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We have before us a subject that is more economic than legal. The important questions about that subject are more political than legal. Into such realms I venture only most warily.

I find interesting Dennis Thompson's portrayal of the Common Market as "the only body in Europe that really matters." His characterization is as apt as it is pithy and, indeed, pertinent for his countrymen's consideration at this moment of economic and electoral decision. And it seems to me that we should ask: why is the Economic Community the only body that "matters"? It matters, I think, because it is the only European international organization that is dynamic—dynamic, not in its own institutional sense of accomplishment and activity, but dynamic as felt in the minds of ordinary people in Europe who perceive that it can affect their daily lives and their common future. The consultative organs, the partial free-trade area of the European Free Trade Association, the military instrument of N.A.T.O. —however well their officials and their member governments may think these bodies are fulfilling their purposes—do not impinge upon the lives of people, do not evoke grass-roots support and even emotion, do not hold promise for the citizen, as does the Common Market.

Perhaps, really, the Common Market does not impinge very forcefully on ordinary lives. But it stands as a symbol and an omen of Europe drawn closer and strengthened and made more prosperous.

As lawyers, we may appropriately narrow our attention somewhat to focus upon the idea of supranationality, itself a significant symbol. Perhaps (as suggested by the French, who ought to know about such things) a measure of romance has tinged the notion of supranationality. It may arguably partake of hyperbole to speak of a "new legal order," in the phrase adapted by Mr. Thompson from the judgment of the Court of Justice in the *First Tariff Commission* case.[1] In this country

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[1] N. V. Algemene Transport—en Expedite Onderneming van Gend en Loos v. Nederlandse Tariefcommissie, case 26-62, 9 Recueil 1, 2 Com. Mkt. L. Rep. 105. 129 (1963).

we find a hearty consensus (which I share) in favor of supranationality for Europe. Inevitably such views, including my own, are built at least partly upon sentiment rather than informed analysis.

Since this great principle of supranationality lies at the core of President de Gaulle's remonstrances against the Community, we should inspect it. And if we scruple to steer clear of fancy, we need not turn toward cynicism (which the French also know about). I would suggest only that we confront these questions: (1) Why should we (particularly as Americans) favor supranationality for Europe? (2) To what extent is supranationality a reality in the Common Market? (3) What problems may be generated as supranational institutions are carried forward through times of an uncertain temper? I wish here mainly to raise these questions; I will offer only a few fragments toward answering them.

I.

As Americans, why have we tended to favor supranational institutions for Europe? Or to restate the question, could the ends we have had in view be equally served by some form of cooperation between national entities, where any international institutions of the Community were subordinated to the control of member states?

Allow me to approach this question first through mention of some economic considerations. We saw after the war the prospect of European countries sinking back into the protectionism and bilateralism of the thirties, in an effort to balance the payments of economies damaged by war and bereft of traditional overseas sources of income. Such policies threatened to set artificial patterns of trade, and hence of production, quite different from those needed to maximize productivity, and particularly the productive power to earn dollar exchange. Dollars were urgently required to purchase capital equipment, which could be obtained for the most part only from dollar-area countries unravaged by the war. We could see a way to alleviate these problems (once their shorter-run aspects were subdued) by loosing the forces of mass production and mass marketing. These forces were available to Europe only on a continental scale, and therefore only through a thoroughgoing multilateralism of trade and investment. An assured freedom of trade among European countries would stimulate the building and rebuilding of productive capacity along more rational and productive lines (with, incidentally, less dislocation of established

producers than would have been the case if the war had not caused so much destruction), which could make Europe competitive with the United States and prevent the dollar shortage from becoming chronic. For the longer run, our generous impulses wished for Europe the prosperity and dynamism of continental-scale economics that had by and large served this country well.

Although the EPU eased intra-European payments problems and the Marshall Plan and OEEC narrowed the dollar gap, economist-statesmen on both sides of the Atlantic have been right in recognizing the continuing need for continental cooperation to free trade (and, concomitantly, to free the movement of capital, labor and management skills). And I believe they have been right to insist further on supranational institutions to accomplish these objectives. The benefits of international economic freedom flow essentially from realigned patterns of investment and production that will not be called forth without some assurance that free trade and its concomitants will endure at least beyond the short run. This degree of permanence is not assured by the traditional style of multilateral treaty organization in which the unanimity rule prevails, where enforcement can be viewed as a matter of etiquette among nations retaining full sovereignty, and where member states do not invest power so substantially in the treaty institutions that those institutions in themselves can deter withdrawal or breach of obligation. Where nations yield sovereignty to the extent of agreeing to be bound by unconsented legislative or enforcement measures that implement treaty objectives, or to be steered in their trade policy by a technocratic agency they cannot as individual nations control or block, they have laid the foundations of a more permanent economic union.

The magnificent craftsmanship of the economic provisions of the Treaty of Rome was matched, within understandable political limits, by the erection of ingenious, practical, and for the most part effective supranational institutions. Are the economic reasons justifying such institutions as strong now as they were after the war, or at the time the Treaty was negotiated? It seems to me that the answer must be yes. While some of the postwar problems that bespoke the need for a customs union have been mitigated, the impetus for the Common Market has been taken over by its very success and continued promise of heightening European prosperity. I would venture to say that that success has rested largely upon the existence of supranational organs

that afford some assurance of permanence, and which have in the event supplied initiative and acceleration in implementing the trade-liberating objectives of the Treaty.

If we were otherwise to question supranationality on economic grounds, we would have to question the merits of the whole Common Market idea as an original proposition. I do not understand even General de Gaulle to be doing that. It is true that idealized economic theory holds that liberalization of trade and all that goes with it produces greater benefits on a global scale (perhaps we should read "free-world scale") than in mere regional expressions like the EEC.[2] Accordingly it may be argued that outsiders like the United States will experience increasing trade disadvantages with every step taken to perfect a European economic union. Although American policy since the war has addressed the issue of "regionalism versus globalism" with ambivalence,[3] it has certainly not discouraged regional groupings in order to hold out for a global free trade system. Conceivably we should rethink this question and in so doing entertain the hypothesis that American trade policy would be better served by encouraging the dissolution of regional groups like the EEC and accelerating "global" free trade along the lines commenced by GATT. But even considered only in economic terms, such a policy would ignore the great differences in the economic development of nations, and would rest to an unrealistic degree on a premise of world political and economic stability. And quite apart from purely economic criteria, there are other reasons to favor the continuation of the Common Market, which I hope can be seen in my very brief inspection of its supranationality from a political viewpoint.

Of course it was the prepossessing concern for political and military security — and not merely for economic betterment — that disposed Europe to regard the idea of supranationality with hospitable eyes. The nations of Europe as they emerged from the war were no longer powers of the greatest order, and none could realistically expect to regain first rank. More than ever, then, war within Europe would be fratricide. Sovereignty turned truculent had bred such war; sovereignty reduced might help prevent it. And particularly after the Czech coup and the Berlin blockade, Western European nations increasingly felt a

[2] See VINER, THE CUSTOMS UNION ISSUE 51-55 (1950).

[3] This ambivalence is incorporated into the General Agreement on Tariffs and Trade (GATT), which is built upon the fundamental premise of universal most-favored-nation treatment (article I), but explicitly allows for customs unions and free-trade areas (article XXIV).

common external threat. The heightened impulse given to mutual security on a European scale imparted momentum to the supranational idea of European union. Americans generally favored some version of European union; it could enhance the international consequence of a friendly continent. When the European Defense Community and companion schemes of political integration miscarried, interest turned to the less glamorous arena of economic integration, where less ambitious and less abrupt programs of integration might prove acceptable. And thus the supranational institutions erected by the Paris and Rome treaties were more than facilities for the economic objectives at hand. They were an experiment in union.

General de Gaulle in effect has asked whether this experiment should be advanced. Does Europe still need or want the supranational elements of integration as much as it did in the past, and how should Americans stand on this question?

I think one must reply that, from the standpoint of both European and American interests, supranationalism should continue to advance. The logic of these days, as much as that of immediate postwar times, dictates this conclusion. Indeed, as we see some European nations placing strains upon their bonds of military friendship with others, supranational institutions as inhibitors of European strife seem at least as important as they did in the postwar days when an impoverished Europe huddled together more instinctively. Viewed in the sweep of 20th century European history, the benefit of supranationality appears to be no less a function of prosperity than of want. And despite what we might wish to think, we cannot ignore the continued potential threat to free Europe from the Soviet Union, most visibly over Berlin. The doubt that atomic weapons would be used in Europe makes the need for integration, to maintain coordinated policies and conventional defense, at least as great as before. While we cannot pretend that the existing European Communities or their supranational institutions supply that measure of union called for by these capital political considerations, they have commenced a habit of supranationalism that is an indispensable foundation for such union.

It seems to me that the great benefit of the recent crisis (and I think one may permissibly identify some benefit) is that it has brought into more prominent consideration the ultimate issues of integration as political questions. True, as Mr. Thompson has indicated, the Luxembourg accords in immediate result have turned somewhat away from

integration, or at most have laid it aside, with nothing done for the Parliament or on the budget question, and with an agreement to disagree on majority voting in the Council. But I believe one encouraging sign is that all parties see more cogently that the big questions are political, as indeed they always have been. General de Gaulle[4] and M. Couve de Murville[5] have stressed the need to elevate political over technocratic discussions. And Professor Hallstein, who is certainly more than a technocrat, has restated his long recognition of the primacy of political questions.[6]

More specifically, the member nations of the Common Market are forced, not only by de Gaulle but by the dynamics of implementing the Rome Treaty into the third stage, to re-examine the extent to which they wish to commit sovereignty and authority to supranational organs. I hope they will emerge by ceding rather more than less. But whatever the result, it should be a consequence of clear and conscious decision, based on eight years' experience with Common Market institutions, that the members' premier purposes will be served by more or less supranationalism. After all, as Mr. Thompson has remarked with regard to majority voting, the Treaty cannot endure without commanding the continuing consent of member states, and it is not practical at this stage to take decisions that override the vital interests of members. And it is true that international and federal institutions do have a way, I think quite normally, of enhancing their own powers. Mr. Thompson has in a slightly different context cited Uniting for Peace and the enlarged role of the Secretary-General in the United Nations; *McCulloch v. Maryland*,[7] with its doctrine of implied powers in the federal government, comes to mind from our own experience. Concern about this sort of phenomenon seems to be part of what underlies the French complaint against "this embryonic technocracy, for the most part foreign," posing "usurpatory" demands.[8] It does seem to me that the Community will be viable as a supranational body in the long run only if its members have vested its institutions with supranational powers consciously and with full awareness of the

[4] Press conference of Sept. 9, 1965, excerpted in European Community No. 86, 8 (Oct. 1965).

[5] Speech to the French National Assembly, Oct. 20, 1965, excerpted in European Community No. 87, 3 (Nov. 1965).

[6] Hallstein, *Progress Hinges on Lasting Economic-Political Interplay*, European Community No. 88, 8 (Dec. 1965—Jan. 1966).

[7] 17 U.S. (4 Wheat.) 316 (1819).

[8] De Gaulle, Press Conference, Sept. 9, 1965, excerpted in European Community No. 86, 8 (Oct. 1965).

probable consequences. If the essential elements of supranationality cannot be agreed to sooner, efforts to impose them or evolve them from within may founder the Community later.

II.

To what extent does supranationality exist in the Common Market? I have no wish to recapitulate Mr. Thompson's comprehensive exposition, and will address myself only to a few aspects of an issue that lawyers will recognize as implicit: the question of what we in this country are inclined to call the "supremacy" of Community law.

Although the Treaty contains no specific jural norm establishing the primacy of Community law over that of member states, and although members have invested Community institutions with competence over only a quite limited range of subjects, it is nevertheless clear that a quality of "supremacy" is found in several areas.

By bold and I think sound decisions in the *Tariff Commission* cases[9] and the *Costa* case,[10] the Court of Justice has established for the Community a doctrine (if not a wholly enforceable reality) of Community law supremacy. These cases ordain (at least as a matter of Community law doctrine, which has not yet been confirmed by all member states applying it in their courts) that provisions of the Treaty and legislative acts pursuant to it, to the extent these are self-executing, create immediate rights and obligations in individual citizens and enterprises which national courts must enforce, even if they conflict with the domestic law of the forum state. And this is true even where the domestic enactment relied upon may be later in time than the treaty obligation involved.[11]

We must, of course, recognize that practical problems of enforcing judicial supremacy loom large if the courts of member states will not faithfully apply Community law in defeasance of their own national

[9] N. V. Algemene Transport—en Expedite Onderneming van Gend en Loos v. Nederlandse Tariefcommissie, case 26-62, 9 Recueil 1, 2 Com. Mkt. L. Rep. 105 (1963); Da Costa en Schaake N. V. v. Nederlandse Belastingadministratie, cases 28-62, 29-62, 30-62, 9 Recueil 59, 2 Com. Mkt. L. Rep. 224 (1963). The second-cited case adds to the first principally in its dictum that a national tribunal of last resort may not be bound, despite the mandatory language of article 177 of the Treaty, to refer to the Court of Justice a Community law question of interpretation upon which the Court of Justice has already passed in a similar previous case. If it chose not to refer the question, the national court presumably would be bound to apply the prior Court of Justice interpretation in the litigation before it.

[10] Costa v. Ente Nazionale Energia Elettrica (ENEL), case 6-64, 3 Com. Mkt. L. Rep. 425 (1964).

[11] See Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491 (1965).

laws. Article 177 of the Treaty, which supplies the only explicit technique whereunder Community law questions arising in national court litigation can be taken to the Community Court of Justice, does not provide at all for review of national court judgments. It provides only for a decision by the Community Court on Community questions which are referred to the Court by the national court in advance of the national court's judgment. Presumably national tribunals will (as article 177 encourages them to do and binds them to do if they are courts of last resort) refer Community law questions to the Community Court when the litigation appears to turn upon the answer to such questions, and then will apply the interpretation rendered by the Community Court of Justice. But there is no appeal from a final national court judgment, and the Court of Justice has no "reachdown" power to take before it important questions of Community law that the national courts have chosen not to refer to it. The result is that the national courts are more or less free despite article 177 to interpret away ("circuminterpret," as one of my students put it) the Community question raised by the litigation, so that it never gets referred to the Court of Justice at all.[12] Finally, we must be aware as a practical matter that the Court of Justice does not "apply" the law to the facts even in the cases that do come before it; the Court just "interprets," and leaves the important and largely discretionary job of application to the processes of judgment in the national court.[13] That is, the Court does not remit a mandate for disposition of the case in the national court "below." A corollary is that the Court can neither declare a national law "invalid" as conflicting with Community law nor ensure that the conflict will not reemerge when the cause returns to the national court.[14]

The fact remains, however, that the national courts are charged by the Treaty with a duty of referring questions of interpreting Community law to the Court, and are encouraged by dictum of that Court to apply Community law (without reference under article 177) where that Court's interpretation already covers the point at issue.[15]

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[12] See Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21, 31 (1963).

[13] Da Costa en Schaake N. V. v. Nederlandse Belastingadministratie, cases 28-62, 29-62, 30-62, 9 Recueil 59, 2 Com. Mkt. L. Rep. 224, 237 (1963); Robert Bosch G.m.b.H. v. Kleding-Verkoopbedrijf de Geus, case 13-61, 8 Recueil 89, 1 Com. Mkt. L. Rep. 1, 26-27 (1962).

[14] See Stein, *supra* note 11, at 513-14.

[15] Da Costa en Schaake N. V. v. Nederlandse Belastingadministratie, cases 28-62, 29-62, 30-62, 9 Recueil 59, 2 Com. Mkt. L. Rep. 224, 237 (1963).

And, as stated, the Court has declared as part of Community law the proposition that self-executing Community law is supreme over conflicting national law. Except in an exacerbated atmosphere which probably would exist only if the Community were about to disintegrate generally, or in particular litigation highly charged with domestic politics, we can expect the "law habit" to lead national courts to implement the supremacy doctrine in national court litigation.[16]

Now, there should be no doubt that this judicially-affirmed doctrine of supremacy, which although implicit in the Treaty was not an inevitable development, significantly enhances the potency of the Treaty's legislative provisions. Mr. Thompson has described the forms through which Council and Commission can exercise legislative (as well as other) powers—forms by which they can of course purport to bind both individuals and member states. The point on which I wish to focus for present purposes is simply the obvious one that overriding Community legislation can be promulgated (at least in theory) without the consent of all member states, and without any but the most indirect participation by the electorate through elected representatives. The most dramatic expression of this legislative power is of course the technique of less-than-unanimous voting in the Council, which, as the Common Market moves this year into its third transitional stage, embraces a substantially widened array of subjects (including for the first time the delicate area of agricultural policy and pricing under articles 43 and 44 of the Treaty, and common trade the tariff agreements with third parties under articles 113 and 114). And we should not overlook the legislative quality that attaches to decisions of the Commission under delegated powers that appear to be quasi-judicial in nature. The Commission for example exercises "exclusive" competence to declare exemptions from the Community antitrust law under article 85(3) of the Treaty, and primary although not

[16] If a national court of last resort refused (let us say, wilfully) to refer a controlling question of Community law to the Court of Justice as required by article 177, it is conceivable that proceedings against the forum state might be brought in the Court of Justice by the Commission (under article 169) or by another member state (under article 170). This state of affairs, which must be regarded as a somewhat unlikely one, would present the interesting possibility that the Court might have an opportunity to "apply" Community law (instead of just interpreting it, see note 13 *supra*) in litigation that originated in a national court. The Court might feel constrained to examine the whole case on its facts and law to see whether the Community law question was determinative; these exertions could be regarded as applying Community law. There would still remain the problem of compelling an independent national judiciary to translate the Court's application of Community law into a judgment enforceable as between the original litigants. See text accompanying note 29 *infra*.

exclusive competence to adjudge charges of infringement or applications for negative clearance under the general antitrust provisions of articles 85(1) and 86.[17] There is little doubt that the Commission, which is really just beginning its work in these areas, will render authoritative interpretations of those important Treaty provisions. The extent to which such powers "preempt" the jurisdiction of national courts and agencies, and (to the degree preemption is absent) the extent to which national tribunals will be bound to apply the Commission's evolving antitrust doctrine, even in derogation of national law, remain to be seen.[18] Some ticklish aspects of these questions are presented by the complex *Grundig* litigation discussed by Professor Ebb in an article in this symposium. In this arena as with that of more direct forms of legislation, however, it remains clear that supranational organs of the Community can and do generate legal norms affecting individuals, and (through use of the directive) binding states to take legislative action which will in its turn affect their inhabitants.

A further procedure for generating supreme Community law is highlighted by Professor Garretson's discussion of the "treaty power" of the Community. I will not engage in a Bricker-amendment-style inspection of the supremacy issues that could flow if this treaty power were thought to be a "general" one, and therefore broader in range than the subjects with which the Treaty primarily deals or the subjects as to which it specifically contemplates agreements with third countries and with other intergovernmental organizations. It suffices to mention that article 228 provides that the Community's agreements with third states or other international organizations shall be binding on member states. Even if we confine our attention to agreements concerned with the central Common Market subject of tariffs, it is clear that by governing national law these agreements may affect individuals; they may supply legal norms that can be vindicated in

[17] Council Regulation No. 17, art. 9, 5 Journal Officiel des Communautés Européennes 204 (1962).

[18] See Buxbaum, *Incomplete Federalism: Jurisdiction over Antitrust Matters in the European Economic Community*, 52 CALIF. L. REV. 56 (1964). Compare the following examples from American federal jurisprudence: San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (activities arguably subject to protection or prohibition of federal labor law may not be adjudicated by state courts); Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), *cert. denied sub nom.*, Walsh v. Lyons, 350 U.S. 825 (1955) (state court adjudication of contract defense based on federal antitrust law would not operate by way of collateral estoppel to foreclose any issues in federal court treble damages action based on the same claim), discussed in Comment, 8 STAN. L. REV. 439 (1956).

national court litigation to which individuals or enterprises are party, just as in the *Tariff Commission* cases.[19]

III.

The reality of "supreme" Community law, some of the sources of which are examined above, may predictably give rise to substantial political problems. I would like to conclude by mentioning three such possible problems, all of which have been touched in at least some aspect by Dennis Thompson.

A. Will a "crisis of democracy" arise, in the shorter or longer run, from the fact that supreme law is made and enforced by supranational organs that bear only a highly attenuated responsibility to any popularly elected representative body?

To simplify a bit, if the Council makes Community law and Community law is supreme and directly binding on individual citizens of member states, will those citizens fail to demand a larger voice in selecting the members of the Community law-making body? Of course the Council is composed of representatives of the respective member governments, which in turn are chosen by democratic processes. The Ministers comprising the Council are probably about as responsive to domestic electoral opinion as they or their principals are generally on questions of foreign relations; their power to legislate through the Council may be analogized to the executive power to leglislate through treaty or executive agreement having internal legal effect. Surely our own experience shows that the exercise of such power does not escape organized pressures seeking to rein it in or to subordinate it to the control of an elected representative body.

Beyond this, we recall that often the Council must act on proposals of the Commission, a body whose members may not be subject to control by any government.[20] This arrangement places a considerable element of initiative a further step removed from the people. The shift of initiative is compounded by the rule that the Council may amend a Commission proposal only by unanimous vote.[21] Concededly, to the extent the Treaty contemplated a "government," it has envisaged at least some element of "government by expert." This seems to me a sensible premise, especially for the early stages of

[19] *Supra* note 9.
[20] Treaty, art. 157(2).
[21] Treaty, art. 149.

developing the Community. But I do question whether the affected citizenry will tolerate this premise in the long run.

Although General de Gaulle has been unduly harsh with the Commission, I think he makes a valid point with respect to the difficulty of removing members. Since unanimity is required on replacements[22] and incumbent members hold office until their successors are chosen,[23] there is a virtual veto power over any attempt at removal, even at the end of a term. Only by the severest threats of disruption has France been able to create a situation in which it may be even possible to remove certain members. Actually, there is much to be said for the veto against removal—it allows the European-minded "technocrats" to get on with their job with more independence than would otherwise be the case. But the whole question of the independence of the Commission and its power of initiative over proposals will pose a problem that must be solved if pressures for democratization become irresistible.

Perhaps a new balance of powers will soon need to be struck, by giving the Parliament more voice. The Commission proposal of last spring respecting enlarged powers for the Parliament seems a step in the right direction. But, as Mr. Thompson has pointed out, the Parliament took nothing and hence was the loser by the Luxembourg accords. Of course the Treaty calls for the eventual election of members of the Parliament by direct universal suffrage,[24] but even if implemented this arrangement would be little more than a sop unless the Parliament is also given some real legislative powers.

B. Can member states be expected to submit to or apply Community acts and decisions that adversely affect their vital interests?

Although the Treaty moved only a limited distance toward subordinating the sovereign powers and freedoms of member states, the provisions that were drawn to this end did not reserve from supranational decision and supreme Community rule matters which members might think infringed their vital interests. Conflict and strain inevitably lurk in any such disposition of powers. They are the inescapable companions of any step toward true supranationality. We in this country fought a terrible civil war over issues which were greatly different in degree but not essentially different in kind, and

[22] Treaty, arts. 158-60.
[23] Treaty, arts. 159-60.
[24] Treaty, art. 138(3).

disputes over allocating federal and state power (not only in the civil rights field) remain lively and acrimonious one hundred years later.

I will not dwell on the current crisis in the Community except to say that something like it could have been expected. It does not seem that the time has yet come when we can expect member states to submit automatically on matters they regard as of fundamental importance. As Mr. Thompson wisely suggests, the qualified majority device is a means of reaching a decision that might not have been arrived at unanimously, and is a stimulus toward unanimity, but will not survive in the present stage of supranational evolution if it is an instrument to override the essential concerns of member states.

To the assertion that qualified majority voting even in the third stage applies only to a limited range of subjects, it may be replied that matters which on their face may not appear vital may become so by force of circumstances. How "vital" is the interest of France and her farmers in agricultural policy and pricing, now brought under majority voting?[25] Mr. Thompson has shown with great pertinency, in his analysis of the decisions so far taken by the Council by less-than-unanimous vote, that "it would not seem that there is anything very serious in any of them."[26] And I think we may take it that the majority vote will not be allowed for some considerable time to govern "anything very serious."

In this sense, I believe the Luxembourg compromise on majority voting—even the French interpretation of it—was realistic. It will orient discussions and negotiations more toward attempts at unanimity, if only to avoid a resurrection of the French boycott. Such an orientation over the long run would cut at the heart of the supranationalism upon which the advance of the Community is postulated. But it seems realistic in present circumstances so far as vital interests are affected. The cession of sovereignty over matters of vital national concern is the very key to the supranational future of the Community; as I comment elsewhere in these remarks, that act of cession to be enduring must be performed with a deep awareness of its consequences.

C. What effect will Community supremacy—as expressed in Court of Justice decisions, for example, or in directives—have upon the independence of national courts and parliaments?

[25] See Hjorth, *The Common Agricultural Policy: Crisis in the Common Market,* 40 WASH. L. REV. 685 (1965).

[26] Thompson, *The Common Market: A New Legal Order,* 41 WASH. L. REV. 385, 406 (1966).

The question of how Community supremacy is to be imposed upon more or less independent branches of national governments remains to be solved. We may suppose a situation in which the Ministers and executive officials of a member state may be perfectly willing to conform to a Community determination, but find themselves unable to procure compliance by the parliament or courts whose actions are constitutionally necessary to implement the Community rule. If a directive, for example, calls for implementation by national legislation, it "binds" only the entity of the member state,[27] not the national parliament as such; use of Community legal procedure to bring the defaulting state into conformity would still seem to bind only the member.[28]

The analogy of our own reapportionment cases, whereunder state legislatures must take affirmative action of a fairly definite nature, is inapplicable in the absence of counterpart procedures for the Community to compel compliance or to act directly upon internal state law when the state organs have failed to act.

Parallel problems of impasse could arise in the judicial arena. The chief difficulties would spring from the regime whereunder the Court of Justice takes no appeals, remits no mandate, and interprets but does not apply Community law.[29] Apparently the only Community control upon a non-conforming national court is the cumbersome procedure of article 169 or 170. The independence of national courts is measured by the extent to which they are not amenable to executive direction, and presumably they would be no more so where the member state had been told by the Court of Justice in an article 169 or article 170 proceeding to make a national court certify a question under article 177 or apply a Court of Justice interpretation thereunder.

The failure of the Treaty to subjugate the independent branches of national governments to superior Community authority must be regarded, at least by those who wish a more thorough supranationalism for Europe, as a serious constitutional flaw. I am sure it is a flaw of which the draftsmen were well aware. It is important, because it illustrates the degree to which essential power remains in the hands of national organs, especially in circumstances where those organs may not be disposed to submit to Community authority.

As with the other issues of supremacy upon which I have touched,

[27] Treaty, art. 189 para. 3.
[28] Treaty, arts. 169-71.
[29] See notes 12-14 *supra*, and accompanying text.

this juridical question is in fact a political question of the highest order of relevance to the Community's future. As I have suggested, such questions should be openly canvassed and attentively considered among member state chancelleries, parliaments and electorates. If the member states and their people have the courage to opt for a strengthened supranationality, let that decision be reached in the open and conscious fashion needed to breed acceptance of Community supremacy in the future. Again, I believe the fundamental question of supranationality is forced for re-examination at this time. It is a political question. Any solution to endure must be a political solution. Perhaps a new dialogue on this question will open more clearly the vistas of greater political as well as economic union.