

2002

The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary

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Recommended Citation

20 Berkeley J. Int'l L. J. 359 (2002).

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The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary

By
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I. INTRODUCTION

The allocation of powers remains one of the most controversial subjects in the integration process of the European Union. The European Union is no longer linked just to economic integration; it has increasingly become more

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state-like and political. In fact, after one of the latest Intergovernmental Conferences of the Member States at the Nice European Council in December 2000,¹ the European Union adopted a Charter of Fundamental Rights.² Additionally, the European Union is preparing for its fifth enlargement, with the goal of nearly doubling the Union's membership.³

The increasing integration of the European Union continues to cause Member States to fear the proliferation of European competences. The increasing use of majority voting has dramatically diminished the influence of each individual Member State; the Member States no longer retain an unlimited veto power over the decision-making process or the depth of integration throughout the Community. Similar to the debate in the United States over the extent to which the Tenth Amendment limits the powers of the federal government, the Member States of the European Union continue to seek means by which the unrestricted growth of Community powers can be limited. Moreover, in response to increasing disapproval rates of European integration among European Union citizens, the Member States also try to ensure national identity within the Union.

In an attempt to address these concerns, the Member States resolved to include additional provisions in the Community Treaties. The goal was to prevent further distance between the Union and its citizens while at the same time recognizing the importance of cultural differences among the Member States.⁴ The result was the Principle of Subsidiarity, which was first incorporated in the European Community Treaty through the Maastricht Treaty.⁵ At the Nice European Council in December 2000, the principle was also included in the newly adopted Charter of Fundamental Rights of the European Union.⁶

1. See Presidency Conclusions: Nice European Council Meeting, 7, 8, and 9 December 2000, http://europe.eu.int/council/off/conclu/dec2000/dec2000_en.htm#1 [hereinafter *Presidency Conclusions*]; Treaty of Nice, Dec. 22, 2000, <http://ue.eu.int/cigdocs/en/cig2000-EN.pdf> (Dec. 22, 2000) (provisional text approved by the intergovernmental conference on institutional reform). For the consolidated version of the Treaty of Nice, see Mar. 10, 2001 O.J. (C 80) 1.

2. See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364). The legal status of the Charter of Fundamental Rights must still be decided by the Member States.

3. See Presidency Conclusions, *supra* note 1, ¶¶ 4-10.

4. See Preamble of the TREATY ON EUROPEAN UNION [hereinafter TEU], May 1, 1992, http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf, July 29, 1992 O.J. (C 191), consolidated version incorporating changes made by the Treaty of Amsterdam amending the Treaty on European Union, Oct. 2, 1997 O.J. (C 340), which states: "[The leaders and political representatives of the Member States], CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them . . . RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity . . ."; see also TEU art. 2(3) which states: "The Union shall set itself the following objectives . . . to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union . . ."; furthermore, see TEU art. 6(3) stating: "The Union shall respect the national identities of its Member States."

5. TREATY ESTABLISHING THE EUROPEAN COMMUNITY (signed in Rome on March 25, 1957), consolidated version, Nov. 10, 1997, art. 5 (ex art. 3(b)), O.J. (C 340) 173 [hereinafter EC TREATY].

6. Charter of Fundamental Rights of the European Union art. 51, 2000 O.J. (C 364) 8, 21.

The Principle of Subsidiarity was intended to be a federal principle by which legislative decisions in the European Union would be taken at the most appropriate level. However, since the introduction of the Principle of Subsidiarity, many questions continue to surround the meaning of subsidiarity in Community law. For example, how can the Principle of Subsidiarity be applied? Which Community institution should interpret and review compliance with subsidiarity? Is the Principle of Subsidiarity justiciable and enforceable? It is the thesis of this article that the Principle of Subsidiarity, despite its broad and abstract structural concept, is a positive and applicable rule of law in the legal context of the European Union. In fact, the Principle of Subsidiarity must be considered a functional principle, which cannot consist of a material determination or a strict enumeration of Community powers. A different issue is, however, the question whether the interpretation of the Principle of Subsidiarity may be pursued in an objective manner. Indeed, the interpretation of subsidiarity may be determined by changing national self-interest and specific bargaining positions of the Member States.

In the first section this article examines the different meanings of subsidiarity, its character as a doctrine of social philosophy and the origins of the concept of subsidiarity in the Community Treaties. The second section of this article describes the community approach to application, interpretation and review of compliance with subsidiarity. In this context, the Principle of Proportionality and the procedural requirement to Show Sufficient Grounds are considered as tools for judicial review and first developments in the case law of the European Court of Justice are discussed. Finally, against the background of political economic theory, the article will highlight a number of contradicting perspectives and limitations within the Principle of Subsidiarity.

II.

THE PRINCIPLE OF SUBSIDIARITY

A. *Differences in Meanings and General Understanding of Subsidiarity*

Since the Maastricht Treaty, Community institutions are obliged to abide by the Principle of Subsidiarity in the application of the European Community Treaties. In addition, the Nice European Council extended the application of the Principle of Subsidiarity to the Charter of Fundamental Rights of the European Union. The Treaty on European Community explicitly states:

In areas which do not fall within the 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 effect of the proposed action, be better achieved by the Community.⁷

7. EC TREATY art. 5(2) (ex art. 3b(2)). With regard to the wording of the Subsidiarity Clause, one is compelled to notice the similarities to the Tenth Amendment of The U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, clear differences must be noticed as well. For example, one obvious difference is the finality in which the Tenth Amendment

This clause sets forth the basis of subsidiarity in the European Union.

Subsidiarity cannot be explained in a simple fashion; it continues to have a variety of meanings. In its theological meaning, subsidiarity is understood as a structural principle concerning the relationship between the society and the state or the individual and the state.⁸ The Principle of Subsidiarity thereby broadly refers to the limits of the right and duty of the public authority to intervene in social and economic affairs.⁹ It is the integrating element of an idealistically contemplated constitution of state and society. The principle clearly distinguishes between the actions of different levels of authority in a society or state, whereby the highest or most centralized level should only take actions if and insofar as a subordinate level cannot achieve the same goal in a better or equally sufficient way.¹⁰

In legal terms, the Principle of Subsidiarity is considered to determine the relationship between different legal provisions. For instance, if a number of legal provisions apply to one statement of affairs or if a single action violates more than one statute, those provisions which are less specific or apply only in the alternative are not applicable to the case and must be rejected. The latter provisions only enjoy subsidiary validity. It is only this meaning of subsidiarity that seems to be common among the different European legal systems.

When taking the different meanings of subsidiarity into account, it is difficult to determine which specific meaning was utilized in the execution of the concept in Community law. Nevertheless, it can be argued that the Principle of Subsidiarity must be interpreted in terms of a structural principle. The aim of a structural principle of that kind is a clear regulation of the distribution of powers between the Community and the Member States. This conclusion places the Principle of Subsidiarity in relation with one principle with which it is often confused, federalism.

It cannot be denied that many correlations exist between subsidiarity and federalism.¹¹ In German constitutional scholarship, this was recognized in the

appears to determine the reservation of powers on the state level. In contrast, the Subsidiarity Clause allows the European Communities to act under certain preconditions even if the actions to be taken do not fall within the exclusive competences of the Community.

8. Roman Herzog, *Subsidiaritätsprinzip*, in EVANGELISCHES STAATSLERIKON col. 3564 (Hermann Kunst et al., eds., 1987); Roman Herzog, *Subsidiaritätsprinzip und Staatsverfassung*, DER STAAT 399, 399-411 (1963); Walter Schöpsdau, *Subsidiaritätsprinzip*, in EVANGELISCHES KIRCHENLEXIKON: INTERNATIONALE THEOLOGISCHE ENZYKLOPÄDIE, col. 539-40 (Erwin Fahlbusch et al. eds., 1997).

9. R.E. Mulcahy, *Subsidiarity*, in NEW CATHOLIC ENCYCLOPEDIA 762 (Cath. Univ. of America, 1981).

10. While this definition seems clear, one troubling aspect is apparent. Although not extremely prevalent with regard to the European Communities, in its general and abstract meaning, the Principle of Subsidiarity raises questions as to the basis or starting point of its comparison of different levels of authority. Specifically, the principle poses the question of which levels of authority must be placed in juxtaposition or serve as comparative figures.

11. The U.S. Supreme Court Case *Cooley v. Philadelphia* illustrates such a correlation. The *Cooley* doctrine maintains that "states are free to regulate those aspects of interstate and foreign commerce so local in character as to demand diverse treatment" See *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851). Yet, the *Cooley* doctrine did prove to be inadequate. Accordingly, after *Cooley* the U.S. Supreme Court increasingly focused on the method and context

late 19th century and founded on the acknowledgment that both principles share the synthesis of two primary facts of human culture, individualism and unity as well as independence and community.¹² While both subsidiarity and federalism attempt to achieve this goal, they are distinguished by their different approaches. The goal of subsidiarity is the definition of different levels of authority in state and society as well as the appropriate distribution of powers thereof. In contrast, the necessary connection of state and society is the aim of federalism. Thus, on one hand federalism presupposes and follows subsidiarity. On the other, federalism provides the frame in which subsidiarity is exercised. In its broadest sense, federalism involves the linking of individuals, groups, and polities in a lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrity of all parties.¹³

B. Subsidiarity as a Structural and Ontological Principle in Theology

For a full understanding of the Principle of Subsidiarity, it is necessary to view it in the context of the theological doctrine of social philosophy, from which it originates. As a socio-structural and ontological principle, the idea of subsidiarity is particularly rooted in the Catholic doctrine of social philosophy and the Catholic teachings on social reconstruction, in which context subsidiarity concerns the relationship between the society and the state or the individual and the state.¹⁴

The idea of subsidiarity was first introduced in the Catholic doctrine of social philosophy by the encyclical letters of Pope Leo XIII, *Immortale Dei*¹⁵ and *Rerum Novarum*.¹⁶ In the encyclical, *Rerum Novarum*, Pope Leo XIII noted that “[i]t is not right . . . for either the citizen or the family to be absorbed by the State; it is proper that the individual and the family should be permitted to retain their freedom of action, so far as this is possible without jeopardizing the common good and without injuring anyone.”¹⁷

of challenged regulations. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 1048 (3d ed. 2000).

12. KONSTANTIN FRANTZ, *DER FÖDERALISMUS ALS DAS LEITENDE PRINZIP FÜR DIE SOZIALE, STAATLICHE UND INTERNATIONALE ORGANISATION UNTER BESONDERER BEZUGNAHME AUF DEUTSCHLAND* (1879); see also MAX HÄNE, *DIE STAATSIDEEN DES KONSTANTIN FRANTZ* (1929). Please note that K. Frantz is cited only for reference, not to advocate his ideas on nationalism or his role in Nazi Germany.

13. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 5 (1987).

14. See, e.g., OSCAR V. NELL-BREUNING, *BAUGESETZ DER GESELLSCHAFT* (Freiburg i. Br.) (1968); Karl Homann & Christian Kircher, *Das Subsidiaritätsprinzip in der Katholischen Soziallehre und in der Ökonomik, in EUROPA ZWISCHEN ORDNUNGSWETTBEWERB UND HARMONISIERUNG: EUROPÄISCHE ORDNUNGSPOLITIK IM ZEICHEN DER SUBSIDIARITÄT* 45, 45-54 (Lüder Gerken ed., 1995).

15. Leo XIII, Encyclical Letter *Immortale Dei*, November 1, 1885, http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/ff_e-xiii_enc-01111885_immortale-dei_en.html.

16. Leo XIII, Encyclical Letter *Rerum Novarum*, May 15, 1891 (St. Paul ed., Boston); John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 15, p. 24; s. 48, p.69 (St. Paul ed., Boston); see also Mulcahy, *supra* note 9, at 762.

17. Leo XIII, Encyclical Letter *Rerum Novarum*, May 15, 1891, s. 52, p. 32 (St. Paul ed., Boston).

In the understanding of the Catholic doctrine, the Principle of Subsidiarity was, however, most distinctly enunciated by Pope Pius XI in his encyclical letter *Quadragesimo Anno*, in 1931.¹⁸ Pope Pius XI asserted:

It is indeed true, as history clearly proves, that owing to the change in social conditions, much that was formerly done by small bodies can nowadays be accomplished only by large corporations. Nonetheless, just as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable, and it retains its full truth today. Of its very nature the true aim of all social body, but never to destroy or absorb them.¹⁹

In turning from the negative emphasis of his formulation to positive thought, Pope Pius XI then concludes:

The state should leave to . . . smaller groups the settlement of business of minor importance. It will thus carry out with greater freedom, power and success the tasks belonging to it, because it alone can effectively accomplish these, directing, watching, stimulating and restraining, as circumstances suggest or necessity demands. Let those in power, therefore, be convinced that the more faithfully this principle be followed, and a graded hierarchical order exist between the various *subsidiary* organizations, the more excellent will be both the authority and the efficiency of the social organizations as a whole and the happier and more prosperous the condition of the state.²⁰

Subsidiarity was thereby defined in the context of the reconstruction of the social order and the authority of the church in the social and economic sphere, conferred to the Christian constitution of the state. Toward the end of the 19th century, and the early 20th century, the Catholic doctrine was particularly critical of increasing individualism in contrast to a well-developed social life, which, in the past, was characterized by the organic linkage of institutions.²¹ Following 19th century liberalism, the church saw the social order to be in jeopardy; society had reached a point at which it was composed for the most part of individual members and the state, while intermediate bodies to regulate juridical and economic conditions were lacking at best.²² In other words, as a result of the deterioration of the structures within society, the state proved increasingly unable to

18. Pius XI, Encyclical Letter *Quadragesimo anno*, May 15, 1931, 39 (St. Paul ed., Boston).

19. *Id.*

20. *Id.* at 40-41 (textual emphasis added by the author).

21. Isaiah Berlin describes this development throughout Europe convincingly with the conception of "man as demiurge." See Isaiah Berlin, *European Unity and its Vicissitudes*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 175, 190 (Henry Hardy ed., 1991). According to Berlin, this concept, expressed by Fichte, Carlyle and Nietzsche, shattered the unitarian European world. "Independence - capacity to determine one's own course—[became] as great a virtue as interdependence once was." *Id.* at 190-91. Following the program of Enlightenment and utilitarianism, the conflict and interplay between the older universal ideal founded upon reason and knowledge, and the new romantic ideal which ultimately led to extreme nationalism and to Fascism. *Id.* at 192-94.

22. Pius XI, Encyclical Letter *Quadragesimo Anno*, May 15, 1931, 40 (St. Paul ed., Boston); John XXIII, Encyclical Letter *Mater et Magister*, May 15, 1961, s. 10-40, p. 6-13 (St. Paul ed., Boston); John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 4-11, p. 11-18 (St. Paul ed., Boston).

protect public welfare. In terms of the reconstruction of the state, the church believed that the solution was a more social life.

As a result, the focus shifted from the interest of the individual to the community, one represented by appropriate public and private institutions and governed by justice and charity as the principal laws of social life.²³ Although this explains the background and goal of the reconstruction of the state in Catholic doctrine, the merits of the Principle of Subsidiarity remain somewhat obscure. For a full understanding of subsidiarity, it is important to further examine the Church's underlying definition of the relationship between state and society.

According to the social doctrine of the Catholic Church, society consists of a form of subjectivity,²⁴ which holds that "the social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy."²⁵ Social life in a community at large is, however, not understood as disposing of an end in itself,²⁶ rather the ulterior motive remains the individual member at all times.²⁷ In short, men and women are defined as social beings whereby society and community enable them to "more fully and more readily . . . achieve their own perfection."²⁸ This definition correlates with the grammatical meaning of the word *subsidium*, aid or help.

In Catholic doctrine these indirect conditions are characterized as the common good, which stands for the sum total of the conditions of social living.²⁹ The common good can only be achieved when personal rights and duties are guaranteed.³⁰ This is where the Catholic Church determines the task of the state. The state as an institution oversees and directs the exercise of rights and intervenes where necessary. In addition, the state may also exercise a substitute function when social sectors or business systems are too weak. Nonetheless, the primary responsibility "belongs not to the state but the individuals and the various groups and associations which make up society."³¹ In this understanding, the socio-structural concept of the Principle of Subsidiarity is further promul-

23. John XXIII, Encyclical Letter *Mater et Magistra*, May 15, 1961, s. 38-40, p. 12-13 (St. Paul ed., Boston).

24. John Paul II, Encyclical Letter *Sollicitudo Rei Socialis*, Dec. 30, 1987, s. 15, p. 25, s. 28, p. 47-50 (St. Paul ed. Boston); John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 13, p. 21 (St. Paul ed., Boston).

25. John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 13, p. 21 (St. Paul ed., Boston).

26. See the original text of the encyclical in Latin: "socialis quaevis opera vi naturae sua subsidium afferre membris corporis socialis debet." Pius XI, Encyclical Letter *Quadragesimo anno*, May 15, 1931, p. 203, Acta Apostolicae Sedis, XXIII (1931).

27. See, e.g., Leo XIII, Encyclical Letter *Immortale Dei*, *supra* note 16, ¶¶ 2-3.

28. Pope John XXIII, Encyclical Letter *Mater et Magistra*, May 15, 1961, s. 65, p. 21 (St. Paul ed., Boston).

29. Mulcahy, *supra* note 9.

30. John XXIII, Encyclical Letter *Pacem in terris*, Apr. 11, 1963, s. 60, p. 20 (St. Paul ed., Boston); Pius XII, Radio Message, *Pentecost*, June 1, 1941, Acta Apostolicae Sedis, XXXIII, 1941, p. 198-203.

31. John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 48, p. 68 (St. Paul ed., Boston).

gated. The community at large renders service to lower and smaller bodies; it outlines conditions which enable them to function more effectively.

The Principle of Subsidiarity, in the context of the Catholic Church, does not define an auxiliary or subsidiary means. Nor does it provide a substitute for deficient powers or lack of efficiency on the level of lower bodies of authority. Yet, even where the state as the community at large must intervene, it must be remembered that intervention is only an aid to the lower society or individual. Such intervention cannot destroy the different levels of society by permanently taking over their functions or preempting their sovereignty.

In sum, subsidiarity in its theological context illustrates two main characteristics. First, in activities of society and state, subsidiarity cannot be understood as an alternative means of intervention where individuum and smaller bodies are unable to perform their duties. Therefore, subsidiarity does not convey the necessary and often problematic substitute for missing powers or the lack of efficiency on lower levels of society or state. Second, subsidiarity can only serve as a political guideline or a mere principle. As a rule of law open and susceptible to enforcement, the Principle of Subsidiarity would require the additional step of its incorporation or transfer into a legal system.³²

C. Origins of Subsidiarity in the EEC Treaty, Article 130r Sec. 4

In the context of the European Communities, the Principle of Subsidiarity is not entirely new. The principle was first introduced in the Treaties through the Single European Act and Article 130r Sec. 4 of the Treaty Establishing the European Economic Community. With regard to Community actions relating to the environment, the Treaty stated that "the Community shall take action . . . to the extent to which the objectives referred to . . . can be attained better at Community level than at the level of the individual Member States."³³ The objectives under which the Treaty allowed the Community to act focused primarily on the preservation, protection and improvement of the environment.³⁴

32. Although the Principle of Subsidiarity is derived predominately from the Catholic doctrine of social philosophy, the idea of subsidiarity can also be found in the writings of Plato, Aristotle, Thomas Aquinas and Johannes Althusius. See, e.g., PLATO, *THE REPUBLIC*, Book II, 369b-369c (John M. Cooper ed., 1997); ARISTOTLE, *THE POLITICS*, Book I 2, 1252a1-1253a29 (T. A. Sinclair & Trevor J. Saunders trans., Penguin Books 1992); Paul E. Sigmund, *Thomistic Natural Law and Social Theory*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS: A NEW TRANSLATION, BACKGROUNDS, INTERPRETATIONS 180, 184-88 (Paul E. Sigmund ed., 1988); JOHANNES ALTHUSIUS, *POLITICA METHODICE DIGESTA, ATQUE EXEMPLIS SACRIS ET PROFANIS ILLUSTRATA*, Chapter X-XVII, 74-86 (Frederick S. Carney trans., 1964); see also Otfried Höffe, *Subsidiarität als staatsphilosophisches Prinzip?*, in *SUBSIDIARITÄT: EIN INTERDISZIPLINÄRES SYMPOSIUM 19-46* (Alois Riklin & Gerard Batliner eds., 1994).

33. TREATY OF ROME ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 130r(4), 298 U.N.T.S. 11 [hereinafter EEC TREATY] as amended by the Single European Act, 25 I.L.M. 506, 515 (1986) [hereinafter SEA].

34. EEC TREATY art. 130r(1), as amended by SEA, *supra* note 33.

However, the interpretation and meaning of EEC Treaty, Article 130r Sec. 4 remained controversial among the Member States.³⁵ The difference of opinion centered around the question of whether the article contained a rule of law or merely a political guideline. The wording of the provision and the Member States' expressed intention to improve the protection of the environment supports a binding character or legal obligation, at least with regard to environmental issues. Thus it can be argued that the applicability of EEC Treaty, Article 130r Sec. 4 and the Principle of Subsidiarity established therein might be limited.

The idea of subsidiarity in the Community Treaties is not limited to the EEC Treaty, Article 130r. It is incorporated in numerous other Community provisions. For instance, pursuant to the Treaty on European Community, Article 3(h), the approximation of laws of the Member States proceeds only to the extent required for the functioning of the common market.³⁶ EC Treaty Article 94 (ex Article 100) specifies that the approximation of such laws only result if they "directly affect the establishment and functioning of the common market."³⁷ Likewise, other provisions justify Community actions only with regard to a specific goal, such as the Internal Market or the Common Market; sufficient grounds must prove the necessity of actions for the achievement of Community objectives.³⁸ Finally, the legal instrument of Community directives clearly illustrates the idea of subsidiarity. Community directives are "binding, as to the result to be achieved" while leaving "the choice of form and methods" for their implementation to the Member States.³⁹

These different provisions unmistakably convey the presence of the idea of subsidiarity throughout the Community Treaties. The Principle of Subsidiarity, even before its adoption through the Single European Act and the Maastricht Treaty, was acknowledged as a general principle by the Community Treaties. The explicit adoption of the Principle of Subsidiarity through the Maastricht Treaty exemplifies the distinct and unambiguous affirmation of that fact.⁴⁰ In spite of a general acknowledgment of the Principle of Subsidiarity, the meaning and importance of the Principle of Subsidiarity remained somewhat obscure. An attempt should therefore be made to interpret the meaning of subsidiarity in the context of European integration and with regard to its value as a measure for decentralization.

35. See, e.g., THOMAS OPPERMAN, *EUROPARECHT* 745-46 (C.H. Beck) (1991); Manfred Zuleeg, *Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiet des Umweltschutzes*, *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* [NVwZ] 280 (1987).

36. EC TREATY art. 3(h) (ex art. 3(h)).

37. EC TREATY art. 94 (ex art. 100).

38. EC TREATY art. 14 (ex art. 7a) & art. 308 (ex art. 235).

39. EC TREATY art. 249 (ex art. 189).

40. It should be noted that with the amendment of the Community Treaties through the Maastricht Treaty, EEC TREATY art. 130r (4) was abolished and art. 130r reworded. As a result of the Amsterdam Treaty, art. 130r was renumbered. It is now EC TREATY art. 174.

III. THE SUBSIDIARITY CLAUSE, APPLICATION AND JUSTICIABILITY

A. *Application of the Subsidiarity Clause*

The Community Treaties define the application of the Principle of Subsidiarity in a negative sense, stating that: "[T]he Community shall take action, in accordance with the Principle of Subsidiarity, only if and in so far as . . . the proposed action *cannot* be sufficiently achieved by the Member States."⁴¹ Despite this definition, both a positive and a negative reading seem appropriate. In its negative meaning, the clause protects the prerogatives of the Member States against undue Community interference. In contrast, the positive reading indicates that the Community should be allowed to act where such action appears necessary. This interpretation clearly suggests that Community competences were the primary focus of the Member States.⁴² That is, the traditional vision of federalism, characterized by the view that a clear line should be drawn between the respective competences of the center and the periphery, was at the center of the Member States' concern.

Accordingly, Article 5 Sec. 2 (ex Art. 3b Sec. 2) stresses that only "areas which do not fall within [the] exclusive competence [of the Community]" are subject to the application of the Principle of Subsidiarity.⁴³ This indicates that subsidiarity is only important in relation to powers that are shared between the Community and the Member States or in areas of concurrent competences.⁴⁴ While the Subsidiarity Clause does not clearly stipulate the allocation of powers between the Community and its Member States, it postulates that the Community, in addition to its exclusive powers, maintains an additional area of power which rests within the broad frame of Community goals. As such, subsidiarity in fact determines the limitation of existing, not exclusive powers, and defines the dynamics in Community integration. It is in this context that the Principle of Subsidiarity signifies more than a mere guideline; it is incorporated into the legal system of the Community Treaties and establishes a rule of law.⁴⁵

Turning to the wording of the Subsidiarity Clause, subsidiarity envisages a twofold test. First, measures at the national level must be reviewed by the Community. This review might include the analysis of financial resources, legal in-

41. EC TREATY art. 5(2) (ex. art. 3b(2)). (textual emphasis added by author).

42. Manfred Zuleeg, *Justiziabilität des Subsidiaritätsprinzips*, in SUBSIDIARITÄT: IDEE UND WIRKLICHKEIT: ZUR REICHWEITE EINES PRINZIPS IN DEUTSCHLAND UND EUROPA 185 (Knut Wolfgang Nörr & Thomas Oppermann eds., 1997); Renaud Dehousse, *Does Subsidiarity Really Matter?*, in EUI WORKING PAPER No. 92/32, at 7 (European University Institute ed., 1992). This view is opposed by Dieter Grimm, who was a Justice on the German Supreme Court. See, e.g., Dieter Grimm, *Effektivität und Effektivierung des Subsidiaritätsprinzips*, 77 KRITISCHE VIERTELJAHRSSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 6-12 (1994).

43. EC TREATY art. 5 (ex art. 3b).

44. See Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 625-26; George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 334.

45. Manfred Zuleeg, *Artikel 3b EC Treaty*, in KOMMENTAR ZUM EU-/EG VERTRAG, Vol. 1, 225 (Hans van der Groeben et al. eds., 1997).

struments and possibilities of enforcement. Overall, the review must demonstrate whether “the objectives of the proposed action”⁴⁶ can be “sufficiently achieved by the Member States.”⁴⁷ Second, the Community must evaluate whether “by reason of the scale or the effect of the proposed action,” its objectives can be “better achieved by the Community.”⁴⁸

The relevant standard of judgment is whether a Community goal can be materialized on a Member State or national level. However, as a prior step to this judgment a valid Community goal must be determined. Community institutions cannot arbitrarily name any goal thought to be worth pursuing. A valid Community action is commanded by the objectives and goals assigned by the Treaty.⁴⁹ And so, the evaluation of the twofold test required by the Subsidiarity Clause can only be set in motion by reference to a legitimate Community goal.

While the first test of the Subsidiarity Clause aims at the evaluation of the most effective action, it is inaccurate to merely limit the application of the Principle of Subsidiarity to a comparison of effectiveness.⁵⁰ The adverb “sufficiently” illustrates the emphasis on effectiveness. However, it is highly questionable whether the determination of effectiveness in this context is justiciable. Instead, the determination of effectiveness is a political question to be answered by the legislature.⁵¹ For example, even if a Community goal can only be achieved in part by Member State action, this does not satisfy the test of insufficiency. As indicated by the conjunction “in so far,” the Community can only pursue actions to the extent to which subordinate national levels prove ineffective. In the above example, this would amount to actions limited in parts. While those parts of a Community goal which can be sufficiently achieved by the Member States must be addressed by national authorities, the remainder must be regulated by Community action.⁵²

The second test of the Subsidiarity Clause aims at the “scale or effects” of proposed Community actions. Both terms are rather vague and general in their meaning, making it difficult to render a specific interpretation for the application of subsidiarity on this basis. In fact, the only interpretation follows from the grammatical use of conjunctions. The connection of “scale” and “effect” with the coordinating conjunction “or” seems to lower the standard of judgment. An alternative rather than an additional requirement is emphasized. On the other

46. EC TREATY art. 5 (ex art. 3b (2)).

47. *Id.*

48. *Id.*

49. EC TREATY art. 5 (ex art. 3b (1)).

50. This was particularly defined by the Commission as the “value added test.” See *The Principle of Subsidiarity*, Communication of the Commission to the Council and the European Parliament, Parl. Eur. Annex Doc. SEC (92) 10.

51. Zuleeg, *supra* note 42, at 228 § 24; see also Dehousse, *supra* note 42.

52. Note that although “shared” legislation of that kind may actually improve the issue of accountability, it places the issue of efficacy into a new context. With regard to varying capacities of different Member States, it seems questionable as to which conclusions may be reached accordingly. Does this imply a patchwork of different Community regulations throughout Europe, differing by Member State? If Member States are unable to achieve Community goals alone but are able to do so together with other Member States, are bilateral or international agreements among those Member States considered sufficient?

hand, complexity is added to the test by the use of the conjunctive adverb "therefore" and the subordinate conjunction "by reason of."⁵³ The conjunctive adverb connects the first test of the Subsidiarity Clause with the second test in a cumulative sense. In doing so, an aspect of cause is added. This is further emphasized by the direct linkage of the conjunctive adverb and subordinate conjunction, "therefore, by reason of." The cumulative aspect and the aspect of cause affirm the requirement that both tests be applied in tandem before an ultimate judgment in accordance with the Principle of Subsidiarity may be reached.⁵⁴

The Subsidiarity Clause does not raise any presumption of competence in favor of the Community or the Member States. The Principle of Subsidiarity constitutes a rule for the proper execution of Community powers (*Kompetenzausübungsregel*). As a decisive tool for the justification of proposed Community actions, other than those based on exclusive powers, the Subsidiarity Clause asserts a general precedence or bias of Member State actions over Community actions. In this context, subsidiarity may be viewed as a general means to distribute or allocate powers similar to that of other federal states, in which state authority is the rule and federal authority the exception.⁵⁵

Despite this conclusion, it is nevertheless important to realize that the wording of the Subsidiarity Clause does not provide any particular guideline for its application. Nor does it fill the principle with an unambiguous meaning or any indication toward its justiciability. The wording of the clause simply suggests that a comparative assessment of national and Community measures be taken before the Community can take action. This leaves ample room for argument, as it is particularly unclear how the Community may prove the application of such comparative measures. Does a comparative assessment in the final result prove to be nothing more than a political question as it might involve delicate political choices? If so, it is questionable whether the European Court of Justice would be equipped to decide subsidiarity issues raised in a suit before the Court. Similar to the political question doctrine in the United States, this raises the additional question of whether it should be the task of the judicial body to answer political questions at all.⁵⁶ This proves troublesome with regard to the

53. EC TREATY art. 5(2) (ex art. 3b (2)).

54. According to the cumulative character of the first and second test of the Subsidiarity Clause, the Community may not take immediate action if the first test indicates that a proposed action cannot be sufficiently achieved by Member States. Regardless of the insufficiency, the Community institutions must continue to evaluate the scale or effect of their proposed actions. This is of significant importance, as it seems most unlikely that a proposed action can be achieved sufficiently at both the Community and Member State level.

55. See, e.g., U.S. CONST., art. I, § 8(3); U.S. CONST, amend. X; see also Grundgesetz [Constitution] art. 30 (Germany): "Die Ausübung der staatlichen Befugnisse und die Erfüllung der staatlichen Aufgaben ist Sache der Länder, soweit dieses Grundgesetz keine andere Regelung trifft oder zuläßt." ["Except as otherwise provided or permitted by this Basic Law, the exercise of governmental powers and the discharge of governmental functions is a matter for the Länder."]; DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 33-35 (1994).

56. See, e.g., W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1098-1103; MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 3-7 (Carolina Academic Press) (1991);

separation of powers doctrine, as well as the fact that the European Court itself is responsible for the broad extension of European powers.⁵⁷

B. Community Approach to the Application of Subsidiarity

In 1992, as a direct result of national reservations toward the ratification of the Maastricht Treaty, the European Council attempted to adopt guidelines for the application of subsidiarity. In the Birmingham Declaration of October 16, 1992,⁵⁸ the European Council focused on the necessary support of the Community by its citizens. The Member States reaffirmed that "decisions must be taken as closely as possible to the citizen" and stressed that "great unity can be achieved without excessive centralization."⁵⁹ The Member States concluded that "[t]he Community can only act where Member States have given it the power to do so in the Treaties. Action at the Community level should happen only when proper and necessary. . ."⁶⁰ On its way to achieving that goal the Principle of Subsidiarity was named the most essential measure.⁶¹

While not spelling out particular guidelines in the Birmingham Declaration, the European Council clearly highlighted the importance of the Principle of Subsidiarity as a means to limit centralization. Furthermore, the European Council emphasized the need for Member States to retain ultimate authority over the Community Treaties, as the Community can only act where the Member States have transferred their powers.

Following the Birmingham Declaration, the European Council made an effort to express more explicit guidelines in its Conclusions of the Edinburgh meeting on December 11-12, 1992.⁶² The Council affirmed that the European Union rests on the Principle of Subsidiarity, which "contributes to the respect for the national identities of Member States and safeguards their powers."⁶³ The Council determined that the Subsidiarity Clause in the EC Treaty, Art. 5 Sec. 2 (ex Art. 3b Sec. 2) would determine whether the Community should act in a given circumstance.⁶⁴ Furthermore, it defined subsidiarity in terms of "a dynamic concept to be applied in the light of the objectives set out in the Treaty."⁶⁵ Accordingly, expanded Community actions were allowed only where

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-9 (Harv. Univ. Press) (1980); FRITZ WILHELM SCHARPF, *GRENZEN DER RICHTERLICHEN VERANTWORTUNG: DIE POLITICAL-QUESTION-DOKTRIN IN DER RECHTSPRECHUNG DES AMERIKANISCHEN SUPREME COURT* (1965).

57. See Christoph Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 WIS. INT'L L.J. (2001)

58. E.C. Bull., no. 10, at 9, point I.8 (1992).

59. *Id.* at 9, point I.8., ¶ 5.

60. *Id.*

61. *Id.*

62. E.C. Bull., no. 12, at 7 (1992).

63. *Id.* at 12-13, point I.15., ¶ 1.

64. *Id.* at 13, point I.15., ¶ 2.

65. *Id.* at 7, point I.1. and at 13-14, point. I.15., ¶ 5.

required by the circumstances and, conversely, restricted if the circumstances no longer justified intervention.⁶⁶

For the application of the Subsidiarity Clause of the Treaty, the European Council attempted to be more explicit by outlining three conditions.⁶⁷ However, these conditions are little more than an extensive repetition of the Subsidiarity Clause itself. In fact, the conditions spelled out by the European Council are limited to repeating the actual wording of the clause in EC Treaty, Article 5 Sec. 2 (ex Article 3b Sec. 2).

One may argue that the European Council failed to produce clarifying guidelines for the application of subsidiarity. In conjunction with its conclusions at the meeting in Edinburgh, the European Council did, however, convey a number of procedural thoughts that may serve as important steps toward a formal application of subsidiarity.⁶⁸ The European Council considered the Commission, with its right of legislative initiative,⁶⁹ the most crucial force in the implementation of the Principle of Subsidiarity. As such, the European Council found that the Commission, in accordance with the proposed systematic use of consultation, could make the subsidiarity aspects of proposed legislation part of future consultations with the Member States. Furthermore, the Commission was specifically required to submit an annual report to the European Council and the European Parliament on the application of the Treaty in the area of subsidiarity.⁷⁰

With regard to the procedures of the Council of Ministers as the ultimate Community legislator,⁷¹ the European Council found that the regular examination of the implementation of the Principle of Subsidiarity "should become an integral part of the overall examination of any Commission proposal."⁷² Existing Council rules, such as the rules on voting, should apply to such examination. Moreover, the examination should include the Council's own evaluation of "whether [a] Commission proposal is totally or partially in conformity" with the Principle of Subsidiarity⁷³ followed by the evaluation of whether any change envisioned by the Council continues to conform with the principle.⁷⁴ All other

66. *Id.* at 12-14, point I.15.

67. *Id.* at 14-15, point I.18.

68. *Id.* at 15-16, points I.20-I.22.

69. EC TREATY art. 211 (ex art. 155). The Commission is the executive branch of the European Union; it formulates programs for general legislation, initiates the legislative process by drafting legislation, carries out administrative tasks assigned to it and oversees as well as enforces compliance with the law.

70. *Id.* at 16, point I.21., ¶ 3.

71. The Council of Ministers must be distinguished from the European Council. The Council of Ministers is the collective head of state of the European Union and consists of representatives of the governments of the Member States. The Council of Ministers exercises primary legislative power within the Union, does however not share the exclusive power of the Commission to initiate legislation. See EC TREATY arts. 202-10 (ex arts. 145-54). The European Council is the Council of Ministers meeting as heads of state or government. It is a forum which holds biannual summit meetings. See TEU art. 4 (ex art. D).

72. E.C. Bull., no. 12, at 16, point I.22. (1992).

73. *Id.* at 16, point I.22., ¶ 3.

74. *Id.* at 16, point I.22., ¶ 3.

Community institutions, committees and working groups participating in the legislative process of the Community, such as the European Parliament or the Permanent Representatives of the Member States,⁷⁵ are also obliged to describe how the Principle of Subsidiarity should be applied on a given proposal.⁷⁶

To be sure, the statements of the European Council with regard to procedures and practices in the application of subsidiarity fall short of providing specific meaning. The most appropriate practice may be the earlier characterization of procedural thoughts, which puts these statements in the context of soft law, provided by political guidelines. On the other hand, the attempt of the European Council to establish a procedural standard of judgment at least suggests that the Community legislators, Commission and Council must evaluate the impact of Community legislation under the aspects of subsidiarity in a transparent manner.⁷⁷

C. *Justiciability of the Subsidiarity Clause*

The question remains as to how to apply the Principle of Subsidiarity and how to review compliance by the Community and its institutions. The responsibility to answer these questions inevitably rested upon the judiciary, as evidenced by past developments of the Community. Indeed, the Member States themselves have advocated this very concept. In the Conclusions of the Edinburgh meeting, the European Council noted, "The Principle of Subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle, as well as review of compliance with it by the Community institution, are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned."⁷⁸ Making the Principle of Subsidiarity subject to judicial review, however, requires an applicable standard of review. The search for such a standard in Community Law leads only to

75. See, e.g., EC TREATY art. 207(1) (ex art. 151).

76. E.C. Bull., no. 12, at 16, point I.22. (1992).

77. It is essential to recognize remaining limitations as well as the historical context in which these statements were made. The Community institutions, particularly the Commission, continue to have broad legislative discretion, even after the Nice European Council Meeting of December 2000. In addition, the only clear conclusion to be drawn from the Birmingham Declaration and the Conclusions of the Edinburgh meeting are the hopes that Member States associate with the Principle of Subsidiarity. Finally, both statements were intended to revitalize the ratification of the Maastricht Treaty in the Member States, particularly after the ratification had failed in Denmark and the realization of European Union seemed increasingly unlikely. See *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, 1997 O.J. (C 340), 105; *Interinstitutional Declaration on Democracy, Transparency and Subsidiarity*, E.C. Bull., no. 10, at 102, point 1.6.2., at 118-19, point 1.6.2. (1993); *Interinstitutional Agreement – Observing the Principle of Subsidiarity*, E.C. Bull., no. 10, at 102, point 1.6.3., at 119-20, point 2.2.2 (1993).

78. E.C. Bull., no. 12, at 14, point I.15., ¶ 5 (1992). Leaving the interpretation of the Principle of Subsidiarity to the European Court of Justice does not take the political question doctrine into account. Instead, by making it the task of the judicial body, the European Council and Member States simply shifted the responsibility and escaped accountability. However, with a lack of existing political procedures in the European Communities, the Court might be the only institution appropriately suited to scrutinize the application and interpretation of the Subsidiarity Principle. This does not make the judiciary the ultimate and appropriate arbiter of political questions; it simply demonstrates that courts are able to decide political issues and have been relied upon to do so in the past.

the legal concept of "proportionality" and the requirement to show sufficient ground.

1. Principle of Proportionality

In European Community law, the Principle of Proportionality is based on the case law of the European Court of Justice and is one of the most important standards of interpretation and lawfulness.⁷⁹ With the Maastricht Treaty, the Principle of Proportionality was positively admitted to the EC Treaty; it states "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."⁸⁰

Proportionality is of particular significance for the protection of fundamental rights, because Community law does not provide a codified standard for the limitation of such rights.⁸¹ The standard is primarily based on the Principle of Proportionality, developed by German Constitutional Law and the rulings of the German Supreme Court, the *Bundesverfassungsgericht*.⁸² Although not identical in all its contents, the European Principle of Proportionality shares the same cornerstones and concept as the German principle.

The Principle of Proportionality may be best compared with the rational basis test developed in accordance with equal protection and the Fourteenth Amendment in the case law of the U.S. Supreme Court. Under the rational basis test of the Fourteenth Amendment, legislative or administrative acts must meet minimum rationality requirements.⁸³ Broadly described, legislative acts have a foundation of reasonableness—legislative requirements or classifications must

79. Case 29/69, *Erich Stauder v. City of Ulm*, Sozialamt, E.C.R. 419, 425, ¶ 7 (1969); Case 11/70, *Internationale Handelsgesellschaft*, 1125, 1136, ¶ 16 (1970). See also Case 11/70, *Internationale Handelsgesellschaft*, E.C.R. 1125, 1146-47 (1970) (Opinion of Advocate General Dutheillet de Lamothé).

80. EC TREATY art. 5 (3) (ex art. 3b (3)). Although only referencing the "necessity" requirement of the principle of proportionality, this cannot be interpreted as any form of restriction on "suitability" or "rationality." Instead, the premise of "necessity" annotates the codification of the principle of proportionality in its entirety. See Case 112/80, *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, E.C.R. 1095, 1118-19, ¶¶ 40-41 (1981); see also BVerfGE 89, 155, 212. Furthermore, the term "mesures nécessaires" in the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8-11, is interpreted by the European Court on Human Rights as including the rationality test. The European Court of Justice is bound by this interpretation. See TEU art. 6 (2) (ex art. F (2)). See also Case 36/75, *Roland Rutili v. Minister for the Interior*, E.C.R. 1219, 1232, ¶ 32 (1975).

81. This conclusion holds true even after the Member States enacted a Charter of Fundamental Rights of the European Union in Nice. The legal status of the Charter remains undecided. See also *supra* note 80.

82. LORD MACKENZIE STUART, *THE EUROPEAN COMMUNITY AND THE RULE OF LAW* 31-32 (1977); NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY: A COMPARATIVE STUDY* 2-3 (1996). For a critical point of view, see Sophie Boyron, *Proportionality in English Administrative Law: A Faulty Translation?* 12 OJLS 237 (1992). The *Bundesverfassungsgericht* or German Supreme Court is the highest court in the Federal Republic of Germany and can best be compared with the U.S. Supreme Court. In the broadest sense, the Court reviews the constitutionality of legal acts and the application of such acts in Germany. The jurisdiction of the Court is regulated in Grundgesetz [Constitution] art. 93 (Germany).

83. TRIBE, *supra* note 11.

be rationally related to a legitimate governmental purpose.⁸⁴ The Principle of Proportionality attempts to achieve a similar result as the rational basis test, the difference is its attempt to do so by means of a more effective and structured approach.

In fact, the primary goal of the Principle of Proportionality is planned efficiency of Community acts. The principle requires that any Community act permitted by the provisions of the Community Treaties, be suited and necessary to achieve its legislative intent.⁸⁵ Among equally suitable measures available for the achievement of this goal, the least burdensome measure must be chosen. Furthermore, the burden imposed by the act must stand in reasonable relationship to the legislative intent.⁸⁶

In the case law of the European Court of Justice, the execution of the Principle of Proportionality is conducted through a threefold test. A Community act that fails to fulfill any one of the three requirements must be ruled unproportional and void. The first test is the suitability of a Community act, including the determination of a goal permitted by the Community Treaties (*Geeignetheit*).⁸⁷ The suitability test is based on an empirical-prognostic evaluation of the effects a Community act might attain within its field of application. The time of enactment must be definitive because assumed suitability cannot be questionable in the retroactive sense.⁸⁸ As for the lack of certain predictions and the wide margin of discretion provided by the Community Treaties,⁸⁹ the European Court is reluctant to declare any act invalid on the basis of the absence of suitability alone.⁹⁰ In fact, the Court only examines whether the legislative intent of a Community act was "obviously inappropriate for the realization of the desired objective."⁹¹

The second test evaluates the necessity of the act.⁹² If various suitable measures are available, necessity is determined by the least burdensome mea-

84. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). The rational basis test was amended by additional equal protection theories, such as the conceivable basis test, the theory of legislative approximation, inclusiveness or strict scrutiny.

85. Case 265/87, *Hermann Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, E.C.R. 2237, 2270, ¶¶ 20-24 (1989); Case 127/91, *Comptoir National Technique Agricole (CNTA) v. Ministère de l'Agriculture*, E.C.R. I-5681, 5697, ¶ 23 (1992).

86. *Id.*

87. See, e.g., *EMILIOU*, *supra* note 82, at 191-92.

88. Case 276/809, *Padana*, E.C.R. 517, 551 (1982) (Opinion of Advocate-General Reischl).

89. Case 29/77, *SA. Roquette Frères v. French State—Administration des Douanes*, E.C.R. 1835, 1840-45, ¶¶ 12-35 (1977).

90. So far the Court has only found certain national acts based on the EC Treaty art. 36 to fail the suitability test. See, e.g., Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, E.C.R. 649, 663-664, ¶¶ 12-14 (1979); Case 271/87, *Commission of the European Communities v. Federal Republic of Germany*, E.C.R. 229, 252-256, ¶¶ 6-23 (1989).

91. Case 40/72, *I. Schroeder KG v. Federal Republic of Germany*, E.C.R. 125, 142, ¶ 14 (1973). See also Case 256/90, *Mignini SpA v. Azienda di Stato per gli Interventini Mercado Agricolo (AIMA)*, E.C.R. I-2651, 2684, ¶ 16 (1992); Case 265/87, *Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, E.C.R. 2237, 2269-2270, ¶¶ 20-24 (1989); Joined Cases 279, 280, 285 and 286/84, *Walter Rau Lebensmittelwerke and Others v. Commission of the European Communities*, E.C.R. 1069, 1125-26, ¶ 34 (1987).

92. See, e.g., *EMILIOU*, *supra* note 82, at 192.

sure (*Erforderlichkeit/Notwendigkeit*). The necessity test plays the most important role in the case law of the European Court of Justice. Of the measures available, each must be equally appropriate to achieve the objective pursued and the Community legislator is not required to make use of a less efficient means. If a less burdensome measure, in principal, achieves the legislative intent but does not do so with the same level of certainty, it may be equally appropriate.⁹³ For the final application and choice among equally suitable measures, the Community is entitled to its own discretion and its own scope of judgment (*Beurteilungsspielraum*).⁹⁴ Both the necessity and suitability test share the need for an evaluation between a desired objective and its realization. Only from this starting point is it possible to assess the burden imposed by a legislative act.⁹⁵ Nevertheless, with regard to the responsibility and area of conduct, the Community institutions often are unable to prevent wholesale or very general decisions. Under specific circumstances certain group interests may be neglected for reasons of overall integration and legal unity.⁹⁶

The third and final test is the selected proportionality or adequacy test (*Verhältnismäßigkeit im engeren Sinne/Angemessenheit*).⁹⁷ The burden of an act must be balanced against its legislative intent and both burden and intent must stand in reasonable relationship to one another. This requires delineating and evaluating the relationships of all affected legal and individual interests based on the actual extent of the burden. The Court makes the final assessment based on the general importance of the affected interests as well as the degree and duration of the burden. The relationship between legislative intent and burden does not need to be a perfectly balanced one, but the goal is to prevent disparities. The European Court of Justice applies the selected proportionality test in a very reserved fashion. It interprets this test as a quasi-global evaluation between the advantages and disadvantages of a proposed measure.⁹⁸

Having described the legal concept of proportionality in Community law, it remains questionable whether the Principle of Proportionality can in fact provide a sufficient standard for judicial review of subsidiarity. Indeed, a number of scholars have suggested that the Principle of Proportionality may prove to en-

93. See, e.g., Case 55/56, *Fédération Charbonnière de Belgique v. High Authority*, E.C.R. 2921 (1955-56); C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, E.C.R. I-4165, ¶ 37 (1995).

94. Case 280/93, *Federal Republic of Germany v. Council of the European Communities*, E.C.R. I-4973, 5068-69, ¶ 90 (1994). Judicial review of the exercise of discretion is "thereby limited to the examination of whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion." For an example of these limits on judicial review, see Case 84/94, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities*, E.C.R. I-5755, 5811, ¶ 58 (1996).

95. If a specific aspect of a burden proves impossible, the Community must name objective standards under which the burden imposed appears less burdensome. The objective perspective of the affected party is thereby of utmost importance. See, e.g., Case 352/85, *Bond van Adverteerders v. The Netherlands State*, E.C.R. 2085, 2135, ¶¶ 36-37 (1988).

96. Case 5/73, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, E.C.R. 1091, 1110-12, ¶¶ 19-23 (1973); Case 12/78, *Italian Republic v. Commission of the European Communities*, 1731, 1749-50 (1979).

97. See, e.g., EMILIOU, *supra* note 82, at 192-94.

98. See Case 5/73, *Balkan-Import-Export*, E.C.R. 1091, 1111-12, ¶¶ 22-23 (1973).

hance justiciability of subsidiarity and reliably indicate the future direction of Court rulings on the issue of subsidiarity.⁹⁹ However, in order to decide whether this evaluation holds true, one must first review the differences and similarities between the principles. Moreover, beyond the specific characteristics of subsidiarity and proportionality, it is essential to determine whether a correlation exists between the principles.

At first glance, there seems to be no immediate interrelation between the Principle of Subsidiarity and the Principle of Proportionality, with both principles holding a broad area of application independent of and separate from each other. While fundamental rights and basic freedoms are the focus of the Principle of Proportionality, the Principle of Subsidiarity is directed at the protection of Member State powers and identity.¹⁰⁰ As such, the Principle of Subsidiarity is an important means for the allocation and distribution of powers between concurrent powers of the Community and the Member States. Furthermore, subsidiarity is intended to increase the awareness of the citizen's interests, thus maintaining national identity and improving accountability. In the latter context, subsidiarity must also be understood as a means to ensure grassroots politics. Conversely, the Principle of Proportionality applies to both concurrent and exclusive Community powers. It focuses on planned efficiency of Community acts in general. These differences display the distinct character of subsidiarity and proportionality.

However, the systematic placement of the Principle of Proportionality in the EC Treaty suggests a different conclusion. As the rule directly following the Subsidiarity Clause, proportionality indicates a close relationship with subsidiarity.¹⁰¹ Indeed, the Subsidiarity Clause contains elements of the Principle of Proportionality. The Subsidiarity Clause, for example, must represent a necessary solution among various available alternatives.¹⁰² Furthermore, the need to place subsidiarity in relation to a Treaty objective clearly demonstrates similarities to the suitability test provided under the Principle of Proportionality. Both require the choice of a valid Community concern, which defines the outcome of suitability. Subsidiarity and proportionality also share a common bond in their purpose and ultimate goal. The Principle of Subsidiarity and the Principle of Proportionality are used in order to regulate Community powers, with the

99. Jean Paul Jacqué & Joseph H. H. Weiler, *On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 COMMON MKT. L. REV. 185, 202-06 (1990); Dehousse, *supra* note 42, 13-17; Bermann, *supra* note 44, at 386-90. Professor Bermann seems to misunderstand the different measures of the Principle of Proportionality. While not differentiating the various measures properly, he omits the suitability test as the first test of proportionality. In fact, in his described order of examination Professor Bermann starts with the reasonable relationship between measure and objective or the "rationality component" of the proportionality test. This, however, is the final test to be applied. Furthermore, his second and third tests are not to be considered separate; they are both part of the second test and must be considered together. What Professor Bermann describes as the "utility component" is as much a part of the necessity test as the objective of a least burdensome measure. Evidently, arguments based on such misunderstanding cannot entirely be convincing.

100. Dehousse, *supra* note 42, at 1.

101. Zuleeg, *supra* note 42, at 190.

102. HELMUT LECHER, DAS SUBSIDIARITÄTSPRINZIP 61 (1993).

view of limiting any violation of rights or values assumed to be of higher importance.

Despite having reached this point, the question of whether proportionality can be a meaningful tool for judicial review of subsidiarity remains. Beyond differences and similarities, the Principle of Proportionality adds an established and pragmatic component to the interpretation of subsidiarity. This is important with regard to issues of suitability and necessity. As established legal concepts, the suitability and necessity requirements may make similar evaluations required by the Principle of Subsidiarity more permissive.¹⁰³ It would be wrong to argue that any Community action found unproportional cannot stand in accordance with the Principle of Subsidiarity. That argument would eliminate subsidiarity as a standard of review. In fact, proportionality would supersede subsidiarity, resulting in a conclusion that would skew both principles. It is therefore imperative to realize that while both principles manifest distinct differences, their independent spheres of application buttress one another. Proportionality can indeed function as an auxiliary means of interpretation or an additional safeguard for subsidiarity.

After complying with the Principle of Subsidiarity, any Community act must be evaluated by the standards of proportionality. While a proposed act may comply with the Principle of Subsidiarity, it may, at the same time, be found invalid under the premises of proportionality. A proposed act of that kind would fail to be enacted as a Community law, demonstrating that, on a different level, proportionality generates an additional standard of review for subsidiarity.

In short, both principles operate in turns, albeit at two different levels of Community action. The Principle of Subsidiarity determines whether action is to be set in motion, whereas the principle of proportionality defines the scope of the action. Accordingly, proportionality is to be considered in relation to actions already taken, and its purpose in ensuring compliance with the Treaty's objectives.¹⁰⁴ Only as part of this interplay can the Principle of Proportionality be a useful tool to enhance the justiciability of subsidiarity.

2. *The Requirement to Show Sufficient Grounds*

Perhaps the only objective standard for judicial review of subsidiarity is provided by the procedural requirement to show sufficient grounds. The sufficient grounds standard is articulated in EC Treaty, Art. 253 (ex Art. 190): "[r]egulations, directives and decisions adopted by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state

103. Nevertheless, it is important to note the clear reluctance of the European Court of Justice to invalidate Community actions based on questions of suitability alone. Likewise with regard to the necessity test, the Court acknowledges an area of broad Community discretion only subject to limited judicial review. See Case C-233/94, *Federal Republic of Germany v. European Parliament and Council of the European Union*, E.C.R. I-2405, 2461, ¶ 56 (1997).

104. Case 84/94, *United Kingdom v. Council*, [1996] E.C.R. I-5758, 5783, point 123-128 (1996) (Opinion of Advocate General Mr. Léger). See also Keon Lenaerts & P. van Ypersele, *Le Principe de Subsidiarité et son Contexte: Etude de l'Article 3B du Traité CE*, 30 CAHIERS DE DROIT EUROPÉEN, 3, 52-57 (1994).

the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.”¹⁰⁵

The European Court of Justice has held that in order to show sufficient grounds:

Community measures must include a statement of the facts and law that led the institution in question to adopt them, so as to make possible reviews by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty.¹⁰⁶

Despite this holding, the Court has limited the standard by further stating that the “failure to refer to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements when the legal basis for the measure may be determined from the other parts of the measure,” but that “explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis.”¹⁰⁷

When one applies the rules enunciated by the European Court of Justice to the Principle of Subsidiarity, it is clear that detailed reasoning to show sufficient grounds is unnecessary. While the reasoning may include the legislative intent of a Community act and the evaluations and conclusions determined by the two-fold test set forward in the Subsidiarity Clause, neither is truly required to show sufficient grounds. In fact, it is sufficient for a directive to simply indicate the legal basis or legislative intent, extrapolated from considerations of the European Parliament or other Community institutions participating in the legislative proceedings of the act.

The value of the procedural requirement to show sufficient grounds, as a standard for judicial review of subsidiarity, is highly questionable. As a minimal standard, albeit justiciable, it cannot provide the much needed tool for interpretation and review of compliance with subsidiarity. The requirement to show sufficient ground remains overly broad and ambiguous. Indeed, the Court is limited in its power of review to verifying whether reasons have even been stated or indicated.

3. *Federal Republic of Germany v. European Parliament & Council: An Example of the Application of Subsidiarity in the European Court of Justice*

Since the ratification of the Maastricht Treaty, the European Court of Justice has been presented with a variety of cases on the subject of subsidiarity.¹⁰⁸

105. EC TREATY, art. 253 (ex art. 190).

106. Case 45/86, *Commission of the European Communities v. Council of the European Communities*, E.C.R. 1493, 1519, ¶ 5 (1987). See also Case 41/93, *French Republic v. Commission of the European Communities*, E.C.R. I-1829, 1850, ¶ 34 (1994); Case 158/80, *REWE-Handelsgesellschaft Nord mbH and REWE-Markt Steffen v. Hauptzollamt Kiel*, E.C.R. 1805, 1833, ¶ 25 (1981).

107. Case 45/86, *Commission of the European Communities v. Council of the European Communities*, E.C.R. 1493, 1519-20 (1987).

108. See, e.g., Case 84/94, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities*, E.C.R. I-5755, 5810-5811, ¶¶ 54-55 (1996). See also *id.*, I-5758, 5783, point 123-128 (Opinion of the Advocate General Mr. Léger); Case 91/95P, *Roger Tremblay &*

Nevertheless, *Federal Republic of Germany v. European Parliament & Council*¹⁰⁹ was the first case that addressed the question of whether Community legislation should be annulled due to a violation of the Principle of Subsidiarity.

Germany challenged a Community directive aimed at the European banking industry. The goal of the directive was to introduce a mandatory bank deposit-guarantee scheme in all Member States and to harmonize the relevant national guarantees with a minimum deposit.¹¹⁰ During the legislative proceedings, Germany tried to prevent the directive from being adopted, but failed. As a result of required majority voting, Germany was outvoted by the remaining Member States.¹¹¹ In response, it initiated an action before the Court and argued that, without the constraints set by a Community directive, the German national deposit-guarantee scheme would sufficiently achieve the objectives pursued by the Community directive.¹¹²

The German deposit-guarantee scheme is a voluntary insurance body, which is not under state control. At the time of the enactment of the challenged directive, all three hundred credit institutions set up in Germany belonged to a guarantee scheme with the exception of only five. Moreover, any credit institution that did not belong to an authorized deposit-guarantee body in Germany was required to inform its customers of that fact before an account was opened.¹¹³

The German government contended that the directive should be annulled based on three points. First, Germany challenged the legal basis of the directive, arguing that the adoption of the directive would have required a unanimous vote by all Member States.¹¹⁴ In particular, Germany claimed the directive should have been based on the implied power prerogative of the EC Treaty.¹¹⁵

Second, the German government argued that there had been a breach of the obligation to show sufficient grounds under EC Treaty, Art. 253 (ex Art. 190). The German government did not claim that the directive infringed upon the Principle of Subsidiarity, but only that the Community legislature did not set out

Others v. Commission, E.C.R. I-5547, 5574-75, ¶¶ 20-25 (1996); Case T-5/93, *Roger Tremblay & Others v. Commission*, E.C.R. II-185, 209 (1995); Case 11/95, *Commission of the European Communities v. Kingdom of Belgium*, E.C.R. I-4115, 4168-4169 (1996); Case 415/93, *Union Royale Belge Des Societes De Football Association (ASBL) and Others v. Jean-Marc Bosman*, E.C.R. I-4921, 5065, ¶ 81 (1995); Cases 430 & 431/93, *Jeroen Van Schijndel & Johannes Van Veen v. Stichting Pensioen Voor Fysiotherapeuten*, E.C.R. I-4705, 4715, point 27 (1995) (Opinion of Advocate General).

109. Case 233/94, *Federal Republic of Germany v. European Parliament & Council of the European Communities*, E.C.R. I-2405(1997) (action under EC TREATY, Art. 230 (ex art. 173)).

110. 1994 O.J. (L 135) 5. See also *Commission Recommendation of 22 Dec. 1986 Concerning the Introduction of Deposit Guarantee Schemes*, 1987 O.J. (L 33) 16.

111. Case 233/94, *Federal Republic of Germany v. European Parliament & Council of the European Communities*, E.C.R. I-2411, 2412, point 9 (1997) (Opinion of Advocate General Léger).

112. *Id.* at 2412, point 10.

113. *Id.* at 2415-16, point 17-24; See also Case 233/94, *Federal Republic of Germany v. European Parliament & Council* E.C.R. I-2441, 2467, ¶ 78 (Judgment of the Court) (1997).

114. Case 233/94, *Federal Republic of Germany v. European Parliament & Council of the European Communities*, E.C.R. I-2441, 2448-49, ¶¶ 10-11 (1997) (Judgment of the Court).

115. EC TREATY art. 308 (ex art. 235).

the grounds to substantiate the compatibility of its actions with the principle.¹¹⁶ In light of the Principle of Subsidiarity, Germany asserted that the Community institutions must give detailed reasons to explain why only the Community, to the exclusion of the Member States, is empowered to act in the area in question.¹¹⁷ In addition, it argued that the directive did not indicate in what respect the objectives could not have been effectively met by action at the Member State level or grounds which established the need for Community action.¹¹⁸

Third, the German government argued that the directive was contrary to the Principle of Proportionality as set out in the conclusions of the Edinburgh European Council.¹¹⁹ The conclusions stipulated that the Community, when adopting legislative measures, should endeavor to take account of "well-established national practices."¹²⁰

Ultimately, the European Court rejected all arguments made by the German government. With regard to the first argument, the Court ruled that the directive was adopted in accordance with the creation of the Internal market and thus based on the correct Treaty provision, which mandated a qualified majority vote.¹²¹ Second, concerning the obligation to show sufficient grounds, the Court relied on *minimum requirements* established by prior case law.¹²² According to the Court, showing sufficient grounds is necessary when it is not apparent which reasons led the Community institutions to adopt certain legislation.¹²³ Only then can the Court exercise its power of review. The Court noted that the preamble of the directive clearly reflected the Community legislature's view that the objective could best be achieved at the Community level.¹²⁴ Further, the European Parliament and the Council stated in the preamble that any action taken by the Member States to implement a Commission recommendation would not fully achieve the desired result. As such, the Court found that the directive complied with the obligation to show sufficient grounds.¹²⁵ Moreover, the Court held that an express reference to the Principle of Subsidiarity in the directive is not required.¹²⁶

116. Case 233/94, *Federal Republic of Germany v. European Parliament & Council of the European Communities*, E.C.R. I-2441, 2451-56, ¶¶ 22-24 (1997) (Judgment of the Court).

117. *Id.*

118. *Id.*

119. *Id.* at 2467, ¶¶ 76-78.

120. *Id.* at 2460-62, ¶ 77.

121. *Id.* at 2449, ¶¶ 13-14. In particular, the Court held that it was the aim of the directive "to prevent the Member States from invoking depositor protection in order to impede the activities of credit institutions authorized in other Member States," clarifying the intent to "abolish obstacles to the right of establishment and the freedom to provide service." *Id.* at 2451, ¶ 19.

122. *Id.* at 2452, ¶ 25, citing Case 41/93, *French Republic v. Commission of the European Communities*, E.C.R. I-1829, ¶ 34 (1994).

123. *Id.* at 2452; 2455-56, ¶¶ 35-38. See also Case 233/94, *Federal Republic of Germany v. European Parliament & Council of the European Communities*, E.C.R. I-2411, 2425, point 71 (1997) (Opinion of the Advocate General Léger).

124. Case 233/94, *Federal Republic of Germany v. European Parliament & Council of the European Communities*, E.C.R. I-2441, 2452-53, ¶¶ 26-28 (Judgment of the Court).

125. *Id.* ¶ 27.

126. *Id.* ¶ 28.

Finally, the Court found it unnecessary to determine the precise legal value of the conclusions of the Edinburgh European Council.¹²⁷ It pointed out that the Community legislature cannot simply respect all "well-established national practices"¹²⁸ when harmonizing legislation.¹²⁹ In fact, the Court stated that the Community may consider harmonizing legislation concerning laws such as deposit-guarantee schemes at any time and wherever deposits are located within the Community.¹³⁰

The restraint in interpreting the Principle of Subsidiarity in more detail or in establishing additional justiciable standards is apparent in the Court's ruling. Not only did the Court refuse to set measures for a more specific interpretation of the requirement to show sufficient grounds with regard to the Principle of Subsidiarity, it clearly did not determine the legal value of a political statement by Member States or the Conclusions of the European Council in Edinburgh. It is fair to argue that the European Court of Justice will most likely continue to interpret the Principle of Subsidiarity in a rather formal and cautious fashion. To prevent damage to further European integration and the relations between the Community and its Member States, the European Court of Justice would be well advised to take seriously the Member States' concerns as expressed in the Subsidiarity Principle. The idea of subsidiarity was incorporated into the EC Treaty to diminish the widespread discontent with a political process that is too far removed from, and not responsive to, the concerns of citizens and Member States.

Despite this conclusion, the context in which the described action was brought before the Court is most significant. It reveals how a Member State that was overruled by a majority vote tried to circumvent this rather democratic outcome by challenging the legal basis of the Community legislation in question. Further, it demonstrates that Member States of the European Union remain uncertain about whether or not to commit themselves to a more democratic system that is increasingly independent from a single Member State's influence.

4. *Contradicting Perspectives and Limitations within the Principle of Subsidiarity*

Due to the difficulty of enforcement, it is not clear if subsidiarity as a rule of law or a constitutional norm will succeed in bringing together a closer union while maintaining national sovereignty. It remains particularly disputable whether, on the basis of the Principle of Subsidiarity alone, a "[g]reater union can be achieved without excessive centralization."¹³¹ This question becomes even more significant if one considers that both advanced European integration, which undoubtedly requires a certain amount of centralization, and national sovereignty contravene one another. It is a paradox that, on one hand, the Member

127. *Id.* at 2468, ¶ 80.

128. *Id.* at 2467, ¶¶ 76-77.

129. *Id.* at 2468, ¶ 80.

130. *Id.* ¶ 82.

131. E.C. Bull. no. 10, at 9, point I.8., ¶ 5 (1992).

States advocate a closer union while, on the other hand, they are afraid to lose their national powers or identities. But this is only the most obvious paradox of subsidiarity. There are additional inherent tensions as well. For example, the principle holds two opposing perspectives or dual functions.¹³²

The two opposing perspectives of subsidiarity can be described most accurately with the economic doctrine of exit and voice, as advanced by Albert O. Hirschman in his analytical work *Exit, Voice, and Loyalty*.¹³³ Exit and voice correlate to market and non-market forces that are economic and political mechanisms, respectively.¹³⁴ Exit as the realm of economics is impersonal and indirect. A customer who is dissatisfied with a product of one firm shifts to that of another, defending his welfare or improving his position. Market forces are set in motion by this behavior, which induce recovery on the part of the firm that has declined in comparative performance.¹³⁵ Exit is impersonal and indirect because it avoids face-to-face confrontation. In general, the customer makes decisions in the anonymity of the marketplace. The results of decisions are only transferred through statistics and not by the articulation of a voice.¹³⁶

Voice, as the political alternative to exit, depends on direct communication, the articulation of opinion, protest and affirmation. Voice is understood as the political action *par excellence* and can graduate from faint grumbling to violent protest.¹³⁷ It is defined as any attempt to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition by various types of actions.¹³⁸

Applied to the Principle of Subsidiarity, voice refers to the actions that citizens may use to have their concerns heard in the political process of the Community. Voice is the active participation of individuals in Community politics. Subsidiarity is the key to ensuring participation of that kind and to increasing accountability while bringing government closer to the citizens. In contrast, exit focuses on the issue of mobility between different Community jurisdictions. Exit directs attention to the individual choice of location and inter-

132. See, e.g., J. H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991) and Viktor Vanberg, *Subsidiarity, Responsive Government and Individual Liberty*, in SUBSIDIARITÄT: IDEE UND WIRKLICHKEIT: ZUR REICHWEITE EINES PRINZIPIES IN DEUTSCHLAND UND EUROPA 253 (Knut Wolfgang Nörr & Thomas Oppermann eds., 1997).

133. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). The application of Hirschman's doctrine with regard to the European Communities is also conducted by J.H.H. Weiler and Viktor Vanberg. Weiler uses the doctrine of exit and voice to explain the paradox of European integration between the "inexorable dynamism of enhanced supranationalism" and the "counter-development towards intergovernmentalism . . . away from European integration." Vanberg directly refers to the concept of subsidiarity as a constitutional norm and distinguishes between what he calls the "communitarian" and "libertarian subsidiarity." See J.H.H. Weiler, *supra* note 132 at 2410-12; Viktor Vanberg, *supra* note 132.

134. HIRSCHMAN, *supra* note 133, at 15-20.

135. *Id.* at 15.

136. *Id.* at 15-16, 22-25.

137. *Id.* at 16, 30-32.

138. *Id.* at 30. Hirschman specifies: "through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion."

governmental competition. By shifting political authority to lower levels, it is easier for citizens to compare particular advantages and disadvantages of different Community jurisdictions and escape from unwanted policies.¹³⁹ Thus, the increase in the mobility of citizens and the possibility of more favorable policies elsewhere, such as lower taxes, promote intergovernmental competition. While voice aims to increase political participation with the goal of achieving improved governance at the national or lower level, exit presents mobility and intergovernmental competition as an instrument to limit the powers of government in general.¹⁴⁰

At first glance both voice and exit seem to make the same promise: to make government more responsive. Voice can even be viewed as a residual to exit.¹⁴¹ Some citizens who are not yet ready to escape a certain policy are more likely to exercise the voice option. In addition, voice can act as an alternative. This might be the case where the ability to influence a policy seems to offer greater results than mere escape. Once exited, the opportunity to use voice is lost. In certain settings the exit option thus becomes the *ultima ratio*. Finally, voice can also function as an alternative if exit is simply not available, such as in a monopolistic or exclusive environment.¹⁴²

Despite these correlations, voice and exit are rather distinct options. Both achieve their goals via differing approaches, resulting in contradictions and competing paradigms. A similar observation has been made with regard to American federalism and is expressed through the terms "rights of persons" versus "rights of places."¹⁴³ These phrases refer to the tension between local self-government and individual rights in federal political structures.¹⁴⁴ The placement of political authority closer to the source from which it originates, namely, the people, creates the dilemma of choosing between individual and collective freedom or between consumership and citizenship. The problem is that individual freedom often diminishes collective freedom. Measures that are conducive to voice and the community in which political participation is exercised may be detrimental to exit and the individual freedom to escape.¹⁴⁵ To stay competitive, lower level governments depend on people and resources, not only to sustain their tax-base but simply to remain functional as a community. Accordingly, exit must be contained. It is in this context that the conflict between voice and exit becomes apparent. Voice is primarily concerned with the

139. Vanberg, *supra* note 133, at 254-55.

140. *Id.* at 254-56.

141. HIRSCHMAN, *supra* note 133, at 33-36.

142. *Id.* at 36-43.

143. Vanberg, *supra* note 133, at 259-60. See also John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS—EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 87-114 (D. A. Kenyon & John Kincaid eds., 1991); John Kincaid, *Consumership versus Citizenship: Is there wiggle room for local regulations in global economy?*, in *FOREIGN RELATIONS AND FEDERAL STATES* 27-47 (Brian Hocking ed., 1992).

144. Vanberg, *supra* note 133, at 260; See also James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 *VAND. L. REV.* 1251, 1272-80 (1994).

145. Vanberg, *supra* note 133, at 259-62.

transfer of powers to lower level government. It induces the regulatory authority to erect trade barriers against goods and services from other polities and to establish an environment in support of special interests.¹⁴⁶ This stands in apparent contrast to the premise of exit, which is the limitation of regulatory powers at whatever level exercised.

As inherent tensions of the Principle of Subsidiarity, the competing paradigms of exit and voice make it evident that the Member States, as lower level governments, must be prevented from using their powers for protectionist purposes. The allocation of regulatory powers through the Principle of Subsidiarity and the execution of such powers by the Member States must be constrained. That is, subsidiarity must not be interpreted as an unconditional endorsement, but rather a qualified one.¹⁴⁷ Where Community issues are involved, precautionary measures must be enforced in the application of regulatory powers by the Member States. Even if the Principle of Subsidiarity, as put forward in the Community Treaties, was a balanced means with which to limit the centralist drift of the Community, it would be necessary to recognize the problems that could occur on the Member State level and that could ultimately threaten the level of Community integration that has been achieved.

IV. CONCLUSION

The complexity and dilemma of subsidiarity lies in its broad and abstract structural concept. Although the defining elements of the Principle of Subsidiarity are rather vague, its character as an applicable rule of law is not called into question. Like the vast majority of legal statutes, the principle of Subsidiarity requires interpretation by the legal community, scholars, and courts to achieve its full appreciation. Furthermore, it is important to note that concepts of law may be dynamic in character. Through different periods of historical, constitutional and social development, the understanding and interpretation of specific rules of law may change. Accordingly, it might even be argued that only a rule of law, which leaves room for and is open to interpretation, is fit for the challenge of longevity, such as the Constitution of the United States of America. In that sense it is necessary to find functional and judicial standards to adequately apply the Principle of Subsidiarity.

Subsidiarity was not limited to a reference in the preamble to the Treaty on European Union or the European Community Treaties. The Principle of Subsidiarity was specifically included in the European Community Treaty as a positive rule of law. The various anthropological and historical definitions of subsidiarity, however, render only minimal aid to the interpretation of the Subsidiarity Clause. If historical, theological or social links are drawn, one may even consider that a legal definition of subsidiarity does not exist. Even among

146. Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 *JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS* 286, 291-92 (1993).

147. Vanberg, *supra* note 133, at 267-68.

the different Member States of the Community, the understanding of subsidiarity was and remains manifold.¹⁴⁸ More importantly, however, it should be remembered that subsidiarity in the European Communities stands before the specific background of European integration. The Subsidiarity Clause is a unique response to problems arising within the process of European integration. To be sure, the European Community is a functional system aiming toward increased integration.

The Principle of Subsidiarity cannot consist of a material determination that strictly enumerates the control of the Member States. The control is meant to be functional, or in terms of American Constitutional Law subject to procedural safeguards, since the goal of subsidiarity is the allocation of powers between the Union as the center and the Member States as the periphery.¹⁴⁹ Whether the interpretation of subsidiarity can be pursued in an objective or unbiased manner, given the differing self-interests of the Member States, European Court of Justice, and European officials, remains questionable. Indeed, the ultimate power to fill subsidiarity with meaning may not rest with those who have the power to do so, but with those provided with the best bargaining positions. It will take unrestricted commitment to European integration by the Member States, along with political compromise and the acknowledgment of their responsibilities in this context, to achieve a meaningful allocation of powers based on the Principle of Subsidiarity.

148. See, e.g., Ian Ward, *Identity and Difference: The European Union and Postmodernism*, in *NEW LEGAL DYNAMICS OF EUROPEAN UNION* 15, 24-25 (Jo Shaw & Gillian More eds., 1995).

149. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in Selection and Composition of the National Government*, 54 *COLUM. L. REV.* 543, 546-60 (1954); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L. J.* 1552 (1977); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *HARV. L. REV.* 489, 495-503 (1977); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 *VAND. L. REV.* 1229, 1240-46 (1994). See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).