

<sup>542</sup> See Backer, *supra* note 11, at 229.

<sup>543</sup> See *supra* notes 506-08 and accompanying text.

legislatures to direct election by the people.<sup>544</sup> Nonetheless, these commentators insist that new, equally effective political safeguards have arisen to take the place of the ones that have become obsolete. Professor Larry Kramer has focused on the role of political parties, arguing that national political parties link the fortunes of state and local politicians together with representatives at the federal level, such that Members of Congress can, in fact, be counted upon to respect the institutional interests of state government.<sup>545</sup>

The problem with Professor Kramer's argument is that the dynamics of party politics have shifted back and forth over time in response to any number of changes. The move from selecting presidential candidates through party "elders" to popular primaries, for example, profoundly altered the internal dynamics of political parties and the way that participants at different levels of the party process relate to one another.<sup>546</sup> One might expect such changes to affect the mechanisms by which parties protect federalism in important ways,<sup>547</sup> and yet these changes can be effected simply by internal party decisions and often without any view to the impact on the federal balance. Similarly, any new statutory reform of campaign finance laws might be expected to profoundly alter the party dynamic.<sup>548</sup> Again, however, federalism concerns would be far from the minds of policy-makers. Anyone genuinely worried about preserving the federal balance ought to hesitate before entrusting it to such a protean set of mechanisms.<sup>549</sup>

This sort of dynamic suggests that at least some aspects of the federal balance ought to be entrenched in a constitution that is relatively difficult to change and enforced through some sort of judicial review.<sup>550</sup> To say this is not to overlook the tremendous difficulties

---

<sup>544</sup> See Kramer, *supra* note 248, at 1508.

<sup>545</sup> See *id.* at 1522-42; Kramer, *supra* note 20, at 278-87.

<sup>546</sup> See, e.g., Bruce Buchanan, *The Presidency and the Nominating Process*, in *The Presidency and the Political System* 251, 253-58, 261 (Michael Nelson ed., 6th ed. 2000) (describing changes in presidential nomination process, and role of political parties within it, over time).

<sup>547</sup> See, e.g., A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789, 793 (1985) (arguing that changes in party system have wrought "a palpable decline in the 'political' safeguards" of federalism); Kramer, *supra* note 20, at 283 (conceding that parties' ability to protect states "may have been compromised to some degree by twentieth-century developments").

<sup>548</sup> See, e.g., Howard, *supra* note 547, at 793; Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1714 (1999) (worrying about effects of campaign finance reform on dynamics of political parties).

<sup>549</sup> See Baker & Young, *supra* note 24, at 115-17; Prakash & Yoo, *supra* note 152, at 1486.

<sup>550</sup> See Baker & Young, *supra* note 24, at 116-17.

associated with substantive judicial review of federalism issues,<sup>551</sup> nor is it to deny that political safeguards almost inevitably will play a primary role.<sup>552</sup> Some level of judicial enforcement, however, is likely to strengthen those political safeguards both in the short term, by reminding the political branches of their constitutional responsibilities,<sup>553</sup> and, perhaps, in the long term as well. Judicial review, as Paul Freund observed, “is an educative and formative influence which . . . may have consequences beyond its immediate application for the mind of a people.”<sup>554</sup> To play such a role, however, the European Court of Justice would have to alter its own perception of its role along the lines I suggested in the previous Section.<sup>555</sup>

Even if one is committed to the idea of ongoing and far-reaching change in the institutional structure, one nonetheless might appreciate the conservative contributions of entrenchment. Bruce Ackerman, for example, has constructed an ambitious and controversial theory based on the right of the American people to change their constitutional structure without following the amendment procedures set out in Article V.<sup>556</sup> Professor Ackerman’s theory includes a “paradox of resistance”<sup>557</sup>—that is, the idea that institutional resistance to reform can force its proponents both to refine their proposals and to seek broader popular support. This effort, in turn, enhances both the quality and legitimacy of the resulting change.<sup>558</sup> The “paradox of resistance” counsels against making the EU’s federal structure *too* protean. Unless the Member States are equipped with institutional safeguards of some durability, they will find themselves unable to

---

<sup>551</sup> See *supra* Parts III.A-B.

<sup>552</sup> Justice Kennedy, for example, in the course of voting to strike down a federal law as outside Congress’s commerce power, wrote that “it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.” *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

<sup>553</sup> See, e.g., Bobbitt, *supra* note 175, at 191-95 (discussing “cueing” function of Supreme Court decisions on federalism in reminding Congress of its own constitutional responsibility); Bermann, *supra* note 11, at 336-37 (arguing that ECJ should engage in *some* substantive review of subsidiarity on ground that “its willingness to entertain the question of subsidiarity would significantly reinforce its essential procedural demand that the political branches themselves take subsidiarity seriously”).

<sup>554</sup> Paul A. Freund, *Umpiring the Federal System*, 54 *Colum. L. Rev.* 561, 578 (1954).

<sup>555</sup> See *supra* notes 533-34 and accompanying text.

<sup>556</sup> See 2 Bruce Ackerman, *We the People: Transformations* 3-31 (1998).

<sup>557</sup> *Id.* at 164.

<sup>558</sup> See *id.* at 164-66 (explaining how President Andrew Johnson’s resistance to Reconstruction “vastly increased the legitimacy of the decision by the People to embrace revolutionary reform”); *id.* at 302-06 (demonstrating how Court’s resistance to New Deal forced President Roosevelt to refine his proposals for change).

force the sort of deliberation necessary to ensure the quality and legitimacy of structural reforms.<sup>559</sup>

Regardless of the degree to which resistance to structural change is built into the system, one should at least try to ensure that the debate concerning such changes will recognize and address the implications for federalism. The Seventeenth Amendment to the U.S. Constitution, for example, profoundly altered the primary political safeguard for state institutional interests, yet the debate over that Amendment seems to have focused on the pros and cons of direct democracy rather than implications for federalism.<sup>560</sup> I (and others) have suggested a parallel danger that reforms designed to ease the Community's "democratic deficit"—perhaps by ceding power from the Council of Ministers to the directly elected European Parliament—could undermine the Union's "political safeguards" for Member States as a byproduct of enhancing democratic legitimacy vis-à-vis the electorate as a whole.<sup>561</sup>

The basic point is that the federalism question—that is, the preservation of the Member States' autonomy as the EU continues to develop—is intimately related to the questions of separation of powers at the Community level and, more broadly, of the legitimacy and efficiency of the Community institutions. American experience is obviously of limited utility in designing particular institutional structures to balance these values in the European context. What our experience *does* usefully show is that these values—federalism, separation of powers, legitimacy, and efficiency—ultimately cannot be separated one from another.

---

<sup>559</sup> Focusing on the New Deal experience, Professor Ackerman suggests that "the Supreme Court will characteristically serve as the conservative branch, leading a principled challenge to a rising movement of revolutionary reform." *Id.* at 291. However, the EU's experience, as well as that of America in other eras, suggests that courts may be a driving force for change, leaving other institutions to play the conservative role. See, e.g., Ackerman, *supra* note 556, at 164-66 (discussing executive resistance to Reconstruction); Lucas A. Powe, Jr., *The Warren Court and American Politics* 490 (2000) (addressing Supreme Court's role in changing structure of Southern society during Civil Rights era); *supra* notes 104-14 and accompanying text (recounting the ECJ's strong role as a force for integration). The important point is simply that the existing structural order ought to have *some* means of institutional self-defense.

<sup>560</sup> See Amar, *supra* note 377, at 1353-54 (observing that proponents of direct election focused primarily on "[s]tate legislative corruption and special interest group control" and that "surprisingly few" opponents of direct election "pointed out that popular election would reduce the ability of the Senate to represent and protect the interests of States *qua* States").

<sup>561</sup> See *supra* notes 471-73 and accompanying text.

## V

## BROADER LESSONS ALL ROUND

My primary purpose in this Article has been to identify certain elements of the American institutional experience of federalism that may be of use to Europeans as they reconsider their own governmental structures. Those elements include the difficulty of enforcing limits on central power through judicial review, the potential of political and institutional safeguards, and the interconnections between separation of powers at the center and the balance between the center and periphery. In this last Part, I turn to some broader speculations about the prospects for federalism in Europe and the lessons that Americans might draw from the European experience.

*A. Federalism or Federalism Lite?*

American federalism has prospered with a mix of extremely limited “power” federalism doctrines and a heavy reliance on process. Even without presuming to prescribe particular procedural structures for European federalism, one might be tempted to recommend the overall approach as a viable model for Europe. That would be a mistake, however, without taking stock of a more basic question: What do we want federalism to *do* in a polity? The way in which the American experience is relevant to Europe ultimately turns on the extent to which Europeans and Americans answer that question in the same way.

At least two quite different answers are possible. First, we might want a strong principle of federalism that would maintain the states (or Member States) as culturally and politically autonomous units. Citizens would continue to identify primarily with their state governments, as Robert E. Lee did when he chose his allegiance to Virginia over his obligations to the Union. State governments would enjoy freedom to pursue radically different regulatory agendas and to dissent from norms articulated at the national level. They would be in a position to thwart tyranny or the excessive accumulation of power at the center simply by refusing to go along.

A second, more modest vision would preserve some opportunity for cultural distinctiveness at the state level, while conceding that most citizens will think of themselves as citizens of the nation (or Union). Regulatory autonomy would be equally marginal: States would retain the capacity to experiment with innovative approaches to goals set at the national level and to compete with one another on marginal rates of taxation or modest variations in the rigor of regulation. Some social norms—such as the definition of marriage or the legality of physi-

cian-assisted suicide—would remain to be decided at the state level. And state governments would check the political power of the center not through defiance but by providing an alternative to the national political culture where potential opposition politicians and political movements can gain experience and strength before challenging the national orthodoxy.

I think it is fair to say that if American federalism was ever intended to preserve the first sort of state autonomy, then it has failed—and failed badly. A recent comparative study of federal systems around the world speaks of “the relatively centralized constitution of the United States.”<sup>562</sup> As one American scholar has observed, “[f]or many Americans, . . . states have become the appendage of the general government; federalism merely provides the means of resisting the reduction of states to mere administrative units.”<sup>563</sup> The question of “devolution”—that is, the extent to which regulatory and welfare responsibilities will be allocated to the states—most often is dominated by the legislative grace of Congress, not constitutional constraints on federal authority.<sup>564</sup>

Although the U.S. Supreme Court has recently revived the notion of judicially enforced limits on central power,<sup>565</sup> few observers expect the Court to roll back the post-1937 administrative state.<sup>566</sup> The limits on federal powers that remain, moreover, generally can be circum-

---

<sup>562</sup> McKay, *supra* note 11, at 3.

<sup>563</sup> Backer, *supra* note 11, at 181; see also *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845-46 (1976) (authorizing judicial review to protect state sovereignty, but only where federal action threatens “separate and independent existence” of states), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (advancing even narrower view of protected state sovereignty); Baker & Young, *supra* note 24, at 141 n.293 (reporting common view among our colleagues that state sovereignty “extends only to choosing ‘state flags and state birds’” and that right to choose state flag has become increasingly suspect).

<sup>564</sup> See Backer, *supra* note 11, at 181 n.33 (“It is within the institutions of federal government that the scope of devolution to the states, or comity, is most effectively debated and decided.”); Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 *Yale L. & Pol’y Rev.* 227 (1996).

<sup>565</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (declaring that Congress may not “commandeer” state officials to enforce federal law); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (ruling that Congress may not override States’ constitutional immunity from suits for money damages); *United States v. Lopez*, 514 U.S. 549 (1995) (holding, for first time since 1937, that federal statute fell outside limits of Congress’s power to regulate interstate commerce).

<sup>566</sup> See, e.g., Young, *supra* note 25, at 1374-76 (suggesting that Court’s federalism initiatives are unlikely to cause fundamental change); Fallon, *supra* note 253, at 469 (concluding that Court generally has “proceeded with relative caution” in federalism area). The Court’s current “federalist revival,” moreover, hangs by a thread. Virtually all of the significant cases have been decided by votes of five to four, and the four dissenters frequently have announced their intention to undo the majority’s handiwork as soon as they can garner a fifth vote. See Linda Greenhouse, *At the Court, Dissent Over States’ Rights Is Now War*, *N.Y. Times*, June 9, 2002, § 4, at 3. The Court’s attempt to protect the states may

vented through Congress's overwhelming power of the purse.<sup>567</sup> The rhetorical commitment of the Republican Party in Congress to state autonomy has not prevented that party from supporting extensive federal preemption of state norms that the party opposes,<sup>568</sup> even before the national response to the events of September 11, 2001, brought a renewed enthusiasm for problem-solving on the federal level.<sup>569</sup> Even in a place like Texas—the only American state to have fought its own revolution and to have existed for a time as an independent nation—national identity predominates. Without denying that considerable cultural distinctiveness remains, it is hard to deny that at the end of the day we are all Americans—not Texans, Okies, Hoosiers, and the like.<sup>570</sup>

From the more modest standpoint, however, American federalism looks considerably better. The states continue to serve, in many areas, as “laboratories of democracy” by experimenting with innovative programs that ultimately may serve as a model for national policy or influence private actors in important ways.<sup>571</sup> In other areas, the fact that states make significant regulatory choices differently from one another allows many Americans to vote with their feet for the regime that they prefer. And state political communities continue to

---

prove ephemeral unless it can somehow gain a broader base of support. See Young, *supra* note 165, at 66-73.

<sup>567</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999) (referring to *South Dakota v. Dole*, 483 U.S. 203 (1987), to suggest that Congress could readily avoid effect of Court's expansion of state sovereign immunity by forcing states to waive their immunity as condition on receipt of federal funds); Baker, *Conditional Spending*, *supra* note 373, at 1924-32.

<sup>568</sup> See *supra* notes 405-06 and accompanying text.

<sup>569</sup> See, e.g., *It's the Economy, Boss*, *Economist*, July 27, 2002, at 11, 11 (observing that “[a]ll the current proposals [in Washington] seem to be about increasing the scope of [the federal] government”); Linda Greenhouse, *Will the Court Reassert National Authority?*, *N.Y. Times*, Sept. 30, 2001, § 4 (Week in Review), at 14 (suggesting that surge of nationalist feeling after September 11 may even induce Court to rethink its pro-state rulings). But see Ernest Young, *The Balance of Federalism in Unbalanced Times: Should the Supreme Court Reconsider Its Federalism Precedents in Light of the War on Terrorism?*, *FindLaw's Writ*, at [http://writ.news.findlaw.com/commentary/20011010\\_young.html](http://writ.news.findlaw.com/commentary/20011010_young.html) (Oct. 10, 2001) (arguing that jurisprudential change of course is not warranted).

<sup>570</sup> My concession here is that state identities are insufficiently distinctive to fit a strong model of federalism, not that the nation has become so homogeneous that even a modest version of federalism is not worth preserving. Cf. Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 37, 45-47 (2001) (making latter argument).

<sup>571</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); *Replacing Gas with a Gas*, *Economist*, July 21, 2001, at 66, 66 (noting how California's very strict automobile emissions regulations have influenced car-makers on three continents to research alternative fuels more aggressively).

provide the wellsprings of democratic opposition to federal government policies, both by social movements and individual political candidates.<sup>572</sup> For instance, the last two Presidents, William Jefferson Clinton and George W. Bush, defeated the incumbent political party at the national level after gaining political experience and support as governors of their respective states.

Although America has learned to live quite well with a more modest form of federalism, Europeans may want the strong form—at least for now. Larry Siedentop, for example, has urged that “[t]he attraction of federalism, properly understood, for Europe is that it should make possible the survival of these different national political cultures and forms of civic spirit.”<sup>573</sup> These diverse cultures may have value in their own right, and, as Professor Siedentop has argued, it is not clear that an equivalently democratic political culture is available at the European level to replace them if they are abandoned.<sup>574</sup> It seems unlikely, moreover, that any of the major players in Europe are currently ready to trade the governmental autonomy of a world power for the autonomy that our system allows, say, the State of New York. To the extent that Europe wants to preserve a strong form of Member State autonomy, the American experience is relevant primarily as a cautionary tale.

### *B. Europe, Federalism, and Time*

Europeans may wish to ask, however, an additional set of questions regarding the relationship between the strong and more modest models of federalism that I have described. Federalism, in its many forms, is often touted as a device for helping people with differing social, political, and cultural commitments live together while still reaping at least some of the benefits of political cooperation. To the extent that it is successful in this, however, federalism ultimately may be self-effacing.<sup>575</sup> When people successfully live together under federalism, familiarity may discourage contempt. Citizens move freely from region to region; ethnic, cultural, and religious patterns become more diffuse. Eventually one finds a Starbuck’s on every corner and

---

<sup>572</sup> See, e.g., Baker & Young, *supra* note 24, at 137-38; Seth F. Kreimer, *Federalism and Freedom*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 66, 70-71 (2001).

<sup>573</sup> Siedentop, *supra* note 8, at 231; see also Börzel & Risse, *supra* note 8, at 52 (observing that “integration of heterogeneous societies, while preserving their cultural and/or political autonomy” is one “major function[ ]” of federalism); Neuman, *supra* note 390, at 575 (observing that “preservation of identities constitutes a far more meaningful goal in Europe than in the United States”).

<sup>574</sup> See Siedentop, *supra* note 8, at 29-30.

<sup>575</sup> I am indebted to Larry Sager for this point.

the political pressures for homogenization and nationalization may make a strong form of federalism untenable.

Could this happen in Europe? Certainly the barriers of language, the relative reluctance of citizens to move from one Member State to another, and the long traditions of each State as an independent nation would make the prospect of homogenization more remote.<sup>576</sup> Notwithstanding determined efforts by European leaders, “the sense of European identity which they hoped to encourage has been slow to evolve, despite the explosion of cross-border transactions and the turnover of generations.”<sup>577</sup> As French President Jacques Chirac observed in his speech to the German Bundestag, “Our nations are the source of our identities and our roots. The diversity of their political, cultural and linguistic traditions is one of the strengths of our Union. In times to come, the nations will remain the foremost reference for our peoples. Contemplating their extinction would be . . . absurd.”<sup>578</sup> So long as these strong affinities and loyalties exist, the “political safeguards” of Member State autonomy seem likely to remain strong despite the weakening of formal legal guarantees.

How we view these probabilities, however, may be at least in part a function of time horizons. Surely no one expects the cultural and linguistic divisions of Europe to evaporate overnight. How strong those divisions will be in two centuries, though, is another matter. Even Americans tend to forget how diverse the American colonies were on the eve of nationhood. As Alan Taylor has observed:

To divide the peoples in three, into the racial and cultural categories of European, African, and Indian, only begins to reveal the human

---

<sup>576</sup> See, e.g., Calleo, *supra* note 119, at 198 (suggesting that “regular large-scale migrations of workers from one region to another . . . seem implausible, given Europe’s linguistic and cultural differences”); Honor Mahony, *Overwhelming National Pride Remains Among Citizens*, May 6, 2002, at <http://www.euobserver.com/index.phtml?aid=6138&sid=9>. But see Stephen Fidler, *Sense of Crisis as Migrants Keep Moving*, *Fin. Times*, July 25, 2002, at 7 (reporting concerns in Europe that migration—albeit from outside EU—already threatens cultural identities in Member States).

<sup>577</sup> Wallace & Smith, *supra* note 127, at 148.

<sup>578</sup> The original speech, given in French, is reprinted in *Le Monde*:

Nos nations sont la source de nos identités et de notre enracinement. La diversité de leurs traditions politiques, culturelles et linguistiques est une des forces de notre Union. Pour les temps qui viennent, les nations resteront les premières références de nos peuples. Envisager leur extinction serait . . . absurde . . .

*Le Monde*, June 28, 2000, at 16; see also von Beyme, *supra* note 5, at 74 (“Cultural identification with Europe remains vague even among cosmopolitans.”); Fischer, *supra* note 7, at 25 (conceding that “[t]he nation-states are realities that cannot simply be erased”). Indeed, as Professors Wallace and Smith observe, “National identities still constitute the basis for political community . . . in spite of the effective loss of control over central issues of national government and state sovereignty.” Wallace & Smith, *supra* note 127, at 148.

diversity of the colonial encounter. For each embraced an enormous variety of cultures and languages. For example, the eighteenth-century “British” colonists included substantial numbers of Welsh, Scots, Irish, Scots-Irish, Germans, Swedes, Finns, Dutch, and French Huguenots—as well as the usual English suspects. Moreover, during the eighteenth century those nationalities were still inchoate, still complicated by powerful local cultures within each kingdom.<sup>579</sup>

Different subunits of early America observed wildly different economic systems and class structures, from the largely unequal planter society of the Carolinas, which focused on a few cash crops, depended on slave labor, and imported most manufactures from Europe,<sup>580</sup> to the yeomen farmers and ocean traders of New England, characterized by a more compressed social hierarchy and far-flung commercial shipping interests.<sup>581</sup> Different colonies had different established churches<sup>582</sup> and wide variations in levels of education.<sup>583</sup>

Perhaps these significant cleavages remain less profound than the present differences that divide Europe, although it is hard to think of any such difference as bitter and divisive as the rift that developed in America after 1789 over the issue of slavery.<sup>584</sup> In any event, the basic point is that federal systems can smooth over—or fight through—quite profound cultural and political differences over the course of a couple of centuries. As Robert Nagel has observed, “By now it is clear that some aspects of the writings of both the framers of the Constitution and later observers like Tocqueville significantly underestimated the forces that would favor centralization.”<sup>585</sup>

<sup>579</sup> Alan Taylor, *American Colonies*, at xi-xii (2001).

<sup>580</sup> See generally *id.* at 222-44 (describing colonial Carolina).

<sup>581</sup> See generally *id.* at 158-86 (depicting New England in colonial period).

<sup>582</sup> See *id.* at 339-40 (“The Puritan colonies of Plymouth, Massachusetts, and Connecticut established their Congregational Church. The Dutch Reformed Church enjoyed legal primacy in New Netherland. The Church of England also enjoyed official favor in Virginia . . .”).

<sup>583</sup> Compare *id.* at 147 (detailing absence of public education in Virginia), with *id.* at 179 (noting that “[a]lmost every New England town sustained a public grammar school, and most women and almost all men could read—which was not the case in the mother country or in any other colonial region”).

<sup>584</sup> In fact, it seems safe to say that a country practicing slavery would not be deemed eligible for admission to the EU today. See TEU art. 6(1) (ex art. F) (providing that “[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”); *id.* art. 49 (ex art. O) (limiting potential membership to countries that “respect[] the principles set out in Article 6(1)”).

<sup>585</sup> Robert F. Nagel, *The Implosion of American Federalism 9* (2001). This is true, Professor Nagel says, not only of the technological changes that the Framers could not have been expected to predict, but even of institutional factors like the war and spending powers that were fully accessible to the founding generation. See *id.*; cf. von Beyme, *supra*

The American experience also suggests, of course, that the “natural” process of centralization I have just described is not necessarily to be feared. Madison wrote in *Federalist No. 46*:

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . .<sup>586</sup>

There is one problem, however. Federalism in the American Founders’ scheme was designed not only to help different people live together but also to serve as part of a “double security”—along with separation of powers at the federal level—against national tyranny.<sup>587</sup> While the strength of our federalism may have declined in tandem with the danger of strife arising from internal differences, it is not at all clear that the need to guard against centralized encroachments on individual liberty has likewise decreased.<sup>588</sup> The self-effacing quality of federalism, in other words, may undermine its continuing ability to guard our liberties. Whether the sort of federalism-based restraint on central authority that survives in this country would prove adequate to protect liberty in Europe—and particularly in a Europe that is preparing to absorb millions of new citizens from areas without the sort of democratic traditions found in the current Member States—is a difficult question.

The last point is that the modest form of federalism that I have described in America is not necessarily a stable end state. It might, rather, be simply a snapshot of a system under continuing pressure

---

note 5, at 79 (noting that “Lorenz von Stein . . . once considered Prussia not to be ripe for a constitution, because it was socially too heterogeneous”).

<sup>586</sup> The *Federalist* No. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>587</sup> James Madison wrote:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.

The *Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961). Whether federalism actually protects liberty in this way is, of course, much disputed. See, e.g., Shapiro, *supra* note 23, at 50-56, 91-105 (collecting pro and con arguments). Lynn Baker and I have addressed that issue elsewhere. See Baker & Young, *supra* note 24, at 134-43.

<sup>588</sup> See, e.g., Portland Decision Highlights Differing Attitudes, Nov. 22, 2001, at <http://www.cnn.com/2001/LAW/11/21/inv.portland.questioning/index.html> (reporting refusal of Portland, Oregon police department to cooperate with sweeping plans by federal Justice Department to interview Middle Eastern immigrants; such refusal being based on state statute prohibiting police from questioning people about social, political, or religious views absent reasonable suspicion of criminal activity).

from forces of homogenization and centralization. Even to the extent that we are content with modest federalism, then, that system will not necessarily maintain itself. Americans thus need to continue thinking about institutional and doctrinal strategies for preserving it.<sup>589</sup> Europeans tempted by the American model, on the other hand, should be aware that “modest” federalism in fifty years may be even more modest than it is now.

### C. *America's Federal Conversation*

I suggested at the outset of this Article that attention to European debates about federalism may pay dividends on this side of the Atlantic. This is true in at least two different senses. The first arises out of the obvious point that Europe is simply very important to America. The United States supported early efforts toward European integration after World War II as a counterweight to Soviet Communism,<sup>590</sup> and contemporary observers have suggested that a unified European partner may help save the United States from “imperial overstretch” in the current era of hegemonic American power.<sup>591</sup> Trade and investment flows between Europe and America are massive and longstanding, and the American economy increasingly will be affected by the state of the common European venture. Americans, in short, have much at stake in the European transformation.

That stake is itself a sufficient reason for American lawyers and legal academics to make some effort to understand the EU and its evolving structure. For my purposes here, however, I am more interested in the significant contributions that the European ferment can make to our own ongoing debates about federalism in this country. The American debate—particularly the subset of that debate going on in the legal academy—is curiously stilted. It tends to be overwhelmingly one-sided; as Robert Nagel has observed, “the radical nationalist position . . . dominates the case law and the academy and is taken for granted.”<sup>592</sup> Much of it takes place at one extreme end of the range of institutional possibilities—that is, should the Constitution protect federalism *at all*—rather than surveying a broad range of possibilities

---

<sup>589</sup> See, e.g., Lessig, *supra* note 174, at 214-15 (arguing that American courts may have to depart from original structure in order to preserve traditional balance of federalism under modern conditions).

<sup>590</sup> See Wallace & Smith, *supra* note 127, at 138-39; Kagan, *supra* note 19, at 17.

<sup>591</sup> See Calleo, *supra* note 119, at 340 (“A strong European Union, able to take primary responsibility for maintaining peace in its own space, could relieve the United States of a heavy burden and free resources for maintaining order elsewhere, most notably in Asia.”).

<sup>592</sup> Nagel, *supra* note 585, at 57.

about how much or what sort of federalism we should have.<sup>593</sup> And, in many ways, our debates are a prisoner of our history; the categories tend to be frozen in terms defined by Reconstruction, the New Deal, and the civil rights struggles of the 1960s. Adopting a comparative focus may help overcome these problems in a number of ways.

Part of the problem is that American debates about federalism are fraught with political and historical baggage. It is hard, for example, to make an argument for “states’ rights”—that is, the position that the states should be able to assert constitutional principle in some instances as a “trump” to national governmental action<sup>594</sup>—without being accused of harboring racist sympathies.<sup>595</sup> The cause of federalism is, after all, most prominently associated with slavery in the nineteenth century and massive resistance to desegregation in the twentieth.<sup>596</sup> Lynn Baker and I have argued elsewhere that this history continues to cloud American debates about federalism, despite the fact that the Reconstruction Amendments are now universally conceded to have nationalized the issue of racial equality.<sup>597</sup> Many, if not most, American liberals continue to oppose federalism based on this history, ignoring the very real sense in which protection of state autonomy may facilitate politically liberal outcomes in many instances.<sup>598</sup>

Step to Europe, however, and this baggage recedes. European federalism surely has baggage of its own, but at least it is *different* baggage. David McKay has observed that “in the EU we have little

---

<sup>593</sup> See Nagel, *supra* note 585, at 51 (stating that tendency is to “label[ ] as constitutionally radical even moderate or marginal reservations about the continuing trend toward centralization”); Young, *supra* note 25, at 1350-51.

<sup>594</sup> See, e.g., Baker & Young, *supra* note 24, at 134-36; Gillette, *supra* note 379, at 1347-48. To say that states should be able to exercise “trumps” in this way does not require one to equate states with persons or to value state autonomy for its own sake. Rather, as Lynn Baker and I have elaborated elsewhere, the point is to confer “trumps” on state governments for the purpose of protecting individual liberty from encroachments by the central government. See Baker & Young, *supra* note 24, at 134-36.

<sup>595</sup> See, e.g., John Mintz, *A Battle Cry from Interior Nominee*, Wash. Post, Jan. 11, 2001, at A1 (describing attacks on Gale Norton, then nominee for Secretary of Interior, that depicted her as racially insensitive for invoking states’ rights).

<sup>596</sup> See, e.g., J. Harvie Wilkinson III, *Editorial, Fear of Federalism*, Wash. Post, Nov. 26, 1999, at A45 (“Throughout American history, the doctrine of states’ rights has borne an inestimable racial burden.”).

<sup>597</sup> See Baker & Young, *supra* note 24, at 143-44; see also Kreimer, *supra* note 572, at 67 (“In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct.”).

<sup>598</sup> See Baker & Young, *supra* note 24, at 149-62; see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986); Stephen Labaton, *States Seek to Counter U.S. Deregulation*, N.Y. Times, Jan. 13, 2002, § 1, at 23.

reason to believe that the ‘federal government’ will come to represent liberal progressive opinion battling against backward regressive states or groups of states.”<sup>599</sup> For the American observer, the shift in context may serve to shake up settled habits of thought about structural issues. If nothing else, the notion of state political and cultural autonomy may be less self-evidently negative to American liberals when contextualized with France rather than Alabama.

Moreover, as Larry Catá Backer has observed, the European experiment offers a chance to reopen a federal conversation that in many ways ended with the triumph of the Union armies at Appomattox.<sup>600</sup> Professor Backer finds in the structure of the Community institutions and the opinions of some of the European national courts echoes of John C. Calhoun’s notion of the “concurrent majority”—that is, a federalism modeled not on the rule of national majorities but on the need to secure a consensus of subnational political communities.<sup>601</sup> For Calhoun, of course, the concurrent majority was a tool for preserving the South’s “peculiar institution” of slavery. The application of similar theories in a very different European context, however, suggests that the idea may have merit in other circumstances—particularly when paired with guarantees of basic human rights linked to common citizenship in the broader political community. The more basic point, however, is that Europe reminds us that the post-1865 (or post-1937) version of American federalism is not the only sort of federalism there is.<sup>602</sup>

One way Europe may shed light on possibilities for American federalism is by exposing Americans to the notion, common in the literature on Europe, that the Member States’ decision to pool some of their sovereignty in the EU institutions actually has *enhanced* their individual sovereignty as a practical matter. According to David Calleo, “the EU has not so much attenuated Europe’s states as rejuvenated them.”<sup>603</sup> He explains:

In practice, . . . every state finds its sphere of successful free agency sharply limited by the reactions of its neighbors, particularly in a crowded and closely interdependent region like Europe. Under such circumstances, if a confederacy increases a state’s ability to an-

---

<sup>599</sup> McKay, *supra* note 11, at 151.

<sup>600</sup> Backer, *supra* note 11, at 177.

<sup>601</sup> See *id.* at 193-208.

<sup>602</sup> See *id.* at 179 (arguing that federal system that Europe adopts “will eventually require Americans to reassess their rather provincial and narrow views of the nature of federalism”).

<sup>603</sup> Calleo, *supra* note 119, at 36.

ticipate and influence the behavior of its neighbors, that state's sovereignty is enhanced rather than reduced.<sup>604</sup>

Americans, by contrast, have tended to view federalism as a zero-sum game, with sovereignty of the federal government trading off with that of the states. Relatively little attention has been paid to developing structures and approaches to federal action that would allow state governments to maximize the benefits of federal cooperation without simply turning over their policy concerns to Washington.<sup>605</sup>

European theory and experience can also confirm certain insights of the American debate. American commentators long have argued that state governments need significant regulatory responsibilities in order to be viable centers of self-government.<sup>606</sup> The German national court articulated a similar idea in its famous *Maastricht* decision, recognizing that

the [Member] States require sufficient areas of significant responsibility of their own, areas in which the people of the State concerned may develop and express itself within a process of forming political will which it legitimizes and controls, in order to give legal expression to those matters which concern that people on a relatively homogenous basis spiritually, socially, and politically.<sup>607</sup>

Similarly, the neofunctionalist theory, which for many years was the driving ethos of European integration, confirms the converse insight, that is, that the shift of important governmental functions to the center is likely to bring about a shift in the loyalties and identity of the people over the long term.<sup>608</sup>

Finally, Europeans are grappling with what seems likely to be the next big debate in American federalism (and possibly American constitutional law generally): the clash between domestic constitutional structures and supranational institutions and commitments.<sup>609</sup> State governmental policies—such as Massachusetts's sanctions on Burma

---

<sup>604</sup> Id. at 141.

<sup>605</sup> Cf. David S. Broder, *Leaving the States in the Lurch*, Wash. Post, July 31, 2002, at A19 (noting, in context of financial crises at state and local level, lack of "any forum where elected officials at all three levels of government can have a serious discussion about national goals and national resources").

<sup>606</sup> See, e.g., Nagel, *supra* note 261, at 103 (emphasizing that state governments need "the capacity to elicit loyalty by providing for the needs of their residents"); Rapaczynski, *supra* note 194, at 404.

<sup>607</sup> *Brunner v. European Union Treaty*, Cases 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57, 89 (BVerfG 1993) (F.R.G.).

<sup>608</sup> See, e.g., Rosamond, *supra* note 147, at 51-52. For a similar argument in the American context, see Young, *supra* note 165, at 44-45.

<sup>609</sup> See, e.g., Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. Rev. 257 (2000); Ku, *supra* note 22; Symposium, *Judicialization and Globalization of the Judiciary*, 38 Tex. Int'l L.J. (forthcoming 2003).

or Mississippi's punitive damages regime<sup>610</sup>—are increasingly subject to challenge under the World Trade Organization, the North American Free Trade Agreement, and similar supranational structures. United States accession to international agreements may require federal regulation in areas traditionally thought to be reserved to the states.<sup>611</sup> And controversy continues about the domestic effect of various forms of international law.<sup>612</sup> Professor Backer thus observes: “As core principles of transnational and international law become part of the domestic law of nations, and as nations themselves become subordinate parts of larger governmental organizations, the line between domestic and international law blurs. This is the brave new world of federal constitutionalism in the twenty-first century.”<sup>613</sup>

The experience of European federalism is likely to offer helpful insights on these issues in several respects.<sup>614</sup> First, Europeans traditionally have understood the Community at least partially in terms of an international organization, constituted by treaties and governed by principles of international law.<sup>615</sup> The development of supremacy, direct effect, and preemption is thus highly relevant to American debates about how to incorporate supranational obligations into the domestic legal order. One American scholar, for example, recently pointed out that the EU's struggle over the “democratic deficit” may offer a model for overcoming our own “democratic deficit” arising from U.S. delegation of authority to international trade institutions.<sup>616</sup> Another scholar has pointed to the ECJ's development of private rights of action against Member States for nonenforcement of EU directives as a clue to the potential effects of similar private rights of action under Chapter 11 of the North American Free Trade Agree-

---

<sup>610</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (state trade sanctions); *Notice of Claim, R. Loewen and Loewen Corp. v. United States of America* (ICSID Case No. ARB(AF)/98/3) (filed Oct. 30, 1998), <http://www.naftaclaims.com> (last visited Oct. 21, 2002) (NAFTA claim challenging punitive award by Mississippi court).

<sup>611</sup> See, e.g., *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3 (potentially requiring federal regulation of many aspects of family law).

<sup>612</sup> See, e.g., Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 *Va. J. Int'l L.* 365 (2002).

<sup>613</sup> Backer, *supra* note 11, at 178.

<sup>614</sup> See, e.g., Charles H. Koch, Jr., *Judicial Review and Global Federalism*, 54 *Admin. L. Rev.* 491, 493 (2002) (proposing that “[i]nsight into the natural evolution of a free trade regime may be gleaned from the fifty-year march toward the current E.U.”).

<sup>615</sup> See, e.g., Deirdre M. Curtin & Ige F. Dekker, *The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise*, in *The Evolution of EU Law*, *supra* note 52, at 83, 92-103 (discussing various ways of viewing legal personality of EU).

<sup>616</sup> See Chantal Thomas, *Constitutional Change and International Government*, 52 *Hastings L.J.* 1, 45-46 (2000). Although Professor Thomas's very brief discussion significantly understates the degree to which the democracy problem remains despite an expansion of the Parliament's role, the suggested comparison seems likely to be fruitful.

ment.<sup>617</sup> Second, the experience of Germany as a strong federal system *within* the Community legal order offers important lessons for a United States that must preserve the autonomy of its subnational units while taking on increasing international obligations.<sup>618</sup>

Most of these lessons, of course, must remain the subjects of other papers. All of the concerns about comparability noted earlier,<sup>619</sup> moreover, are relevant when we attempt to take the comparison the other way. As Robert Kagan has demonstrated, Europe is at a far different place in history than America, and that difference has profound implications for the role of supranational regimes.<sup>620</sup> The important point for present purposes is simply that the federal experience is a two-way street: Americans may well have just as much to learn from Europe as Europeans can learn from us. Given increasing pressure on the already modest American guarantees of state autonomy, those lessons may prove invaluable in years to come.

### CONCLUSION

Europe appears to be moving toward an ever-closer Union while Europeans retain substantial attachments to their Member States. The people of Europe thus confront a question of institutional design: How does one maintain meaningful Member State autonomy within the broader institutional framework of the Union? This question differs from the one faced by students of federalism in the United States. In America, we deal with a 200-year-old constitutional structure whose basic outlines are relatively fixed but which must be made to work despite radical shifts in economic relationships, technology, and the nature and functions of government. Europeans, on the other hand, have both the luxury and the challenge afforded by a system that is still very much in the making; they have, in other words, an opportunity to design a structure of constitutional federalism in light of contemporary challenges and experience.

Europeans are thus in a position to profit from the experience—and the mistakes—of others. I have focused on the arc of American federalism here because it offers plenty of both. Four points, I think, are particularly salient:

---

<sup>617</sup> See Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 *Int'l L. & Pol.* 1 (2001); see also Koch, *supra* note 614, at 494-503 (discussing role of judicial review in development of EU as predictor of the future impact of supranational adjudication under World Trade Organization).

<sup>618</sup> See, e.g., Halberstam, *supra* note 155, at 242-43 (discussing how German *Länder* have demanded—and received—larger role in EU affairs).

<sup>619</sup> See *supra* Part II.A.

<sup>620</sup> See Kagan, *supra* note 19.

*First*, the necessity for judicial enforcement of substantive limits on central power, assuming that a relatively fixed point of state autonomy is to be achieved, tends to trade off with the existence of political and institutional checks on the central authority. Substantive limits, moreover, are exceedingly difficult for courts to define and enforce in a way that convincingly maintains the distinction between judging and policymaking. While a meaningful federalism jurisprudence probably cannot afford to ignore substantive limits on central power altogether, designers of a federal system ought to focus on developing political and institutional checks that will make the federal balance as self-enforcing as possible. And courts should concentrate on formulating a federalism doctrine that reinforces those political and institutional safeguards that exist.

*Second*, the separation and allocation of powers and functions within the central government has profound implications for federalism. If political safeguards for federalism are to function, then lawmaking at the central authority must be channeled through the particular institutions of that authority in which the states or Member States are represented. Division of powers also checks central authority simply by multiplying the barriers to central lawmaking and enhancing the force of legislative inertia; where the central government fails to act, after all, the field is left open to regulation by the periphery. Barriers and impediments to lawmaking within the central structure thus should not necessarily be viewed as “inefficiencies” in need of streamlining and reform; they actually may be valuable guardians of Member State autonomy.

*Third*, there are distinct advantages to being a “complete” government—that is, one with its own enforcement powers, resource base, and convincing claims to democratic legitimacy. To the extent that the Community lacks these things, it is unlikely to be a successful competitor to the Member State governments for the loyalties of the People. Conversely, solutions to such problems as a democratic deficit or a lack of resources at the Community level may give rise to new problems of state autonomy. In some ways, the better the Community institutions work on their own, the more trouble the Member States will find themselves in.

*Finally*, while comparisons are helpful, we should be aware of their limits. The relatively modest model that serves well in America may not be adequate for Europe with its strong sense of distinctiveness among various political communities. That very distinctiveness may, of course, buttress whatever safeguards of Member State autonomy the EU elects to construct. But the American experience illustrates that federal systems are dynamic over time, and distinctiveness

may erode due to the very success of the federal structure in helping different people live together.

None of this, in principle, is particularly new. But structural arguments are almost always more convincing when they come clothed in institutional experience; as the late Charles Black observed, we should be dealing with “the practicalities and proprieties of the thing,” not with abstractions.<sup>621</sup> To the extent that the American experience throws light on the “practicalities and proprieties” of designing and maintaining a federal system, the New World may have something to give back to the Old.

---

<sup>621</sup> Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 22 (1969).