C. *The Categories of Mutation* 2437
1. *Extension* 2437
2. *Absorption* 2438
3. *Incorporation* 2441
4. *Expansion and its Causes* 2442
a. *Incrementalism* 2447
b. *A Strategy of Revival* 2448
c. *Structuralism: the Abiding Relevance of Exit and Voice* 2449
D. *Evaluating the Mutation of Jurisdictional Limits and the Erosion of Strict Enumeration in the 1970's.* 2450
1. *The Question of Constitutionality* 2450
2. *Mutation and the Question of the Democratic Character of the Expansion* 2452
E. *Conclusion* 2453

III. *1992* AND BEYOND 2453
A. *Introduction* 2453
B. *Structural Background to 1992 and the Single European Act—The Tension and its Resolution* 2456
C. *Under the Shadow of the Vote I* 2461
D. *Under the Shadow of the Vote II: Question Marks* 2464
1. *The Challenge of Compliance* 2464
2. *Challenges of "Democracy" and "Legitimacy"* 2466

IV. BEYOND *1992*: TWO VISIONS OF THE PROMISED LAND—THE IDEOLOGY, ETHOS, AND POLITICAL CULTURE OF EUROPEAN INTEGRATION 2474
A. *1992 and the "Ideological Neutrality" of the Community* 2476
B. *The Ethos of European Integration: Europe as Unity and Europe as Community* 2478

INTRODUCTION

In 1951, France, Germany, Italy, and the Benelux countries concluded the Treaty of Paris establishing the European Coal and Steel Community. Lofty in its aspirations, and innovative in some of its institutional arrangements, this polity was perceived, by the actors themselves—as well as by the developers of an impressive academic theoretical apparatus, who were quick to perceive events—as an *avant garde* international organization ushering forth a new model for transnational discourse. Very quickly, however, reality dissipated the dream, and again quickly following events, the academic apparatus was abandoned.[1]

Forty years later, the European Community is a transformed polity. It now comprises twelve Member States, has a population of 340 million citizens, and constitutes the largest trading bloc in the world. But the notion of "transformation" surely comes from changes deeper than its geography and demography. That Europe has been transformed in a more radical fashion is difficult to doubt. Indeed, in the face of that remarkable (and often lucrative) growth industry, *1992* commentary, doubt may be construed as subversion.

The surface manifestations of this alleged transformation are legion, ranging (in the eyes of the beholder, of course) from the trivial and ridiculous[2] to the important and sublime. Consider the changes in the following:

(1) the scope of Community action. Notice how naturally the Member States and their Western allies have turned to the Community to take the lead role in assisting the development and reconstruction of Eastern Europe.[3] A mere decade or two ago, such an overt for-

---

1. For a review of Integration Theory and its demise, see, e.g., Greilsammer, *Theorizing European Integration In its Four Periods*, 2 JERUSALEM J. INT'L REL. 129 (1976); Krislov, Ehlermann & Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, in 2:1 INTEGRATION THROUGH LAW 3, 6-11 (1986).

2. The winning song in the popular Eurovision Song contest last year was entitled "Altogether 1992." The Times (London), May 7, 1990 at 6, col. 8.

3. *See European Commission Defines A General Framework for Association Agreements ("European Agreements") Between the EEC and the Countries of Eastern and Central Europe*, EUROPE DOC. (No. 1646/47) 1 (Sept. 7, 1990) (reprint of Commission communication to Council and Parliament).

The evolution is limited, however. For example, the absence of a true Community apparatus for foreign policy rendered the political (not military) initiative in relation to the Iraqi crisis no more than hortatory. *See e.g., Gulf Crisis: Positions Taken By the Twelve and the Western European Union*, EUROPE DOC. (No. 1644) 1 (Aug. 23, 1990) (statements of Aug. 2, 10, & 21, 1990); *Gulf/EEC: The Foreign Ministers of the Twelve Confirm Their Position and Intend to Draft an "Overall Concept" for their Relations with the Region's Countries*, EUROPE DOC. (No. 5413) 3-4 (Jan. 19, 1991). The Community has taken, however, a leading role in the Yugoslav crisis

On the evolving foreign policy posture of the Community in the wake of 1992, see generally R. DEHOUSE & J. WEILER, EPC AND THE SINGLE ACT: FROM SOFT LAW TO HARD LAW (European University Institute Working Papers of the European Policy Unit, No. 90/1).

eign policy posture for the Community would have been bitterly contested by its very own Member States.[4]

(2) the mode of Community action. The European Commission now plays a central role in dictating the Community agenda and in shaping the content of its policy and norms. As recently as the late 1960's, the survival of supranationalism was a speculative matter,[5] while in the 1970's, the Commission, self-critical and demoralized, was perceived as an overblown and overpaid secretariat of the Community.[6]

(3) the image and perception of the European Community. Changes in these are usually more telling signs than the reality they represent. In public discourse, "Europe" increasingly means the European Community in much the same way that "America" means the United States.

But these surface manifestations are just that—the seismographer's tell-tale line reflecting deeper, below-the-surface movement in need of interpretation. Arguably, the most significant change in Europe, justifying appellations such as "transformation" and "metamorphosis," concerns the evolving relationship between the Community and its Member States.[7]

---

4. In 1973, the French Foreign Minister, M. Jobert, pressed the separateness [of the Framework for European Political Cooperation which dealt with foreign policy] from the Community to a point of forcing the Ministers to meet in EPC in Copenhagen in the morning, and to assemble the same afternoon in Brussels as a Community Council to deal with Community business.

Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, in 1:3 INTEGRATION THROUGH LAW 63 (1986).

5. *See, e.g.*, Heathcote, *The Crisis of European Supranationality*, 5 J. COMMON MKT. STUD. 140 (1966).

6. *See, e.g.*, B. BIESHEUVEL, E. DELL & R. MARJOLIN, REPORT ON EUROPEAN INSTITUTIONS 10-12, 49-56 (1980) (report of the Committee of Three to the European Council, Oct. 1979) [hereinafter REPORT ON EUROPEAN INSTITUTIONS]; *see also Proposal for Reform of the Commission of the European Communities and its Services* (1979) (report made at the request of the Commission by an independent Review Body under the Chairmanship of Mr. Dirk Spierenburg) (report requested in part because of sense of malaise in Commission) [hereinafter *Spierenburg Report*]. For a self-mocking but penetrating picture, see M. VON DONAT, EUROPE: QUI TIRE LES FICELLES? (1979).

7. The juxtaposition of Community/Member States is problematic. The concept of the Community, analogous to the concept of the Trinity, is simultaneously both one and many. In some senses Community is its individual Member States; in other senses it is distinct from them. This inevitable dilemma exists in all federal arrangements. Moreover, the notion of an individual state itself is not monolithic. When one talks of a Member State's interests, one usually sacrifices many nuances in understanding the specific position of that state.

> [D]ifferent, conflicting and often contradictory interests, either objective or subjective, are frequently expressed as unified, subjective "national" interests. Behind these articulated, subjective "national" interests, however, lie a variety of sets of social, economic and political relations, as well as different relationships between private and public economic organisations and the state.

F. SNYDER, NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW 90 (1990) (footnote omitted); *see also id.* at 32, 37. While the danger of sacrificing these many voices within a state cannot be avoided, I shall try to minimize it by referring to the interest of the Member States in preserving their prerogatives *as such* in the Community polity.

How can this transformation in the relationship between the Member States and the Community be conceptualized?

In a recent case, the European Court of Justice spoke matter-of-factly of the EEC Treaty[8] as "the basic constitutional charter" of the Community.[9] On this reading, the Treaties have been "constitutionalized" and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state. Put differently, the Community's "operating system" is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles.

This judicial characterization, endlessly repeated in the literature,[10] underscores the fact that not simply the content of Community-Member State discourse has changed. The very architecture of the relationship, the group of structural rules that define the mode of discourse, has mutated. Also, the characterization gives us, as analytical tools, the main concepts developed in evaluating nonunitary (principally federal) polities. We can compare the Community to known entities within meaningful paradigms.

This characterization might, however, lead to flawed analysis. It might be read (and has been read[11]) as suggesting that the cardinal material locus of change has been the realm of law and that the principal actor has been the European Court. But this would be deceptive. Legal and constitutional structural change have been crucial, but only in their interaction with the Community political process.

The characterization might also suggest a principal temporal locus of change, a kind of "Big Bang" theory. It would almost be natural, and in any event very tempting, to locate such a temporal point in that well-known series of events that have shaken the Community since the mid-1980's and that are encapsulated in that larger-than-life date, *1992*.[12] There is, after all, a plethora

---

8. EEC Treaty, as amended by the Single European Act (SEA).

9. Case 294/83, Parti ecologiste 'Les Verts' v. European Parliament, 1986 E.C.R. 1339, 1365 [hereinafter *Les Verts*].

10. For fine recent analyses, see Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990); Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989); and literature cited in both.

The importance of the legal paradigm as a characterizing feature of the Community is recognized also in the nonlegal literature. *See, e.g.*, Keohane & Hoffmann, *Conclusions: Community Politics and Institutional Change*, in THE DYNAMICS OF EUROPEAN INTEGRATION 276, 278-82 (W. Wallace ed. 1990).

11. "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe." Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 1 (1981); *see also* A. GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE (1969).

12. *1992* actually encapsulates, in a game which resembles some new Cabala of Community life, a temporal move to an ever increasing higher celestial sphere. The key dates in this game of numbers are: the 1984 European Parliament Draft Treaty of European Union and the 1985 Commission White Paper (completing the Internal Market), endorsed by the 1986 Single European Act (which entered into force in

of literature which hails *1992* as the key seismic event in the Community geology.[13] But, one should resist that temptation too. This is not to deny the importance of *1992* and the changes introduced in the late 1980's to the structure and process of Community life and to the relationship between Community and Member States. But even if *1992* is a seismic mutation, explosive and visible, it is nonetheless in the nature of an eruption.

My claim is that the *1992* eruption was preceded by two deeper, and hence far less visible, profound mutations of the very foundational strata of the Community, each taking place in a rather distinct period in the Community's evolution. The importance of these earlier subterranean mutations is both empirical and cognitive. Empirically, the *1992* capsule was both shaped by, and is significant because of, the earlier Community mutations. Cognitively, we cannot understand the *1992* eruption and the potential of its shockwaves without a prior understanding of the deeper mutations that conditioned it.

Thus, although I accept that the Community has been transformed profoundly, I believe this transformation occurred in three distinct phases. In each of the phases a fundamental feature in the relationship of the Community to its Member States mutated; only the combination of all three can be said to have transformed the Community's "operating system" as a non-unitary polity.

These perceptions condition the methodological features of my Article. One feature is a focus on evolution. I shall chart the principal characteristics of the new "operating system" in an historical framework. In other words, I shall tell a story of evolution over time. This approach will enable me not only to describe but also to analyze and explain. Each evolving facet of the new system will be presented as a "development" that needs systemic and historical analysis.

Second, in this analysis I shall focus on what I consider to be the two key *structural* dimensions of constitutionalism in a nonunitary polity: (a) the relationships between political power in the center and the periphery and between legal norms and policies of the center and the periphery; and (b) the principle governing the division of material competences between Community and Member States, usually alluded to as the doctrine of enumerated powers. The structure and process of the Community will thus occupy pride of place rather than substantive policy and content.

July 1987), and to which was added the April 1988 Commission (Delors) Plan of Economic and Monetary Union, endorsed in the 1989 Madrid Summit and strengthened by the Dublin 1990 decision to hold two Intergovernmental Conferences leading to a new treaty in 1991. The new treaty is to deal with Economic and Monetary Union as well as Political Union and is to come into effect by the date of arrival at the highest sphere of all, *1992*.

13. "The Single European Act . . . represents the most comprehensive and most important amendment to the EEC Treaty to date." Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects*, 11 MICH. J. INT'L L. 1097, 1103 (1990) [hereinafter "*1991 Project*"]. Although I agree with Ehlermann that the SEA is the most important formal amendment, I contend that earlier developments without formal amendment should be considered even more important. For a recent comprehensive bibliography of *1992* literature, see 11 MICH. J. INT'L L. 571 (1990).

The final feature of my methodological approach relates to the position of law in the evolution of the Community. In a sharp critique of a classic study of the European Community legal order, Martin Shapiro made the following comments, which could be leveled against much of the legal literature on the Community:

> [The study] is a careful and systematic exposition of the judicial review provisions of the "constitution" of the European Economic Community, an exposition that is helpful for a newcomer to these materials. But— . . . [i]t is constitutional law without politics . . . . [I]t presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology . . . . [S]uch an approach has proved fundamentally arid in the study of [national] constitutions . . . it must reduce constitutional scholarship to something like that early stage of archeology that resembled the collection of antiquities . . . oblivious to their context or living matrix.[14]

The plea for a "Law and . . ." approach is of course *de rigueur*, be it Law and Economics, Law and Culture, Law and Society—Law in Context. At one level, a goal of this Article will be precisely to meet aspects of this critique of, and challenge to, European legal literature. I shall try to analyze the Community constitutional order with particular regard to its living political matrix; the interactions between norms and norm-making, constitution and institutions, principles and practice, and the Court of Justice and the political organs will lie at the core of this Article.

And yet, even though I shall look at relationships of legal structure and political process, at law and power, my approach is hardly one of Law in Context—it is far more modest. In my story, de Gaulle and Thatcher, the economic expansion of the 1960's, the oil crisis of the 1970's, Socialists and Christian Democrats, and all like elements of the political history of the epoch play pithy parts. It is perhaps ironic, but my synthesis and analysis are truly in the tradition of the "pure theory of law" with the riders that "law" encompasses a discourse that is much wider than doctrine and norms and that the very dichotomy of law and politics is questionable.

The shortcomings of this "purism" (not total to be sure) are self-evident: my contribution cannot be but a part of a more totalistic and comprehensive history. But, if successful, the "pure" approach has some virtues, as its ultimate

---

14. Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537, 538 (1980). In his comment Shapiro alludes to what in its own terms is a model analysis: Barav, *The Judicial Power of the European Economic Community* 53 S. CAL. L. REV. 461 (1980). And, of course, not all constitutional scholarship of the Community falls into this trap. *See, e.g.*, F. SNYDER, *supra* note 7; Lenaerts, *supra* note 10; Mancini, *supra* note 10.

claim is that much that has happened in the systemic evolution of Europe is self-referential and results from the internal dynamics of the system itself, almost as if it were insulated from those "external" aspects.[15]

I. 1958 TO THE MID-1970'S: THE FOUNDATIONAL PERIOD—TOWARD A THEORY OF EQUILIBRIUM[16]

The importance of developments in this early period cannot be overstated. They transcend anything that has happened since. It is in this period that the Community assumed, in stark change from the original conception of the Treaty, its basic legal and political characteristics. But understanding the dynamics of the Foundational Period is of more than historical interest; the patterns of Community-Member State interaction that crystalized in this period conditioned all subsequent developments in Europe.

In order to explain the essentials of the Foundational Period, I would like to make recourse to an apparent paradox, the solution to which will be my device for describing and analyzing the European Community system.

A. *A Paradox and its Solution: Exit and Voice*

If we were to ask a lawyer during the Foundational Period to compare the evolution of the European Community with the American experience, the lawyer would have said that the Community was becoming "more and more like a federal (or at least pre-federal) state." By contrast, if we were to ask a political scientist at the same point in time to compare the European system with, say, the American system, the political scientist would have given a diametrically opposite answer: "they are growing less and less alike."

The paradox can be phrased in noncomparative terms: from a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European legal integration moved powerfully ahead. From a political-decisional-procedural tionalismpoint of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration. It is not

15. The "insulation" cannot be total. External events are mediated through the prism of the system and do not have a reality of their own. *Cf.* Teubner, *Introduction to Autopoietic Law*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (G. Teubner ed. 1988) (the autopoietic approach to law, pioneered by Niklas Luhmann and elaborated by Gunther Teubner, acknowledges a much greater role to internal discourse of law in explaining its evolutionary dynamics; autopoiesis also gives a more careful explanation to the impact of external reality on legal system, a reality which will always be mediated by its legal perception).

16. The intellectual genesis of this Article is rooted in my earlier work on the Community. *See* Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267 (1981). It was later developed in J. WEILER, IL SISTEMA COMUNITARIO EUROPEO (1985) (an attempt to construct a general theory explaining the supranational features of the European Community). In the present work I have tried, first, to locate my construct, revised in the light of time, within a broader context of systemic understanding and, second, to use it as a tool to illuminate the more recent phenomenon of *1992*.

surprising, therefore, that lawyers were characterizing the Community of that epoch as a "constitutional framework for a federal-type structure,"[17] whereas political scientists were speculating about the "survival of supranationalism."[18]

Identifying the factual and conceptual contours of this paradox of the Community and explaining the reasons for it will be the key to explaining the significance of the Foundational Period in the evolution of the Community.

What then are the contours of this legal-political puzzle? How can it be explained? What is its significance?

In *Exit, Voice and Loyalty*,[19] Hirschman identified the categories of Exit and Voice with the respective disciplines of economics and politics. Exit corresponded to the simplified world of the economist, whereas Voice corresponded to the messy (and supposedly more complex) world of the political scientist. Hirschman stated:

> Exit and Voice, that is, market and non-market forces, that is, economic and political mechanisms, have been introduced as two principal actors of strictly equal rank and importance. In developing my play on that basis I hope to demonstrate to political scientists the usefulness of economic concepts *and to economists the usefulness of political concepts*. This reciprocity has been lacking in recent interdisciplinary work . . . .[20]

The same can be said about the interplay between legal and political analysis. The interdisciplinary gap there is just as wide.

The interplay of Exit and Voice is fairly clear and needs only a brief adjustment for the Community circumstance. Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation. Apart from identifying these two basic types of reaction to malperformance, Hirschman's basic insight is to identify a kind of zero-sum game between the two. Crudely put, a stronger "outlet" for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice. And although Hirschman developed his concepts to deal with the behavior of the marketplace, he explicitly suggested that the notions of Exit and Voice may be applicable to membership behavior in any organizational setting.

Naturally I shall have to give specific characterizations to Exit and Voice in the Community context. I propose first to discuss in legal categories the Exit

---

17. Stein, *supra* note 4, at 1.

18. Heathcote, *supra* note 5.

19. A. HIRSCHMAN, EXIT, VOICE AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

20. *Id.* at 19 (emphasis in original).

option in the European Community. I shall then introduce Voice in political categories.

B. *Exit in the European Community: Formal and Selective*

Formal (or total) Exit is of course an easy notion, signifying the withdrawal of a Member State from the European Community. Lawyers have written reams about the legality of unilateral Member State withdrawal.[21] The juridical conclusion is that unilateral withdrawal is illegal. Exit is foreclosed. But this is precisely the type of legal analysis that gives lawyers a bad name in other disciplines. It takes no particular insight to suggest that should a Member State consider withdrawing from the Community, the legal argument will not be the critical or determining consideration. If Total Exit is foreclosed, it is because of the high enmeshment of the Member States and the potential, real or perceived, for political and economic losses to the withdrawing state.

Whereas the notion of Total Exit is thus not particularly helpful, or at least it does not profit from *legal* analysis, I would introduce a different notion, that of Selective Exit: the practice of the Member States of retaining membership but seeking to avoid their obligations under the Treaty, be it by omission or commission. In the life of many international organizations, including the Community, Selective Exit is a much more common temptation than Total Exit.

A principal feature of the Foundational Period has been the closure, albeit incomplete, of Selective Exit with obvious consequences for the decisional behavior of the Member States.

C. *The Closure of Selective Exit*

The "closure of selective Exit" signifies the process curtailing the ability of the Member States to practice a selective application of the *acquis communautaire*, the erection of restraints on their ability to violate or disregard their binding obligations under the Treaties and the laws adopted by Community institutions.

In order to explain this process of "closure" I must recapitulate two dimensions of E.C. development: (1) the "constitutionalization" of the Community legal structure; and (2) the system of legal/judicial guarantees.

---

21. For further discussion, see Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 ISRAEL L. REV. 282, 284-88 (1985).

1. *The Foundational Period: The "Constitutionalization" of the Community Legal Structure*

Starting in 1963 and continuing into the early 1970's and beyond,[22] the European Court of Justice in a series of landmark decisions established four doctrines that fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states.

a. *The Doctrine of Direct Effect*

The judicial doctrine of direct effect, introduced in 1963 and developed subsequently,[23] provides the following presumption: 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. Direct effect (a rule of construction in result) applies to all actions producing legal effects in the Community: the Treaty itself and secondary legislation. Moreover, with the exception of one type of Community legislation,[24] direct effect operates not only in creating enforceable legal obligations between the Member States and individuals, but also among individuals *inter se*. Critically, being part of the law of the land means that Community norms may be invoked by individuals before their state courts, which must provide adequate legal remedies for the E.C. norms just as if they were enacted by the state legislature.

The implications of this doctrine were and are far reaching. The European Court reversed the normal presumption of public international law whereby international legal obligations are result-oriented and addressed to states. Public international law typically allows the internal constitutional order of a state to determine the method and extent to which international obligations may, if at all, produce effects for individuals within the legal order of the state. Under the normal canons of international law, even when the international obligation itself, such as a trade agreement or a human rights convention, is intended to bestow rights (or duties) on individuals within a state, if the state fails to bestow the rights, the individual cannot invoke the international obligation before national courts, unless internal constitutional or statutory law, to which

---

22. The process of constitutionalization is an ongoing one. I suggest the 1970's as a point of closure since, as shall be seen, by the early 1970's all major constitutional doctrines were already in place. What followed were refinements.

23. On the doctrine of direct effect and its evolution, see T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 183-218 (1988).

24. Community directives may produce direct effects in the vertical relationship between public authority and individuals but not in the horizontal relationship of individuals *inter se*. *See* Case 148/78, Pubblico Ministero v. Tullio Ratti, 1979 E.C.R. 1629; Case 152/84, M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority, 1986 E.C.R. 723.

public international law is indifferent, provides for such a remedy. The typical remedy under public international law in such a case would be an inter-state claim. The main import of the Community doctrine of direct effect was not simply the conceptual change it ushered forth. In practice direct effect meant that Member States violating their Community obligations could not shift the locus of dispute to the interstate or Community plane. They would be faced with legal actions before their own courts at the suit of individuals within their own legal order.

Individuals (and their lawyers) noticed this practical implication, and the number of cases brought on the basis of this doctrine grew exponentially. Effectively, individuals in real cases and controversies (usually against state public authorities) became the principal "guardians" of the legal integrity of Community law within Europe similar to the way that individuals in the United States have been the principal actors in ensuring the vindication of the Bill of Rights and other federal law.

b. *The Doctrine of Supremacy*

The doctrine of direct effect might not strike all observers as that revolutionary, especially those observers coming from a monist constitutional order in which international treaties upon ratification are transposed automatically into the municipal legal order and in which some provisions of international treaties may be recognized as "self-executing." The full impact of direct effect is realized in combination with the second "constitutionalizing" doctrine, supremacy. Unlike some federal constitutions, the Treaty does not include a specific "supremacy clause." However, in a series of cases starting in 1964[25] the Court has pronounced an uncompromising version of supremacy: in the sphere of application of Community law, any Community norm, be it an article of the Treaty (the Constitutional Charter) or a minuscule administrative regulation enacted by the Commission, "trumps" conflicting national law whether enacted before or after the Community norm. Additionally, although this has never been stated explicitly, the Court has the "Kompetenz-Kompetenz" in the Community legal order, i.e. it is the body that determines which norms come within the sphere of application of Community law.[26]

---

25. For a particularly subtle analysis of the supremacy of Community law and its evolution, see J. USHER, EUROPEAN COMMUNITY LAW AND NATIONAL LAW—THE IRREVERSIBLE TRANSFER 30-38 (1981). For a more skeptical view, see De Witte, *Retour à "Costa". La primauté du droit communautaire à la lumière du droit international*, 20 REVUE TRIMESTRIELLE DU DROIT EUROPEENNE, [RTDEUR] 425 (1984). For a survey and analysis of the most recent constitutional developments, see Jacobs, *Constitutional Developments in the European Community and the Impact of the Single European Market After 1992*, 11 MICH. J. INT'L L. 887 (1990). Recently the final resistance to Supremacy was removed with the decision of the French Conseil d'Etat in Raoul Georges Nicolo and Others [1990] CMLR 173.

26. The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within *its sphere of competence*. This more accurate characterization of supremacy renders crucial the question of

In light of supremacy the full significance of direct effect becomes transparent. Typically, in monist or quasi-monist states like the United States, although treaty provisions, including self-executing ones, may be received automatically into the municipal legal order, their normative status is *equivalent* to national legislation. Thus the normal rule of "later in time" (*lex posteriori derogat lex anteriori*) governs the relationship between the treaty provision and conflicting national legislation. A national legislature unhappy with an internalized treaty norm simply enacts a conflicting national measure and the transposition will have vanished for all internal practical effects.[27] By contrast, in the Community, because of the doctrine of supremacy, the E.C. norm, which by virtue of the doctrine of direct effect must be regarded as part of the Law of the Land, will prevail even in these circumstances. The combination of the two doctrines means that Community norms that produce direct effects are not merely the Law of the Land but the "Higher Law" of the Land. Parallels to this kind of constitutional architecture may, with very few exceptions, be found only in the internal constitutional order of federal states.

c. *The Doctrine of Implied Powers*

One possible rationale underlying the Court's jurisprudence in both direct effect and supremacy has been its attempt to maximize the efficiency by which the Community performs the tasks entrusted to it by the Treaty. As part of this rationale, one must consider the question of specific powers granted the Community to perform these tasks. Direct effect and supremacy will not serve their functions if the Community does not have the necessary instruments at its

---

defining the spheres of competence and in particular the concomitant institutional question which court will have the final decision as to the definition of spheres, i.e. the question of Kompetenz-Kompetenz. The European Court has never addressed this issue squarely, but implicit in the case law is the clear understanding that the Court has, as a matter of Community law, the ultimate say on the reach of Community law. *See, e.g.*, Case 66/80, Spa Int'l Chemical Corp. v. Amministrazione delle Finanze dello Strato, 1981 E.C.R. 1191; Case 314/85, Firma Foto Frost v. Hauptzollamt Lubeck-Ost, 1987 E.C.R. 4199, cases in which the Court reserved to itself the prerogative of declaring Community law invalid.

In principle, under the EEC Treaty, art. 173, there are several reasons for annulling a measure of Community law—for example, infringement of an essential procedural requirement under EEC law. This issue, clearly, seems to belong in the exclusive province of the European Court of Justice. On second look however, one of the grounds for annulment, indeed the first mentioned in Article 173, is "lack of competence." If the issue of competence relates only to the respective competence of the various Community institutions, there is no problem in regarding this issue too as falling exclusively in the hands of the European Court of Justice. But the phrase "lack of competence" clearly applies also to the question of general competence of the Community vis-a-vis its Member States. The question as to what part of legislative competence was granted the Community by the Member States is, arguably, as much an issue of Member State constitutional law as it is of Community law. By claiming in the aforementioned cases exclusive jurisdiction to pronounce on these issues the Court was implicitly, but unquestionably, asserting its Kompetenz-Kompetenz, its exclusive competence to determine the competence of the Community. Of course one rationale of the decision is to ensure the uniform application of Community law throughout its legal space. But this rationale, functionally persuasive as it may be, does not necessarily override from the perspective of a Member State the interest in the integrity of a state's constitutional order.

27. Of course, on the international plane, a wrong, for which state responsibility would lie, would have been committed. The remedies for this wrong would be on the international plane as well.

disposal. The issue in which this consideration came to the fore, in 1970, was the treaty-making power of the Community. The full realization of many E.C. internal policies clearly depended on the ability of the Community to negotiate and conclude international treaties with third parties. As is the case with Member States, the problems facing the Community do not respect its internal territorial and jurisdictional boundaries. The Treaty itself was rather sparing in granting the Community treaty-making power, limiting it to a few specified cases.

In its landmark decision of that period[28] (the period *circa* 1971) the European Court held that the grant of internal competence must be read as implying an external treaty-making power. The European Court added that Community international agreements would be binding not only on the Community as such, but also, as appropriate, on and within the Member States.[29] The significance of this ruling goes beyond the issue of treaty-making power. With this decision, subsequently replicated in different contexts,[30] the European Court added another rung in its constitutional ladder: powers would be implied in favor of the Community where they were necessary to serve legitimate ends pursued by it. Beyond its enormous practical ramifications, the critical point was the willingness of the Court to sidestep the presumptive rule of interpretation typical in international law, that treaties must be interpreted in a manner that minimizes encroachment on state sovereignty. The Court favored a teleological, purposive rule drawn from the book of constitutional interpretation.

In a parallel, although much less noticed, development, the European Court began to develop its jurisprudence on the relationship between areas of Community and Member State competence. The Treaty itself is silent on this issue. It may have been presumed that all authority granted to the Community was to be shared concurrently with the Member States, subject only to the emerging principle of supremacy. Member States could adopt national policies and laws, provided these did not contradict Community law in the same sphere.

In a bifurcated line of jurisprudence laid in place in the early 1970's and continued thereafter, the European Court developed two complementary doctrines: exclusivity and preemption.[31] In a number of fields, most importantly in common commercial policy, the European Court held that the powers of the

---

28. Case 22/70, Commission of the European Communities v. Council of the European Communities, 1971 E.C.R. 263 [hereinafter *ERTA*].

29. For the evolution of the foreign relations power of the Community, see J. GROUX & P. MANIN, THE EUROPEAN COMMUNITIES IN THE INTERNATIONAL ORDER (1985); Lachman, *International Legal Personality of the EC: Capacity and Competence*, 1984 LEGAL ISSUES EUR. INTEGRATION 3; Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle*, in MIXED AGREEMENTS 35 (1983).

30. The doctrine of implied powers is discussed fully in Tizzano, *Les Compétences de la Communauté*, in TRENTE ANS DE DROIT COMMUNAUTAIRE 45, 49-52 (European Commission, Perspectives Européennes, 1982).

31. *See* Waelbroeck, *The Emergent Doctrine of Community Pre-emption—Consent and Re-delegation*, in 2 COURTS AND FREE MARKETS 548 (1982).

Community were exclusive. Member States were precluded from taking any action per se, whether or not their action conflicted with a positive measure of Community law. In other fields the exclusivity was not an a priori notion. Instead, only positive Community legislation in these fields triggered a preemptive effect, barring Member States from any action, whether or not in actual conflict with Community law, according to specific criteria developed by the Court.

Exclusivity and preemption not only constitute an additional constitutional layer on those already mentioned but also have had a profound effect on Community decisionmaking. Where a field has been preempted or is exclusive and action is needed, the Member States are pushed to act jointly.

d. *The Doctrine of Human Rights*

The last major constitutional tremor was in the field of human rights.[32] The Treaty contains no Bill of Rights and there is no explicit provision for judicial review of an alleged violation of human rights. In a much discussed line of cases starting in 1969, the Court asserted that it would, nonetheless, review Community measures for any violation of fundamental human rights, adopting for its criteria the constitutional traditions common to the Member States and the international human rights conventions to which the Member States subscribed. This enormously complex jurisprudence will be discussed later in this Article, but its symbolic significance in a "constitution-building" exercise deserves mention here. The principal message was that the arrogation of power to the Community implicit in the other three doctrines would not be left unchecked. Community norms, at times derived only from an implied grant of power, often directly effective, and always supreme, would be subjected to a human rights scrutiny by the Court. This scrutiny is important given the "Democracy Deficit" in Community decisionmaking.

If nothing else, this jurisprudence was as clear an indication as any of the audacious self-perception of the European Court. The measure of creative interpretation of the Treaty was so great as to be consonant with a self-image of a constitutional court in a "constitutional" polity. It should be noted further that the human rights jurisprudence had, paradoxically, the hallmarks of the deepest jurists' prudence. The success of the European Court's bold moves with regard to the doctrines of direct effect, supremacy, implied powers, and human rights ultimately would depend on their reception by the highest constitutional courts in the different Member States.

The most delicate issue in this context was that of supremacy. National courts were likely to accept direct effect and implied-powers, but found it

32. *See* Weiler, *Eurocracy and Distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

difficult to swallow the notion that Community law must prevail even in the face of an explicit later-in-time provision of a national legislature to whom, psychologically, if not in fact constitutionally, Member State courts owed allegiance. Accepting supremacy of Community law without some guarantee that this supreme law would not violate rights fundamental to the legal patrimony of an individual Member State would be virtually impossible. This especially would be true in Member States like Italy and Germany where human rights enjoy constitutional protection. Thus, even if protection of human rights per se need not be indispensable to fashioning a federal-type constitution, it was critical to the acceptance by courts in the Member States of the other elements of constitution-building. One by one, the highest jurisdictions in the Member States accepted the new judicial architecture of Europe.[33]

The skeptic may, however, be justified in challenging the "new legal order" I have described incorporating these doctrines,[34] especially the sharp lines it tries to draw in differentiating the "new" Community order from the "old" public international law order. After all, a cardinal principle of international law is its supremacy over national law. The notion of direct effect, or at least self-execution, is also known to international law, and implied powers jurisprudence has operated in the jurisprudence of the International Court of Justice as well.[35] If international law shares these notions of supremacy, direct effect, and implied powers,[36] the skeptic may be correct in challenging the characterization of Community development in the Foundational Period as something out of the ordinary.

One reply is that the Community phenomenon represents a quantitative change of such a magnitude that it is qualitative in nature. Direct effect may exist in international law but it is operationalized in so few instances that it must be regarded as the exception which proves the general rule of its virtual nonexistence. In the Community order direct effect is presumptive.[37] The question of supremacy, however, brings the key difference between the two systems into sharp relief. International law is as uncompromising as Community law in asserting that its norms are supreme over conflicting national norms. But, international law's horizontal system of enforcement, which is typically actuated through the principles of state responsibility, reciprocity, and counter measures,

---

33. The story of acceptance of the principle of supremacy by national courts is charted in H. SCHERMERS & D. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 115-24 (1987). *See also* M. VAN EMPEL, LEADING CASES ON THE LAW OF THE EUROPEAN COMMUNITIES 203-39 (1990).

34. *See, e.g.*, Wyatt, *New Legal Order, or Old?*, 7 EUR. L. REV. 147 (1982); *see also*, De Witte, *supra* note 25.

35. *See, e.g.*, Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174.

36. One could also argue that protection of fundamental human rights has become part of the customary law patrimony of international law. *Cf.*, Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (deliberate torture under color of official authority violates universally accepted norms of international law of human rights).

37. *See* Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983).

gives the notion of supremacy an exceptionally rarified quality, making it difficult to grasp and radically different from that found in the constitutional orders of states with centralized enforcement monopolies.

The constitutionalization claim regarding the Treaties establishing the European Community can only be sustained by adding one more layer of analysis: the system of judicial remedies and enforcement. It is this system, as interpreted and operationalized by the European judicial branch, that truly differentiates the Community legal order from the horizontality of classical public international law.

2. *The Community System of Judicial Review*

As mentioned above, the hierarchy of norms within the European Community is typical of a nonunitary system. The Higher Law of the Community is, of course, the Treaty itself. Neither Community organs nor the Member States may violate the Treaty in their legislative and administrative actions. In addition, Member States may not violate Community regulations, directives, and decisions. Not surprisingly, then, the Community features a double-limbed system of judicial review, operating on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: (1) the measures of the Community itself (principally acts of the Council of Ministers, Commission, and European Parliament), which are reviewable for conformity with the Treaties; and (2) the acts of the Member States, which are reviewable for their conformity with Community law and policy, including the above-mentioned secondary legislation.

Needless to say, in the context of my discussion of the closure of Exit and of Member States' attempts to disregard those obligations they dislike, the effectiveness of review of the second set of measures assumes critical importance. I, therefore, focus only on that aspect of judicial review here.

a. *Judicial Review at the Community Level*

Either the Commission or an individual Member State may, in accordance with Articles 169-72 of the EEC Treaty, bring an action against a Member State for failure to fulfill its obligations under the Treaty. Generally, this failure takes the form either of inaction in implementing a Community obligation or enactment of a national measure contrary to Community obligations. The existence of a mandatory and *exclusive* forum for adjudication of these types of disputes sets the Community apart from many international organizations.

The role of the Commission is even more special. As one commentator noted, "[u]nder traditional international law the enforcement of treaty obligations is a matter to be settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent Community body, the Commis-

sion, to invoke the compulsory jurisdiction of the European Court against a defaulting Member State."[38]

At the same time, the "intergovernmental" character of this procedure and the consequent limitations on its efficacy are clear. Four weaknesses are particularly glaring:

(1) the procedure is political in nature; the Commission (appropriately) may have nonlegal reasons not to initiate a prosecution;

(2) a centralized agency with limited human resources is unable adequately to identify, process, and monitor all possible Member State violations and infringements;

(3) Article 169 may be inappropriate to apply to small violations; even if small violations are properly identified, dedicating Commission resources to infringements that do not raise an important principle or create a major economic impact is wasteful; and finally, and most importantly,

(4) no real enforcement exists; proceedings conclude with a "declaratory" judgment of the European Court without enforcement sanctions.

b. *Judicial Review at the Member State Level*

The weaknesses of Articles 169-172 are remedied to an extent by judicial review within the judicial systems of the Member States in collaboration with the European Court of Justice. Article 177 provides, inter alia, that when a question concerning the interpretation of the Treaty is raised before a national court, the court may suspend the national proceedings and request a preliminary ruling from the European Court of Justice in Luxembourg on the correct interpretation of the Treaty. If the national court is the court of last resort, then it must request a European Court ruling. Once this ruling is made, it is remitted back to the national court which gives, on the basis of the ruling, the opinion in the case before it. The national courts and the European Court are thus integrated into a unitary system of judicial review.

The European Court and national courts have made good use of this procedure. On its face the purpose of Article 177 is simply to ensure uniform interpretation of Community law throughout the Member States. That, apparently, is how the framers of the Treaty understood it.[39] However, very often the

38. Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 EUR. L. REV. 442, 443 (1979).

39. Pescatore, *Les Travaux du "Groupe Juridique" dans la Négociation des Traités de Rome*, 34 STUDIA DIPLOMATICA 159, 173 (1981) ("Pour autant que je m'en souvienne, l'acceptation de cette idée, dans son principe, ne fit pas de difficultés; je penche à croire que tous, peut-être, n'avaint pas conscience de l'importance de cette innovation.").

factual situation in which Article 177 comes into play involves an individual litigant pleading in national court that a rule, measure, or national practice should not be applied because it violates the Community obligations of the Member State. In this manner the attempts of Member States to practice selective Community membership by disregarding their obligations have become regularly adjudicated before their own national courts. On submission of the case, the European Court has rendered its interpretation of Community law within the factual context of the case before it. Theoretically, the European Court may not itself rule on the *application* of Community law. But, as one scholar notes:

> [I]t is no secret . . . that in practice, when making preliminary rulings the Court has often transgressed the theoretical border line . . . . [I]t provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.[40]

The fact that the national court renders the final judgment is crucial to the procedure. The binding effect and enforcement value of such a decision, coming from a Member State's own court, may be contrasted with a similar decision handed down in declaratory fashion by the European Court under the previously discussed Article 169 procedure. A national court opinion takes care of the most dramatic weakness of the Article 169 procedure: the ability of a Member State, *in extremis*, to disregard the strictures of the European Court. Under the 177 procedure this disregard is impossible. A state, in our Western democracies, cannot disobey its own courts.

The other weaknesses of the 169 procedure are also remedied to some extent: individual litigants are usually not politically motivated in bringing their actions; small as well as big violations are adjudicated; and, in terms of monitoring, the Community citizen becomes, willy-nilly, a decentralized agent for monitoring compliance by Member States with their Treaty obligations.

The Article 177 system is not complete, however. Not all violations come before national courts; the success of the system depends on the collaboration between national courts and the European Court of Justice; and Member States may, and often have, utilized the delays of the system to defer ruling.

On the other hand, the overall effect of the judicial remedies cannot be denied. The combination of the "constitutionalization" and the system of judicial remedies to a large extent *nationalized* Community obligations and introduced on the Community level the *habit of obedience* and the respect for

---

40. Rasmussen, *Why is Article 173 Interpreted Against Private Plaintiffs?*, 5 EUR. L. REV. 112, 125 (1980).

the rule of law which traditionally is less associated with international obligations than national ones.[41]

It is at this juncture that one may speculate about the most profound difference between the Community legal order and international law generally. The combined effect of constitutionalization and the evolution of the system of remedies results, in my view, in the removal from the Community legal order of the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and countermeasures. The Community legal order, on this view, is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure.[42] Without these features, so central to the classic international legal order, the Community truly becomes something "new."

At the end of the day the debate about the theoretical difference between international law and Community law may have the relevance of some long-lasting theological disputes—i.e. none at all. Whatever the differences in theory, there can be no argument that the Community legal order as it emerged from the Foundational Period appeared in its operation much closer to a working constitutional order, a fact which, as will shortly emerge, had a fundamental impact on the way in which it was treated by its Member States.

---

41. *See* H.L.A. HART, THE CONCEPT OF LAW (1961) (especially chs. 3 & 10); *see also* Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System*, 17 CORNELL INT'L L.J. 1 (1984).

42. The argument for treating the Community as a fully self-contained regime in which states cannot resort to countermeasures rests, briefly, on two lines of reasoning. First, the Treaty itself provides for a comprehensive system of compulsory judicial dispute resolution and remedies, akin to that in a federal state, which would exclude the apparatus of state responsibility and countermeasures, a creature of the self-help horizontality of international law. *Cf.* Submissions of the Commission cited approvingly by the Court in Joined Cases 142 & 143/80, Amministrazione Delle Finanze Dellostato v. Essevi, 1981 E.C.R. 1413, 1431 ("[a]bove all, it must be pointed out that in no circumstances may the Member States rely on similar infringements by other Member States in order to escape their own obligations under the provisions of the Treaty"); Joined Cases 90 & 91/63, EEC Commission v. Luxembourg, 1964 E.C.R. 625; Case 232/78, EEC Commission v. France 1979 E.C.R. 2729. *See also* Ministere Public v. Guy Blanguernon [1990] 2 CMLR 340 ("[A]ccording to settled case law, a Member state cannot justify failure to fulfill its obligation . . . by the fact that other Member States have also failed to fulfill theirs. . . . Under the legal system laid down by the Treaty the implementation of Community law by Member States cannot be subject to a condition of reciprocity.") (p. 6).

Second, even in an extreme case in which a Member State failed to execute a judgment of the European Court, the recourse to countermeasures would inevitably affect individuals removed from the dispute, militating against the very notion of a "new legal order of international law . . . the subjects of which comprise not the only Member States but also their nationals." Case 26/62, N.V. Algemene Transport—en Expeditie Oderneming Van Gend & Loos v. Nederlandse administratie der belastingen, 1963 E.C.R. Recital 2 [hereinafter *Van Gend & Loos*]. *Contra* Simma, *Self Contained Regimes*, 16 NETHERLANDS Y.B. INT'L L. 111, 123-29 (1985) (sustains ultimate recourse, even for Community, to public law and classical state reponsibility).

D. *The Dynamics of Voice in the Foundational Period*

I return to the main theme of this part of the analysis: the relationship between Voice and Exit.

The closure of Exit, in my perspective, means that Community obligations, Community law, and Community policies were "for real." Once adopted (the crucial phrase is "once adopted"), Member States found it difficult to avoid Community obligations. If Exit is foreclosed, the need for Voice increases. This is precisely what happened in the European Community in the Foundational Period. In what may almost be termed a ruthless process, Member States took control over Community decisionmaking.

We may divide the Community decisionmaking process into the following phases: (1) the political impetus for a policy; (2) the technical elaboration of policies and norms; (3) the formulation of a formal proposal; (4) the adoption of the proposal; and (5) the execution of the adopted proposal.

The Treaty's original decisionmaking process had strong supranational elements. The European Commission, the Community body par excellence, had virtually exclusive proposal-making competence (the nearly exclusive "right of initiative"), essentially enabling it to determine the agenda of the Community. The Commission was also responsible for preparing the proposals for formal adoption by the Council of Ministers (comprising the representatives of the Member States) and for acting as the secondary legislature of the Community. The adoption process was supranational, especially in relation to most operational areas, in that it foresaw, by the end of the transitional period, decision by majority voting. Finally, execution (by administrative regulation) was, again, the preserve of the Commission.

During the Foundational Period, in every phase of decisionmaking, the Member States, often at the expense of the Commission, assumed a dominant say. The cataclysmic event was the 1965 crisis brought about by France, which objected to the entry into force of the Treaty provisions that would actually introduce majority voting at the end of the Transitional Period. The crisis was "resolved" by the legally dubious Luxembourg Accord,[43] whereby, de facto, each and every Member State could veto Community proposed legislation. This signaled the rapid collapse of all other supranational features of Community decisionmaking.

The European Council of Ministers, an organ *dehors* the Treaties, assumed the role of giving impetus to the policy agenda of the Community. The Commission formally retained its exclusive power of proposal, but in reality was reduced to something akin to a secretariat. Technical elaboration became

43. The text may be found in B:2 ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW ¶ B10-336. Although the Accord does not as such sanction the veto power, "a convention giving each Member State, in effect, a right of veto in respect of its 'very important interests' was established by the practice of the Council after 1965." *Id.* at ¶ B10-337.

infused with Member State influence in the shape of various groups of national experts.[44] In the proposal formulation process the Commission commenced a practice of conducting a first, unofficial round of negotiations with COREPER, the sub-organ of Council.[45] In addition, as mentioned, the Luxembourg Accord debilitated the Council's voting process, giving each Member State control over proposals and their adoption. Even in the execution of policies, the Commission and Community were "burdened" with a vast range of management and other regulatory committees composed of Member State representatives who controlled that process as well.[46]

Increased Voice is thus a code for a phenomenon of the Member States jointly and severally taking control of decisionmaking, leading to the process by which the original institutional structures foreseen in the Treaties broke down. It caused the so-called *Lourdeur*[47] of the Community process and is believed by many to be the source of much of the Community malaise of that period and beyond.

E. *The Relationship between Exit and Voice in the Foundational Period*

How then do we explain these conflicting developments on the legal and political planes? I suggest explanations at three overlapping levels. The combination captures the richness and significance of the Community experience in the Foundational Period.

First, the developments in each of the respective political and legal domains can be explained as entirely self-referential and self-contained. Thus, for example, the very advent of de Gaulle had a major negative impact in the political realm.[48] Within the realm of law there was a clear internal legal logic which led the Court from, for example, the doctrine of direct effect to the doctrine of supremacy.[49]

---

44. *See, e.g.*, REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6; A. SPINELLI, TOWARDS THE EUROPEAN UNION (1983).

45. COREPER, the Committee of Permananent Representatives, is composed of permanent representatives of the Member States to the Community who fulfill the essential day-to-day role of State representatives to Council. On the role of COREPER within the work of the Council of Ministers, *see, e.g.*, REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6, at 39-41.

46. In passing, I should note that Member State control meant governmental-executive control. One net effect of this process was the creation of the so-called democracy deficit, which I discuss *infra*. *See infra* text following note 61.

47. The heaviness of the decisional process, debilitating to the efficiency of the Council and the Community as a whole. *See, e.g.*, REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6, at 27-29, 37-38.

48. "Throughout the eleven years during which General de Gaulle [who was 'allergic' to anything supranational] remained in power, no notable progress could be made in integration, either in the political domain, the institutional domain, the monetary domain or in the geographical extension of the common market." Greilsammer, *supra* note 1, at 141.

49. If one accepts, as one must, the principle of the uniform application of Community law throughout the Community, a clear link exists whereby a holding of direct effect compels a holding of supremacy. In *Van Gend & Loos*, 1963 E.C.R. Recital 2, the Commission and the Advocate General differed as to whether direct effect existed. The Advocate General argued that since the Community had no principle of supremacy, there was no direct effect. The Commission argued that direct effect would compel supremacy. Thus,

The second explanation is that in the face of a political crisis already manifest in the 1960's, resulting from, *inter alia*, a new posture of France under de Gaulle and declining political will among the Member States to follow the decisionmaking processes of the Treaty and to develop a loyalty to the European venture, the European Court of Justice stepped in to hold the construct together.[50] In this second level of analysis the relationship is unidirectional. The integrating federal *legal* development was a response and reaction to a disintegrating confederal *political* development.

The most fascinating question in this regard is how to explain the responsiveness of the Member State courts to the new judicial architecture. We have already noted that absent such responsiveness—normatively in accepting the new constitutional doctrines and practically in putting them into use through the application of the preliminary reference procedure of Article 177—the constitutional transformation ushered by the European Court would have remained with all the systemic deficiencies of general public international law. One could hardly have talked with credibility about a new legal order.

Due to its nature, reply to the question must remain speculative. In addition, probably no one answer alone can explain this remarkable phenomenon. The following are some possible explanations in brief, all of which may have contributed to the overall enlistment of the judicial branch in Europe.

The first reply, one which holds considerable force, is the most obvious. Courts are charged with upholding the law. The constitutional interpretations given to the Treaty of Rome by the European Court of Justice carried legitimacy derived from two sources: first from the composition of the Court, which had as members senior jurists from all Member States, and second from the legal reasoning of the judgments themselves. One could cavil with this or that decision,[51] but the overall construct had an undeniable coherence, which seemed truly to reflect the purposes of the Treaty to which the Member States had solemnly adhered.

Secondly, it is clear that a measure of transnational incrementalism developed. Once some of the highest courts of a few of the Member States endorsed the new constitutional construct, their counterparts in other Member States heard more arguments that those courts should do the same, and it became more difficult for national courts to resist the trend with any modicum of credibility. The fact that the idea of European integration in itself held a certain appeal could only have helped in this regard.

---

although they disagreed on the result, they acknowledged the linkage between the two.

50. The most radical challenge to the Court as an integrationist activist transcending the political will of the Member States is H. RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986), which also critiques most books on the Court that support this approach. *But see* Cappelletti, *Is the European Court of Justice "Running Wild"?* 12 EUR. L. REV. 3 (1987); Weiler, *The Court of Justice on Trial* (Review Essay) 24 COMMON MKT. L. REV. 555 (1987) (reviewing H. RASMUSSEN, *supra*).

51. Indeed, in several of the key cases, such as *Van Gend & Loos*, the Court's own Advocate General differed from the Court. For an analysis, see Stein, *supra* note 4. *See also* H. RASMUSSEN, *supra* note 50.

Last, but not least, noble ideas (such as the Rule of Law and European Integration) aside, the legally driven constitutional revolution was a narrative of plain and simple judicial empowerment. The empowerment was not only, or even primarily, of the European Court of Justice, but of the Member State courts, of lower national courts in particular. Whereas the higher courts acted diffidently at first, the lower courts made wide and enthusiastic use of the Article 177 procedure. This is immediately understandable both on a simple individual psychological level and on a deep institutional plane. Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation. For many this would be heady stuff. Even in legal systems such as that of Italy, which already included judicial review, the E.C. system gave judges at the lowest level powers that had been reserved to the highest court in the land. Institutionally, 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. And the ingenious nature of Article 177 ensured that national courts did not feel that the empowerment of the European Court of Justice was at their expense.[52]

Finally there is a third, critical, layer, that explains the relationship between the contrasting legal and political developments during the Foundational Period. It might be true that the Court of Justice stepped in in the face of a political decline. But it would be wrong to consider the relationship in exclusively unidirectional terms. The relationship has been bidirectional and even circular. The integrating legal developments at least indirectly influenced the disintegrating political ones.

I suggest a tentative thesis, which perhaps could even be part of a general theory of international lawmaking. This thesis meshes neatly with Hirschman's notion of Exit and Voice and posits a relationship between "Hard Law" and "Hard Law*making*." The "harder" the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law's "opposability" to them. When the international law is "real," when it is "hard" in the sense of being binding not only on but also in states, and when there are effective legal remedies to enforce it, decisionmaking suddenly becomes important, indeed crucial.[53] This

52. In some areas, such as human rights, the high courts of at least some of the Member States needed some judicial persuasion. *See supra* text following note 32 and *infra* text following note 84.

53. For example, in the United Nations, the following structure exists: in the General Assembly, resolutions (in principle, not binding) may be adopted by majority vote; in the Security Council, resolutions (binding) may be vetoed by the Permanent Members. The Permanent Members must be seen, at least partially, as representative of the major interests of the different political groupings in the General Assembly.

The Council of Europe, to a certain extent, with the exception of the human rights apparatus, has a similar construction. Year after year the Council of Europe passes resolutions and treaties in a seemingly effortless stream. This is so because resolutions and draft treaties of the Council of Europe do not, as such, bind the Member States. Members can always "go home," think about individual proposals, and decide to

is a way of explaining what happened in the Community in that period.

What we called, in Hirschmanian terms, the closure of Selective Exit was just that: the process by which Community norms and policy hardened into binding law with effective legal remedies. The increase in Voice was the "natural reaction" to this process. The Member States realized the critical importance of taking control of a decisionmaking process, the outcome of which they would have to live with and abide by. By "natural reaction" I do not mean to imply a simplistic causal relationship. I do not suggest that, as a direct result of the decisions of the Court, in say, *Van Gend & Loos*[54] (in 1963) or *Costa v. ENEL*[55] (in 1964), the French government decided (in 1965) to precipitate the crisis that led to the Luxembourg Accord. I suggest that the constitutionalization process created a normative construct in which such a precipitous political development becomes understandable. Because Community norms in terms of substance were important,[56] and because they were by then situated in a context that did not allow selective application, control of the creation of the norm itself was the only possible solution for individual states.[57]

---

accept or reject them.

A similar linkage exists with relation to conclusion of multilateral treaties and the permissible regime of reservations. Under the old regime, texts of multilateral treaties were adopted, unless otherwise provided, by unanimous vote of the contracting parties (Enhanced Voice). The corollary was that states were highly restricted in their ability to make reservations; these had to be accepted by all parties to the Treaty (Limited Exit). Under the new treaty law—ushered by the Reservation to the Convention on Genocide Case, 1951 I.C.J. 15, and later by the Vienna Convention on the Law of Treaties (1969) Articles 9(2) and 19-21—the text of a multilateral treaty could be adopted by the vote of two-thirds of the states present and voting (Reduced Voice), but the corollary was the greater ease with which States could make reservation to such texts. In some modern conventions such as the 1982 Law of the Sea Convention the unanimous adoption (Enhanced Voice) was again accompanied by a prohibition on reservations (Reduced Exit). A similar development may be noted in relation to the doctrine of the Persistent Objector in the formation of customary law. It is clear that the modern approach to custom is more lenient towards the formation of custom with more limited participation of states in that formation (Reduced Voice). It has been predicted that this in turn will lead to a greater invocation by states of the doctrine of Persistent Objector (Enhanced Exit). *See* Stein, *The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985).

The relationship between decisionmaking and normative outcomes exists beyond the realm of public law and may be found in private law institutions as well. Thus Gilmore, in discussing the evolution of contract theory, contrasts the 19th century model, which embraced a narrow consideration theory (whereby it was difficult to enter into a contract), but also a narrow excuse theory (difficult to get out). In our terms this would correspond to High Voice and Restricted Exit. Twentieth century contract theory saw a move towards "a free and easy approach to the problem of contract formation" (Reduced Voice), which "goes hand in hand with a free and easy approach to the problem of contract dissolution or excuse" (Easy Exit). G. GILMORE, THE DEATH OF CONTRACT 48 (1974).

54. *Supra* note 42.

55. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585.

56. Even if the Community did not, in its initial phases, affect the lives of many citizens, it was crucial in some important economic and political sectors, for example, agriculture.

57. It is difficult to adduce hard proof for this thesis, but the following is evocative. In the British White Paper presented to Parliament by the Prime Minister in July 1971 advocating British accession to the Community, the linkage is rather clear. *See* THE UNITED KINGDOM AND THE EUROPEAN COMMUNITIES, 1971, CMND 4715, ¶¶ 29-30 [hereinafter THE UK AND THE EC]. In MEMBERSHIP OF THE EUROPEAN COMMUNITY: REPORT ON RENEGOTIATION, 1975, CMND 6003, the linkage is actually made. In a section entitled "The Special Nature of the Community," ¶ 118, one finds first an explanation of "The direct applicability of Community law in member countries," ¶ 122, corresponding to our analysis of the constitutionalization and the closure of Selective Exit. Immediately afterwards, in "Power of member governments,"

Historically (and structurally) an equilibrium was established. On the one hand stood a strong constitutional integrative process that, in radical mutation of the Treaty, linked the legal order of the Community with that of the Member States in a federal-like relationship. This was balanced by a relentless and equally strong process, also deviating radically from the Treaty, that transferred political and decisionmaking power into a confederal procedure controlled by the Member States acting jointly and severally.

The linkage between these two facets of the Community may explain and even resolve several issues regarding the process of European integration.

The first issue relates to the very process of constitutionalization in the 1960's and early 1970's, a phenomenon that has been, as noted, at the center of legal discourse about the Community. Indeed, insiders refer to this period, especially in the jurisprudence of the European Court, as the "Heroic Period." But, as we observed, these profound constitutional mutations took place in a *political* climate that was somewhat hostile to, and suspicious of, supranationalism. How then—and this is the dilemma—could changes so profound, which would normally require something akin to a constitutional convention subject to elaborate procedures of diplomatic negotiation and democratic control, occur with a minimal measure of political (read: Member State) opposition?[58] Part of the answer rests, of course, in the fact that constitutionalization during the Foundational Period was judicially driven, thus attaching to itself that deep-seated legitimacy that derives from the mythical neutrality and religious-like authority with which we invest our supreme courts.

The explanation I suggest is derived from the Hard Law/Hard Lawmaking theorem, from the interplay of Exit and Voice. Instead of a simple (legal) cause and (political) effect, this subtler process was a circular one. On this reading, the deterioration of the political supranational decisional procedures, the suspension of majority voting in 1966, and the creation and domination of intergovernmental bodies such as COREPER and the European Council constituted the political conditions that allowed the Member States to digest and

---

¶¶ 123-25, one finds: "[T]he importance of accommodating the interests of individual member states is recognised in the Council's general practice of taking decisions by consensus, so that each member state is in a position to block agreement unless interests to which it attaches importance are met." ¶ 124. The authoritative ENCYCLOPAEDIA OF EEC LAW, in interpreting the Luxembourg Accord and the veto power, states: "the existence of that convention [veto power] was a significant factor in the decision by Denmark and the United Kingdom, and subsequently by Greece, to enter the Communities." B:2 ENCYCLOPAEDIA OF EEC LAW, *supra* note 43, at ¶ B10-337.

In *ERTA*, *supra* note 28, one of the key "constitutionalizing" cases, Advocate General Dutheillet de Lamothe seems to suggest the same type of linkage: "Finally, from the point of view of the development of common policies, are there not grounds for fearing that the Ministers would resist the adoption of regulations which would result in the loss, in cases not provided for by the Treaty, of their authority in international matters?" *Id.* at 292.

58. Our confusion is enhanced if we consider that the changes introduced by the Single European Act in 1986 were *per se* less radical, and yet necessitated a tortuous political process, including a constitutional challenge in the supreme court of one of the Member States. *See* Croty v. An Taoiseach, 49 Common Mkt. L.R. 666 (1987) (Irish Supreme Court).

accept the process of constitutionalization. Had no veto power existed, had intergovernmentalism not become the order of the day, 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.

Our speculation should not stop here; while this description of the legal-political equilibrium may explain how and why the Member States were willing to digest, or accept, the constitutional revolution, it does not explain their interest in doing so. A theory of state action without interest analysis is incomplete. What, then, was the interest of the Member States in not simply accepting the changing morphology of the Community but actually pursuing it?

The fundamental explanation is that the Member States, severally and jointly, balanced the material and political costs and benefits of the Community. Both the Community vision and its specific policy agenda were conceived as beneficial to the actors. It may, at first sight, seem reasonable when thinking about the Community and its Member States to conceive of this relationship as a zero-sum game: the strengthening of the Community must come "at the expense" of the Member States (and vice-versa). However, the evolution of the Community in its Foundational Period ruptures this premise of zero-sum. The strengthening of the Community was accompanied by the strengthening of its Member States.[59] Stanley Hoffmann gave a convincing political explanation of this phenomenon.[60] But the phenomenon also derives from the unique legal-political equilibrium of the Community structure.

The interplay between the Community normative and decisionmaking regimes, as explained above, gave each individual Member State a position of power brokerage it never could have attained in more traditional fora of international intercourse. The constitutional infrastructure "locked" the Member States into a communal (read: Community) decisionmaking forum with a fairly rigorous and binding legal discipline. The ability to "go it alone" was always somewhat curtailed, and in some crucial areas, foreclosed. The political superstructure, with its individual veto power and intergovernmental discourse, gave each Member State a decisive position of influence over the normative outcome.

Finally, in at least an indirect way, these basic features of the Foundational

---

59. It is easy to identify the interest that the small states would have in this structure: their weight in, and power over, decisionmaking in inherently interdependent policy areas becomes incomparably larger compared to outside arms-length negotiations. In principle this is true also for larger Member States. *Cf.* THE UK AND THE EC, *supra* note 57, at 7-14. In addition, the larger Member States had particular interests that could be vindicated effectively through the Community. Examples are the French interest in a European-wide common agricultural policy and the German interest in relegitimation.

60. Hoffmann, *Reflections on the Nation-State in Western Europe Today*, in THE EUROPEAN COMMUNITY—PAST, PRESENT & FUTURE 21, 22 (L. Tsoukalis ed. 1983).

Period accentuate and explain a permanent feature of the Community: its so-called democracy deficit.[61]

As already mentioned, the reference to "Member State" as a homogeneous concept/actor is misleading in several ways[62]—and increasingly so in an ever more complex Community.[63] In discussing the Democracy Deficit it is more accurate to speak instead of the "government," i.e. the executive branch, of each Member State. Admittedly, the Treaty itself laid the seeds for the Democracy Deficit by making the statal executive branch the ultimate legislator in the Community. The decisionmaking Council members are first of all members of their respective executive branches and thus directly representative of their home state governments. The only democratic check on Council decisions is a submission to the meek control of the European Parliament. Direct democratic accountability, by design or by default, remains vested in national parliaments to whom the members of the Council are answerable.

The mutations of the legal structure and the political process in the Foundational Period impacted this basic deficiency in a variety of ways.

The process of constitutionalization, hardening Community measures into supreme, often directly effective, laws backed with formidable enforcement mechanisms, meant that once these laws were enacted, national parliaments could not have second thoughts or control their content at the national, implementing level. The only formal way in which accountability could be ensured would be by tight ex ante control by national parliaments on the activities of ministers in Community fora. This has proved largely not feasible.[64] The net result is that the executive branches of the Member States often act together as a binding legislator outside the decisive control of any parliamentary chamber.

The changes in the decisionmaking processes meant that it was not simply the Voice of the Member States that was enhanced, but the Voice of "governments." It is not entirely fanciful to surmise that the acceptability of the Community system in the Foundational Period was not simply because it vindicated the interests of Member States but also because it enhanced the power of governments (the executive branch) per se.

---

61. *See* D. MARQUAND, PARLIAMENT FOR EUROPE 64-66 (1979); *see also Report drawn up on behalf of the committee on Institutional Affairs on the democratic deficit in the European Community*, PE Doc. No. A 2-276/87, (Feb. 1, 1988) [hereinafter *Toussaint Report*].

62. *See supra* note 7.

63. *See* F. SNYDER, *supra* note 7, at 32-36.

64. *See* Sasse, *The Control of the National parliaments of the Nine over European Affairs*, in PARLIAMENTARY CONTROL OVER FOREIGN POLICY 137 (A. Cassese ed. 1980). Denmark may be the exception. *See* Mendel, *The Role of Parliament in Foreign Affairs in Denmark* in PARLIAMENTARY CONTROL OVER FOREIGN POLICY, *supra*, at 53, 57.

F. *Conclusions to the Foundational Period*

The Foundational Period has been characterized by legal scholars as an heroic epoch of constitution-building in Europe, as a time of laying the foundation for a federal Europe. It has been described by political scientists as a nadir in the history of European integration, as an era of crumbling supranationalism. The thrust of my argument has been that a true understanding of this period can only be achieved by a marriage of these two conflicting visions into a unified narrative in which the interaction of the legal and the political, and the consequent equilibrium, constitute the very fundamental feature of the Community legal structure and political process.

This very feature helps explain the uniqueness and stability of the Community for much of its life: a polity that achieved a level of integration similar to that found only in full-fledged federal states and yet that contained unthreatened and even strengthened Member States.

II. 1973 TO THE MID-1980'S: MUTATION OF JURISDICTION AND COMPETENCES

A. *Introduction*

The period of the mid-1970's to the mid-1980's is traditionally considered a stagnant epoch in European integration. The momentum created by the accession of Great Britain, Ireland, and Denmark did not last long. The Oil Crisis of late 1973 displayed a Community unable to develop a common external posture. Internally the three new Member States, two of which, the U.K. and Denmark, were often recalcitrant partners, burdened the decisionmaking process, forcing it to a grinding pace. It is not surprising that much attention was given in that period to proposals to address a seriously deteriorating institutional framework and to relaunch the Community.[65]

And yet it is in this politically stagnant period that another large scale mutation in the constitutional architecture of the Community took place, a mutation that has received far less attention than the constitutional revolution in the Foundational Period. It concerned the principle of division of competences between Community and Member States.

---

65. *See* REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6; *Spierenburg Report*, *supra* note 6; The Six Reports and Resolution of the European Parliament on Institutions of July 9, 1981 (Hänsch, Diligent, Baduel Glorioso, Van Miert, Elles, Antoniozzi); *The institutional system of the Community: Restoring the balance*, BULL. EUR. COMMUNITIES (Supp. 3/82) 5; *French government memorandum on revitalization of the Community*, 14 BULL. EUR. COMMUNITIES (11-1981) 92; *German Italian initiative: Draft European Act*, 14 BULL. EUR. COMMUNITIES (11-1981) 87 (*Genscher-Colombo Initiative*); *Report on European political cooperation*, BULL. EUR. COMMUNITIES (Supp. 3/81) 14. See generally, on that epoch and these proposals, Weiler, *The Genscher-Colombo Draft European Act: The Politics of Indecision*, 6 J. EUR. INTEGRATION 129 (1983).

In most federal polities the demarcation of competences between the general polity and its constituent units is the most explosive of "federal" battlegrounds. Traditionally, the relationship in nonunitary systems is conceptualized by the principle of enumerated powers. The principle has no fixed content and its interpretation varies from system to system; in some it has a stricter and in others a more relaxed construction. Typically, the strength by which this principle is upheld (or, at least, the shrillness of the rhetoric surrounding it) reflects the strength of the belief in the importance of preserving the original distribution of legislative powers as a defining feature of the polity. Thus, there can be little doubt about the very different ethos that underscored the evolution of, for example, the Canadian and U.S. federalisms, in their formative periods and beyond, regarding enumeration. Nowhere is this different ethos clearer than in the judicial rhetoric of enumeration. The dicta of Lord Atkin[66] and Chief Justice Marshall[67] concerning powers are the theater pieces of this rhetoric. Likewise, the recurring laments over the "death of federalism"[68] in this or that federation are typically associated with a critique of a relaxed attitude towards enumeration and an inevitable shift of power to the center at the expense of the states.

The different views about the strictness or flexibility of enumeration reflects a basic understanding of federalism and integration. Returning to the Canadian/U.S. comparison, we find the Atkin and Marshall dicta reconceptualized as follows: Wade, in the context of the Canadian experience, suggests that:

> 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 the whole federal situation [is] that neither side, so to speak, should have it in its power to invade the sphere of the other.[69]

In contrast, Sandalow, reflecting on the U.S. experience, suggests that:

---

66. On enumeration, Lord Atkin stated:

> No one can doubt that this distribution [of legislative powers between the Dominion and the Provinces] . . . is one of the most essential conditions, probably the most essential condition [in the Canadian federal arrangement] . . . . While the ship of state now sails on larger ventures . . . she still retains the watertight compartments which are an essential part of her original structure.

A.-G. Canada v. A.-G. Ontario, 1937: 1 D.L.R. 673, 682-84 (P.C.).

67. Over a century before, Chief Justice Marshall asserted: "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 [C]onstitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

68. *E.g.*, van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

69. Wade, *Amendment of the Constitution of Canada: The Role of the United Kingdom Parliament* in BRITISH NORTH AMERICA ACTS: THE ROLE OF PARLIAMENT, 2 HC 42, at 102, 108 (1981) (memorandum and evidence submitted to the Foreign Affairs Committee of the House of Commons).

> The disintegrative potential of [questions concerning the legality of governmental action] is especially great when they [challenge] the distribution of authority in a divided or federal system. . . . [Where] Congress determines that a national solution is appropriate for one or another economic issue, its power to fashion one is not likely to be limited by constitutional divisions of power between it and the state legislatures.[70]

These differences in approach could be explained by formal differences in the structure of the British North American Act (which predated the current Canadian Constitution) as compared to the U.S. Constitution. But they also disclose a principled difference in the way the two systems value enumerated powers within the federal architecture, a difference between ends and means, functions and values. In the Wade conception of the Canadian system the division of powers was considered a per se value, an end in itself. The *form* of divided governance was considered to be on par with the other fundamental purposes of a government, such as obtaining security, order, and welfare, and was viewed as part of its democratic architecture. In the United States, the federal distribution retained its constitutional importance as the system evolved. In practice, however, it would seem that the principle of division was subjected to higher values and invoked as a useful *means* for achieving other objectives of the U.S. union. To the extent that the division became an obstacle for the achievement of such aims it was sacrificed.[71] We may refer to this approach as a functional one. The dichotomy is, of course, not total; we find strands of both the functional and per se approaches in each of the systems. Nevertheless, clear differences exist in the weight given to each of the strands and in the evolution of the two federations. In addition, the legal debate about division of powers was (and remains) frequently the code for battles over raw power between different loci of governance, an aspect ultimately of crucial importance.

In Europe, the Treaty itself does not precisely define the material limits of Community jurisdiction.[72] But it is clear that, in a system that rejected a "melting pot" ethos and explicitly in the preamble to its constituent instrument affirms the importance of "an ever closer union among the *peoples* of Europe," that saw power being bestowed by the Member State on the Community (with residual power thus retained by the Member States) and consecrated in an international Treaty containing a clause that effectively conditions revision of the treaty on ratification by parliaments of all Member States,[73] the "original" understanding was that the principle of enumeration would be strict and that

70. Sandalow, *The Expansion of Federal Legislative Authority*, in COURTS AND FREE MARKETS 49, 49-50 (1982) (I have reversed the order of quoted sentences).

71. These developments have had their critics. *E.g.* van Alstyne, *supra* note 68; *cf.* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

72. Articles 2 and 3 of the EEC Treaty set out the "tasks" or "purposes" of the Community, from which its competences are derived in rather open-textured language.

73. EEC Treaty, art. 236.

jurisdictional enlargement (*rationae materia*) could not be lightly undertaken. This understanding was shared not only by scholars,[74] but also by the Member States and the political organs of the Community, as evidenced by their practices,[75] as well as by the Court of Justice itself. In its most famous decision, *Van Gend & Loos*, the Court affirmed that the Community constitutes "a new legal order of international law for the benefit of which the states have limited their sovereign rights, *albeit in limited fields*."[76] And earlier, in even more striking language, albeit related to the Coal and Steel Community, the Court explained that,

> [t]he Treaty rests on a derogation of sovereignty consented by the Member States to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those.[77]

In light of the Member States' vigorous reaction to the constitutional mutation of the Community during the Foundational Period, seizing effective control of Community governance, and the fact that a lax attitude to enumeration would indeed seem to result in a strengthening of the center at the expense of the states, we would expect that this "original" understanding of strict enumeration would be tenaciously preserved.

I characterize the period of the 1970's[78] to the early 1980's as a second and fundamental phase in the transformation of Europe. In this period the Community order mutated almost as significantly as it did in the Foundational Period. In the 1970's and early 1980's, the principle of enumerated powers as a constraint on Community *material* jurisdiction (absent Treaty revision)

---

74. Judge Pescatore, who later became one of the formidable champions of an expansive and evolutive view of the Community, offered a classic endorsement of this original narrow understanding in at least some of its aspects. Pescatore, *Les relations extérieures des Communautés europeenne*, RECUILS DES COURS [RDC] I [1961-II].

75. For example, in the enactment of Council Regulation No. 803/68, O.J. (L 148) 6, 6 (June 28, 1968), relating to the customs value of goods, a matter at the heart of the common market and the economic sphere of Community activity, the Council resorted to Article 235 of the Treaty as legal basis, not believing it had inherent authority in the Customs Union provisions of the Treaty.

76. *Van Gend & Loos* (emphasis added).

77. Joined Cases 7/56, 3-7/57, Dinecke Algera v. Common Assembly of the European Coal and Steel Community, 1957-58 E.C.R. 39 [hereinafter *Algera*].

78. 1973 seems an appropriate signpost since it followed the European Council meeting of October 1972 in which an explicit decision was made to make full (and on my reading, expansive) use of Article 235 as part of general reinvigoration of the Community. This process coincided with the accession of the three new Member States. Declaration of Paris Summit, BULL. EUR. COMMUNITIES (10-1972).

substantially eroded and in practice virtually disappeared.[79] Constitutionally, no core of sovereign state powers was left beyond the reach of the Community. Put differently, if the constitutional revolution was celebrated in the 1960's albeit "in limited fields," the 1970's saw the erosion of these limits. As an eminent authority assesses the Community today: "There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."[80]

The 1970's mutation I describe went largely unnoticed by the interpretive communities in Europe: the Member States and their governments, political organs of the Community, the Court and, to an extent, academia.[81] This lack of attention is all the more ironic and striking when it is noted that the interaction among those interpretive communities brought about this fundamental mutation. To be sure, the expansion of Community jurisdiction in the 1970's and early 1980's was widely observed. Indeed, this growth was, as mentioned above, willed by all actors involved.

What was not understood was that, during this process of growth and as a result of its mechanics, the guarantees of jurisdictional demarcation between Community and Member States eroded to the point of collapse. This cognitive dissonance in accounts of the period is so striking that I shall attempt to explain not only the legal-political process by which strict enumeration eroded and practically disappeared, but also the reasons so fundamental a change in the Community architecture was not obvious to all.[82]

---

79. I should emphasise that my analysis is confined to the question of material competences. Organic and institutional changes are jealously guarded. That, as shall emerge, is part of my thesis. In other words, it is the fact that organic and institutional changes are kept under tight control (essentially conserving the prerogatives of the Member States gained in the Foundational Period) that enables the Member States to be lax about material demarcation.

80. Lenaerts, *supra* note 10, at 220. Note that Lenaerts refers in this statement to what I have termed in this article "absorption."

81. *But see* Tizzano, *Lo sviluppo delle competenze materiali delle Comunita europee* RIVISTA DIR. EUR. 139 (1981); Sasse & Yourow, *The Growth of Legislative Power of the European Communities* in COURTS AND FREE MARKETS 92 (1982).

82. The erosion of jurisdictional limits did not mean that the Community and its Member States would never resort to Treaty amendment. Clearly changes as to the method of exercising jurisdiction such as the shift from unanimity to majority voting *ex* Article 100 would require such amendment. Not all Treaty amendment concerns jurisdictional limits. More interestingly, even in areas where jurisdiction was already clearly asserted, such as in the environmental field, the Member States would, for example in the Single European Act, "reinvent the wheel." And in matters concerning monetary and economic union they are now negotiating Treaty amendments to give effect to the new monetary constructs. My claim is that this has become their choice—and if they had wished they could have introduced the new monetary regime *ex* Article 235, easily showing, in the light of other practice concerning 235—that it was necessary for the good functioning of the common market. There are however many advantages to pursuing the Treaty amendment route: to mention just two, the new regime becomes entrenched and cannot be changed by simple legislation (something important for, say, the independence of the proposed central European bank), and it enjoys a higher level of political legitimacy since it calls for ratification by all Member State parliaments.

It is also important to understand that I am not claiming that in this period jurisdictional expansion was *quantitatively* impressive. This would be strange in a Community that was decisionally stagnant. In fact there were many areas of explicit Community competence, such as transport regulation, where nothing was done. The interesting tale concerns the variety of new fields into which the Community moved, each on its own of relatively little importance. In fact, it could be argued that these activities emerged as a

Naturally, because the process itself went largely unnoticed when it occurred, its far-reaching consequences and significance were not appreciated at the time. It is a general theme of this article that the first series of mutations in the Foundational Period conditioned those that followed in the 1970's. I additionally argue that the consequences and significance of the then-unnoticed mutations in the 1970's are becoming acutely transparent today in the final phase of Community evolution. Together with the early mutations, the mutations of the 1970's define the very significance of the Community's evolution.

B. *A Typology of Jurisdiction in the European Community*

In mapping the original understanding of the distribution of competences of the Community and Member States in schematic terms, the following picture emerges.

(1) there are areas of activity over which the Community has no jurisdiction;

(2) there are areas of activity that are autonomous to the Community (therefore beyond the reach of the Member States' jurisdiction as such); and

(3) there are large areas of activity where Community and Member State competences overlap.

A very strict concept of enumeration would suggest that this jurisdictional demarcation, whatever its precise content, could and should change only in accordance with the provisions for Treaty amendment. Jurisdictional mutation in the concept of enumeration would occur where there is evidence of substantial change in this map without resort to Treaty amendment.

In fact, during the period in question, mutation thus defined occurred. Moreover, it was not occasional or limited, but happened in a multiplicity of forms, the combination of which leads to my claim of erosion of constitutional guarantees of enumeration. The picture may best be grasped by thinking of mutation as occurring in four distinct categories or prototypes.

---

distraction, given the Community's inability to deal with its truly pressing problems. But the cumulative effect of all these activities was significant.

C. *The Categories of Mutation*[83]

1. *Extension*

Extension is mutation in the area of autonomous Community jurisdiction. The most striking example of this change is the well-known evolution of a higher law of human rights in the Community. As already mentioned, the Treaty contains elaborate provisions for review of Community measures by the European Court of Justice.[84] It does not include a "Bill of Rights" against which to measure Community acts, nor does it mention, as such, human rights as a grounds for review. Yet, as mentioned earlier, in a process starting in 1969 but consolidated in the 1970's,[85] the Court constructed a formidable[86] apparatus for such review. Despite legal and policy rationales, such a development could not have occurred had the Court taken a strict view of permissible change in the allocation of competences and jurisdiction. Had the Court taken such a view, such a dramatic change could have taken place only by Treaty amendment.

An equally striking example from an area of autonomous Community jurisdiction concerns the standing of the European Parliament. The plain and simple language of the Treaty would seem to preclude both action against and by the European Parliament.[87] Yet the Court, in an expansive, systemic (and, in my view, wholly justified[88]) interpretation of the Treaty, first allowed Parliament to be sued[89] and then, after some hesitation,[90] granted Parliament standing to sue other Community institutions.[91]

The category of extension requires four ancillary comments.

First, it must be emphasized that the analysis of extension (and indeed the other categories of mutation) is intended, for the time being, to be value-neutral. I do not present these examples as a critique of the Court "running wild" or

---

83. It is important that we do not use the term "mutation" loosely. As a "Framework Document," the Treaty itself often calls for, or allows, change without Treaty amendment. I want to reserve the term mutation to those instances where the change is fundamental. Obviously, as shall be seen, when mutation does occur it is always justified by some reference to the Treaty and its "implicit" principles. It is important to understand that I do not make a normative or interpretative argument for some construction of a legal basis in the Treaty. The strict "legal" evaluation is of little interest in my view. My point is that the relevant interpretative communities, by choosing to opt for the wide and flexible reading of the Treaty, have transformed strict enumeration into a very flexible notion, practically emptied of material content in the Community.

84. *See supra* text surrounding note 32.

85. For a comprehensive description and analysis of human rights jurisprudence in the Community, see Clapham, *European Union—The Human Rights Challenge* in 1 HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW (1991).

86. For a critique, see Clapham, *supra* note 85; Weiler, *supra* note 29.

87. *See* EEC Treaty, art. 173.

88. Weiler, *Pride and Prejudice—Parliament v. Council*, 14 EUR. L. REV. 334 (1989).

89. Parti Ecologiste "Les Verts" v. European Parliament, 1986 E.C.R. 1339.

90. Case 302/87, Comitology Decision of September 27, 1988 (not yet reported).

91. Case 70/88, Tchernobyl Decision of May 22, 1990 (not yet reported).

exceeding its own legitimate interpretative jurisdiction. Evaluating these developments, to which I shall return later, involves considerations far wider and weightier than the often arid discussion of judicial propriety. What is important, if there is any force in my argument, is the recasting of known judicial developments, usually analyzed in other legal contexts,[92] as data in the analysis of jurisdictional mutation.

Second, in the case of extension, the principal actor instigating extension was the Court itself, although, of course, at the behest of some plaintiff. Other actors played a more passive role. The action of the Court must be viewed simultaneously as reflective of a flexible, functional approach to enumeration and constitutive of such an ethos in the Community.

Third, this jurisdictional mutation, despite the radical nature of the measures themselves, was rather limited, since it was confined to changes within the autonomous sphere of the Community and did not have a direct impact on the jurisdiction of the Member States. Indeed, the human rights jurisprudence actually curtailed the freedom of action of the Community.[93] The changes of standing concerning the Parliament were similar in potentially chilling the legislative power of Commission and Council, although in a more muted form.

Finally, and perhaps not altogether surprisingly, these developments and others like them were, with limited exceptions, both welcomed and accepted by the different interpretative communities in Europe, partly because they were seen as pertaining to the other legal categories and partly because they did not encroach directly on the Member State jurisdiction. (In any event, these developments were hardly perceived as pertaining to the question of jurisdictional demarcation.)

2. *Absorption*

Absorption is a far deeper form of mutation. It occurs, often unintentionally, when the Community legislative authorities, in exercising substantive legislative powers bestowed on the Community, impinge on areas of Member State jurisdiction outside the Community's explicit competences.

One of many striking illustrations[94] is offered by the events encapsulated in the *Casagrande* case.[95]

Donato Casagrande, an Italian national, son of Italian migrant workers, lived all his life in Munich. In 1971 and 1972 he was a pupil at the German Fridtjof-

---

92. Thus the human rights jurisprudence has been discussed essentially as part of a debate on judicial review and not seen as an issue of enumerated powers. Likewise, the issue of Parliamentary standing has been seen as an issue of procedure and institutional balance but, again, not as one of enumeration ethos.

93. Indirectly of course, this curtails the freedom of the Member States acting qua Council of the Community.

94. See, e.g., Joined Cases 6 & 11/69, EEC Commission v. France, 1969 E.C.R. 523 and the discussion thereof in Lenaerts, *supra* note 10.

95. Case 9/74, Casagrande v. Landeshauptstadt München, 1974 E.C.R. 773 [hereinafter *Casagrande*].

Nansen-Realschule. The Bavarian law on educational grants (BayAföG) entitles children who satisfy a means test to receive a monthly educational grant from the Länder. The city of Munich refused his application for a grant relying on Article 3 of the same educational law, which excluded from entitlement all non-Germans except stateless people and aliens residing under a right of asylum.

Casagrande, in an action seeking a declaration of nullity of the educational law, relied principally on Article 12 of Council Regulation 1612/68.[96] The article provides that "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." Further, the Member States must encourage "all efforts to enable such children to attend these courses under the best possible conditions."[97]

The Bayerisches Verwaltungsgericht, in an exemplary understanding of the role of review of the European Court of Justice, sought a preliminary ruling on the compatibility of the Bavarian educational provision with Article 12 of the Council Regulation.

The submission of the Bavarian public prosecutor's office (Staatsanwaltschaft), which intervened in the case, illustrated the issue of powers and mutation well. It was submitted that the Council exceeded its powers under Articles 48 and 49 of the EEC Treaty.[98] These Articles concern the conditions of workers. "Since individual educational grants come under the sphere of educational policy [in respect of which the Council has no jurisdiction] . . . it is to be inferred that the worker can claim the benefit of assimilation with nationals [as provided in Article 12] only as regards social benefits which have a direct relation with the conditions of work itself and with the family stay."[99]

Under this view, Article 12 of the Regulation must be read as entitling children of migrants to be admitted to schools under the same conditions as children of citizens, but not to receive educational grants. If we give the Bavarian public prosecutor's assertion its strongest reading, he denied the very possibility of a conflict between Article 12 and the Bavarian BayAföG, since Article 12 simply could not apply to educational grants. Under a weaker interpretation, he was pleading for a narrow interpretation of the Article 12 provision because of the jurisdictional issue. Underlying this submission was the deeper ground that if education is outside the Community competence, then the Regulation itself transgressed the demarcation line. In any event, the interpretation sought by Casagrande could not stand.

---

96. 1968 O.J. (L 257) 2.
97. *Id.* at art. 12.
98. *Casagrande*, 1974 E.C.R., at 776.
99. *Id.*

How then did the Court deal with the question? One can detect two phases in the process of judicial consideration. The first phase consisted of an interpretation of the specific Community provision in an effort to understand its full scope. While engaging in this phase the Court acted as if it were in an empty jurisdictional space with no limitations on the reach of Community law. Not surprisingly, the Court's rendering of Regulation 12 led it to the conclusion that the Article did cover the distribution of grants.[100]

In the second phase of analysis the Court addressed the jurisdictional mutation problem.[101] We must remember that the primary ground for the illegality of a measure, the infringement of the Treaty, certainly includes jurisdictional competence.[102] The Court first acknowledged that "educational and training policy is not *as such* included in the spheres that the Treaty had entrusted to the Community institutions."[103] The allusion to the Community institutions is important: the case after all deals with an issue of "secondary legislation" enacted by the political organs. But, in the key, although oblique, phrase the Court continued, "it does not follow that the exercise of powers transferred to the Community," enlarging thus the language from Community institutions to the Community as a whole and hence from secondary legislation to the entire Treaty, "*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*."[104] Now we understand the importance of the two-phased judicial analysis.

In phase one the Court explained the meaning of a Community measure. The interpretation may be teleological but not to the same extent as the Court's performance in the evolution of the higher law of human rights. Absorption is in this way distinguishable from extension. In the second phase, the Court stated that to the extent that national measures, even in areas over which the Community has no competence, conflict with the Community rule, these national measures will be absorbed and subsumed by the Community measure. The Court said that it was not the Community policy that was encroaching on national educational policy; rather, it was the national educational policy that was impinging on Community free-movement policy and thus must give way.

The category of absorption also calls for some interim commentary. First, in this higher form of mutation at least two interpretative communities are playing a role in the erosion of strict enumeration: principally the legislative interpretative community, comprising in this case the Commission, Parliament, and the Council (with a decisive role for the governments of the Member

100. *Casagrande*, at Judgment Recitals 8, 9.
101. *Casagrande*, at Judgment Recitals 10-15.
102. *See* EEC Treaty, art. 173.
103. *Casagrande*, at Judgment Recital 12 (emphasis added).
104. *Id.* (emphasis added).

States), and the judicial one.[105] This is important in relation to the question of the acceptance of the overall mutation of jurisdictional limits. As a simple examination of extension might have indicated, it cannot be seen as a judicially led development, although legal sanctioning by the Court plays an important role in encouraging this type of legislation in future cases.

Second, the limits of absorption are important. Although absorption extends the effect of Community legislation outside the Community jurisdiction, 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.

This distinction should not diminish the fundamental importance of absorption and its inclusion as an important form of mutation. This can be gauged by trying to imagine the consequences of a judicial policy that would deny this possibility of absorption. The scope of effective execution of policy over which the Community had direct jurisdiction would, in a society in which it is impossible to draw neat demarcation lines between areas of social and economic policy, be significantly curtailed. But at the same time there is a clear sacrifice and erosion of the principle of enumeration. And, of course, the absorption doctrine invokes a clear preference for Community competence over Member State competence. In a sense the language of the Court suggests a simple application of the principle of supremacy. But this is not a classical case of supremacy. After all, in relation to issues of jurisdiction, supremacy may only mean that each level of government is supreme in the fields assigned to it. Here we have a case of conflicts of competences. The Court is suggesting that in such conflicts Community competence must prevail. This is the doctrinal crux of absorption.

3. *Incorporation*[106]

The term is borrowed from the constitutional history of the United States and denotes the process by which the federal Bill of Rights, initially perceived as applying to measures of the federal government alone, was extended to state action through the agency of the Fourteenth Amendment. The possibility of incorporation within the Community system appears at first sight improbable. We noted already the absence of a Community "Bill of Rights." Community incorporation would entail not one but two acts of high judicial activism. First, the creation of judge-made higher law for the Community, and then its application to acts of the Member States.

---

105. The case highlights the fiction of assimilating government with Member State. Bavaria is as much a part of the Federal Republic of Germany as the central German government.

106. I dealt with this issue extensively in Weiler, *The European Court at a Cross Roads: Community Human Rights and Member State Action*, in DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION 821 (F. Caportorti ed. 1987), and present here merely the bare bones of the argument.

Looking at this issue not through the prism of human rights discourse, but as a problem of jurisdictional allocation, suggests that incorporation may not, after all, be so inconceivable. In the field of human rights, incorporation invokes no more than a combination of extension and absorption. The frequency and regularity by which these two other forms of Community mutation are exercised suggest that incorporation is a distinct possibility.

The interplay of the actors in pushing for this form of mutation is interesting. In an early case, the Court, of its own motion, seemed to open the door to this development. In subsequent cases, the Commission pushed hard for such an outcome, but the Court's responses have been mixed. In some cases it seemed to be nodding in this direction, while in other cases it firmly rejected the possibility.[107]

I cannot therefore present incorporation as a *fait accompli* in the evolving picture of mutation of jurisdictional limits. But the concept, even in its current embryonic Community form, is important for two reasons.

First, it shows again the internal interplay of the various actors in pushing the frontiers of Community jurisdiction. At times it is the Court; at other times the legislative organs in conjunction with the Court; at other times still the Commission trying, as in the *Cinéthèque* case, to enlist the Court's support (in this case rather unsuccessfully[108]).

Second, it shows the dynamics of the of enumeration. That incorporation could be tried, more than once—at first causing a split between the opinions of the Court and its Advocate General, which later developed into a somewhat bifurcated jurisprudence[109]—is only conceivable in a legal-political environment which has already moved, through the agencies of extension and incorporation, far away from a strict concept of enumeration.

4. *Expansion and its Causes*

Expansion is the most radical form of jurisdictional mutation. Whereas absorption concerned Community legislation in a field in which the Community had clear original jurisdiction, and describes a mutation occurring when the effects of such legislation spill over into fields reserved to the Member States, expansion refers to the case in which the original legislation of the Community "breaks" jurisdictional limits.

I have already alluded to the expansive approach to implied powers adopted by the Court as part of the constitutionalization process in the Foundational Period. If expansively applied, the implied powers doctrine may have the de facto consequence of permitting the Community to legislate and act in a manner

---

107. For cases and analysis, see Weiler, *supra* note 106.

108. *See* Case 60-61/84, Cinéthèque S.A. v. Federation National des Cinémas Francais, 1985 E.C.R. 2605.

109. For discussion, see Weiler, *supra* note 106, at 824-30.

not derived from clear grants of power in the Treaty itself. This would not constitute veritable expansion. The implied powers doctrine is not veritable expansion because typically the powers implied are in an area in which the Community clearly is already permitted to act, and the powers to act would be construed precisely as "instruments" enabling effective action in a permissible field. Thus, in the leading case of implied powers,[110] there was no question that the Community could act in the field of transport policy; what the Court did was to enable it, within this field, to conclude international agreements.

Even though the implied powers doctrine cannot be construed strictly as true expansion as defined above, it is important in this context. First, the way a court approaches the question of implied powers is in itself an indirect reflection of its attitude toward enumeration. Even if implying powers as such does not constitute a mutation, a court taking a restrictive approach to enumeration will tend to be cautious in implying powers, whereas a court taking a functional, flexible approach to enumeration will be bolder in its implied powers jurisprudence. It is interesting that the European Court of Justice itself has changed its attitude toward implied powers and, by implication, toward enumeration. In its very early jurisprudence, it took a cautious and reserved approach to implied powers; it was really only in a second phase that it changed direction on this issue as part of the process of constitutionalization.[111]

Second, even though, strictly speaking, the implied powers doctrine is intended to give the Community an instrument in a field within which it already has competence, these distinctions often break down in reality. When the Court in the 1970's considered and construed the powers that flowed from the common commercial policy, it did, even on a very conservative reading, extend the jurisdictional limits of the Community.[112]

It is, however, in the context of Article 235 of the Treaty that we find the locus of true expansion. Article 235 is the "elastic clause" of the Community—its "necessary and proper" provision. 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

110. *See ERTA*, *supra* note 28, at 273, 290.

111. *Compare Algera*, *supra* note 77 (denying right to set aside administrative measures) *with ERTA*, *supra* note 28 (establishing right to enter into agreements with third countries).

112. *See, e.g.*, Opinion 1/78, Opinion given pursuant to the second subparagraph of Article 238(1) of the EEC Treaty, 1979 E.C.R. 2871 9 (*Rubber*). The Council (and France and Britain as interveners) claimed that conclusion of the Rubber Agreement, as an instrument of Cooperation and Development which also impinges on broader strategic concerns of the Member States, was outside the scope and competence of the Community's Common Commercial Policy. The Court gave an extensive reading to the limits of the exclusive (!) Common Commercial Policy and held that, "it is clear that a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connexion with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade." *Id.* at 2912, Recital 43.

powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

On its face, this is no more than a codified version of an implied powers doctrine; clearly, Article 235 should not be used to expand the jurisdiction of the Community (which derives from its objectives and functional definition as explicitly and implicitly found elsewhere in the Treaty) by adding new objectives or amending existing ones. Since however the language of the Article is textually ambiguous, and concepts such as "objectives" are by their nature open-textured, there has been a perennial question how far beyond the literal Treaty definition of the Community's spheres of activities and powers the use of Article 235 will permit without actually amending the Treaty.

The history of Article 235 in legislative practice, judicial consideration, and doctrine includes several changes which reflect the changes in the development of the Community itself.

In the period 1958 to 1973, Article 235 was used by Community institutions relatively infrequently[113] and, when used, was usually narrowly construed. Under the restrictive view, shared by all interpretative communities at the time,[114] the function of Article 235 was to compensate *within an area of activity explicitly granted by the Treaty* for the absence of an explicit grant of legal power to act. Two examples demonstrate the early conception of the Article. One was the enactment on the basis of Article 235, in 1968, of Regulation 803/68 on Customs Valuation, setting out the criteria by which the value of imported goods to the Community for the purpose of imposing customs duties would be calculated. Implicit in this recourse to Article 235 was the belief that:

(1) customs valuation was necessary to attain the objectives of the Treaty; but

(2) since the reach of the Community spheres of activity had to be narrowly construed, one could not use the common commercial policy or Article 28 as a legal basis, as these did not explicitly cover customs valuation.

A second example is the use of Article 235 as a legal basis for extending the list of food products in Annex II to the Treaty.[115] Here it was clear that

113. For quantitative analysis, see J. WEILER, IL SISTEMA COMUNITARIO EUROPEO 195 (1985).

114. *E.g.*, Usher, *The Gradual Widening of European Community Policy on the Basis of Article 100 and 235 of the EEC Treaty* in STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY 30 (1988) ("Article 235 was obviously intended as an exceptional measure.").

115. Article 38(3) of the EEC Treaty provides, *inter alia*, that "products subject to [the Common Agricultural Policy of the EEC] are listed in Annex II to this Treaty." It also explicitly foresees that this list should be enlarged by adding new products. And yet despite this explicit invitation the political organs

the sphere of activities did cover the measure in question, but that there was no specific grant of power in relation to new products. Recourse to Article 235 seemed necessary. The explanation for this restrictive quantitative and qualitative usage is simple. Quantitatively, in that phase of establishing the basic structures of the Community system, the Treaty was relatively explicit in defining the legislative agenda and granting legal powers. The initial legislative program simply did not call for frequent recourse to Article 235. Qualitatively, that period, especially since the mid-1960's, was characterized by a distinct decline in the "political will" of at least some of the Member States to promote expansion of Community activity.

Following the Paris Summit of 1972, where the Member States explicitly decided to make full use of Article 235 and to launch the Community into a variety of new fields, recourse to Article 235 as an exclusive or partial legal basis rose dramatically.

Therefore from 1973 until the entry into force of the SEA, there was not only a very dramatic quantitative increase in the recourse to Article 235, but also a no less dramatic understanding of its qualitative scope. In a variety of fields, including, for example, conclusion of international agreements, the granting of emergency food aid to third countries, and creation of new institutions,[116] the Community made use of Article 235 in a manner that was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense. Only a truly radical and "creative" reading of the Article could explain and justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states.[117] But this wide reading, in which all political institutions partook,[118] meant that it would become virtually impossible to find an activity which could

---

did not believe that they had the power to amend the list without recourse to Article 235.

116. For fuller accounts of the wide use and wide construction, see, e.g., Usher, *supra* note 114; H. SMIT & P. HERZOG, 6 LAW OF THE EUROPEAN COMMUNITY 269 (1991).

117. The Community Framework Regulations on food aid policy and food aid management were initially based jointly on Article 43 (Common Agricultural Policy) and Article 235 of the EEC Treaty. *See* Council Food Aid First Framework Regulation No. 3391/82, 1982 O.J. (L 352) 1; Council Food Aid Second Framework Regulation No. 3972/86, O.J. (L 370) 1 (1986), as amended by Regulation No. 1930/90, O.J. (L 174) 6 (1990), is based exclusively on Article 235. Before the adoption of Framework Regulations there were a few decisions on emergency operations which were based exclusively on Article 235. *See, e.g.*, Council Regulation No. 1010/80, 1980 O.J. (L 108) 1; Council Regulation No. 3827/81, 1981 O.J. (L 392) 1 (both concerning supply of sugar to UNRWA as food aid for refugees); Council Regulation No. 3723/81 1981 O.J. (L 373) 11 (concerning the supply of exceptional food aid to the least developed countries). So long as the food aid is a mechanism for disposal of Common Agricultural Policy (CAP) surpluses there is no question of legal basis and competence based on Article 43 of the EEC Treaty. The inclusion of Article 235 would cover the incidence of food aid that is not so tied to CAP objectives and mechanisms. The current exclusive reliance on 235 is deliberate in order to disconnect food aid from the CAP and emphasize that it is not an instrument of the CAP. Laudable as the granting of food aid is, it is difficult to see how the functioning of the common market, a condition for the recourse to Article 235, is served by granting humanitarian food aid to non-associated countries. *But see* Marenco, *Les Conditions d'Application de l'Article 235 du Traite* CEE, 12 REVUE DU MARCHÉ COMMUN [RMC] 147 (1970).

118. Parliament has pushed for the usage of Article 235 as well, since, *inter alia*, it is one of the provisions under which consultation with Parliament is obligatory.

not be brought within the "objectives of the Treaty."[119] This constituted the climax of the process of mutation and is the basis for my claim not merely that no core activity of state function could be seen any longer as still constitutionally immune from Community action (which really goes to the issue of absorption), but also that no sphere of the material competence could be excluded from the Community acting under Article 235. It is not simply that the jurisdictional limits of the Community expanded in their content more sharply in the 1970's than they did as a result of, for example, the Single European Act. The fundamental systemic mutation of the 1970's, culminating in the process of expansion, was that any sort of constitutional limitation of this expansion seemed to have evaporated.

It is important to emphasize again that, for this inquiry, the crucial question is not the per se legality of the wide interpretation of Article 235.[120] In the face of a common understanding by all principal interpretative communities, that question has little if any significance and perhaps no meaning.[121] Far

---

119. Elsewhere I have argued, tongue in cheek, that, on this reading defense would also be a permissible usage of Article 235, since the common market could hardly function with the territories of the Member States under occupation. J. WEILER, *supra* note 113, at 188. For broad interpretation of the "objectives" of the Community, see Case 242/87, Commission v. Council, 1989 E.C.R. 1425 [hereinafter *Erasmus*].

120. The Court tacitly sanctioned this wide usage. Broadly speaking, two principal conditions must be fulfilled to invoke Article 235. The measure must be "necessary," in the course of the operation of the common market, to attain one of the objectives of the Treaty. In addition, Article 235 may be used when the Treaty does not provide the "necessary" powers. The Court addressed both conditions liberally in the leading case of the early period, Case 8/73, Hauptzollanmt Bremerhaven v. Massey Ferguson GmbH, 1973 E.C.R. 897 [hereinafter *Massey Ferguson*]. Regarding the second, the Court was explicit. In an action for annulment of the regulation adopting the above-mentioned Community customs valuation regime, the Court had to decide whether reliance on Article 235 as an exclusive basis was justified. While acknowledging that a proper interpretation of the alternative legal bases in the EEC Treaty (arts. 9, 27, 28, 111, & 113) would provide an adequate legal basis, and thus, under a strict construction, render Article 235 not "necessary," the Court, departing from an earlier statement, nonetheless considered that the Council's use of Article 235 would be "justified in the interest of legal certainty." *Massey Ferguson*, *supra*, at 908. Legally, this might have been an unfortunate formulation since an aura of uncertainty almost *ipso facto* attaches to a decision to make recourse to Article 235. Politically, it may have been wise, for a more rigid interpretation could have thwarted the desire of the Member States, consonant with the Treaty objectives, to expand greatly the areas of activity of the Community, even if by dubious use of Article 235. Practically speaking, recourse to Article 235 in that period made little difference in the content of measures adopted because virtually all measures were adopted under the penumbra of de facto unanimity. Taking their cue from this case, Community institutions henceforth made liberal use of Article 235 without exhaustively considering whether other legal bases existed. Regarding the first requirement that the measure be "necessary" to attain one of the objectives of the Treaty, the Court was willing to construe Community legal reach and the notion of objectives very widely, not only in a whole range of cases not directly concerned with 235, but also in *Massey Ferguson* itself. Since Member States had the ability to control the usage of Article 235, disagreements, often acrimonious, on the proper scope to be given to the first condition were resolved within the Council and not brought before the Court.

121. The doctrinal writing continues the attempt to ascribe material limitations on the usage of Article 235 even in the face of this overwhelming practice. THE ENCYCLOPAEDIA OF EC LAW is a typical example: "Art. 235 does not open unlimited opportunity to increase the powers of the Community. In the first place, recourse to Art. 235 is limited by the objectives of the Treaty." Then comes the retreat: "Extensive interpretation as to the nature of these objectives is, of course, always possible, but the strongest guarantee against abuse is the required unanimity of the Council . . . ." B:2 ENCYCLOPAEDIA OF EC LAW, *supra* note 43, at B10/70/19, General Note to Article 235, (Release 40:23-ix-86). The learned commentator implicitly admits the futility of the task and then, abandoning an analytical attempt to circumscribe the Article in normative terms, resorts to an institutional guarantee, as if the Council could not itself, even if acting

more intriguing and far more revealing is to explore the explanation for and the significance of the phenomenon. One should not, after all, underestimate its enormity in comparison to other nonunitary (federal) systems. Not only did the Community see in this second phase of its systemic evolution a jurisdictional movement as profound as any that has occurred in federal states, but even more remarkable, indeed something of a double riddle, this mutation did not, on the whole, ignite major "federal" political disputes between the actors (for example, between the Member States and the Community).

No one factor can explain a process so fundamental in the architecture of the Community. I suggest the following as some of the more important factors of this change.

a. *Incrementalism*

Part of the explanation to the riddles can be found already in the very description I offered of the process of jurisdictional mutation. There is no single event, no landmark case, that could be called the focal point of the mutation. Even some of the important cases I mentioned, such as those in the field of human rights, were not seen through the prism of jurisdictional mutation. Instead, there was a slow change of climate and ethos whereby strict enumeration was progressively, relentlessly, but never dramatically, eroded. Extension, absorption, incorporation, and powers implied by the Court, all feed on each other in cog-and-wheel fashion so that no dissonances are revealed within the constitutional architecture itself as it is changing. When the Court is very activist in an area, in extension, for example, it is so toward the Community as such and not the more sensitive Member States.[122] By contrast, in the cases of absorption and expansion, areas where the mutative effect impinges on Member State jurisdiction, the role of the Court is in a kind of "active passivism," reacting to impulses coming from the political organs and opting for the flexible rather than strict notion of enumeration. In its entire history there is not one case, to my knowledge, where the Court struck down a Council or Commission measure on grounds of Community *lack of competence*.[123] The

---

unanimously, abuse Article 235. Where writers try to insist on material limits, they end up flying in the face of the legislative practice. *See, e.g.*, LESGUILLONS, EXTENSION DES COMPETENCE DE LA CEE PAR L'ARTICLE 235 DU TRAITE DE ROME AFDI 996 (1974); Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty*, 18 COMMON MKT. L. REV. 447 (1981). For other more or less successful attempts, see Giardina, *The Rule of Law and Implied Powers in the European Communities* 1 ITAL. Y.B. 99 (1975); Marenco, *supra* note 117; Olmi, *La place de l'article 235 CEE dans le système des attribution de competence de la Communauté*, in MELANGES F. DEHOUSSE 279 (1979); Waelbroeck, *Article 235*, in 15 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE 521, 530 (1987).

122. The exception to this institutional "coziness" is the case law concerning the "exclusive" competence of the Community. *See* Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle*, *supra* note 29, at 71-72.

123. There have been many cases of annulment of Council and Commission measures, but not on grounds that the *Community* exceeded its competences. In Joined Cases 281, 283-85, 287/85, F.R.G. v. Commission of the Eur. Communities, 1987 E.C.R. 3203 (Re: The Immigration of Non-Community

relationship between Court and political organs was a bit like the offense in American football.[124] The Court acted as the "pass protectors" from any constitutional challenge; the political organs and the Member States made the winning pass.

Nevertheless, incrementalism alone cannot explain a change so radical and a reaction so muted. Politically, the Community architecture at the end of the Foundational Period was unlike any other federal polity. Therein lies one emphatically important aspect of this development. Even if the judicial signals indicated that strict enumeration would not be enforced by the Court, these could, after all, have remained without a response by the political organs and the Member States.

Two factors, one historical and one structural, combine to explain the aggressiveness with which the political process rushed through the opening judicial door. Both factors are rooted in the heritage of the Foundational Period.

b. *A Strategy of Revival*

In a determined effort commencing in 1969,[125] the end of the de Gaulle era, and culminating in the successful negotiation of the British, Danish, and Irish accessions in 1973, the Community sought ways to revitalize itself, to

---

Workers), the Court annulled a Commission decision as going beyond the scope of Commission's powers under Article 118. The parties invited the Court to consider the social sector as being the preserve of the Member States, "from which it follows that, like all the other fundamental choices made in the Treaty, that choice may only be amended by use of the procedure provided for in Article 236." *Id.* at 3232. The Court, however, pointedly refrained from endorsing that proposition, gave a wide reading to the scope of action of the Community in the social field, and annulled the decision on the grounds that the *Commission* exceeded its powers, not that the Community had no competence in the field. In Recitals 23 and 24 of the judgment the Court said,

> [M]igration policy is capable of falling within the social field within the meaning of Article 118 only to the extent to which it concerns the situation of workers from non-member countries as regards their impact on the Community employment market and working condition. As a result, in so far as Decision 85/381/EEC includes the promotion of cultural integration as a whole among the subjects for consultation it goes beyond the social field in which, under Article 118, the Commission has the task of promoting cooperation between Member States.

This judgment has been read as a decision implicitly excluding cultural integration from Community competence. Bradley, *The European Court and the Legal Basis of Community Legislation*, 13 EUR. L. REV. 379, 384 (1988). I disagree with this reading. The Court specifically mentions that it is interpreting the meaning of the social field within the meaning of Article 118, which is special in that it gives certain powers to the Commission. In the light of the broad reading given by the Court to the scope of Community objectives in the context of Article 235. *Compare Erasmus*, *supra* note 119 (where the Court construed the objectives of the Community to include the enhancement of the quality of teaching and formation furnished by Community universities with a view to insure the competitiveness of the Community in world markets and also "the general objective" of creating a citizens' Europe). This underlies the broad reading of the term 'objectives' which will be sanctioned by the Court. I submit that, had the same decision been made by the Council on the legal basis of Articles 118 *and 235*, the Court would have, in the light of the judgment, held it to be within *Community* competence.

124. Of which, despite five years in the Midwest, I am still happily ignorant of most nuances.

125. Prompted by and reflected in the *Report of the Working Party examining the problem of the enlargement of the powers of the European Parliament*, BULL. EUR. COMMUNITIES (Supp. 4/72) 1 (*Vedel Report*).

shake off the hangovers of the Luxembourg Crisis, to extricate itself from the traumas of the double British rejection, and to launch itself afresh. The Paris Summit of 1972, in which the new Member States participated, introduced an ambitious program of substantive expansion of Community jurisdiction and a revival of the dream of European union. Article 235 was to play a key role in this revival. In retrospect this attempt was a failure, since the Community was unable to act in concert on the issues that really mattered during the 1970's, such as developing a veritable industrial policy or even tackling with sufficient vigor Member State obstacles to the creation of the common market. The momentum was directed to a range of ancillary issues, such as environmental policy, consumer protection, energy, and research, all important of course, but a side game at the time. Yet, although these were not taken very seriously in substance (and maybe because of that), each required extensive and expansive usage of Article 235 and represented part of the brick-by-brick demolition of the wall circumscribing Community competences.

c. *Structuralism: The Abiding Relevance of Exit and Voice*

But the structural, rather than historical, explanation of the process of expansion and its riddles is the critical one. The process of decline in the decisional supranational features of the Community during the Foundational Period, demonstrated by the enhanced Voice of the Member States in the Community policymaking and legislative processes, was the key factor giving the Member States the confidence to engage in such massive jurisdictional mutation and to accept it with relative equanimity.

In federal states, such a mutation would by necessity be *at the expense* of Member State government power. In the post-Foundational Period Community, in contrast, by virtue of the near total control of the Member States over the Community process, the community appeared more as an instrument in the hands of the governments rather than as a usurping power. The Member State governments, jointly and severally, were confident that their interests were served by any mutative move.[126] If the governments of the Member States could control each legislative act, from inception through adoption and then implementation, why would they fear a system in which constitutional guarantees of jurisdictional change were weakened? Indeed, they had some incentive, in transferring competences to the Community, to escape the strictures, or nuisance, of parliamentary accountability. In federal states, the classical dramas of federalism in the early formative periods presuppose two power centers: the central and the constituent parts. In the Community, in its post-Foundational Period architecture, the constituent units' power *was* the central power.

126. To be sure, Article 235 provides for unanimity; Member State confidence was boosted because of the knowledge that also in the implementation of any measure their interests would be guaranteed.

As we see in several cases from that period, it was hardly feasible politically, although it was permissible legally, for a Member State to approve an "expansive" Community measure and to challenge its constitutionality as *ultra vires*.[127] It is easy also to understand why the Commission (and Parliament) played the game. The Commission welcomed the desire to reinvigorate the Community and to expand its (and the Commission's own) fields of activity. Since most Community decisionmaking at that time was undertaken in the shadow of the veto consecrated by the dubiously legal Luxembourg Accord, the Commission found no disadvantage, and in fact many advantages, in using Article 235. Neither the Commission, nor Parliament, which was to be consulted under the Article 235 procedure, were likely to challenge judicially the usage. Moreover, since Article 235 enabled the adoption of "measures," whether regulations, directives, or decisions, it provided a flexibility not always available when using other legal bases.

D. *Evaluating the Mutation of Jurisdictional Limits and the Erosion of Strict Enumeration in the 1970's.*

The process of mutation is evidence of the dynamic character of the Community and its ability to adapt itself in the face of new challenges. It is also evidence that what were perceived as negative and debilitating political events in the 1960's had unexpected payoffs. I do not believe that the Community would have developed such a relaxed and functional approach to mutation had the political process not placed so much power in the hands of the Member States. Yet even then at least two long-term problems were taking root.

1. *The Question of Constitutionality*

I have argued that the de facto usage of Article 235, from 1973 until the Single European Act, implied a construction, shared by all principal interpretive communities, that opened up practically any realm of state activity to the Community, provided the governments of the Member States found accord among themselves. This raised two potential problems of a constitutional nature.

From the internal, autonomous legal perspective, it is clear that Article 235 could not be construed simply as a procedural device for unchecked jurisdictional expansion. Such a construction would empty Article 236 (Treaty Revision) of much of its meaning and would be contrary to the very structure of Article 235. Legal doctrine was quick to find autonomous internal constructions

127. A Member State may challenge an act even if it voted in favor of it. Case, 166/78, Government of the Italian Republic v. Council of the Eur. Communities, 1979 E.C.R. 2575, 2596. But it will normally not choose to challenge on grounds of lack of competence. In Case 91/79, Commission v. Italy, 1980 E.C.R. 1099, Italy was sued by the Commission for failure to implement an environmental protection directive, the *vires* of which (pre-SEA) could have been challenged in defense; Italy explicitly elected not to do so.

which would not empty the Article of meaning, but which would emphasize its virtually limitless substantive scope. Thus it has been suggested that Article 235 cannot be used in a way that would actually violate the Treaty.[128] Few writers (or actors) sought to check the expansive use of the Article.[129] The general view had been (and in many quarters remains) that the requirement of unanimity does effectively give the necessary guarantees to the Member States. If there has been a debate over the Article's meaning, it concerns the analytical construction of the Article. The Community is no different from any other legal polity. Language, especially such contorted language as found in Article 235, has never been a serious constraint on a determined political power.

The constitutional problem with an expansive interpretation of Article 235, and in general with the entire erosion of strict enumeration, does not thus rest in the realm of autonomous positivist legalisms.

The constitutional danger is of a different nature. As we saw, results of the constitutional "revolution" of the Community in the 1960's and the system of judicial remedies upon which they rest depend on creating a relationship of trust, a new community of interpretation, in which the European Court of Justice and Member State courts play complementary roles.

The overture of the European Court toward the Member State courts in the original constitutionalizing decisions, such as *Van Gend & Loos*, was based on a judicial-constitutional contract idea. Suggesting that the new legal order would operate "in limited fields,"[130] the European Court was not simply stating a principle of European Community law, which, as the maker of that principle, it would later be free to abandon. It was inviting the supreme Member State courts to accept the new legal order with the understanding that it would, indeed, be limited in its fields.

The acceptance by the Member State legal orders was premised, often explicitly, on that understanding. Thus the Italian Constitutional Court, when it finally accepted supremacy, did so "on the basis of a *precise criterion of division of jurisdiction*."[131]

The danger in this process is now clear. Whereas the principal political actors may have shared a common interest in the jurisdictional mutation, it was, like still water, slowly but deeply boring a creek in the most important foundation of the constitutional order, the understanding between the European Court and its national counterparts about the material limits to Community jurisdiction. The erosion of enumeration meant that the new legal order, and the judicial-legal contract which underwrote it, was to extend to all areas of

---

128. As mentioned earlier, institutional and organic changes would in principle require Treaty amendment, though Usher, *supra* note 114, gives examples of institutional changes *ex* 235.

129. *See* Lachmann, *supra* note 121 (detailing strong Danish principled opposition to wide use of Article 235).

130. *Van Gend & Loos*, *supra* note 42.

131. Frontini v. Amministrazione Delle Finanze, 1974 Common Mkt. L.R. 372, 385 (emphasis added).

activity—a change for which the Member State legal orders might not have bargained. With the addition of the SEA, what was an underground creek will become one of the more transparent points of pressure of the system.

There is another, obvious sense in which erosion of enumeration is problematic from a constitutional perspective. The general assumption that unanimity sufficiently guarantees the Member States against abusive expansion is patently erroneous. First, it is built on the false assumption that conflates the government of a state with the state. Constitutional guarantees are designed, in part, to defend against the political wishes of this or that government, which government after all, in a democratic society, is contingent in time and often of limited representativeness. Additionally, even where there is wall-to-wall political support, there will not necessarily be a recognition that constitutional guarantees are intended to protect, in part, individuals against majorities, even big ones. It is quite understandable why, for example, political powers might have a stake in expansion. One of the rationales, trite yet no less persuasive, of enumeration and divided powers is to anticipate that stake to prevent concentration of power in one body and at one level. When that body and that level operate in an environment of reduced public accountability (as is the case of the Commission and the Council in the Community environment) the importance of the constitutional guarantee even increases.

2. *Mutation and the Question of the Democratic Character of the Expansion*

Treaty amendment by Article 236 satisfies the constitutional requirement all Member States have that calls for assent of national parliaments. The expansive usage of Article 235 evades that type of control. At a very formal level, the jurisdictional mutation of the nature that occurred in the 1970's accentuates the problems of democratic accountability of the Community. This deficit is not made up by the nonbinding consultation of the European Parliament in the context of 235.

The "democratic" danger of unchecked expansion is not, however, in the formal lack of Member State parliamentary ratification: the structure of European democracies is such that it is idle to think that governments could not ram most expansive measures down willing or unwilling parliamentary throats. After all, in most European parliamentary democracies, governments enjoy a majority in their national parliaments and members of parliaments tend to be fairly compliant in following the policies of the party masters in government. The danger of expansion rests in a more realistic view of European democracies.

The major substantive areas in which expansion took place were social: consumer protection, environmental protection, and education, for example. These are typically areas of diffuse and fragmented interests. Whether we adopt

a traditional democratic or a neo-corporatist model,[132] we cannot fail to note that the elaboration of the details of such legislation in the Community context had the effect of squeezing out interest groups representing varying social interests, which had been integrated to one degree or another into national policymaking processes.[133] The Community decisionmaking process, with its lack of transparency and tendency to channel many issues into "state interests," tends to favor certain groups well-placed to play the Community-Member State game and disfavor others—especially those that depend on a parliamentary chamber and the "principle of re-election" to vindicate diffuse and fragmented interests.

Expansion thus did not simply underscore the perennial democracy deficit of the Community, but actually distorted the balance of social and political forces in the decisional game at both the Member State and Community level.

E. *Conclusion*

The principal feature of the period lasting from the mid-1970's into the 1980's is that precisely in this period, one of political stagnation and decisional malaise, another important, if less visible, constitutional mutation—the erosion of the limits to Community competences—took place. The full importance of this mutation and some of its inherent dangers and risks come to light only now, in the *1992* epoch. And yet a final word is called for. Unlike the constitutional revolution in the Foundational Period, which seems irreversible and which constitutes the very foundation of the Community, the mutation of the 1970's can perhaps be checked. I shall return to this theme below.

III. *1992* AND BEYOND

A. *Introduction*

The *1992* program and the Single European Act (SEA) determine both the current agenda of the Community and its *modus operandi*.[134] Neither instru-

---

132. Parliament is only one of the actors in the outplay of democratic choices. *Cf.* P. SCHMITTER, DEMOCRATIC THEORY AND NEO-CORPORATIST PRACTICE (Eur. U. Inst. Working Papers, No. 83/74).

133. On the ambivalent position of pressure groups at the E.C. level, see, e.g., Loosli-Surrans, *Quelle Sécurité pour les Consommateurs Européens?*; Micklitz, *Considerations Shaping Future Consumer Participation in European Product Safety Law* in C. JOERGES, PRODUCT LIABILITY AND PRODUCT SAFETY IN THE EUROPEAN COMMUNITY (Eur. U. Inst. Working Papers, No. 89/404). *See generally* A. PHILIP, PRESSURE GROUPS IN THE EUROPEAN COMMUNITY (U. Ass'n for Contemp. Eur. Stud. Occasional Papers, No. 2, 1985).

134. *See generally* J. DERUYT, L'ACTE UNIQUE EUROPÉEN (1989); 1992: ONE EUROPEAN MARKET (1988); Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989); Dehousse, *1992 and Beyond: The Institutional Dimension of the Internal Market Programme*, 1 LEGAL ISSUES OF EUR. INTEGRATION 109 (1989); Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987) [hereinafter *Internal Market*]; Ehlermann, *"1992 Project," supra* note 13; Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 FORDHAM INT'L L.J. 446 (1987); Glaesner, *The Single European Act*, 6 Y.B. EUR. L. 283 (1986); Glaesner, *L'Article*

ment is on its face functionally radical; the White Paper[135] goal of achieving a single market merely restates, with some nuances, the classical (Treaty of Rome) objective of establishing a common market. The bulk of the *1992* program is little more than a legislative timetable for achieving in seven years what the Community should have accomplished in the preceding thirty. The SEA is even less powerful.[136] Its forays into environmental policy and the like fail to break new jurisdictional ground, and its majority voting provisions, designed to harmonize non-tariff barriers to trade, seem to utilize such restrictive language, and open such glaring new loopholes,[137] that even some of the most authoritative commentators believed the innovations caused more harm than good in the Community.[138] Clearly, the European Parliament and the Commission were far from thrilled with the new act.[139]

---

100 A: Un Nouvel Instrument Pour la Realisation du Marche Commun, 25 CAHIERS DE DROIT EUROPÉEN 615 (1989); Moravcsik, *Negotiating the Single European Act: national interests and conventional statecraft in the European Community*, 45 INT'L ORGANIZATION 19 (1991).

135. COMPLETING THE INTERNAL MARKET (Milan, June 28-29, 1985), Com (85) 310 (White Paper from the Commission to the European Council). In this White Paper the Commission outlined its internal market strategy, later to be called the *1992* program.

136. "Measured against Parliament's Draft Treaty of European Union and other recent reform proposals, as well as against the stated preferences of the Commission and certain Member States, the Single European Act is not a revolutionary product." Bermann, *supra* note 134, at 586.

137. *See, e.g.*, SEA, art. 100a(4) (supplementing the EEC Treaty, art. 100).

138. *See, e.g.*, Pescatore, *Some Critical Remarks on the Single European Act*, 24 COMMON MKT. L. REV. 9 (1987) (describing SEA as a "severe setback" for the European Community); *see also* Pescatore, *Die "Einheitliche Europäische Acte," Eine ernste Gefahr für den Gemeinsamen Markt*, 21 EUROPARECHT 153 (1986).

139. *See* Address by Commission Vice President Frans Andriessen, Signing Ceremony for SEA (1986) BULL. EUR. COMMUNITIES (2-1986) point 1.1.1. (giving SEA decidedly cool reception); *see also* Address by Jacques Delors, Programme of the Commission for 1986, *reprinted in* BULL. EUR. COMMUNITIES (Supp. 1/86). Delors gave the Act a cool reception but put on a brave face: "You [Parliament] have your reservations, we have ours; but it would be a mistake to be *overly* pessimistic." (emphasis added).

Ehlermann in his 1987 paper comments that "[c]omparing the final text of the Single European Act with the Commission's original ideas shows that the differences are greatest in the area of the internal market. Nowhere does the end result depart so radically from the Commission's original paper." Ehlermann, *The Internal Market*, *supra* note 134, at 362. This is revealing since it suggests that at its core, the internal market, the SEA seemed at first disappointing. Ehlermann's comments are particularly authoritative since he was Director General of the Commission's Legal Service and privy to most developments from the inside. His assessments also reflect the Commission's moods.

See Parliament Fights On For More Say, Eur. Parliament News, Jan. 1986, at 1, col. 1 (UK ed.) (report on Parliament's negative reaction to outcome of intergovernmental conference).

See the following debates of the European Parliament: Resolution following the debate on the statement by the Council and the Commission after the meeting of the European Council on Dec. 2-3, 1985, in Luxembourg, 1985 O.J. (C 352) 60; Resolution on the position of the European Parliament on the Single Act approved by the Intergovernmental Conference on Dec. 16-17, 1985, 1986 O.J. (C 36) 144; Resolution on European Union and the Single Act, 1986 O.J. (C 120) 96; Resolution on relations between the European Parliament and the Council, 1986 O.J. (C 283) 36; Resolution on relations between the European Parliament and the Commission in the Institutional Context of the Treaties, 1986 O.J. (C 283) 39; Resolution on the ratification procedure for the Single Act in national parliaments and on the attainment of European Union, 1986 O.J. (C 29) 119; Resolution on the Single European Act, 1987 O.J. (C 7) 105; Resolution on the strategy of the European Parliament for achieving European Union, 1987 O.J. (C 190) 71; Resolution on the results obtained from implementation of the Triple Act, 1988 O.J. (C 309) 93; Resolution on relations between parliaments and the European Parliament, 1989 O.J. (C 69) 149.

And yet, with the hindsight of just three years, it has become clear that *1992* and the SEA do constitute an eruption of significant proportions.[140]

Some of the evidence is very transparent. First, for the first time since the very early years of the Community, if ever, the Commission plays the political role clearly intended for it by the Treaty of Rome. In stark contrast to its nature during the Foundational Period and the 1970's and early 1980's, the Commission in large measure both sets the Community agenda and acts as a power broker in the legislative process.[141]

Second, the decisionmaking process takes much less time. Dossiers that would have languished and in some cases did languish in impotence for years in the Brussels corridors now emerge as legislation often in a matter of months.[142]

For the first time, the interdependence of the policy areas at the new-found focal point of power in Brussels creates a dynamic resembling the almost forgotten predictions of neo-functionalist spillover.[143] The ever-widening scope of the legislative and policy agenda of the Community manifests this dynamic. The agreement to convene two new intergovernmental conferences to deal with economic and monetary union just three years after the adoption of the SEA symbolizes the ever-widening scope of the agenda, as does the increased perception of the Community and its institutions as a necessary, legitimate, and at times effective locus for direct constituency appeal.

But if the instruments themselves (especially the SEA) are so meager, how can one explain the changes they have wrought?

In the remainder of the Article I shall do the following: First, I shall take a closer look at the impact of the SEA on the elements of Community structure and process analyzed in the preceding sections of this Article. I shall try to show that the changes are greater than meet the eye. I believe that their significance, analyzed in the light of the transformation effected in the previous two

---

140. Again Ehlermann can serve as our barometer. Writing in 1990 he comments: "The '1992 Project' has radically changed the European Community. It has given the 'common market' new impetus and has lifted the Community out of the deep crisis in which it was bogged down in the first half of the 1980's." He adds, "[the] Single European Act . . . represents the most comprehensive and most important amendment to the EEC Treaty to date . . . . [T]he core and the '*raison d'être*' of the [SEA] are the provisions on the internal market." Ehlermann, "*1992 Project*," *supra* note 13, at 1097, 1103. This change in nuance in assessing the SEA reflects a general shift in opinion in European Institutions. My own assessment has been that the dynamics generated by the SEA and *1992* surprised most observers and actors.

141. This development is the expected result of "returning" to majority voting. Amendments to Commission proposals must be unanimous. EEC Treaty, art. 149 (1). But, the Commission "may alter its proposal at any time during the procedures [of decisionmaking]." EEC Treaty, art. 149 (3). The Commission may amend its own proposal, finding a *via media* among contrasting amendments. None of the amendments on its own could gain unanimity, but a compromise version, in the form of a Commission's altered proposal, may gain a majority. This prerogative of the Commission obviously gives it considerable power it did not have under the shadow of the veto.

142. *See* Ehlermann, "*1992 Project*," *supra* note 13, at 1104-06.

143. *Cf.* Keohane & Hoffmann, *Conclusions: community politics and institutional change*, in THE DYNAMICS OF EUROPEAN INTEGRATION 276, 282ff (W. Wallace ed. 1990). For a review of neo-functionalist spillover, see Greilsammer, *supra* note 1.

periods in the Community evolution, is far-reaching. Then, instead of elaborating further on the promise inherent in this last period in Community evolution, a subject on which there has been no shortage of comment and celebration, I shall attempt to point out dangers and raise critical questions.

B. *Structural Background to* 1992 *and the Single European Act—The Tension and its Resolution*

The balance of constitutionalism and institutionalism, of reduced Exit and enhanced Voice, was the heritage of the Foundational Period and explains much of the subsequent strength and stability of the Community polity.[144] But the Foundational Period equilibrium was not without its costs. Those costs are the ones inherent in consensus politics: the need to reach unanimous agreement in policymaking and governance.

From the little empirical evidence available, we know that consensus politics did not significantly impede policy management during the 1960's, 1970's, and into the 1980's.[145] However, the Community became increasingly unable to respond to new challenges, that called for real policy choices. Thus, while consensus politics (the manifestation of enhanced Voice) explains the relative equanimity with which the jurisdictional limits of the Community broke down in the 1970's, this very consensus model also explains why, within the Community's expanded jurisdiction, it was unable to realize its most traditional and fundamental objectives, such as establishing a single market in the four factors of production.[146] From a structural point of view, one critical impediment to these goals was the growth in the number of Member States. In just over a decade the number of Member States doubled. But the new Member States entered a Community with decisional processes that were created in the Foundational Period and that were not changed to accommodate the increased number of participants. Achieving consensus among the original six was difficult enough. It became substantially more difficult with the first enlargement to nine and virtually debilitating when the number grew to twelve. In addition, the entry first of Britain, Ireland, and Denmark and then of Greece, Spain, and Portugal caused the Community to lose a certain homogeneity of policy perception and cultural orientation. This loss of homogeneity accentuated a problem that would exist in any event by the pure numbers game. Community decisionmaking fell into deep malaise. It is not surprising that almost every

144. *See supra* Sections I.D-E.

145. *See* Krislov, Ehlermann & Weiler, *supra* note 1, at 30-57.

146. For an analysis of the fragmented market despite close to three decades of a common market regime, see J. PELKMANS & A. WINTERS, EUROPE'S DOMESTIC MARKET (1988).

initiative between 1980 and the SEA recognized the need to change processes of decisionmaking, usually by moving to some form of majority voting.[147]

Another structural element encouraged change. The evolving rules concerning the free movement of goods and other factors of production between the Member States created a regulatory gap in the European polity. A rigorous (and courageous[148]) jurisprudence of the Court of Justice seriously limited the ability of the Member States to adopt protectionist measures via-a-vis each other.[149] Indeed, it went further. The Court held that once the Community enacted measures regulating nontariff barriers to movement of goods, such measures would preempt any subsequently enacted Member State legislation that frustrated the design of the extant Community measures.[150] In addition, it is important to remember that this was an area in which the Treaty provided for unanimous decisionmaking. The Treaty rule on decisionmaking and the Court's jurisprudence on the preemptive effect of such decisionmaking combined to chill the climate in which the Community and its Member States were to make critical decisions to eliminate the numerous barriers to a true common market. Not only was it difficult to achieve consensus on one Community norm to replace the variety of Member State norms, but also there was the growing fear that once such a norm was adopted, it would lock all Member States into a discipline from which they could not exit without again reaching unanimity. If the Community once agreed on a norm on, for example, the permissible level of lead in gasoline, no Member State could subsequently reduce the level further without the consent of all twelve Member States within the Community decisionmaking process. The combination of legal structure and political process militated against easy consensus even on nonprotectionist policy.

The deep political subtlety of the Commission white paper outlining the *1992* program becomes clear in this context, as does its ultimate success. Unlike all earlier attempts and proposals to revive the Community, the *1992* White Paper, although innovative in its conception of achieving a Europe without frontiers,[151] was entirely functional. It delineated the ostensibly uncontroversial goal of realizing an internal market, and, in the form of a technical list of of required legislation, the uncontroversial means necessary to achieve that goal.

---

147. *See* J. DERUYT, *supra* note 134, at 25-65 (analysis of previous attempts to reinvigorate in the 1980's, including Genscher-Colombo initiative, Stuttgart Solemn Declaration, and Parliament 1984 Draft Treaty, as well as work and conclusion of Dooge Committee which laid ground for SEA.)

148. Unlike those of most other systems in Europe, judges on the European Court serve for renewable terms (Article 167 EEC). This rule compromises the appearance of independence. Currently the intergovernmental conference holds a proposal to extend the terms of judges to 12 years and make them nonrenewable. *See* Resolution of European Parliament on the Intergovernmental Conference PE 146.824, art. 167.

149. The famous line of decision from Case 8/74, Procureur du Roi v. Benoit and Gustave Dassonville, 1974 E.C.R. 837 and its progeny. *See generally* L. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC (1985).

150. *See, e.g.*, Case 148/78, Pubblico Ministero v. Ratti, 1979 E.C.R. 1629, 1643 (Recital 27); Case 5/77, Tedeschi v. Denkavit Commerciale, 1977 E.C.R. 1555, 1576-77 (Recital 35) [hereinafter *Denkavit*].

151. Ehlermann, "*1992 Project*," *supra* note 13, at 1099.

Critically, it eschewed any grandiose institutional schemes. These were to come as an inevitable result, once *1992* was in place. Because of this technocratic approach, the White Paper apparently appealed to those with different, and often opposing, ideological conceptions of the future of Europe. To some, it represented the realization of the old dream of a true common marketplace, which, because of the inevitable connection between the social and the economic in modern political economies, would ultimately yield the much vaunted "ever closer union among the peoples of Europe." To others, it offered a vision of the European dream finally lashed down to the marketplace, and, importantly, a market unencumbered by the excessive regulation that had built up in the individual Member States. Dismantling regulation that impeded intra-Community trade would, on this reading, yield the dismantling of regulation altogether.

The key to the success of the *1992* strategy occurred when the Member States themselves agreed to majority voting. They took this step clearly not as a dramatic political step toward a higher level of European integration in the abstract, but rather as a low-key technical necessity in realizing the "non-controversial" objectives of the White Paper. This movement found expression in the single most important provision of the SEA, Article 100a.

As indicated above, this provision at face value seems minimalist and even destructive. First, the move to majority voting in Article 100a is couched as a residual measure and derogation from the principal measure, which requires unanimity, namely old Article 100.[152] Second, the exception to Article 100a, Article 100a(4), was drafted in an even more restrictive form by the heads of state and government themselves.[153] The exception states that for enactments by majority voting a Member State may, despite the existence of a Community norm, adopt national safeguard measures.[154] Indeed, this exception may be seen as an ingenious attempt by the Member States to retain the equilibrium of the Foundational Period in the new context of majority voting.

The essence of the original equilibrium rested on the acceptance by the Member States of a comprehensive Community discipline on the condition that each would have a determinative Voice, the veto, in the establishment of new norms. In Article 100a, the Member States, by accepting a passage to majority voting, seemed to be destroying one of the two pillars of the foundational equilibrium. But, by allowing a Member State to derogate from a measure even

152. *See* Article 100a (1) ("By way of derogation from Article 100 . . . .").

153. *See* Ehlermann, *Internal Market*, *supra* note 134, at 381.

154. Article 100a (4):

> If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36 . . . it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

in the face of a Community norm (adopted by a majority!) the other pillar of comprehensive Community jurisdiction seems to be equally eroded, thereby restoring the equilibrium. The exception breaks, of course, the rule of pre-emption established by the Court in cases where harmonization measures were adopted.[155]

Finally, as an indication of the low-key attitude toward the new voting procedure, a proposal to formally "repeal" the Luxembourg Accord was rejected by the Member States. Indeed, when presenting the SEA to their national parliaments, both the French and British ministers for foreign affairs claimed that the Single European Act left the Luxembourg Accord intact. Thus the French Foreign Minister solemnly declared in the *Assemblée Nationale*, responding to concerns that the SEA gave too much power to the Community at the expense of the Member States, that *"en toute hypothèse, même dans les domaines où s'applique la règle de la majorité qualifiée, l'arrangement de Luxembourg de janvier 1966 demeure et conserve toute sa valeur."* Likewise, in the House of Commons the British Foreign Secretary assured the House that "as a last resort, the Luxembourg compromise remains in place untouched and unaffected."[156]

These three elements together may have given the Member States the feeling that the step they took was of limited significance and the outside observer the impression that the basic equilibrium was not shattered. It is most striking in this connection to note that even Mrs. Thatcher, the most diffident Head of Government among the large Member States, characterized the Single European Act on the morrow of its adoption by the European Council as a "modest step forward."[157] But shattered it was, since each of these precautions was either ill-conceived or rendered impracticable because of open-textured drafting and a teleology that traditionally presaged for construing derogations to the Treaty in the narrowest possible way.

Although the language of the provision suggests the new system was intended as a derogation, the prevailing view is that Article 100a has become the "default" procedure for most internal market legislation, and that the procedure of other articles is an exception.[158] Significantly, the connection

---

155. *See Denkavit, supra* note 150.

156. On the failure of the proposal to repeal the Accord, see Ehlermann, *"1992 Project," supra* note 13, at 1106. For declarations in the British Parliament and the French Parliament on the continued existence of the Luxembourg Accord even after the SEA, see 96 PARL. DEB., H.C. (5th ser.) 320 (1986) (Debates of the House of Commons of April 23, 1986); Séance of the Assemblee Nationale (Nov. 20, 1986), J.O. No. 109 [1] A.N. (C.R.), 8th Législature, 81st Séance 6611 (Nov. 21, 1986).

157. Washington Post, Dec. 4, 1985, at A29, col. 1.

158. "Article 100a thus gives the Council enormous scope for action, which is limited principally, I suspect, only by the existence of other enabling provisions," Ehlermann, *Internal Market, supra* note 134, at 384. Ehlermann argues convincingly that Article 100a will be used in most cases, even in amending old Article 100 legislation, a case in which Article 235's provision for unanimity may have been used in the past. He says it will be used also for legislation of a scope that goes beyond the grounds of Article 100, which was limited to harmonization of national measures that affected the establishment or functioning of the common market. Thus, Article 100a will be used, in most cases, when *new* legislation to achieve the

between Article 100a and Article 8a means that majority voting should take place, except where specifically excluded,[159] for all measures needed to achieve the objective of an internal market. The internal market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[160] This requirement of majority voting extends the scope of Article 100a procedure beyond the harmonization of technical standards affecting the free movement of goods. The net result is that few cases exist that would *compel* resort to the old legal basis and its unanimity requirement. The Commission proposes the legal basis of decisions; any change of such basis would be subject itself to a unanimous Council vote, which would be difficult to achieve. In any event, even if Council could change the legal basis, the Court, if a challenge were brought, would tend to side with the Commission on issues of legal basis.[161]

Likewise, and contrary to some of the doomsday predictions,[162] the derogation to the principle of preemption in Article 100a(4), so carefully crafted by prime ministers and presidents, has had and must have very little impact. It allows a Member State to adopt, under strict conditions and subject to judicial review, unilateral derogation of Community harmonizing measures when the Member State seeks to uphold a higher level of protection. But that does not seem to be the real battlefield of majority voting. The real battlefield is regulation by the Community in areas in which Member States may feel that they do not want any regulation at all, let alone a higher Community standard.[163]

The sharpest impact, however, of majority voting under the SEA does not turn on these rather fine points. Earlier I explained that, although the language of the Luxembourg Accord suggested its invocation only when asserting a vital national interest, its significance rested in the fact that practically all decision-making was conducted under the shadow of the veto and resulted in general consensus politics.[164]

---

common market is needed. *Id.*

159. *E.g.*, SEA, art. 100a(2).

160. SEA, art. 8a.

161. In a series of cases, starting with Case 45/86, Commission of the European Communities v. Council of the European Communities, 1987 E.C.R. 1493 (GTP), the Commission has challenged the Council's use of Article 235 (which provides for unanimity) rather than alternative legal bases in the Treaty. In a clear departure from its precedent, which would have allowed the Council to do so, in *Massey Ferguson*, *supra* note 120, the Court sided with the Commission. *See also* Case 51/87 Commission of E.C. v. Council of E.C., 1988 E.C.R. 5459; Case 165/87, Commission of E.C. v. Council of E.C., 1988 E.C.R. 5545; Case 275/87, Commission of E.C. v. Council of E.C., 1989 E.C.R. 259; Case 288/87. *But see* Case 242/87, Commission of E.C. v. Council of E.C., 1989 E.C.R. 1425.

162. *See, e.g.*, Pescatore, *supra* note 138.

163. Britain strongly opposed, on principle, the adoption of Council Directive No. 89/662 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning the labelling of tobacco products, 1989 O.J. (L 359). It did not oppose the low standard of the regulation but argued that the Commuity did not have competence in the field of health. The derogation in Article 100a(4) was useless in the face of this type of opposition. Britain had recourse only if it wanted a higher standard of protection against the danger of smoking.

164. The only habitual prior exception concerned decisions within the process of adopting the Community budget.

Likewise, the significance of Article 100a was its impact on *all* Community decisionmaking. Probably the most significant text is not the SEA, but the consequently changed rules of procedure of the Council of Ministers, which explain the rather simple mechanism for going to a majority vote.[165] Thus, Article 100a's impact is that practically all Community decisionmaking is conducted under the shadow of the vote (where the Treaty provides for such vote). The Luxembourg Accord, if not eliminated completely, has been rather restricted. For example, it could not be used in the areas in which Article 100a provides the legal basis for measures. In addition, to judge from the assiduousness with which the Member States argue about legal bases, which determine whether a measure is adopted by majority or unanimity,[166] it is rather clear that they do not feel free to invoke the Luxembourg Accord at whim. If the Accord persists at all, it depends on the assertion of a truly vital national interest, *accepted as such* by the other Member States, and the possibility of any Member State forcing a vote on the issue under the new rules of procedure. In other words, in accordance with the new rules, to invoke the Luxembourg Accord a Member State must persuade at least half the Member States of the "vitality" of the national interest claimed.

C. *Under the Shadow of the Vote I*

Majority voting thus becomes a central feature of the Community in many of its activities.[167] A parallel with the opposite (Luxembourg Accord veto) practice of the past exists: today, an actual vote by the majority remains the exception. Most decisions are reached by consensus. But reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto. The possibility of breaking deadlocks by voting drives the negotiators to break the deadlock without actually resorting to the vote. And, as noted above, the power of the Commission as an intermediary among the negotiating members of Council has been considerably strengthened.

This Article has emphasized the relationships between the transformations of each of the definitional periods of the Community. In discussing each of the earlier periods, I have already pointed out the evolution of some important

---

165. *See* amendment of the Council's Rules of Procedure adopted by the Council on July 20, 1987, 1987 O.J. (L 291) 27. New Article 5 provides:

> 1. The Council shall vote on the initiative of its President. The President shall, furthermore, be required to open voting proceedings on the invitation of a member of the Council or of the Commission, provided that a majority of the Council's members so decides.

The new rules do not differentiate between votes *ex* Article 100a and any other legal basis which provides for majority voting in the Treaty.

166. See Article 235 cases, *supra* note 161.

167. Several important Community areas remain that require unanimity. Article 100a(2) provides for exceptions from majority voting in the field of movement of persons, fiscal provisions, and rights and interests of employed persons.

structural elements, such as the growth in the number of the Member States, that partially caused this "return" to majority voting.

But, of course, the crucial linkage to the past is not cause but effect. The "(re)turn" to majority voting constitutes a transformation as momentous as those that occurred earlier in the life of the Community because of those earlier changes. It is trite but worth repeating, that absent the earlier process of constitutionalization, a process that gave a real "bite" to Community norms, adoption by majority would be of far lesser significance. What puts the Community and its Member States in a new "defining" situation is the fact that the Foundational equilibrium, despite attempts to rescue it in the actual drafting of the SEA, seems to be shattered.[168] Unlike any earlier era in the Community,[169] and unlike most of their other international and transnational experience, Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders.

Likewise, the erosion of enumeration is far more significant in the environment of majority voting. There is something almost pitiful in the rude awakening of some of the Member States. For example, in 1989, the Council, in a hotly contested majority vote on the basis of Article 100a, adopted the new Community cigarette labelling directive, which specifies a menu of mandatory warnings. Manufacturers must choose a warning to print on all cigarette packets.[170] The directive was hotly contested not because of the content of the warnings or even the principle of warnings, but because one of the Member States challenged the competence of the Council (meeting as a Council of Health Ministers) to adopt legislation pursuing the *objective* of health. Strictly speaking, to achieve a common market in tobacco products, it would be enough to pass a measure providing that cigarette packages carrying any of the warnings agreed upon could not be impeded in its intra-Community free movement.

---

168. If the Member States did not want to be in this situation, why did they, in practice, construe the SEA as they did? One can only speculate as to the answer: Critically, Member States differ in relation to the turn to majority voting. Some feel that the reality of interdependence is such that a blocking possibility pays less than the ability to force a recalcitrant major player in certain circumstances. In addition, it seems that, as in earlier episodes, some simply did not appreciate the significance of their constitutionalizing moves and unwittingly found themselves in the "trap" of Community discipline, where the stakes of rupture are possibly very high. It always seems difficult to root an explanation in ignorance by, or mistake of, major state actors. But how else does one explain the statements made by the British and French Foreign Ministers in their respective parliamentary assemblies? *See supra* note 156. Or how does one explain Thatcher's early evaluation of the SEA as a "modest" step—a step which later has come to be regarded as the "most comprehensive and most important amendment to the EEC Treaty to date . . ."? Was she deliberately underestimating the nature of change brought about by, in particular, the shift to majority voting, or was she, as I argue in the text, not fully aware of the limits to the safeguards built into the revised Article 100a? Failure of Member States to appreciate the full impact of their action is not new. As indicated above, it would appear that in negotiating Article 177 the Member States were not fully aware of its far-reaching constitutional implications. *See supra* text accompanying note 39.

169. There were a few episodes in which the Luxembourg Accord did not "save" a Member State. The Agricultural Price increase episode in 1982 is an example. *See* The (London) Times, May 19, 1982 at 1, 5, 30 (articles on EEC override of British veto); *A Failure for Europe*, *id.* at 15; *see also Editorial Comments: The Vote on the Agricultural Prices: A New Departure?*, 19 COMMON MKT. L. REV. 371 (1982).

170. *See* Cigarette Labelling Directive, *supra* note 163.

This directive goes much further, however. Instead of stopping at the Market rationale, its legal basis includes the European Council meeting of June 1985, which launched a European action program against cancer and the Resolution of July 1986 on a program of action of the European Communities against cancer.[171]

What, in June 1985 (prior to the SEA), may have seemed a totally banal resolution under which Member States could control any operationalization of the action program against cancer, attained an altogether different meaning in 1989, when the measures could be, and were, adopted by majority vote. However, in the light of the erosion of the principle of enumeration in the 1970's, a challenge to the constitutionality of the measure as *ultra vires* would likely fail.

Member States thus face not only the constitutional normativity of measures adopted often wholly or partially against their will, but also the operation of this normativity in a vast area of public policy,[172] unless the jurisprudence changes or new constitutional amendments are introduced.[173]

---

171. 1986 O.J. (C 184) 19.

172. Admittedly, legislating on the outer reaches of Community jurisdiction requires resorting to Article 235, which does provide for unanimity. But, as discussed *supra* at text following note 158, Article 100a could be used in some instances instead of 235, especially given the new Commission strategy, supported by the Court, of limiting the use of 235 whenever another Treaty legal basis exists; the cigarette labelling directive illustrates this point quite forcefully.

173. In fact, in this new decisional climate a heightened sensitivity to demarcation of competences exists, one which hardly existed in the past. *See* Resolution of Parliament of July 12, 1990, on the principle of Subsidiarity, (PE 143.504):

> [H]aving regard to the future development of the Community, in particular its commitment to draw up a draft constitution for European Union and the fact this process of transforming the European Community *requires a clear distinction to be made between the competences of the union and those of the member States*. . .

Preamble to Resolution, at 13 (emphasis added); *see also* 27th Report of the Select Committee on the European Communities [of the British House of Lords] on Economic and Monetary Union and Political Union of October 30, 1990 (HL Paper 88-I) at ¶¶ 143-44, 204 ("There is also a more general fear that the Community is taking collective decisions in areas where such choices could perfectly well be left to the member States.")[hereinafter Select Comm.]. *See generally* Jacqué & Weiler, *On the Road to European Union—A New Judical Architecture: An Agenda for the Intergovernmental Conference*, 27 COMMON MKT. L. REV. 185, 199-206 (1990); *Editorial Comments*, 27 COMMON MKT. L. REV. 181 (1990).

For a recent harsh critique of the unchecked expansion of jurisdiction, see Hailbronner, *Legal-Institutional Reforms of the EC: What can we learn from Federalism Theory and Practice*, EC 92 AND BEYOND: NEW POLITICAL STRUCTURES AND CONSTITUTIONAL PROBLEMS OF EUROPEAN INTEGRATION (E. Petersman ed. forthcoming).

In the recently leaked "Non-Paper" of the Luxembourg Presidency of April 15, 1991, setting out the state of negotiation of the Intergovernmental Conference, the Principle of Subsidiarity has been inserted as an operational part of the Treaty. The proposal is included as an amendment to EEC Treaty, art. 3 and reads as follows:

> La Communauté agit dans les limites des compétences qui lui sont conférées et des objectifs qui lui sont assignés par le present traité. Dans les domaines que ne relévent pas de sa competénce exclusive, la Communauté intervient conformément au principe de la subsidiarité, si et dans la mesure où les objectifs qui lui sont assignes peuvent etre mieux réalisés au niveau communautaire qu'au niveau des Etats membres oeuvrant isolément, en raison des dimensions ou des effets de l'action envisagée.

Non-Paper: Project D'Articles De Traite, En Vue De La Mise En Place D'Une Union Politique 12 (Luxembourg, April 15, 1991).

D. *Under the Shadow of the Vote II: Question Marks*

As indicated above, I think enough has been written about the promise of the enhanced "efficiency" of the decisional process and the internal dynamic generated and manifested, for example, in the current intergovernmental conferences.[174]

In contrast, I wish to explore less visible implications of the change. Since the SEA does rupture a fundamental feature of the Community in its Foundational Period, the equilibrium between constitutional and institutional power, it would follow from the analysis of the Foundational Period that the change should have implications that go beyond simple legislative efficiency. On this reading, the SEA regime does truly constitute a defining experience for the Community. The lack of any temporal perspective suggests great caution in this part of the analysis, and I pose my points as questions and challenges rather than affirmations.

1. *The Challenge of Compliance*[175]

Although the problem of compliance with Community norms by the Member States is not new, the context of the SEA regime changes our evaluation.

In reading the explanation earlier that the Community has developed effective mechanisms for the enforcement of Community law, one should not be misled to think that no violations, by Member States, Community institutions, or individuals, occur. They occur regularly and, as Community activities and impact expand, increasingly.[176] In this respect the Community is no different (in principle) than, for example, any state of equivalent size and complexity. Indeed, that was the critical factor in our analysis. When violation takes place it does so in a constitutional context with an ethos of domestic rather than international law. Since the Member States were able to control the elaboration of Community legislation in all its phases and were able to block any measure not to their liking, the noncompliance reflex would tend to operate at a surface and convenience level and thus would not indicate fundamental discontent.[177]

If this proposal survives the Conference and is ultimately adopted it would, on my reading, provide a new criterion for judicial review by the Court *ex* Articles 173 and 177(b). The fact that subsidiarity, often thought of as a principle incapable of translation into an operative positive obligation, has been included, is an indication of the strength of feeling concerning the question of erosion of jurisdictional limits.

174. For the "bright side of the moon" see Ehlermann, *"1992 Project," supra* note 13.

175. *See generally* Weiler, *The White Paper and the Application of Community Law*, in 1992: ONE EUROPEAN MARKET? 337 (1988).

176. The White Paper raises the issue explicitly in § 152.

177. The Commission drew a bleak picture in the White Paper:

> Of the total number of complaints received by the Commission, some 60%, i.e. on average 255 each year, relate to Articles 30-36 of the Treaty, but because of the lack of resources it can, in a given year, settle only one hundred cases. The resulting delays and backlogs benefit the infringing States, impede systematic action, proceedings, and frustrate the confidence of industry as well as that of the man in the street. Measures have to be taken to remedy the situation.

Under the new regime noncompliance could become more of a strategy. If the equilibrium of Voice and Exit is shattered by reducing the individual power of Member State Voice, the pressure might force a shift to strategies of Exit, which, in the Community context means selective application rather than withdrawal. There are some signs that this may be happening.[178] In any event, although the Community is impressively on course in "implementing" the *1992* legislative program, a "black hole" of knowledge exists regarding the true level of Member State implementation.[179]

This problem of compliance is merely one manifestation of the deep dilemma involved in dismantling the Foundational equilibrium. It is useful here, albeit in a very loose manner, to introduce Hirschman's third notion, Loyalty. Two possible readings of the future present themselves. On one reading, the dismantling of the Foundational equilibrium will constitute a destabilizing act of such dimension that it threatens the acceptance not simply of a particular Community measure but of the very constitutional foundation. Alternatively, acceptance of Community discipline may have become the constitutional reflex of the Member States and their organs.[180] A Loyalty to the institution may have developed that breaks out of the need for constant equilibrium. The two decades of enhanced Voice thus constitute a learning and adaptation process

---

Id. at § 153. One should not minimize the pragmatic nature of the problem, accentuated by the ability of Member States to disregard judgments of the Court in direct Article 169 actions. Nonetheless, it is interesting to note that the protectionist violation the Commission points out has been in some measure at least a response to the jurisprudence of the Court and not to consensual legislation. As far as directives are concerned, in most cases, nonincorporation is a result of objective constitutional and procedural difficulties at the national level (especially in Italy and Belgium) and not from an evasive or defiant strategy by a Member State.

178. The problem was considered sufficently grave to merit specific mention in the conclusions of the Dublin Summit of June 25-26, 1990, which set up the new Intergovernmental Conferences. Thus, in Annex I, mention was made of the need to give consideration to the automatic enforceability of Article 169 and 171 judgments of the European Court and of Member States ensuring the implementation and observance of Community law and European Court judgments. Dublin Summit, Annex I, *reprinted in Conclusions of the European Council Dublin 25 & 26 June 1990*, EUROPE DOC. (No. 1632/1633) 9 (June 29, 1990).

The European Parliament in its proposed Treaty Amendments submitted to the Intergovernmental Conference suggested amending Article 171 to read:

> The court may combine its judgments with financial sanctions against the Member State that has been found to be in default. The amount and method of collection of such sanctions shall be determined by a regulation adopted by the Community in accordance with the procedure laid down pursuant to Article 188(b). The Court may also impose on recalcitrant states other sanctions such as suspension of right to participate in certain Community programmes, to enjoy certain advantages or to have access to certain community funds.

art. 171, PE 146.824. The Select Committee of the House of Lords, in its Report on Economic and Monetary Union and Political Union, observed: "[T]here are Member States which seem to treat their obligation to translate Directives into national law by a certain date as little more than a vague guideline." Select Comm., *supra* note 173, at ¶ 146; *see also id.* ¶¶ 45-48, 205.

179. On the general picture of implementation, see Septieme Rapport Annuel au Parlement Europeen Sur Le Controle De L'Application Du Droit Communutaire, Com (90) 288 final (May 22, 1990). *See also* Commission Reports on the Implementation of the White Paper.

180. For suggestions that this issue may be not quite as settled as one may wish, not even among the courts of the Member States, see, e.g., Cartabia, *The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community*, 12 MICH. J. INT'L L. 173 (1990); Szyszczak, *Sovereignty: Crisis, Compliance, Confusion, Complacency?*, 15 EUR. L. REV. 480 (1990).

resulting in socialization; at the end of this period decisional changes affecting Voice will not cause a corresponding adjustment to Exit. Time will tell, but there are signs that Loyalty with a large mixture of expediency may prevent or at least reduce the otherwise destabilizing effect of the new change.

2. *Challenges of "Democracy" and "Legitimacy"*[181]

1992 also puts a new hue on the question of the Democracy Deficit. A useful starting point could indeed be a focus on the European Parliament and its role.

It is traditional to start an analysis of the role of the European Parliament in the governance structure of the Community with a recapitulation of the existing Democracy Deficit in E.C. decisionmaking. This deficit informs, animates, and mobilizes the drive to change the powers of the European Parliament. In addition, to the extent that the governments of the Member States have responded, weakly and grudgingly, to this drive, it is surely because even they recognized the compelling power of the Democracy Deficit argument.

The typical argument views the European Parliament as the only (or at least principal) repository of legitimacy and democracy in the Community structure. The phrase most often used in this context is "democratic legitimacy."[182] The Commission, in this view, is an appointed body of international civil servants, and the Council of Ministers represents the Executive branch of each national government which, through Community structures, has legislative powers it lacks on respective national scenes.

Thus, the Council, a collectivity of Ministers, on a proposal of the Commission, a collectivity of nonelected civil servants, could, and in some instances must, pass legislation which is binding and enforceable even in the face of conflicting legislation passed by national parliaments. This occurs without corresponding parliamentary scrutiny and approval. Indeed, the Council could pass the legislation in the face of the European Parliament's disapproval. This happens often enough to render the point not simply theoretical. What is more, the Council can legislate in some areas that were hitherto subject to parliamentary control at the national level. We have already seen how the constitutionalization process in the Foundational Period and the erosion of enumerated powers in the second period accentuated this problem.

---

181. See Weiler, *Parlement européen, intégration européenne, démocratie et légitimité*, in LE PARLEMENT EUROPEEN 325 (1988), in which I have elaborated these points more expansively. I have been considerably helped by, and have drawn in particular on, the following works: L. BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989); T. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); J. HABERMAS, LEGITIMATION CRISIS (1975); L. HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS (1990); Dahl, *Federalism and the Democratic Process*, in LIBERAL DEMOCRACY, XXV NOMOS, at 95 (1983). My own synoptic presentation cannot do justice to the richness of the works cited.

182. The problem of democratic structures is addressed this way by the Dublin Summit, Annex I, *supra* note 178, at 8.

According to this view of the Community, the powers of the European Parliament are both weak and misdirected. They are weak in that the legislative power (even post-SEA) is ultimately consultative in the face of a determined Council. Even the Parliament's budgetary powers, though more concrete, do not affect the crucial areas of budgetary policy: revenue raising and expenditure on compulsory items.[183] The power to reject the budget *in toto* is a boomerang which has not always proved effective, although in 1984 the budget ultimately was amended in a direction that took account of some of Parliament's concerns. The possibility of denying a discharge on past expenditure lacks any real sanction power.

Those parliamentary powers that are real, the powers to dismiss the Commission, to ask questions of the Commission, and to receive answers, are illusory at best and misdirected at worst. They are illusory because the power to dismiss is collective and does not have the accompanying power to appoint. They are misdirected because the Council is the "Villain of the Piece" in most European Parliament battles.

All these well-known factors taken together constitute the elements of the Democracy Deficit and create the crisis of legitimacy from which the Community allegedly suffers.

Although the Democracy Deficit is prominent in Parliamentary rhetoric, the day-to-day complaint of Parliament especially in the pre-SEA days was not that the Community legislator (the Council) was over-vigorous and violated democratic principles, but rather that it failed to act vigorously enough. Critics argued that the Council had incapacitated itself and the entire Community by abandoning Treaty rules of majoritarian decisionmaking by giving a *de facto* veto to each Member State government that asserts a "vital national interest."

The veto power arrogated by the Member States produced another facet of the Democracy Deficit: the ability of a small number of Community citizens represented by their Minister in the Council to block the collective wishes of the rest of the Community.

Parliamentarians almost uniformly claim that both facets of the malaise could be corrected by certain institutional changes, which on the one hand would "de-block" the Council by restoring majority voting, but which would also significantly increase the legislative and control powers of Parliament.

Increased powers to the Parliament, directly elected by universal suffrage, would, so it is claimed, substantially reduce the Democracy Deficit and restore legitimacy to the Community decisionmaking process.

---

183. Parliament has a final say (within limits set by the Commission) only on expenditure items which are not mandated by the Treaty itself. For the best explanation of Parliamentary powers in this field, see J. JACQUÉ, R. BIEBER, V. CONSTANTINESCO & D. NICKEL, LE PARLEMENT EUROPÉEN 178 (1984). *See also* Case 34/86, Council v. Parliament, 1986 E.C.R. 2155 (Re: the 1986 Budget) (especially opinion of Advocate General Mancini). Parliament was granted real approval control as regards Association Agreements *ex* Article 238 and accession of new Member States *ex* Article 237. It has no formal powers, even of consultation as regards trade agreements *ex* Article 113.

It is further argued that, regarding the decisional malaise, Parliament has over the years boasted a *Communautaire* spirit which would, if given effective outlet, transcend nationalistic squabbles and introduce a dynamism far more consonant with the declared objectives of the Treaties. The large majority accorded to the Draft Treaty Establishing the European Union is cited as a typical example of this dynamism. Although these points seem obvious, they receive little critical analysis.

The absence of a critical approach derives in part from a loose usage of the notions of democracy and legitimacy. Very frequently in discourse about Parliament and the Community the concepts of democracy and legitimacy have been presented interchangeably although in fact they do not necessarily coincide.

To be sure, today, a nondemocratic government or political system in the West could not easily attain or maintain legitimacy, but it is still possible for a democratic structure to be illegitimate—either *in toto* or in certain aspects of its operation.[184]

In spite of all the conceptual difficulties of dealing with "legitimacy,"[185] even in this brief excursus it may be useful to draw one classical distinction between formal (legal) legitimacy and social (empirical) legitimacy.

The notion of formal legitimacy in institutions or systems implies that all requirements of the law are observed in the creation of the institution or system. This concept is akin to the juridical concept of formal validity. In today's Europe, as in the West generally, any notion of legitimacy must rest on some democratic foundation, loosely stated as the People's consent to power structures and process. A Western institution or system satisfies formal legitimacy if its power structure was created through democratic processes.[186] Thus, in the Community context, I simply point out that the Treaties establishing the Community, which gave such a limited role to the European Parliament, were approved by the national parliaments of all founding Member States and subsequently by the parliaments of six acceding Member States. Proposals to give more power to the European Parliament have failed, for a variety of reasons, to survive the democratic processes in the Member States.[187]

---

184. A stark example may drive the point home better than an abstract explication: Germany during the Weimar period was democratic but the government enjoyed little legitimacy. Germany during National Socialism ceased to be democratic once Hitler rose to power, but the government continued to enjoy widespread legitimacy well into the early 1940's. *Cf.* G. CRAIG, GERMANY 1866-1945, at chs. 15, 18 (1981).

185. *See generally* Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

186. Franck's synthesis of "legitimacy" as it applies to the rules applicable to states is: *"Legitimacy is a property of a rule or rule making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."* T. FRANCK, *supra* note 181, at 24 (emphasis in original).

187. The SEA, which touches only slightly the so-called Democracy Deficit, was ratified by the parliaments of all the Member States. Likewise, with each Community enlargement, in 1973, 1981, and 1986, national parliaments had the opportunity to protest the nondemocratic character of the Community,

This definition of formal legitimacy is thus distinct from that of simple "legality." Formal legitimacy is legality understood in the sense that democratic institutions and processes created the law on which it is based (in the Community case the Treaties).

Thus, in this formal sense, the existing structure and process rests on a formal approval by the democratically elected parliaments of the Member States; and yet, undeniably, the Community process suffers from a clear Democracy Deficit in the classical sense outlined above.

"Social legitimacy," on the other hand, connotes a broad, empirically determined societal acceptance of the system. Social legitimacy may have an additional substantive component; legitimacy occurs when the government process displays a commitment to, and actively guarantees, values that are part of the general political culture, such as justice, freedom, and general welfare.[188]

An institution, system, or polity, in most, but not all, cases, must enjoy formal legitimacy to enjoy social legitimacy. This is most likely the case in Western Democratic traditions, which embody the Rule of Law as part of their political ethos. But a system that enjoys formal legitimacy may not necessarily enjoy social legitimacy. Most popular revolutions since the French Revolution occurred in polities whose governments retained formal legitimacy but lost social legitimacy.

These admittedly primitive distinctions will become relevant to our discussion with one further excursus into the notions of integration and democracy.[189]

Obviously, democracy cannot exist in a modern polity as in "the Greek Polis" or "the New England town." Representative democracy replaces direct

---

but instead, reconfirmed the governance system.

188. Franck usefully sorts legitimacy theories into three groups. The first group regards legitimacy as process. He cites Weber:

> Weber postulates the validity of an order in terms of its being regarded by the obeying public "as in some way obligatory or exemplary" for its members because, at least, in part, it defines "a model" which is "binding" and to which the actions of others "will in fact conform . . . ." At least, in part, this legitimacy is perceived as adhering to the authority issuing an order, as opposed to the qualities of legitimacy that inhere in an order itself.

T. FRANCK, *supra* note 181, at 16-18, 250 n.29 (quoting from M. WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31 (1968)). The second group mixes process and substance. This notion "is interested not only in how a ruler and a rule were chosen, but also in whether the rules made, and commands given, were considered in the light of all relevant data, both objective and attitudinal." T. FRANCK, *supra* note 181, at 17. Franck quotes Habermas: "Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just . . . ." T. FRANCK, *supra* note 181, at 248 n.27 (quoting J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178-79 (1979)). His third group, primarily neomarxist, focuses on outcomes. "In this view, a system seeking to validate itself . . . must be defensible in terms of the equality, fairness, justice, and freedom which are realized by those commands." T. FRANCK, *supra* note 181, at 18.

We do not have to choose among these different conceptualizations of legitimacy, since all three support my simple proposition distinguishing social legitimacy from both democracy and legal validity simpliciter.

189. *See generally* Dahl, *supra* note 181.

participation. Nonetheless, democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed. Although this formula is vague, it is sufficient for present purposes.

Imagine three independent polities, each enjoying a representative democracy. Let us further assume that each government enjoys legislative and regulatory power in the fields of education, taxation, foreign trade, and defense. In relation to each of these four functions the electors can influence directly their representatives, through elections and the like, as to the polity's education policy, level of taxation, type of foreign trade (e.g., protectionist or free), and defense force composition and policy. Assume finally that for a variety of reasons the three polities decide to integrate and "share their sovereignty" in the fields of taxation, foreign trade and defense.

If this decision to integrate was democratically reached within each polity, the integrated polity certainly enjoys formal legitimacy. However, by definition, initially the new integrated polity's "responsiveness" will be less than that of the three independent polities. Prior to the integration, the majority of electors in polity *A* would have a controlling influence over their level of taxation, the nature of their foreign trade policy, and the size and posture of their army. In the integrated polity, even a huge majority of the electors in polity *A* can be outvoted by the electors of polities *B* and *C*.[190] This will be the case even if the new integrated polity has a perfectly democratically elected "federal" legislator. The integrated polity will not be undemocratic but it will be, in terms of the ability of citizens to influence policies affecting them, less democratic.[191]

This transformation occurs, in reverse form, when a centralized state devolves power to regions, as in the cases of Italy, Spain, and recently France. Regionalism, "the division of sovereignty" and granting of it to more or less autonomous regions is in some respects the opposite of integration. One of the prime motivations for regionalism is to enhance democracy in the sense of giving people more direct control of areas of public policy that affect their lives.

To suggest that in the process of integration there is a loss, at least in one sense, of democracy, does not, as such, condemn the process of integration. The electors in polities *A*, *B*, and *C* usually have formidable reasons for integrating despite this loss of some direct control over policy when it is made in the larger polity. Typically the main reason is size. By aggregating their resources, especially in the field of defense, total welfare may be enhanced despite the loss of the more immediate influence of their government's policies. Similar

190. The dilution in Voice operates on two levels: a diminution in the specific gravity of each voter's weight in the process, and a diminution in the gravity of each voter's state.

191. Different federal options will of course have consequences also for the allocation choices of voters and substantive policy outcomes. For a sustained discussion of this issue, see Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152 (1981).

advantages may accrue in the field of foreign trade. Phenomena such as multinational corporations, which may manage to escape the control of any particular polity, may exist, and only an integrated polity can tax or regulate them effectively. In other words the independence and sovereignty of the single polities may be illusory in the real interdependent world. Nonetheless, the ability of the citizens of polity *A*, *B*, or *C* directly to control and influence these areas will have diminished.

Even within each polity the minority was obliged to accept majority decisions. So why do I claim that in the enlarged, integrated polity, in which an equally valid majoritarian rule applies, a loss of democracy occurs? This is among the toughest aspects of democratic theory.

What defines the boundary of the polity within which the majority principle should apply? No theoretical answer exists to this question. Long term, very long term, factors such as political continuity, social, cultural, and linguistic affinity, and a shared history determine the answer. No one factor determines the boundaries; rather they result from some or all of these factors. People accept the majoritarian principle of democracy within a polity to which they see themselves as belonging.[192]

The process of integration—even if decided upon democratically—brings about at least a short-run loss of direct democracy in its actual process of governance. What becomes crucial for the success of the integration process is the social legitimacy of the new integrated polity despite this loss of total control over the integrated policy areas by each polity.

How will such legitimacy emerge? Two answers are possible. The first is a visible and tangible demonstration that the total welfare of the citizenry is enhanced as a result of integration. The second answer is ensuring that the new integrated polity itself, within its new boundaries, has democratic structures. But more important still is giving a temporarily enhanced voice to the separate polities. It is not an accident that some of the most successful federations which emerged from separate polities—the United States, Switzerland, Germany—enjoyed a period as a confederation prior to unification. This does not mean confederation is a prerequisite to federation. It simply suggests that in a federation created by integration, rather than by devolution, there must be an adjustment period in which the political boundaries of the new polity become socially accepted as appropriate for the larger democratic rules by which the minority will accept a new majority.[193]

---

192. "Thus it does not seem possible to arrive at a defensible conclusion about the proper unit of democracy by strictly theoretical reasoning: we are in the domain not of theoretical reason but of practical judgment." Dahl, *supra* note 181, at 106; *see also* L. BRILMAYER, *supra* note 181, at 13-27, 52-78 (ch. 1, "Political Legitimacy and Jurisdictional Boundaries" and ch. 3, "Boundary Assumptions in Domestic Political Theory").

193. We do not have to take the formal transfer as the actual transfer. Arguably, the United States became truly federal only after the Civil War.

From the political, but not legal, point of view the Community is in fact a confederation. The big debate is therefore whether the time is ripe for a radical change toward a more federal structure, or whether the process should continue in a more evolutionary fashion.

These answers about the possible emergence of legitimacy can be at odds with each other. Giving an enhanced Voice to each polity may impede the successful attainment of the goals of integration. Denying sufficient Voice to the constituent polities (allowing the minority to be overridden by the majority) may bring about a decline in the social legitimacy of the integrated polity with consequent dysfunctions and even disintegration. In terms of democratic theory, the final objective of a unifying polity is to recoup the loss of democracy inherent in the process of integration. This "loss" is recouped when the social fabric and discourse are such that the electorate accepts the new boundary of the polity and then accepts totally the legitimacy—in its social dimension—of being subjected to majority rule in a much larger system comprised of the integrated polities.

We can now see how these notions play out in a reconstructed analysis of the democracy issue in the Community.

As stated above, a premise of the traditional analysis is that the Community suffers from a legitimacy crisis. Is the absence of legitimacy formal? Surely not. The Community, including its weak Parliament, appointed Commission, and unaccountable Council, enjoys perfect formal legitimacy. The Treaties all have been approved by the Community electorate through their national parliaments in accordance with the constitutional requirement of each Member State. In addition, the Treaties have been approved several times more with the accession of each new Member State and most recently with the adoption of the Single European Act.

If there is a crisis of legitimacy it must therefore be a crisis of social (empirical) legitimacy. What is the nature of this crisis of social legitimacy, if indeed it exists?

The traditional view is that the absence of legitimacy is rooted in the Democracy Deficit. As stated above, the implication is that any increase in the legislative and control powers of the European Parliament at the expense of the Council contributes to an elimination of this legitimacy crisis. I challenge the premise and the conclusion. I believe that Parliament should be given enhanced powers, because I acknowledge the Democracy Deficit in the formal sense explained above. But I think that it is at least questionable whether this will necessarily solve the legitimacy problems of the Community. It may even enhance them.

The legitimacy problem is generated by several factors, which should be discussed separately. The primary factor is, at least arguably, that the European electorate (in most Member States) only grudgingly accepts the notion that crucial areas of public life should be governed by a decisional process in which

their *national* voice becomes a minority which can be overridden by a majority of representatives from other European countries. In theoretical terms there is, arguably, still no legitimacy to the notion that the boundaries within which a minority will accept as democratically legitimate a majority decision are now European instead of national. It is interesting, and significant, that for the first time national parliaments are taking a keen interest in the structural process of European integration and are far from enamored with the idea of solving the Democracy Deficit by simply enhancing the powers of the European Parliament.[194]

At its starkest, this critical view claims that in terms of social legitimacy no difference exists between a decision of the Council of Ministers and a decision of the European Parliament. To the electorate, both chambers present themselves as legislative, composed of Member State's representatives. In both cases, until time and other factors resolve this dimension of legitimacy, the electorate of a minority Member State might consider it socially illegitimate that they have to abide by a majority decision of a redefined polity.

On this view, the most legitimating element (from a "social" point of view) of the Community was the Luxembourg Accord and the veto power. To be sure, a huge cost in terms of efficient decisionmaking and progress was paid. But this device enabled the Community to legitimate its program and its legislation. It provided the national electorates an ex ante "insurance policy" that nothing could pass without the electorate Voice having a controlling say. The "insurance policy" also presented an ex post legitimation as well: everything the Community did, no matter how unpopular, required the assent of national ministers. The legitimacy of the output of the Community decisional process was, thus, at least partially due to the public knowledge that it was controllable through the veto power. The current shift to majority voting might therefore exacerbate legitimacy problems. Even an enhanced European Parliament, which would operate on a co-decision principle, will not necessarily solve the legitimacy problem. The legitimacy crisis does not derive principally from the accountability issue at the European level, but from the very redefinition of the European polity.

Pulling all the threads together, the conclusion provides at least food for thought: in a formal sense, majority voting exacerbates the Democracy Deficit by weakening national parliamentary control of the Council without increasing the powers of the European Parliament. But even increasing the powers of the European Parliament (to full co-decision on the most ambitious plan) does not wholly solve the problem. It brings to the fore the intractable problem of redefining the political boundaries of the Community within which the principle of majority voting is to take place. It is an open question whether the necessary

194. *See, e.g.*, Select Comm., *supra* note 173, at ¶¶ 157, 158, 210.

shift in public loyalty to such a redefined boundary has occurred even if we accept the formalistic notion of state parliamentary democracy.

IV. BEYOND *1992*: TWO VISIONS OF THE PROMISED LAND—THE IDEOLOGY, ETHOS, AND POLITICAL CULTURE OF EUROPEAN INTEGRATION

By way of conclusion I would like to examine, far more tentatively, another facet of the transformation of Europe: the ideology, ethos, and political culture of European integration, particularly in relation to *1992*.[195]

Ideological discourse within the Community, especially in the pre-*1992* period, had two peculiar features. On the one hand, despite the growing focus of Community activity on important issues of social choice, a near absence of overt debate on the left-right spectrum existed. *1992* (as a code for the overall set of changes) represents a break from this pattern.

On the other hand, there was abundant discourse on the politics and choices of the integration model itself. But this discourse was fragmented. In specialized political constituencies, especially those concerned with Community governance, public discourse was typically a dichotomy between those favoring the Community (and further European integration) and those defending "national sovereignty" and the prerogatives of the Member State.

The outcome of the debate was curious. In the visible realm of political power from the 1960's onwards, it seemed that the "national interest" was ascending.[196] The "high moral ground" by contrast, seemed to be occupied fairly safely by the "integrationists."

So far as the general public was concerned, the characterizing feature of public discourse was a relatively high level of indifference, disturbed only on

---

195. In the earlier parts of this Article I rested my interpretation, as much as possible and at least in its factual matrix, on an "objective" reality rooted in "empirical" and consequently "refutable" data. Likewise, my analytical moves were transparent enough to open them to rational critique. Obvious and inevitable limitations on the resulting "scientific objectivity" of the Article exist. Clearly, to give the most banal example, my own prejudices, overt and less overt, shaped the selection of factual data, and, of course, their perception and analysis. Readers are always better placed than the writer to expose those prejudices and discount them in assessing the overall picture.

In turning to ethos, ideology, and political culture, the screening process of the "self" (my "self") plays an even bigger role in the narrative. To try to "document" my assertions and conclusions here would be to employ the semblance of a scholarly apparatus where it is patently not merited. I do not, and cannot, claim to root this part of the Article on the kind of painstaking research and complex tools that characterize the work of the social historian or the historical sociologist. *Caveat Lector!* Nonetheless, my brief narrative will, I hope, serve a function. Compared to the plethora of systemic and substantive theories and analyses of the processes of European integration, a real dearth of ideological and cultural scrutiny exists. Two recent extremely illuminating reflections on these issues are F. SNYDER, *supra* note 7, and J. ØRSTRØM MØLLER, TECHNOLOGY AND CULTURE IN A EUROPEAN CONTEXT (1991). By offering my perspective on these issues, I hope the reader is drawn to reflect, and thereby, challenged to take position.

196. The constitutional revolution was not immediately apparent even to relatively informed audiences. *See* Weiler, *Attitudes of MEPs Towards the European Court*, 9 EUR. L. REV. 169 (1984). One of the interesting conclusions of this survey of attitudes is that even those Members of the European Parliament strongly opposed to the dynamics of European integration and the increase in power of the Commission and Parliament regarded the Court with relevant equanimity.

rare occasions when Community issues caught the public imagination. Although opinion polls always showed a broad support for the Community, as I argued earlier, it was still possible to gain political points by defending the national interest against the threat of the faceless "Brussels Eurocracy."

Here, the importance of *1992* has not been only in a modification of the political process of the Community, but also in a fascinating mobilization of wide sections of general public opinion behind the "new" Europe. The significance of this mobilization cannot be overstated. It fueled the momentum generated by the White Paper and the Single European Act, and laid the ground auspiciously for creating Community initiatives to push beyond *1992*. These Community initiatives included the opening in December 1990 of two new Intergovernmental Conferences designed to fix the timetable and modalities of Economic and Monetary Union, as well as the much more elusive task of Political Union. Although no one has a clear picture of "political union,"[197] with open talk about Community government, federalist solutions, and other such codes,[198] even if the actual changes to the existing structure will be disappointing, in the ideological "battle" between state and Community, the old nationalist rhetoric has become increasingly marginalized and the integrationist ethos has fully ascended. The demise of Prime Minister Thatcher symbolizes this change.

The impact of *1992*, however, goes well beyond these obvious facts of mobilization and "European ascendancy." Just below the surface lurk some questions, perhaps even forces, which touch the very ethos of European integration, its underlying ideology, and the emergent political culture associated with this new mobilization. Moreover, in some respects the very success of *1992* highlights some inherent (or at least potential) contradictions in the very objectives of European integration.

I shall deal first with the break from the Community's supposed ideological neutrality, and then turn to the question of the ethos of European integration in public discourse.

---

197. The term has no fixed meaning and is used to connote a wide variety of models from federalist to intergovernmentalist. *See generally*, R. MAYNE & J. PINDER, FEDERAL UNION: THE PIONEERS (1990); THE DYNAMICS OF EUROPEAN UNION (R. Pryce ed. 1987) (usefully tracing evolution of concept of political union over history of European integration up to Single European Act); EUROPEAN UNION: THE EUROPEAN COMMUNITY IN SEARCH OF A FUTURE (J. Lodge ed. 1986).

198. *See, e.g.*, President Delors' speech to the European Parliament of January 17, 1990: "Cet exécutif [of the future Community on which Delors was speculating—the Commission according to the logic of the Founders] devra être responsable, bien entendu, devant les institutions démocratique de la future *féderation . . . .*" *Jacques Delors Presente De Programme de la Commission et Dessine Un Profit de L'Europe de Demain*, EUROPE DOC. (No. 1592) 7 (Jan. 24, 1990) (emphasis added). Likewise, when speaking approvingly of Mitterrand's idea of an "all European Confederation," Delors adds: "Mais ma conviction est qu'une telle conféderation ne pourra voir le jour qu'une fois réalisé l'Union politique de la Communauté!" *Id.* at 4.

A. *1992 and the "Ideological Neutrality" of the Community*

The idea of the single market was presented in the White Paper as an ideologically neutral program around which the entire European polity could coalesce in order to achieve the goals of European integration. This idea reflected an interesting feature of the pre-*1992* Community: the relative absence of ideological discourse and debate on the right-left spectrum. The chill on right-left ideological debate derived from the governance structure of the Community.[199]

Since in the Council there usually would be representatives of national governments from both right and left, the desired consensus had to be one acceptable to all major political forces in Europe. Thus, policies verged towards centrist pragmatic choices, and issues involving sharp right-left division were either shelved[200] or mediated to conceal or mitigate the choice involved. The tendency towards the lowest common denominator applied also to ideology.

Likewise, on the surface, the political structure of the European Parliament replicates the major political parties in Europe. National party lists join in Parliament to sit in European political groups. However, for a long time the politics of integration itself, especially on the issues of the European Parliament's power and the future destiny of the Community, were far more important than differences between left and right within the chamber. The clearest example was the coalescing of Parliament with a large majority behind the Independent-Communist Spinelli and his Draft Treaty for European Union.[201]

Most interesting in this perspective is the perception of the Commission. It is an article of faith for European integration that the Commission is not meant to be a mere secretariat, but an autonomous political force shaping the agenda and brokering the decisionmaking of the Community. And yet at the same time, the Commission, as broker, must be ideologically neutral, not favoring Christian Democrats, Social Democrats, or others.

This neutralization of ideology has fostered the belief that an agenda could be set for the Community, and the Community could be led towards an ever closer union among its peoples, without having to face the normal political cleavages present in the Member States. In conclusion, the Community political culture which developed in the 1960's and 1970's led both the principal political actors and the political classes in Europe to an habituation of all political forces to thinking of European integration as ideologically neutral in, or ideologically transcendent over, the normal debates on the left-right spec-

---

199. Of course I do not suggest that choices with ideological implications were not made. But they were rarely perceived as such.

200. Thus, the proposed European company statute was shelved for many years because of the inability to agree, especially on the role of labor in the governance structure of the company.

201. Typically, right and left have differed sharply in Parliament on issues of foreign affairs and extra-Community policies.

trum. It is easy to understand how this will have served the process of integration, allowing a nonpartisan coalition to emerge around its overall objectives.

1992 changes this in two ways. The first is a direct derivation from the turn to majority voting. Policies can be adopted now within the Council that run counter not simply to the perceived interests of a Member State, but more specifically to the ideology of a government in power. The debates about the European Social Charter and the shrill cries of "Socialism through the backdoor," as well as the emerging debate about Community adherence to the European Convention on Human Rights and abortion rights are harbingers of things to come. In many respects this is a healthy development, since the real change from the past is evidenced by the ability to make difficult social choices and particularly by the increased transparency of the implications of the choice. At the same time, it represents a transformation from earlier patterns with obvious dysfunctional tensions.

The second impact of *1992* on ideological neutrality is subtler. The entire program rests on two pivots: the single market plan encapsulated in the White Paper, and its operation through the new instrumentalities of the Single European Act. Endorsing the former and adopting the latter by the Community and its Member States—and more generally by the political class in Europe—was a remarkable expression of the process of habituation alluded to above. People were successfully called to rally behind and identify with a bold new step toward a higher degree of integration. A "*single European* market" is a concept which still has the power to stir. But it is also a "single European *market*." It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology, and political culture: the culture of "the market." It is also a philosophy, at least one version of which—the predominant version—seeks to remove barriers to the free movement of factors of production, and to remove distortion to competition as a means to maximize utility. The above is premised on the assumption of formal equality of individuals.[202] It is an ideology the contours of which have been the subject of intense debate within the Member States in terms of their own political choices. This is not the place to explicate these. Elsewhere, two slogans, "The One Dimensional Market" and "Big Market as Big Brother," have been used to emphasize the fallacy of ideological neutrality.[203] Thus, for example, open access, the cornerstone of the single market and the condition for effective nonprotectionist competition, will also put pressure on local consumer products in local markets to the extent these are viewed as an expression of cultural diversity. Even more

---

202. There is an alternative construction of the Community political ideology also present in the European debate, one which recognizes "inequalities but deploring their inequities, considers the market to be just one of several basic means of governing society." F. SNYDER, *supra* note 7, at 89.

203. Bieber, Dehousse, Pinder & Weiler, *Back to the Future: Policy, Strategy and Tactics of the White Paper on the Creation of a Single European Market*, in 1992: ONE EUROPEAN MARKET? 18-20 (1988).

dramatic will be the case in explicit "cultural products," such as television and cinema. The advent of Euro-brands has implications, for better or for worse, which extend beyond the bottom line of national and Community economies. A successful single market requires widespread harmonization of standards of consumer protection and environmental protection, as well as the social package of employees. This need for a successful market not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European-wide neutrality of competition above other competing values.

It is possible that consensus may be found on these issues, and indeed that this choice enjoys broad legitimacy. From my perspective, it is important to highlight that the consensus exudes a powerful pressure in shaping the political culture of the Community. As such, it is an important element of the transformation of Europe.

B. *The Ethos of European Integration: Europe as Unity and Europe as Community*

As indicated above, *1992* also brings to the fore questions, choices, and contradictions in the very ethos of European integration. I shall explore these questions, choices, and contradictions by construing two competing visions of the Promised Land to which the Community is being led in *1992* and beyond. The two visions are synthetic constructs, distilled from the discourse and praxis of European integration.

Unitarian and communitarian visions share a similar departure point. If we go back in time to the 1950 Schuman Declaration and the consequent 1951 Treaty of Paris establishing the European Coal and Steel Community, these events, despite their economic content, are best seen as a long-term and transformative strategy for peace among the states of Western Europe, principally France and Germany.[204] This strategy tried to address the "mischief" embodied in the excesses of the modern nation-state and the traditional model of statal intercourse among them that was premised on full "*sovereignty*," "*autonomy*," "*independence*," and a relentless defense and maximization of the national interest. This model was opposed not simply because, at the time, it displayed a propensity to degenerate into violent clashes, but also because it was viewed as unattractive for the task of reconstruction in times of peace.[205] The Europe-

204. *See, e.g.*, Schuman Declaration of May 9, 1950, *reprinted in* 13 BULL. EUR. COMMUNITIES 14, 15 (1980) [hereinafter Schuman Declaration] ("The gathering of the nations of Europe requires the elimination of the age-old opposition of France and the Federal Republic of Germany."); Preamble to 1951 Treaty of Paris, *reprinted in* EUR. COMMUNITY INFO. SERVICE, TREATIES ESTABLISHING THE EUR. COMMUNITIES (1987) ("Considering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it . . . .").

205. This does not mean that states and leaders were engulfed in some teary-eyed sentimentalism. Signing on to the Community idea was no doubt also a result of cool calculation of the national interest.

an Community was to be an antidote to the negative features of the state and statal intercourse; its establishment in 1951 was seen as the beginning of a process[206] that would bring about their elimination.

At this point, the two visions depart.

According to the first—unity—vision, the process that started in 1951 was to move progressively through the steps of establishing a common market and approximating economic policies[207] through ever tighter economic integration (economic and monetary union), resulting, finally, in full political union, in some version of a federal United States of Europe. If we link this vision to governance process and constitutional structure, the ultimate model of the Community and the constitutionalized treaties stands as the equivalent, in the European localized context, of the utopian model of "world government" in classical international law. Tomorrow's Europe in this form would indeed constitute the final demise of Member State nationalism and, thus, the ultimate realization of the original objectives through political union in the form of a federalist system of governance.[208]

The alternative—community—vision also rejects the classical model of international law which celebrates statal sovereignty, independence, and autonomy and sees international legal regulation providing a "neutral" arena for states to prosecute their own ("national") goals premised on power and self-interest.[209] The community vision is, instead, premised on limiting, or sharing, sovereignty in a select albeit growing number of fields, on recognizing, and even celebrating, the reality of *interdependence*, and on counterpoising to the exclusivist ethos of statal autonomy a notion of a *community* of states and peoples sharing values and aspirations.

Most recently, it has been shown convincingly, not for the first time, how the classical model of international law is a replication at the international level of the liberal theory of the state.[210] The state is implicitly treated as the analogue, on the international level, to the individual within a domestic situation. In this conception, international legal notions such as self-determination,

---

See A. MILWARD, THE RECONSTRUCTION OF WESTERN EUROPE 1945-51 (1984). But this does not diminish the utility of seeking the overall ethos of the enterprise that they were joining.

206. On the one hand: "In taking upon [it]self for more than 20 years the role of champion of a united Europe, France has always had as [its] essential aim the service of peace." On the other hand: "Europe will not be made all at once, or according to a single . . . plan." Schuman Declaration, *supra* note 204, at 15.

207. EEC Treaty, art. 2.

208. Of course, even in this vision, one is not positing a centrist unified Europe but a federal structure of sorts, in which, local interests and diversity would be maintained. Thus, although Delors speaks in his Oct. 17, 1990, speech of Europe as federation, he is—in good faith—always careful to maintain respect for "pluralism." *See Jacques Delors at the College of Europe In Bruges, reprinted in* EUROPE DOC. (No. 1576) 1, 5 (Oct. 21, 1989) [hereinafter *Delors Speech of Oct. 17, 1990*].

209. This, of course, is the classical model of international law. It is not monolithic. There are, in international law, voices, from both from within and without, calling for an alternative vision expressed in such notions as "common heritage of humankind." *See, e.g.*, P. SANDS, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE (World Resources Inst., 1990).

210. M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, at XVI *passim* (1989).

sovereignty, independence, and consent have their obvious analogy in theories of the individual within the state. The idea of community is thus posited in juxtaposition to the international version of pure liberalism and substitutes a modified communitarian vision.

Since the idea of "community" is currently in vogue and has become many things to many people, I would like to explain the meaning I attach to it in this transnational European context.[211] The importance of the EEC inter-statal notion of *community* rests on the very fact that it does not involve a negation of the state. It is neither state nor community. The idea of community seeks to dictate a different type of intercourse among the actors belonging to it, a type of self-limitation in their self-perception, a redefined self-interest, and, hence, redefined policy goals. To the interest of the state must be added the interest of the community. But crucially, it does not extinguish the separate actors who are fated to live in an uneasy tension with two competing senses of the polity's self, the autonomous self and the self as part of a larger community, and committed to an elusive search for an optimal balance of goals and behavior between the community and its actors. I say it is crucial because the unique contribution of the European Community to the civilization of international relations—indeed its civilizing effect on intra-European statal intercourse—derives from that very tension among the state actors and between each state actor and the Community. It also derives from each state actor's need to reconcile the reflexes and ethos of the "sovereign" national state with new modes of discourse and a new discipline of solidarity.[212] Civilization is thus perceived not in the conquering of Eros but in its taming.[213]

Moreover, the idea of Europe as community not only conditions discourse among states, but it also spills over to the peoples of the states, influencing relations among individuals. For example, the Treaty provisions prohibiting discrimination on grounds of nationality, allowing the free movement of workers and their families, and generally supporting a rich network of transnational social transactions may be viewed not simply as creating the optimal conditions for the free movement of factors of production in the common market. They also serve to remove nationality and state affiliation of the

---

211. I certainly do not find it useful to make an explicit analogy to the theories of community of domestic society, although I would not deny their influence on my thinking. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); M. WALZER, SPHERES OF JUSTICE (1983), and the fierce debates about these, *see, e.g.*, Dworkin, *To Each His Own*, NEW YORK REVIEW OF BOOKS, Apr. 14, 1983; *Spheres of Justice: an Exchange*, NEW YORK REVIEW OF BOOKS, July 21, 1983.

212. *Cf.* EEC Treaty, art. 5.

213. This tension between actor and community finds evocative expression in the Preamble and opening Article of the EEC Treaty, the foundation of the current Community. The Preamble speaks of "an ever closer union among the *peoples* of Europe" (emphasis added) whereas Article 2 speaks of "closer relations between the *States* belonging to it" (emphasis added). Note, too, that the Preamble speaks about the peoples, of Europe rejecting any notion of a melting pot and nation-building. Finally, note the "ever closer union": something which goes on for "ever" incorporates, of course, the "never." *See* EEC Treaty, preamble.

individual, so divisive in the past, as the principal referent for transnational human intercourse.

The *unity* vision of the Promised Land sees then as its "ideal type" a European polity, finally and decisively replacing its hitherto warring Member States with a political union of federal governance. The *community* vision sees as its "ideal type" a political union in which Community and Member State continue their uneasy co-existence, although with an ever-increasing embrace. It is important also to understand that the voice of, say, Thatcher is not an expression of this community vision. Thatcherism is one pole of the first vision, whereby Community membership continues to be assessed and re-evaluated in terms of its costs and benefits to a Member State, in this case Great Britain, which remains the ultimate referent for its desirability. The Community is conceived in this way of thinking not as a redefinition of the national self but as an arrangement, elaborate and sophisticated, of achieving long-term maximization of the national interest in an interdependent world. Its value is measured ultimately and exclusively with the coin of national utility and not community solidarity.

I do not think that *1992* can be seen as representing a clear preference and choice for one vision over the other. But there are manifestations, both explicit and implicit, suggesting an unprecedented and triumphal resurgence and ascendancy of the unity vision of Europe over the competing vision of community: part and parcel of the *1992* momentum. If indeed the road to European union is to be paved on this unity vision, at the very moment of ascendancy the Community endangers something noble at its very core and, like other great empires, with the arrival of success may sow the seeds of self-destruction.

Why such foreboding? Whence the peril in the unity vision?

At an abstract logical level it is easy to challenge the unity vision which sets up a fully united Europe as the pinnacle of the process of European integration. It would be more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super) state. It would be equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism. The problem with the unity vision is that its very realization entails its negation.

But the life of the Community (like some other things) is not logic, but experience. And experience suggests that with all the lofty talk of political union and federalism we are not about to see the demise of the Member States, at least not for a long time. The reports leaking out of the intergovernmental conference suggest fairly modest steps on this road.

That being the case, the unease with the unity vision nonetheless remains. For if the unity ethos becomes the principal mobilizing force of the polity, it may, combined with the praxis and rhetoric of the *1992* single market, compro-

mise the deeper values inherent in the community vision, even if the Community's basic structure does not change for years to come.

I suggested above that these values operated both at the interstate level by conditioning a new type of statal discourse and self-perception and at the societal and individual level by diminishing the importance of nationality in transnational human intercourse. How then would the unity vision and the *1992* praxis and rhetoric corrode these values?

The successful elimination of internal frontiers will, of course, accentuate in a symbolic and real sense the external frontiers of the Community. The privileges of Community membership for states and of Community citizenship for individuals are becoming increasingly pronounced. This is manifest in such phenomena as the diffidence of the Community towards further enlargement (packaged in the notion of the concentric circles),[214] in the inevitable harmonization of external border controls, immigration, and asylum policies, and in policies such as local European content of television broadcasting regulation. It assumes picaresque character with the enhanced visibility of the statal symbols already adopted by the Community: flag, anthem, Community passport. The potential corrosive effect on the values of the community vision of European integration are self-evident. Nationality as referent for interpersonal relations, and the human alienating effect of *Us* and *Them* are brought back again, simply transferred from their previous intra-Community context to the new inter-Community one. We have made little progress if the *Us* becomes European (instead of German or French or British) and the *Them* becomes those outside the Community or those inside who do not enjoy the privileges of citizenship.

There is a second, slightly more subtle, potentially negative influence in this realm. A centerpiece of the agenda for further integration is the need of Europe to develop the appropriate structures for a common foreign and defense policy.[215] It has indeed been anomalous that despite the repeated calls since the early 1970's for a Europe that will speak with one voice,[216] the Community has never successfully translated its internal economic might to commensurate outside influence. There could be much positive in Europe taking such a step to an enhanced common foreign and security policy. The potential corrosive element of this inevitable development rests in the suspicion that some of the harkening for a common foreign policy is the appeal of strength and the vision of Europe as a new global superpower. Europe *is* a political and economic superpower and often fails to see this and discharge its responsibilities appropriately. But the ethos of strength and power, even if transferred from the Member

214. *See Delors Speech of Oct. 17, 1990*, *supra* note 208.

215. *Id.*; *see also* Proposals of European Parliament to Intergovernmental Conference, PE 146.824, new art. 130u (proposing full-fledged apparatus for European foreign and security policy).

216. On the history of European Political Cooperation and the idea of Europe speaking with one voice, see Stein, *supra* note 4.

State to the European level, is closer to the unity rather than community notion of Europe and, as such, partakes of the inherent contradiction of that vision.

All these images and the previous question marks are not intended as an indictment of *1992* and the future road of European integration. Both in its structure and process, and, in part, its ethos, the Community has been more than a simple successful venture in transnational cooperation and economic integration. It has been a unique model for reshaping transnational discourse among states, peoples, and individuals who barely a generation ago emerged from the nadir of Western civilization. It is a model with acute relevance for other regions of the world with bleak histories or an even bleaker present.

Today's Community is impelled forward by the dysfunctioning of its current architecture. The transformation that is taking place has immense, widely discussed promise. If I have given some emphasis to the dangers, it is not simply to redress a lacuna in the literature. It is also in the hope that as this transformation takes place, that part, limited as it may be, of the Community that can be characterized as the modern contribution of Europe to the civilization of interstatal and intrastatal intercourse shall not be laid by the wayside.