SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Journal of International Law

Volume 27 | Issue 1

1995

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THE SUBSIDIARITY PRINCIPLE IN EUROPEAN UNION LAW — AMERICAN FEDERALISM COMPARED

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I. INTRODUCTION

More than 200 years ago, the draftsmen of the U.S. Constitution struggled with an enduring dilemma for modern nations now contemplating new political structures for the combination of autonomous states: what form shall the new government take, and if that structure is to be federal, what shall be the proper allocation of power between the states and the federal government?

Although the fundamental structure of American federalism is in place, the work refining the balance between state and federal power is an on-going process. The Republican Party victory in 1994, gaining majority control of both houses of Congress, virtually assures that new legislative measures will be passed to reallocate some powers to state and local governments. Among the most controversial areas of dispute likely will be those programs involving social benefits.[1]

Social policy has emerged as one of the most important elements in the European Union (EU)[2] legal system. The preamble to the European Economic Community Treaty (EC Treaty) expressly refers to the impor-

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[1] The new Speaker of the House, Newt Gingrich, and Senator Bob Dole, the Republican National Chairman, focused on the 10th Amendment of the U.S. Constitution when they met with Republican governors in early 1995 to discuss legislative goals. Jerry Gray, *Welfare - G.O.P. Governors Make Their Pitch*, N.Y. TIMES, Jan. 7, 1995, at A8.

[2] On November 1, 1993, the twelve Member States of what was known as the European Economic Community approved the Maastricht Treaty on European Union (TEU), creating the European Union (EU). TREATY ON EUROPEAN UNION [TEU] 1992 O.J. (C224) 1. *See also* European Union, FIN. TIMES, Nov. 1, 1993, at 15.

tance of social goals:

> [D]etermined to lay the foundations of an even closer union among the peoples of Europe; Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe; Affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples.[3]

Moreover, Article 2 of the EC Treaty, which sets forth the goals of the common market, includes among those goals "an accelerated raising of the standard of living,"[4] which obviously incorporates both social and economic elements. The Community Charter of the Fundamental Social Rights of Workers (Social Charter),[5] which was adopted by all the Member States except the U.K. at the European Council meeting in Strasbourg on December 9-10, 1989,[6] has provided an even greater stimulus to progress in social action. As the European Community (EC) has increased its activism in such sensitive areas as social policy, some Member States have been particularly concerned that the new central government might tread on their local prerogatives.

The principle of "subsidiarity" in EU law requires that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government which is capable of effectively addressing the problem.[7] In effect, subsidiarity is a guideline for contemporary power-sharing between the relatively new institutions of the EU and the constituent Member States that formed the Union.

This essay examines the notion of subsidiarity in the EU, comparing it to the American brand of federalism. Although the analogy is justified, it is clear that subsidiarity does not have an exact counterpart in the American system of federalism. Nevertheless, the underlying concern over the division of powers is essentially the same under both systems of government.

Most of the difficulties to be encountered in applying and interpreting the notion of subsidiarity remain yet unmet and thus are destined for

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[3] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY] Preamble.

[4] *Id.* at art. 2.

[5] The Community Charter of the Fundamental Social Rights of Workers. 3 C.M.L.R. 642 (1989).

[6] Commission of the European Communities, XXIIIrd General Report of the Activities of the European Communities - 1989, 187-88 (1990).

[7] TONY VENABLES & DAVID MARTIN, AMENDMENT OF THE TREATIES 24 (1992).

future resolution. Perhaps some useful guidance can be obtained by analyzing the long history of America's experience in reconciling the divergent interests which intersect at the juncture of federal and state powers. Following an examination of the subsidiary principle in Part II, Part III will review American federalism with that objective in mind.

II. THE SUBSIDIARITY PRINCIPLE AND ITS SIGNIFICANCE IN THE EU

The notion of subsidiarity originated in ancient times and was first applied within the Roman Catholic Church.[8] In the context of religious philosophy, the concept of subsidiarity referred to the relationship between government and private enterprise.[9]

In the EC, subsidiarity came to be known as a method of power-sharing between the central governing institutions and the governing bodies of the Member States. The principle was first mentioned in the EC in 1975 as part of the European Commission's Report on Economic Union.[10] Although the subsidiarity principle was not mentioned by name, the report advocated an expansion of Community powers only where Member States could not effectively accomplish the desired tasks.[11] The theme of the Report was that individual Member State action and Community action should complement each other, rather than compete with each other.[12]

In 1984, the draft treaty on European Union (Draft Treaty)[13] was adopted by the European Parliament as a proposal for Community reform. For the first time, the subsidiarity principle was expressly mentioned as

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[8] 13 NEW CATHOLIC ENCYCLOPEDIA 762 (1967).

[9] The Papal Encyclical of 1931, "Quadregesimo Anno," discussed the concept of subsidiarity in general:

> [J]ust as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so it is an injustice, a grave evil and a disturbance of right order, for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help members of the social body, but never to destroy or absorb them.

Editorial Comments, *The Subsidiarity Principle*, 27 COMMON MKT. L. REV. 181, 182 (1990) [hereinafter *The Subsidiarity Principle*].

[10] Supp. 5/75, Bull. EC

[11] Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107, 1110-11 (1992).

[12] *Id.* at 1114.

[13] *See* Draft Treaty Establishing the European Union, 1984 O.J. (C 77) 33, 53-4 [hereinafter Draft Treaty].

a general constitutional rule.[14] Paragraph 9 of the Preamble stated: "Intending to entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently."[15]

Furthermore, the Draft Treaty clarified the practical effect of the subsidiarity principle on Community action: "The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers."[16]

The Draft Treaty was too ambitious for the Member States to approve.[17] As a result, the Member States agreed to the Single European Act (SEA)[18] as a more modest means of reform. The SEA promoted the principle of subsidiarity only in the area of environmental protection, amending the EC Treaty by adding the following proviso: "The Community shall take action relating to the environment to the extent to which the objectives can be attained better at Community than at the level of the individual Member States."[19]

Thus, the SEA gave new powers to Community institutions to protect the environment, using the principle of subsidiarity as a guideline for the exercise of that power. However, the SEA granted additional powers in other potentially controversial areas such as worker health and safety, regional development and research and technology, with no corresponding link to subsidiarity.[20] Additionally, it was widely expected that new treaty amendments concerning economic and monetary union would be forthcoming.[21] The fact that the SEA did very little to promote subsidiarity as a principle of general application concerned many Member States because of the growing expansiveness of Community jurisdiction. This concern was exacerbated by the SEA innovation of qualified majority voting, in place of unanimity, which allowed a Commission proposal to become Council legislation despite the opposition of some Member

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[14] George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States,* 94 COLUM. L. REV. 332, 340-44 (1992) [hereinafter Bermann, *Taking Subsidiarity Seriously*].

[15] Draft Treaty, *supra* note 13, Preamble Para. 9, 1984 O.J. (C 77) 33.

[16] *Id.*

[17] Bermann, *Taking Subsidiarity Seriously, supra* note 14, at 344.

[18] Single European Act, 1987 O.J. (L 169) 1.

[19] EC TREATY art. 130r(4) (as amended 1987).

[20] Bermann, *Taking Subsidiarity Seriously, supra* note 14, at 345.

[21] *Id.*

States.

In 1992, the Maastricht Treaty on European Union (TEU)[22] further expanded EU jurisdiction, but simultaneously helped quell the fears of Member States by adopting subsidiarity as a central constitutional principle of broad application.[23] Community institutions are instructed to "respect . . . the principle of subsidiarity" as they carry out their responsibilities.[24] The TEU is replete with other references, both direct and indirect, to the subsidiarity principle. For example, the TEU states that in the new EU, "decisions are taken as closely as possible to the citizens."[25] The TEU defines subsidiarity by adding the following new paragraph to the EC Treaty:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[26]

Finally, the TEU amended the EC Treaty in virtually every area where powers were conferred upon the Community's governing institutions by adding language incorporating the subsidiarity principle.[27]

The subsidiarity principle represents a constitutional limitation on the scheme of power-sharing between the governing bodies of Member States and the institutions of the EC.[28] Rather than creating a division among respective powers of the EU and the individual Member States, subsidiarity creates a presumption of deference to state or local government decision making in those areas of concurrent jurisdiction. In its

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[22] TREATY ON EUROPEAN UNION [TEU] 1992 O.J. (C224) 1.

[23] *Id.*

[24] *Id.* at art. B.

[25] EC TREATY art. A, (as amended 1992).

[26] *Id.* at art. 3B.

[27] For example, TEU art. G (amending EC Treaty art. 127) assures that the Community, while supplementing vocational training policies, will "fully respect [ ] the responsibility of the Member States for the content and organization of vocational training." EC TREATY art. 127(1) (as amended 1992). Similar amendments to the EC Treaty are effected by the TEU for other new subjects brought under the EU jurisdiction, including consumer protection, culture, education, health and industrial competitiveness.

[28] George A. Bermann, *Subsidiarity and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 97, 98 (1993) [hereinafter Bermann, *Subsidiarity and The European Community*].

application, the subsidiarity principle urges the European Council of Ministers (Council), the European Parliament (Parliament), and the European Commission (Commission) to take actions pursuant to their constitutional powers only when constituent Member States cannot adequately achieve the desired results by acting alone or in conjunction with other Member States.[29]

The subsidiarity principle thus expresses the *aspiration* that the decision-making integrity of Member States over local affairs will be preserved, and the institutions of the EC will be prevented from encroaching on areas more appropriately reserved for Member States.[30] One commentator has described subsidiarity as a principle of governance by which actions to accomplish legitimate government objectives, ideally, are taken at the lowest level of government capable of dealing with the underlying problem.[31] The Centre for Economic Policy Research (CEPR) defines subsidiarity "as a presumption that the European Union should do only what states cannot do well themselves."[32] While the subsidiarity principle promotes strong, central political unity when necessary to advance the desired ends of the collective policy, it also promotes the advantageous benefits of localism whenever possible.[33] Professor Bermann concludes that the prime virtues of "localism" which subsidiarity attempts to protect and advance include self-determination and accountability, political liberty, flexibility, preservation of local identities, diversity and respect for internal divisions of component states.[34]

Self-determination by local populations is preserved under subsidiarity because rules and actions are being implemented at levels of government where individuals are more involved and effectively represented.[35] Likewise, accountability by local governments is preserved because a local population's dissatisfaction with actions can be effectively directed at the level of local government directly responsible for those actions.[36] The notions of state sovereignty and democratic home rule under U.S. federalism incorporate the same policies of self-determination and accountability.

Professor Weiler discusses the importance of subsidiarity to the

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[29] *Id.*

[30] Thomas C. Fischer, *"Federalism" in the European Community and the United States: A Rose By Any Other Name*, 17 FORDHAM INT'L L.J. 389, 425 (1994).

[31] Bermann, *Subsidiarity and The European Community*, *supra* note 28, at 97-98.

[32] *Figuring Out Subsidiarity*, THE ECONOMIST, Nov. 27, 1993, at 58.

[33] Bermann, *Subsidiarity and The European Community*, *supra* note 28, at 98.

[34] Bermann, *Taking Subsidiarity Seriously*, *supra* note 14, at 340-44.

[35] *Id.* at 340.

[36] *Id.*

European electorate in the context of preserving the virtues of self-determination, "legitimacy" and the democratic process.[37] He states:

> 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.[38]

The second benefit of subsidiarity is political liberty. By promoting the diffusion of power away from a central European government to the many governing bodies of individual Member States, the risk of political tyranny and oppression is lessened.[39] Correspondingly, political liberty and individual freedom are advanced.[40]

The third positive effect of subsidiarity is the flexibility of local governments to respond more effectively and quickly to changes in economic, social and other conditions within the local population.[41] This in turn leads to a better system of government.[42]

The fourth virtue of subsidiarity is its preservation of local identities. Through self-determination and political representation, local communities can better protect their unique and distinctive cultures and mores.[43] Additionally, through this preservation of local identities, diversity is fostered throughout the political landscape.[44] Thus, diversity is a fifth virtue of subsidiarity.

The final virtue of subsidiarity in the EU is respect for the internal divisions of Member States. The continuing concern of Member States that the power of their governing bodies will be eroded by community government cannot be underestimated.[45] For example, in the late 1980's,

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[37] J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

[38] *Id.* at 2472-73 (emphasis in original).

[39] Bermann, *Taking Subsidiarity Seriously*, *supra* note 14, at 341.

[40] *Id.* This same virtue of political liberty under the subsidiarity principle appears in U.S. constitutional federalism as the separation of powers doctrine. *See* THE FEDERALIST No. 45 (James Madison).

[41] Bermann, *Taking Subsidiarity Seriously*, *supra* note 14, at 341.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 341-42.

[45] *See, e.g.*, VENABLES & MARTIN, *supra* note 7, at 13 ("In line with [the principle

the German Lander criticized the EC institutions for interfering unnecessarily in the legislative rights conferred on them by the German Constitution.[46] In response to this criticism by the German government, and by the British as well, then Commission President Jacques Delors put subsidiarity at the forefront of consideration in the future governance of the EC.[47] Fear of centralization continues to be a major concern of Member States, and such fear has played a pivotal role in the historical development of subsidiarity in Europe.[48]

Decisions by the European Court of Justice muddled the issues of Member State sovereignty and Community law preemption, and spurred the concern over protection of the virtues discussed previously.[49] Many of these cases required the same analysis as the U.S. Supreme Court made in the early commerce clause cases regarding dormancy and preemption of state law.

The above analysis is not intended to be a complete discussion of the historical development of subsidiarity in the EU, but summarizes the significance of the subsidiarity principle in the establishment of a scheme of government between the Member States and the Community institutions. In the same manner, the next section discusses the concept of "federalism" in the U.S. and summarizes its historical development and significance.

III. AMERICAN FEDERALISM COMPARED

A survey of constitutional history in the U.S. discloses a more or less continuous debate on issues of federalism and states' rights, but no counterpart for the European subsidiarity principle. The draftsmen of the U.S. Constitution struggled mightily in 1787 between two opposing theories. The so-called "nationalists" argued for a strong central government that would have powers superior, in virtually all respects, to those of the states.[50] The proponents of limited government in a federal system were more satisfied with the existing Articles of Confederation.[51] Howev-

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of subsidiarity]. Member States express the clear wish in the [TEU] that whilst competence is extended to new areas, definite limits are set on the scope and type of action which can be undertaken by the Community.").

[46] *The Subsidiarity Principle*, *supra* note 9, at 182.

[47] *Id.*

[48] *See* JOSEPHINE STEINER, EEC LAW 3-6 (1988).

[49] *See supra* notes 13-30 and accompanying text.

[50] JOHN H. FERGUSON & DEAN E. MCHENRY, THE AMERICAN SYSTEM OF GOVERNMENT 60 (10th ed. 1969).

[51] The Articles of Confederation were drafted in 1776-77 and were ratified in 1781.

er, all of those involved in the Constitutional Convention recognized that the original Articles of Confederation had not worked very well due to the lack of authority for the central government to act decisively on critical issues.[52]

The new Constitution which resulted from that debate has been called a "bundle of compromises,"[53] but it nevertheless established a strong central government while reserving authority to the individual states.[54] The first ten amendments were proposed by Congress on September 25, 1789, and ratification was completed two years later on December 15, 1791. A key provision in the U.S. Constitution, the Tenth Amendment, provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."

The proponents of state sovereignty and states' rights theories have emphasized throughout the history of the U.S. the ambiguities in the distribution of national and state powers. The arguments opposing a strong federal government reached their height during the period between the Constitution's ratification and the commencement of the Civil War of 1860-1865. The ultimate claim of states' rights advocates during that contest was the right to secede from the Union, a claim which was interred when the Civil War concluded in favor of the Union. However, the notions of state sovereignty and states' rights continued to receive judicial support in other respects until 1937. From that time until the early 1970s, when they were revitalized by conservative Supreme Court justices, state sovereignty and states' rights had little vitality.

The states' rights argument which flows from the ambiguities of the Tenth Amendment is founded upon the following analysis: As a result of the successful American Revolution in 1776, the sovereignty of the British Crown over North America was transferred to the victorious individual states.[55] Thereafter, the states could act as independent nation-

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1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 79-137 (Merrill Jenson ed., 1976).

[52] For a comprehensive summary of federalism and states' rights in the U.S., see THE OXFORD COMPANION TO THE SUPREME COURT 278-287, 830-835 (Kermit L. Hall, ed., 1992).

[53] *See, e.g.*, FERGUSON, *supra* note 50, at 61; JAMES MACGREGOR BURNS ET AL., GOVERNMENT BY THE PEOPLE 38 (9th ed. 1975).

[54] FERGUSON, *supra* note 50, at 61-65. *See also* MAX. J. SKIDMORE & MARSHALL CARTER WANKE, AMERICAN GOVERNMENT, A BRIEF INTRODUCTION 15-17, 21-22 (3d ed. 1981).

[55] An exception was the power over foreign affairs which went directly from Great Britain to the United States. *See* United States v. Curtiss-Wright Export Corp., 299 U.S.

states, except to the extent that they voluntarily and collectively vested exclusive power in a central government.

The notions of state sovereignty and states' rights often have been represented by using a geometric metaphor; there are "two separate spheres of dual sovereignty," one federal, and the other state. Since each is sovereign, each is supreme in its sphere and the powers are mutually exclusive. However, it is recognized that they share concurrent powers, so that both the federal government and the state government can regulate the same area.[56]

Some of the early decisions of the Supreme Court provided the foundations for a strong central government. The modern interpretation of the Tenth Amendment to the U.S. Constitution was provided by the Supreme Court decision in the case of *United States v. Darby*,[57] in which the Court stated:

> The [Tenth] Amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the Amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[58]

The Court's decision in *Darby* vanquished the view that an otherwise valid exercise of a delegated or implied power by the federal government could be blocked by the states under the Tenth Amendment.

The fact that the Constitutional draftsmen had omitted the word "expressly" in the Tenth Amendment is very significant because it showed that the object of the amendment was not to interfere with or restrict any of the powers delegated to the federal government by the Constitution, whether expressly delegated or not.

304, 316 (1936).

[56] *See generally* FERGUSON, *supra* note 50, at 90 ("All governmental power cannot be classified into Federal or state categories. Some powers are shared by the two levels of government; these are usually called 'concurrent powers'.").

[57] United States v. Darby, 312 U.S. 100 (1940). Four years earlier, the Supreme Court in *United States v. Butler* had invalidated federal attempts to regulate agriculture, despite the fact that agriculture had been found to be within the spending power delegated to Congress for the general welfare. Federal legislation was found to be in excess of congressional power because agriculture traditionally had been regulated by the states. United States v. Butler, 297 U.S. 1, 68 (1935).

[58] *Darby*, 312 U.S. at 124.

The view of federal supremacy articulated in the *Darby* decision was briefly modified in 1976 in the Supreme Court's decision in the case of *National League of Cities v. Usery*.[59] The Court applied the Tenth Amendment to prevent the application of the Federal Fair Labor Standards Act[60] to state and local government employees. The Federal Fair Labor Standards Act, which had been applied to the states, was enacted in 1938 to provide a minimum fair wage[61] and to encourage employers to hire additional employees to relieve the economic pressures of the Great Depression. However, the *Usery* decision held that the Tenth Amendment prevented the application of the minimum wage law to state and local government employees under the doctrines of state sovereignty and dual federalism.[62]

Rather than protecting state interests totally from interference by federal regulation, the *Usery* decision was limited to preventing federal regulation of "functions essential to separate and independent [state] existence."[63] In this particular case, the functions in question were the "power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime."[64]

Although many viewed the *Usery* decision as revitalizing the notion of dual federalism, its impact lasted for just over nine years. The Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*[65] overruled *Usery*. The Court concluded that it was impossible to discriminate between a "traditional governmental function," protected under *Usery* by the Tenth Amendment, from a "nontraditional" function which would not be protected.[66]

In *Garcia*, the Court recognized that the states continue to occupy a "special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."[67] However, the Court clarified its intention by stating that any such limitations were basically to be found within the political

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[59] National League of Cities v. Usery, 426 U.S. 833 (1976).

[60] 29 U.S.C. § 201-219 (1988 & Supp. V 1993).

[61] BURNS, *supra* note 53, at 627.

[62] *National League of Cities*, 426 U.S. at 845.

[63] *Id.*

[64] *Id.*

[65] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[66] *See id.* at 540-541.

[67] *Id.* at 556.

process "through state participation in federal governmental action."[68] The decision did not speculate about what limits, if any, the Constitution might impose on the states' participation.

Advocates of strong central government could view the *Garcia* decision as an implicit recognition that each state is represented in Congress and thereby can use the political process to prevent, or at least attempt to prevent, unwelcome federal involvement in state activity.

In recent years, there has been increasing concern that the U.S. is overregulated by Congress. Many commentators are wondering whether Congress is the most efficient regulator in some of the areas into which it has intruded, or whether it would be more efficient to allow the states to regulate according to their individual perceptions of local priorities and policies. Many of the disputes concerning who should regulate arise when Congress attempts to regulate local behavior by using its power provided under the Commerce Clause.

Judicial construction of the Commerce Clause theoretically could lead to the adoption of the subsidiarity principle. However, a review of the historical treatment of Commerce Clause power reveals that the courts have shown little inclination to impose upon Congress any obligation to defer to the states.

Section 8 of the U.S. Constitution lists the various powers delegated by the people to Congress. Certain of those powers, such as the power to "declare War . . . To raise and support armies . . . To provide and maintain a navy . . . ." rarely are coveted by the states and it is generally conceded that it is best to leave those responsibilities to a strong central government. However, with respect to certain other powers, frequent opportunities for conflict exist between the federal government and the states.

Among other things, Section 8 provides that: "the Congress shall have the power to lay and collect taxes, duties, impose and excises . . . To regulate commerce with foreign nations, and among the several states . . . ." The Federal Government frequently uses its "commerce power" as the basis for the enactment of federal legislation. Much of the controversy concerning federal congressional overreach is centered upon Congress' use of its "commerce power."

Early decisions of the Supreme Court dealt with the limits of the Commerce Clause. In 1824, the Court held in *Gibbons v. Ogden*[69] that congressional power over interstate commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other

[68] *Id.*

[69] Gibbons v. Ogden, 22 U.S. 1 (1 Wheat.).

than are prescribed in the Constitution."[70] Although *Gibbons* was one of the first decisions to take an expansive view of federal authority under the Commerce Clause, Chief Justice Marshall nevertheless recognized that there were limits on congressional power. He noted that as comprehensive as the commerce power was, it was "restricted to that commerce which concerns more states than one."[71]

While granting considerable latitude to Congress, the Court did articulate some limitations on congressional reach. However, none rose to the level of imposing a principle of deference to state and local authorities, as contemplated by the subsidiarity principle. In *Wickard v. Filburn*,[72] the Supreme Court stated that:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect on interstate commerce* and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[73]

The Supreme Court has made it clear that the scope of judicial review of congressional actions under the Commerce Clause is very narrow: "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is *any rational basis* for such finding."[74] While such expansive readings by the Supreme Court of congressional power would seem to be conclusive, the debate over federal encroachments on states' rights continues to this day, no doubt exacerbated by the legislative ambitions of Congress.

Recent Supreme Court opinions authored by Justice O'Connor may represent growing judicial impatience with pervasive regulation by Congress. In *Gregory v. Ashcroft*,[75] the Court interpreted the Tenth Amendment to require a rule of statutory interpretation which it labeled the

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[70] *Id.* at 196.

[71] *Id.* at 194

[72] Wickard v. Filburn, 317 U.S. 111 (1942).

[73] *Id.* at 125 (emphasis added).

[74] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (emphasis added). *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); N.L.R.B. v. Jones & Laughlin Steel, 301 U.S. 1 (1936). This was further clarified in a subsequent decision of the Supreme Court in *Maryland v. Wirtz*, in which the Court stated: "Neither here nor in Wickard has the court declared that Congress may use a relatively trivial impact on Congress as an excuse for broad general regulation of state or private activities." Maryland v. Wirtz, 392 U.S. 183, 196 (1968).

[75] Gregory v. Ashcroft, 501 U.S. 452 (1991).

"plain statement rule," cautioning courts to be "absolutely certain that Congress intended" to intrude in state powers.[76]

In its subsequent decision in the case of *New York v. United States*,[77] in which Justice O'Connor again authored the majority opinion, the Court found a provision of the Low-level Radioactive Waste Policy Amendments Act of 1985[78] to be constitutionally invalid. The Act essentially requires the states to make the choice of either accepting ownership of radioactive wastes generated within their jurisdiction, or to regulate such materials in accordance with federal standards.[79] The Court expressed concern that Congress was attempting to "commandeer" the states' ability to regulate such issues within their borders, and thereby impose upon the states financial obligations for implementing policies established by the federal government.[80]

Despite the significance of both *Gregory v. Ashcroft* and *New York v. United States*, the Court did not adopt a subsidiarity principle in those decisions. However, to the extent that the decisions ensure that the federal government will bear the financial burdens of implementing new federal policies, they clearly do provide a source of encouragement for Congress to consider carefully whether the states can better regulate a particular area without federal intervention. In the final analysis, the Tenth Amendment was not designed for, nor has it been interpreted to ensure, the establishment of a broad policy of deference to state and local authorities in areas where the federal government shares regulatory power.

Two recent decisions in the lower federal courts illustrate the nature of this controversy in contemporary litigation. On October 19, 1993, the U.S. Federal District Court for the Middle District of Tennessee issued its decision in the case of *United States v. Cortner*,[81] a criminal action in which the defendant filed a motion to dismiss as unconstitutional a charge that he had violated the federal Anti-Car Theft Act of 1992.[82] Federal

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[76] *Id.* at 464.

[77] New York v. United States, 112 S.Ct. 2408 (1992).

[78] 42 U.S.C. § 2021(b)-(d) (1988).

[79] *New York*, 112 S.Ct. at 2428-9.

[80] *Id.* at 2420. Justice White dissented on the grounds that the Court was not following the *Garcia* decision. *Id.* at 2443 (White, J., dissenting). The rationale of *New York v. United States* was subsequently applied in Board of Natural Resources of Wash. v. Brown, 992 F.2d 937 (9th Cir. 1993).

[81] United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993), *rev'd*, U.S. v. Osteen and Cortner, 1994 U.S. App. LEXIS 19221 (6th Cir. July 26, 1994) (*petition for cert. filed*, Oct. 24, 1994).

[82] 18 U.S.C. § 2119 (Supp V. 1993); § 101 of the Anti Car Theft Act of 1992, H.R. 4542, 102 Cong., 2d Sess., *reprinted in* 1992 U.S.C.C.A.N. 2829, 2834.

District Court Judge Wiseman sustained the motion, finding that the Act lacked "any rational nexus to interstate commerce," and that Congress therefore lacked the power to legislate "carjacking" penalties under the Commerce Clause.[83] The court noted that the facts established a "pure case of *intrastate* automobile theft at gunpoint."[84]

Judge Wiseman stated that his decision was consistent with the established standard of review for Commerce Clause cases, and found the federal statute to be in excess of congressional powers because it only involved intrastate theft, therefore failing to raise a federal issue.[85] Judge Wiseman articulated his concern about congressional overreach:

> The Congress has had a recent penchant for passing a federal criminal statute on any well-publicized criminal activity. The courts, in an obeisant deference to the legislative branch, have stretched the Commerce Clause of the Constitution beyond the wildest imagination of the framers and beyond any rational interpretation of the language itself. At every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point where we are unable to do our jobs. The historically unique and discrete jurisdiction of the federal courts is being distorted. The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress. The Congress is able to do this, however, only because we in the judicial branch are willing to interpret the Commerce Clause of the Constitution so broadly.[86]

Judge Wiseman proceeded to relate the historical view of state versus federal powers, as stated by the Supreme Court in *Bell v. United States*: "It has been a widely held and historically accepted premise of our governmental structure that law enforcement was primarily the business of state and local governments and that we as a nation deplored the idea of a national police force."[87]

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[83] *Cortner*, 834 F. Supp. at 244.

[84] *Id.* at 242.

[85] The Supreme Court has long adhered to the view that "a court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects *interstate* commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) (emphasis added).

[86] *Cortner*, 834 F. Supp. at 244. One of the possible reasons for the proliferation of federal law and law enforcement agencies is the pervasive national problem of unlawful drug traffic and use.

[87] *Id.* at 244 (quoting Bell v. United States, 462 U.S. 356, 363-66 (1983) (Stevens,

Upon review, the Sixth Circuit Court of Appeals reversed and remanded *Cortner*.[88] The court explained:

> It may well be that the carjacking statute is unwise and encroaches on traditional views of federalism, as Judge Wiseman observes in *United States v. Cortner*, 834 F. Supp 242 (M.D. Tenn. 1993), but it is not unconstitutional under current Commerce Clause doctrine. So long as the activity regulated has an effect on interstate commerce it makes no difference that the transported item is not "at rest" and is no longer "in" interstate commerce.[89]

The Sixth Circuit concluded that it was "obvious that carjackings as a category of criminal activity have an effect on interstate travel and the travel of foreign citizens to this country."[90]

Other federal judges, including some at the appellate court level, nevertheless have shared Judge Wiseman's concerns. For example, in *United States v. Lopez*,[91] the U.S. Court of Appeals for the Fifth Circuit reviewed the defendant's conviction under the federal Gun-Free School Zones Act of 1990 for possession of a firearm in a school zone.[92] The Act makes it unlawful for any individual knowingly to possess a firearm in a school zone, and even makes it a federal crime to carry an unloaded firearm in an unlocked suitcase on a public sidewalk in front of one's residence, so long as that part of the sidewalk is within 1,000 feet of the boundary of the school bounds of any public or private school, regardless of whether it is during the school year or whether the school is actually in session.[93]

In the opinion written by Judge Garwood, the Fifth Circuit Court of Appeals reversed the conviction and held that: (1) The Gun-Free School Zones Act was invalid because it was beyond the power of Congress under the Commerce Clause,[94] and (2) even if the conviction might have been upheld had the government alleged and proved that the offense had a nexus to interstate commerce, the defendant still would be entitled to reversal of the conviction because the indictment did not allege any

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J., dissenting)).

[88] United States v. Osteen and Cortner, 1994 U.S. App. LEXIS 19221 (6th Cir. July 26, 1994) (*petition for cert. filed*, Oct. 24, 1994).

[89] *Id.*

[90] *Id.* at 4 (quoting U.S. v. Johnson, 22 F.3d 106, 109 (6th Cir. 1994)).

[91] United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S.Ct. 1536 (April 18, 1994).

[92] 18 U.S.C. §§ 921-922 (Supp. V. 1993).

[93] *See id.* §§ 922(q)(1), 921(a)(25)-(26).

[94] *Lopez*, 2 F.3d at 1367-68.

connection to interstate commerce.[95]

The court began its analysis with reference to James Madison's comments in The Federalist Papers: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."[96] The court noted that Madison's understanding of the federal government's powers was confirmed by the Tenth Amendment.

The court also observed that the notion of dual sovereignty shared by the states and the federal government was relevant because the instant case "pits the states' traditional authority over education and schooling against the federal government's acknowledged power to regulate firearms in or affecting interstate commerce."[97]

The court noted that "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states."[98] However, if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. Therefore, even if the Gun-Free School Zones Act intrudes upon a domain traditionally left to the states, it is constitutional so long as it falls within the commerce power delegated to Congress.

After an extensive historical review of other congressional exercises of power over the regulation of firearms, the court concluded that in this particular case, there was no rational basis for the exercise of the commerce power by Congress. "Broad as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned."[99] The court in *Lopez* concluded that Congress had overstepped its powers in passing the Gun-Free School Zones Act of 1990 because the regulated activity did not substantially affect intrastate commerce.[100] The *Lopez* case was argued before the U.S. Supreme Court in late November, 1994.[101]

The *Cortner* and *Lopez* decisions are illustrative of the growing dissatisfaction among the federal judiciary with the expansive exercise of congressional powers under the Commerce Clause. In some cases, this

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[95] *Id.* at 1368.

[96] THE FEDERALIST, *supra* note 40, at 292.

[97] *Lopez*, 2 F.3d at 1346.

[98] *Id.* (quoting New York v. United States, 112 S.Ct. 2408, 2417 (1992)).

[99] *Id.* at 1361.

[100] *See id.* at 1363-68.

[101] *See* U.S. v. Lopez, 63 U.S.L.W. 3419 (Nov. 29, 1994) (stating that *U.S. v. Lopez* oral arguments were heard on November 8, 1994). *See also* Harvey Berkman, *Congress' Reach May Be Nipped*, NAT'L L.J., Nov. 21, 1994, at A6.

may not amount to very much more than judicial grumbling about the increased work load of federal courts. There has been no Supreme Court decision in the last fifty years setting aside a finding by Congress in support of legislation based upon the Commerce Clause on the grounds that such finding was without a rational basis. It therefore appears that if Congress does articulate formal findings when it passes such legislation to show why it considers the matter to be subject to its regulatory power under the Commerce Clause, it is unlikely that the courts would view such a finding as "irrational." It should be noted that in *Lopez*, the legislation was set aside because Congress *failed* to make any such findings establishing the necessary connection with interstate commerce.

Many federal courts take a different approach and no longer bother to even insist on such findings. In another case arising in California, the police arrested the defendant in a Sacramento high school parking lot upon finding two rifles in the trunk of his car.[102] When he was prosecuted under the federal Gun Free School Zones Act, he used the same defense that proved successful in the *Lopez* case.

In reaching a conclusion that was exactly opposite to that of the Fifth Circuit, Judge Alarcan of the Ninth Circuit stated that Congress long ago had made findings that firearms move in interstate commerce, and it was not necessary to repeat such findings each time it legislates on the subject.[103] The opinion further stated that Congress is entitled to "highly deferential" treatment when it legislates under the Commerce Clause.[104]

The notion of federalism in the U.S. has traveled a long and tortuous path and those who favor strong central government clearly have won significant victories. However, the tendency of the central government, through the legislative branch, to overregulate continues to cause concern and dissension among the states and the judiciary. One can expect that this process of constant adjustment and readjustment will continue unabated, despite the fact that America's version of federalism has long envisioned a strong central government.

IV. LESSONS FROM THE AMERICAN EXPERIENCE: DANGERS OF "CREEPING FEDERALISM"

To the extent that American federalism is a useful guide, it suggests that the contagion of "creeping federalism" could spread in the EU and result in pervasive control of local affairs by the central European government. Because confusion persists in the EU about the meaning of

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[102] United States v. Edwards, 13 F. 3d 291, 292 (9th Cir. 1994).

[103] *Id.* at 294.

[104] *Id.* at 293.

subsidiarity and its real significance in stemming the growth of central control, the subsidiarity principle may not adequately protect against encroachment upon state powers by the central European government.[105] Upon review of European descriptions of subsidiarity, one cannot avoid being struck by the high level of abstraction in attempts to define the principle.[106] Until consensus is reached on the meaning of subsidiarity, and it is effectively internalized and assimilated in the government structure, the danger of "creeping federalism" remains very real for the EU. Indeed, evidence of this phenomenon already appears in the pervasive central European government control of certain programs in apparent disregard of the subsidiarity principle.

One example of the general inclination toward federalism of local issues in the EU is the common agricultural policy (CAP), which accounts for over half of the EU's budget.[107] Yet it is said that farming results in few international externalities, so there is no economic reason for the EU to be so pervasively involved in agricultural policy and regulation. Thus, it may be argued, agricultural policy is an area which should be left for the individual Member States to regulate.[108] A lack of uniform application and consensus on the meaning of subsidiarity allows such a triumph of federal control.

This is not to suggest that all centralization of governmental power is necessarily undesirable. In fact, the presence of externalities which cross borders might require the presence of pervasive government control. For example, Professors Schemmel and de Regt argue that the principle of subsidiarity should not result in a shift of power from EU institutions in the implementation of environmental legislation.[109] They assert that "because problems of environmental protection are largely transboundary in nature (pollution does not recognize a nation's sovereign border), there

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[105] Former Prime Minister Thatcher was known to describe the term "subsidiarity" as "gobbledegook." *See, e.g.*, Philip Howard, *Column*, THE TIMES (London), Oct. 15, 1992, at 16.

[106] Professor Bermann has observed that, "[a] particular problem with subsidiarity, however, is that it tends more to describe an abstract goal than a method of achieving it." Bermann, *Subsidiarity and The European Community*, *supra* note 28, at 103.

[107] *Figuring out Subsidiarity, supra* note 32, at 58.

[108] *Id.* Nevertheless, there have been recent calls for massive CAP reform, triggered in part by GATT negotiations and tremendous inefficiencies within the agricultural bureaucracy, which could be minimized by application of the subsidiarity principle. *See* Lionel Barber, *Report Sends Tremors Through Brussels*, FIN. TIMES, Sept. 30, 1994, at 30.

[109] Matthew L. Schemmel & Bas de Regt, *The European Court of Justice and the Environmental Protection Policy of the European Community*, 17 B.C. INT'L & COMP. L. REV. 53, 80 (1994).

are compelling reasons for developing environmental protection policies primarily at the Community level."[110] Yet some aspects of environmental legislation may not require central control, such as the prescription of minimum standards of drinking water which the EU has established since 1980.[111]

In drawing comparisons between the U.S. experience with federalism and the developing European experience with federalism governed by subsidiarity, Professor Fischer aptly points out that subsidiarity is a two-edged sword which can cut against Community action, but also can cut against state action.[112] The analysis of subsidiarity will be much like the analysis of congressional power over commerce among the several states.[113] The U.S. Supreme Court is the final arbiter of congressional regulations under the Commerce Clause, and the resolution of subsidiarity issues will depend on the European Court rather than the courts of the individual Member States. Professor Hartley observes:

> In practice, it will almost always be possible to formulate the objectives of [a] measure in different ways. In defending the measure, the Commission and the Council will argue for a formulation which requires Community action. One can even expect that the preamble and wording of the measure will be drafted so as to facilitate this.
>
> In such a situation, everything will depend on the European Court. It will decide whether the measure falls within an area in which the Community has exclusive jurisdiction; it will formulate the objectives of the measure, and it will decide whether they can be better achieved by Community action. All these questions involve so many imponderables that it will almost always be possible for the Court, if it wishes, to find grounds for upholding the measure. As a result, the effectiveness of subsidiarity will depend, to a considerable extent, on the attitude and policy of the European Court.[114]

Thus, despite the supposed promotion of the subsidiarity principle as a guideline to restrict EU action, substantial potential appears to exist for "creeping federalism" to evolve in the EU, as it has in the U.S., despite

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[110] *Id.*

[111] *Figuring out Subsidiarity, supra* note 32, at 58. The article points out that "the quality of a Dane's drinking-water has no effect on the quality of a Spaniard's drinking water." *Id.*

[112] Fischer, *supra* note 30, at 435.

[113] *Id. See also* U.S. CONST. art. I, § 8, cl. 3.

[114] Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213, 217 (1993).

the constitutional limitations on the power of the federal government.[115]

One of the challenges for the EU in the near future will be how to put subsidiarity into practice and turn it into a meaningful concept. Otherwise, the triumph of federalism over local interests may continue in all areas of concern, resulting in pervasive central government control. This in turn will cause additional strife among the EU with countries such as Denmark and Great Britain, who are adamantly opposed to strong central government control by the EU.

The answers to such problems in the U.S. lie in the political process, apparently as intended by the original framers of the Constitution. Whether as a result of lobbying efforts by state and local governments and their supporting organizations, or by the voting preferences of the citizenry, Congress theoretically is restrained from excessive intervention in state and local matters.[116] As has been suggested, however, theory and practice often have been at variance in this regard. The November 1994 elections appeared to send to Congress a message of widespread voter disaffection with the federal government. One can attribute the current raging at incumbent politicians not only to a reaction against excessive congressional intervention in state and local affairs, but also to dissatisfaction with excessive government intervention at any level, regardless of whether the intervenor is federal, state or local.

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[115] Professor Bermann notes that:

> [R]ecent years, however, have witnessed growing concern over the impact of federal legislation and regulation on the fabric of U.S. federalism. Some commentators have taken to complaining of the "uncritical acceptance in many quarters of the notion that the federal government is the best level of government at which to establish regulatory programs."

Bermann, *Taking Subsidiarity Seriously*, *supra* note 14, at 405.

In view of these concerns, Professor Bermann offers several suggestions on how to effectively put the subsidiarity principle into practice in the EU to prevent such " uncritical acceptance" of pervasive central government control. *Id.*

[116] *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).