

BUILDING A COMMON FRONTIER OR DECONSTRUCTING NATIONAL IDENTITY?: AN ANALYSIS OF THE EFFORT TO CENTRALIZE CONTROL OF THIRD COUNTRY IMMIGRATION IN THE EUROPEAN UNION

*Catherine E. Halliday-Roberts**

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I. INTRODUCTION

Faraway from the frightening attacks on the World Trade Center and the Pentagon, a wall next to a mosque in Northern England reads, “Avenge USA – kill a Muslim now.”¹ The terrorist attacks on September 11, 2001, although

* Catherine Halliday-Roberts graduated Summa Cum Laude from Valparaiso University School of Law. She served as the Executive Managing Editor of her school’s Law Review and received the Burton Award for Excellence in Legal Writing for her Student Note on Immigration Law, published in 2001. She is a member of the State Bar of California and an Adjunct of Professor at Santa Monica College.

1. Peter Ford, *Xenophobia Follows US Terror; Amnesty International Says Government Curbs On Immigration Are Adding to the Anti-Arab Backlash*, CHRISTIAN SCIENCE MONITOR, Oct. 11, 2001, at 4 [hereinafter Ford, *Xenophobia*].

launched against the United States, have left no corner of the world untouched. Even in Europe, the acts of violence have incited a "swelling mood of xenophobia."² Far right parties have drawn on the attacks to renew their campaigns against foreigners and refugees.³ In response, national governments are tightening their immigration policies in the name of fighting international terrorism.⁴

Likewise, the European Union ("EU") institutions are proposing increased control of external borders.⁵ The institutions are pushing for greater autonomy by the EU in order to ensure that the border policies of member nations are uniform.⁶ The appeal to increased control, however, is not a complete change from previous policy. Since the oil crisis of the 1970's created an economic scare, Europe has more or less closed its door to primary immigration.⁷ Moreover, increased migration due to political instability and the extreme poverty of neighboring countries has also contributed to the fear that floods of refugees to the EU would deplete the supply of jobs in Europe.⁸ Most recently, the war in Bosnia and United States presence in Afghanistan have resulted in a large flood of refugees to safe havens in the EU, arousing xenophobia and contributing to the move toward stricter, more uniform policies.⁹

2. *Id.* Moroccans in Madrid, Spain complain of increased affronts by police after September 11th; police have marched into Moroccan establishments asking for immigration papers and throwing anyone who cannot produce them in jail. *Id.* Mosques in the Netherlands have been covered with graffiti and firebombed, while in Sweden, Britain, and the Netherlands, a handful of people from Islamic countries have been physically assaulted. Geoff Winestock, *Attack on America: Relaxation of Immigration Rules Is Put On Hold Following the Attacks On the U.S., Europeans Retreat From Moves to Change Asylum, Refugee Status*, WALL ST. J. EUR., Oct. 8, 2001, at 12[hereinafter Winestock].

3. Winestock, *supra* note 2, at 12.

4. *Id.*; Andrew Borowiec, *Europe Tightens Arab Migration Rules; Tunisian Symposium Cites Deepening Social Rift Across Mediterranean Sea*, WASH. TIMES, Nov. 14, 2001, at A12. In Britain, the government announced "new measures to clamp down on illegal immigrants" in early October 1999, raising concern that the fight against terrorism will impede on the refugees' ability to seek asylum. Ford, *Xenophobia*, *supra* note 1, at 4. The German Interior Minister, Otto Schilly, delayed debate on a non-refugee status bill, determining that it needed to be "reevaluated." Winestock, *supra* note 2, at 12. The leader of the National Front in France called for creation of a national guard to stop crime in cities with large migrant populations. *Id.*

5. *See infra* Part II.C.

6. *See infra* Part II.C.

7. F.T. McCarthy, *Go For It: Many European Countries Are Getting Hot Under the Political Collar About Immigration. Yet in Truth, the European Union Needs More Immigrants, Not Fewer*, ECONOMIST, May 6, 2000, at 1, available at 2000 WL 8141841 [hereinafter McCarthy]. Primary immigrants are economic migrants who are the first members of their families to settle in a particular country. *Id.* In contrast, secondary immigrants migrate to a country to reunite with their families. *Id.* The EU members continue to permit secondary immigrants to enter their countries. *Id.*

8. JOHN HANDOLL, FREE MOVEMENT OF PERSONS IN THE EU 352 (1995).

9. Nathan A. Adams, IV, *Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1, 11 (2000); Peter Ford, *Migrant Crisis Divides Europe; Britain and France*

Disparate immigration policies among the nations of the EU have prompted third country immigrants¹⁰ to attempt to enter through nations with the laxest border policies, creating additional controversy among the member nations.¹¹ The French government, in particular, has requested that Britain toughen its treatment of asylum applicants in order to prevent asylum shopping among the nations of the EU.¹² France has established a camp outside of the English Channel to house the growing number of refugees lining up at Britain's gates in order to take advantage of more lenient policies, and the French Interior Minister appealed to the English government to harmonize its immigration legislation in order to make the country less attractive to asylum seekers.¹³

Europe has thus pushed for greater centralization of immigration policies.¹⁴ Although the member states currently maintain control of immigration matters through intergovernmental action in the Justice and Home Affairs pillar of the EU, thirteen member states have voluntarily unified their immigration policies through the Schengen Agreement.¹⁵ Nonetheless, voluntary uniformity through regional cooperation is inherently different than ceding control to an increasingly supranational institution via centralization.¹⁶

This paper analyzes the impact of the EU's effort to unify the immigration law of its member states by vesting more power in its institutions. Specifically, this Paper addresses the vital role that third country immigration matters play in a nation's sovereignty and the importance of respecting that sovereignty when considering centralization of immigration law under an international regime. Following this Introduction, Part II of this paper briefly discusses the history and development of immigration law in the EU and the origins of the move toward federalism, as well the recent proposals of the EU institutions to centralize control of the nations' external borders.¹⁷

Part III compares the impact of centralization with the effect of decentralization on immigration policies and juxtaposes the EU with a

Fight as 390,000 Immigrants Per Year – 10 Times the US Rate – Seek Asylum in Europe, CHRISTIAN SCIENCE MONITOR, Sept. 7, 2001, at 1 [hereinafter Ford, *Migrant Crisis*].

10. The term "third country immigrants" refers to persons from non-member states seeking admission into an EU member state. This Paper primarily focuses on third country immigration, rather than immigration within the EU. Internal immigration is only discussed in order to explain the EU's desire to unify external immigration policies as a means of facilitating immigration between members of the EU.

11. Ford, *Migrant Crisis*, *supra* note 9, at 1 (asserting that "illegal immigrants say they are attracted by the relative leniency of British asylum procedure, the lure of jobs, the lack of ID cards which makes it easier to hide - as well as the other Afghans and Iraqis already living in England").

12. *Id.*

13. *Id.*

14. See *infra* Part II.C.

15. See *infra* Part II.A and II.B.

16. See *infra* Part III.C.

17. See *infra* Part II (outlining immigration law in the EU).

federation that has successfully federalized immigration law, the United States.¹⁸ Part IV proposes a decentralized approach to control of external borders in order to protect national sovereignty, history, and culture while permitting countries to achieve uniformity via international agreements.¹⁹ Furthermore, Part IV explores the benefits of targeting the root cause of immigration, rather than merely attempting to correct immigration after the fact by fortifying external borders.²⁰ This approach balances the countries' interest in national sovereignty with the EU's interest in achieving free movement across internal borders because it allows the nations to control their own immigration policies while retaining the option to enter into regional agreements without ceding complete control to an increasingly supranational authority.²¹

II. THE HISTORY AND DEVELOPMENT OF IMMIGRATION LAW IN THE EU

This section analyzes the foundation and history of immigration law as it has developed in the EU. A review of the evolution of immigration law is important in order to provide the necessary framework for understanding current developments and concerns. The first subpart begins by discussing the origins of the EU and the development of immigration policies in the face of centralization.²² The second subpart then examines the current status of immigration law and the future trends in the EU.²³

A. Immigration Law Eludes Centralization

Although the EU had modest beginnings, originating with the European Coal and Steel Community,²⁴ it has evolved into an expansive community with fifteen member nations.²⁵ The Treaty of Rome ("Treaty") forms the cornerstone

18. See *infra* Part III (discussing benefits and burdens of centralization and decentralization).

19. See *infra* Part IV (discussing the decentralized approach).

20. See *infra* Part IV (discussing the eliminating of illegal immigration by targeting the root problems).

21. See *infra* Part IV (discussing the proposed solution).

22. See *infra* Part II.A (discussing the origin of the EU's immigration laws).

23. See *infra* Part II.C (discussing current immigration policies).

24. Treaty Instituting the European Coal and Steel Community (Treaty of Paris), Apr. 18, 1951, 261 U.N.T.S. 140 (entered into force Jul. 23, 1952) [hereinafter ECSC Treaty]; Barbara Crutchfield George, et al., *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity Against the Sovereignty of Its Independent Member Nations*, 9 PACE INT'L L. REV. 111, 112-13 (1997). The European Coal and Steel Community initiated the economic union of European nations when six countries joined together to create a common market in coal and steel. ECSC Treaty, *supra*; 1 DAMIAN CHALMERS, EUROPEAN UNION LAW: LAW AND EU GOVERNMENT 13 (1998) [hereinafter CHALMERS].

25. DESMOND DINAN, EVER CLOSER UNION?: AN INTRODUCTION TO THE EUROPEAN COMMUNITY 5 (LYNNE RIENNER PUBLISHERS, INC. 1994) (1957). The fifteen members include Belgium, France, Germany, Italy, Luxembourg, Netherlands, United Kingdom, Denmark, Ireland, Greece, Spain, Portugal, Austria,

of the present union by creating the European Economic Community ("EEC").²⁶ The EEC focuses on establishing a common market "to promote throughout the Community a harmonious and balanced development of economic activities...."²⁷ The Treaty has subsequently been amended on many occasions, most notably by the Maastricht Treaty on EU ("Maastricht Treaty").²⁸

In furtherance of the common market, the Treaty advocates the free movement of persons across internal borders.²⁹ Article 3 mandates "an internal market characterized by the abolition, as between member states, of obstacles to the free movement of ... persons...."³⁰ Moreover, Article 8 provides every citizen of the Union with the right to move and reside freely within the territory of any member state.³¹

Despite the Treaty's promotion of free movement across internal borders, regulation of the movement of persons across external borders has been reserved to the member states, thus eluding centralization.³² Immigration and asylum became key political issues during the 1970's and 1980's.³³ Although the economic expansion of Western Europe led to a tremendous increase in immigration from third countries in the 1950's and 1960's, a slump in the European economies as a result of a rise in the price of oil prompted tighter controls on entry in 1973.³⁴ Further, the collapse of the "Iron Curtain" incited fears of mass immigration from Eastern European countries and the former Soviet Union.³⁵ The southern members of the EU also dreaded migration from

Finland, and Sweden. *Id.* For further discussion of the origins and evolution of the EU, see 1 CHALMERS, *id.* note 24, at 5-50.

26. Treaty Establishing the European Economic Community, Mar. 25, 1957, 294 U.N.T.S. 17 (entered into force Jan. 1, 1958) [hereinafter EC Treaty]. "By this Treaty, the High Contracting Parties establish among themselves a European Community." *Id.* at art. 1.

27. EC Treaty, *id.* note 26, at art. 2.

28. HANDOLL, *supra* note 8, at 17; see also Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247 (entered into force Nov. 1, 1993) [hereinafter TEU].

29. HANDOLL, *supra* note 8, at 17.

30. EC Treaty, *supra* note 26, at art. 3(c).

31. *Id.* at art. 8a (1). "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." *Id.*

32. TEU, *supra* note 28, at art. K.1. Article K.1 provides:

Member States shall regard the following areas as matters of common interest:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries....

Id.

33. HANDOLL, *supra* note 8, at 351-52.

34. *Id.* at 351.

35. *Id.* at 352.

North Africa.³⁶ The events and ensuing reservations resulted in rigorous application of asylum and refugee policies.³⁷ Consequently, the Community determined that immigration issues would be best addressed through intergovernmental cooperation, rather than centralized action, as the member states were unwilling to risk losing control of a controversial arena domestically.³⁸

The Maastricht Treaty thus divided the Union into three pillars: the European Community; the Common Security Policy; and the Justice and Home Affairs.³⁹ By vesting control of external immigration within the framework of cooperation on justice and home affairs, more commonly known as the third pillar, the EU institutions have limited authority over the field.⁴⁰ The European Court of Justice has no judicial review over the matters, and the role of the European Parliament is weak.⁴¹ The primary control of third party immigration rests with the individual member nations.⁴²

B. Thirteen Nations Flirt with Unification

Rather than centralization, thirteen of the fifteen EU member states have opted for a self-imposed unification of immigration policies on their external frontiers.⁴³ Originally, nine EU members entered into the 1985 Schengen Agreement and the 1990 Convention applying the agreement (collectively, the "Schengen Instruments"), pledging to abolish internal borders and to cooperate

36. *Id.*

37. *Id.*

38. Amy L. Elson, *Baltic State Membership in the European Union: Developing a Common Asylum and Immigration Policy*, 5 *IND. J. GLOBAL LEGAL STUD.* 317, 328 (1997).

39. See TEU, *supra* note 28, at Titles V, VI; see also Diane P. Wood, *International Law and Federalism: What is the Reach of Regulation?*, 23 *HARV. J.L. & PUB. POL'Y* 97, 100 n.13 (1999) (discussing the Titles establishing the three pillars).

40. TEU, *supra* note 28, at arts. K, K.1 & K.2. The balance of power of the third pillar tips in favor of the Member States. HANDOLL, *supra* note 8, at 31. Although the Commission has the power of proposal in conjunction with the member states, "it does not have the role of Treaty guardian." *Id.* But see TEU, *supra* note 28, at art. K.9 (allowing the Council to bring asylum policy within the scope of the EC Treaty, or the first pillar, thus vesting the institutions with substantial authority).

41. Elson, *supra* note 38, at 329. Handoll writes:

The Court of Justice enjoys, with limited potential exceptions, no powers of interpretation or judicial review: its powers of review are restricted to the possibility of determining, as a matter of EC law, that the EC, rather than the Member States acting under the CJHA provisions, is competent in a particular area. The European Parliament has limited rights to be consulted: democracy is still to be seen at the national level.

HANDOLL, *supra* note 8, at 31.

42. TEU, *supra* note 28, at arts. K.1 & K.2.2; see also Elson, *supra* note 38, at 329.

43. *The Changing Face of Europe*, CNN.COM, at <http://www.cnn.com/SPECIALS/2000/eurounion/story/overview/> (last visited Feb. 3, 2003). (revealing that only Britain and Ireland have not signed the Schengen Agreements).

in an effort to enforce external borders.⁴⁴ Their central objective was the gradual abolition of controls at the common frontiers, similar to the EU's goal of eliminating internal borders in order to achieve a common market.⁴⁵ To facilitate the free movement of persons, the Schengen Instruments aimed to abolish controls at the common, internal frontiers, as well as synchronize controls at the external frontiers, by harmonizing immigration, visa, and asylum policies; increasing cooperation in the policing of external borders and enforcing laws; and establishing the Schengen Information System.⁴⁶ Article 21 of the Schengen Instruments even recognizes non-EU nationals' right of free movement within the Schengen territory once they have been admitted by one of the members to the agreement.⁴⁷

Nonetheless, border checks may be carried out for a limited time period for public policy or national security reasons.⁴⁸ France, in fact, has raised security concerns as a justification for temporary reestablishment of some internal checks that the Schengen Instruments abolished.⁴⁹ Additionally, Spain refused to comply with an extradition order and threatened to suspend the Schengen provisions on legal cooperation, preferring to control crime on its own terms.⁵⁰ Although the Schengen Instruments do not form a part of the EU system, they have experimental merit and may pave the way for Union-wide integration.⁵¹

44. Schengen Agreement on the Gradual Abolition of Checks at their Common Border, June 14, 1985, 30 I.L.M. 68 [hereinafter the Schengen Agreement]; Convention Applying the Schengen Agreement of June 14, 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Suppression of Controls at Common Frontiers, June 19, 1990, 30 I.L.M. 84 (1991) [hereinafter the Schengen Convention]; HANDOLL, *supra* note 8, at 51; Giovanna I. Wolf, *Efforts Toward "An Ever Closer" European Union Confront Immigration Barriers*, 4 IND. J. GLOBAL LEGAL STUD. 223, 225 (1996) [hereinafter Wolf]. "The Schengen Agreement of 1985 stemmed from the earlier Saarbrücken Agreement of 1984 eliminating controls at the mutual borders of France and the Federal Republic of Germany." Kerry E. McCarron, *The Schengen Convention As a Violation of International Law and the Need For Centralized Adjudication On the Validity of National and Multilateral Asylum Policies For Members of the United Nations*, 18 B.C. INT'L & COMP. L. REV. 401, 409 (1995). The Schengen Agreement was named for Schengen, Luxembourg, the city where the parties signed it. *EU Ministers Discuss Common Visa Controls In View of Enlargement Article By Rafaele Rivais: "European Union Wants to Reconcile Enlargement and Security"*, WORLD NEWS CONNECTION, Oct. 13, 2001, available at 2001 WL 29287738. Interestingly, the parties initially signed the Schengen Agreements, in 1985, in response to a wave of terrorist attacks. *Id.*

45. EC Treaty, *supra* note 26, at art. 7a ("The Community shall adopt measures with the aim of progressively establishing the internal market . . ."); HANDOLL, *supra* note 8, at 51.

46. HANDOLL, *supra* note 8, at 51; Wolf, *supra* note 44, at 225.

47. The Schengen Agreement, *supra* note 44, at art. 21; Wolf, *supra* note 44, at 225.

48. HANDOLL, *supra* note 8, at 52.

49. Wolf, *supra* note 44, at 226.

50. *Id.*

51. *Id.* at 225.

C. The EU Institutions Ponder Centralization

The Schengen Instruments' abolition of internal border controls posed some problems for asylum policies, permitting asylum seekers who have entered the EU to freely move from one member state to another and complete multiple asylum applications.⁵² Consequently, all members of the Schengen Instruments signed the Dublin Convention in 1990⁵³ to prevent the phenomenon of asylum shopping.⁵⁴ The Dublin Convention creates a system whereby only one nation is responsible for review of an asylum application, thus avoiding the pitfalls of asylum shopping and "refugees in orbit," a trend created when no nation considers itself responsible for review of any asylum application and instead removes each applicant to a safe third country after every review.⁵⁵ Eventually all EU nations signed the Dublin Convention, which serves as the EU's main instrument in the field of asylum.⁵⁶

In addition to the common asylum policy, in October of 1999, the European Council met in Tampere, Finland to consider the need for a common border policy in response to increased illegal immigration and the trade in human beings incited by the stricter border controls of the 1970's and 1980's.⁵⁷ The European Council determined that, in order to develop common policies on asylum and immigration, it must consider the need for consistent control of external borders to combat both illegal immigration and those who commit crimes involving immigration.⁵⁸

52. Catherine Phuong, *Persecution By Third Parties and European Harmonization of Asylum Policies*, 16 GEO. IMMIGR. L.J. 81, 90 (2001).

53. Convention Determining the State Responsible for Examining Applications for Asylum Requests Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 [hereinafter *Dublin Convention*].

54. Phuong, *supra* note 52, at 90.

55. *Id.* Articles 4 through 8 of the Dublin Convention set out the factors for determining the nation responsible for reviewing a particular asylum application. Dublin Convention, *supra* note 53, at arts. 4-8. Article 4 requires the State where the applicant's family member is a refugee and a legal resident to review the asylum application. *Id.* at art. 4. If an applicant possesses a valid residence permit or visa, Article 5 requires the State that issued the permit or visa to review the application. *Id.* at art. 5. Article 6 requires the member state whose borders an immigrant illegally crossed to review the application, unless the immigrant was living in another member State at least six months before making the asylum application. *Id.* at art. 6. Article 7 provides that the member State responsible for controlling the alien's entry must review the asylum application unless the State waived the need for a visa, and the alien subsequently applies for asylum in another member State that also waived the visa requirement. *Id.* at art. 7. In the event that no member State is responsible for examining the application based on the previous factors, the first member State with which the alien files the application is responsible. *Id.* at art. 8.

56. Phuong, *supra* note 52, at 90.

57. *Id.* at 94; Europa-The European Union On-line, *The Fight Against Illegal Immigration and the Trade in Human Beings*, at <http://www.ue2002.es/Presidencia/plantillaDetalle.asp?opcion=3&id=588&idioma=ingles> (last visited Feb. 17, 2002) [hereinafter *Fight*].

58. *Fight*, *supra* note 57

In response to the European Council's mandate, the European Commission issued a Communication on a common European policy on illegal immigration on November 15, 2001.⁵⁹ The Commission noted that, although a legal framework for the issuance of visas, border controls, and illegal entry exists individually in all member states and at the regional level through the Schengen Instruments, all members must work together to effectively apply common rules.⁶⁰ The Commission asserted that the "common security system is only as strong as its weakest point."⁶¹

The Commission further urged the Council to approve, as soon as possible, an Action Plan to combat illegal immigration.⁶² It identified six major areas for possible action: (1) visa policy,⁶³ (2) information exchange,⁶⁴ (3) border management,⁶⁵ (4) police cooperation,⁶⁶ (5) aliens law and criminal law,⁶⁷ and (6) return and readmission policy.⁶⁸ Acknowledging the national efforts to combat illegal immigration, the Communication stressed the need for a European dimension to ensure further progress, asserting that immigration regulations, particularly visa policies, facilitate the EU's goal of free movement of persons across borders while contributing to the prevention of illegal immigration.⁶⁹

59. Europa-The European Union On-line, *Commission of the European Communities, Communication From the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*, at http://a140.g.akamai.net/7/140/6631/f97fe6c0772571/multimedia.ue2002.es/pdf/com2001_0672en01.pdf (last visited Feb. 17, 2002) [hereinafter *Communication From the Commission*]; *EU to Intensify Controls on Illegal Immigration*, XINHUA NEWS AGENCY, Feb. 15, 2002, at 2, available at 2002 WL 13684581; *Fight*, *supra* note 57.

60. COMMUNICATION FROM THE COMMISSION, *supra* note 59, at 10.

61. *Id.*

62. *Id.* at 11-24.

63. Coordinated visa regulations facilitate the free movement of persons across borders, while also contribution to the prevention of illegal immigration. COMMUNICATION FROM THE COMMISSION, *supra* note 59, at 11.

64. Shared assessments assist in estimating the scale of illegal migration by compiling the number of refused entries, apprehensions of illegals at the border or in the country, rejected applications for international protection, applications for national regularization procedures, and escorted or forced returns. *Id.* at 14.

65. The Commission proposed a European Border Guard as a means of implementing high standard external border controls. *Id.* at 17.

66. Cooperation and co-ordination at the operational level will ensure coherence and consistency. *Id.* at 8.

67. A comprehensive and concerted approach to fighting illegal immigration and smugglers will ensure an internal as well as external preventative effective. *Id.* at 20.

68. *Id.* at 3. The EU, as an entity, may use its political weight to encourage third countries to fulfill their readmission obligations. *Id.* at 25.

69. *Id.* at 3, 11.

Based on the Communication from the European Commission, the Laeken European Council urged the development of an Action Plan.⁷⁰ The Council recommended the adoption of a common policy on immigration and asylum.⁷¹ In particular, the European Council advocated more effective control of the external borders, determining that external border controls would “help in the fight against terrorism, illegal immigration networks and the traffic in human beings.”⁷² Thus, the European Council directed the Council and the Commission to arrange cooperation between the services responsible for external controls.⁷³ It further requested that the Council and member states move toward a common visa identification system and review the possibility of creating common consular offices.⁷⁴

In response to the European Council’s instructions, the 2002 Spanish Presidency of the EU intends to “move forward in the formulation of a common European policy on asylum and immigration” by considering the need for effective controls at external borders.⁷⁵ The President named fulfillment of the Tampere Council’s mandates as part of his six priorities during his six-month term in office, spanning the first six months of 2002.⁷⁶ Specifically, he supports improvement in managing the control of the external borders in furtherance of a common policy on asylum and immigration.⁷⁷ In the field of asylum, he proposes measures to apply the Dublin Convention more efficiently.⁷⁸ In the field of immigration, he will encourage an Action Plan based on the Commission’s Communication on illegal immigration.⁷⁹ Thus, although immigration matters are currently reserved to the Justice and Home Affairs pillar, preventing the EU institutions from exercising much control in the field, the EU has indicated a desire to centralize immigration law in order to facilitate control of its external borders.

70. Europa-The European Union On-line, *Presidency Conclusions, European Council in Laeken: 14 and 15 December 2001*, at 12, available at http://ue.eu.int/Newsroom/makeFrame.asp?MAX=&BID=MEETING_76&DID=68827&LANG=1&File=/pressData/en/ec/68827.pdf (last visited Mar. 6, 2002) [hereinafter *Laeken Council*]; see also *Fight*, *supra* note 57.

71. LAEKEN COUNCIL, *supra* note 70, at 12.

72. *Id.* at 13.

73. *Id.*

74. *Id.*

75. Europa-The European Union On-Line, *Spanish Presidency Advocates "Facilitating Legal Immigration" and "Avoiding Illegal Immigration"*, at <http://www.ue2002.es/Presidencia/plantillaDetalle.asp?opcion=3&id=650&idioma=ingles> (last visited Mar. 06, 2002).

76. Europa-The European Union On-Line, *More Europe: Program of the Spanish Presidency of the EU 7*, at <http://www.ue2002.es/principal.asp?opcion=3&subopcion=1&idioma=ingles> (last visited Mar. 06, 2002).

77. *Id.* at 8.

78. *Id.* at 9.

79. *Id.*

III. CENTRALIZATION JUXTAPOSED WITH DECENTRALIZATION

The evolution of immigration law in the EU lays the foundation for understanding the current debate regarding centralization. This part of the paper discusses the concerns raised by centralization and decentralization of national law regulating third country immigration.⁸⁰ The first subpart examines the implications of centralization and ceding control to EU institutions.⁸¹ The second subpart analyzes implications of decentralization and retaining control at the national level.⁸² Lastly, the final subpart discusses the United States' experience with federalism in immigration law in an attempt to predict whether the EU would benefit from a similar, centralized approach.⁸³

A. Centralization of Immigration Law Ensures Uniformity

The EU was founded, in part, because its members were willing to cede their autonomy in areas where the individual countries were limited functionally.⁸⁴ The countries agreed to centralize power in Community institutions because common action would be more effective than national action alone.⁸⁵ Recently, the European institutions have been using the same justification for centralizing immigration law.⁸⁶

Centralization of the EU's immigration law is often favored based on the notion that freedom of movement between internal borders will be compromised if the external borders are not adequately and uniformly guarded.⁸⁷ Nations would be unwilling to remove internal checkpoints if they were wary of the persons crossing internal borders due to the lax border policies of other member states. Consequently, nations would continue enforcement of visas and internal identity checks and impede, rather than promote, free movement within the EU.

Even if the nations continued their progress toward freedom of movement internally, despite the disparity of external border policies, the European institutions argue that the external borders would only be as strong as the nation

80. See *infra* Part III (discussing of the implications of centralization and decentralization of immigration law).

81. See *infra* Part III.A (discussing the implications of centralization of immigration law).

82. See *infra* Part III.B (discussing the implications of decentralization of immigration law).

83. See *infra* Part III.C (comparing the United States' experience with centralization of immigration to that of the EU).

84. 1 CHALMERS, *supra* note 24, at 7 (revealing that "the Second World War laid bare many of the functional limits of the nation-State").

85. See, e.g., EC Treaty, *supra* note 26, at art. 5 (establishing the principle of Subsidiarity, only allowing the Community to act in areas where its action would be more effective than national action).

86. See *supra* Part II.C (discussing the rationales of the Commission, European Council, and Presidency for centralizing immigration law).

87. See *supra* Part II.B.

with the most lenient laws.⁸⁸ Immigrants would enter the EU through the country with the most relaxed policies, and then, once inside the EU, they would cross successfully from one country to another without confronting internal checks. Due to the heightened awareness of national security prompted by threats of terrorism, centralization presents tremendous benefits by theoretically ensuring that all nations apply the same policies. Member nations may then feel secure in permitting entry from an internal border or a fellow member state. Nations will feel confident that common, agreed-upon immigration policies will prevent the entrance into their frontiers by terrorists and may even mitigate economic threats.⁸⁹

Nonetheless, the Schengen Instruments have demonstrated a workable solution to the seemingly divergent aims of free movement across internal borders and national control of external borders by creating a scheme for voluntary uniformity without centralization. The countries that desire to push forward with the goals of the European Council Treaty are capable of entering into an international agreement, thereby allowing those who wish to coordinate their policies to participate.⁹⁰ At the same time, the countries that do not wish to coordinate may refuse to sign the agreement and may continue to maintain their own external borders.⁹¹ Thus, uniformity can be achieved through international cooperation rather than centralization within the EU.

Britain and Ireland have maintained their own external controls, and consequently greater internal controls, while the parties to the Schengen Instruments have created common border policies in order to facilitate freedom of movement internally.⁹² Thus, Britain and Ireland have avoided any affect of the policies of other nations by opting out of the Schengen Instruments. Although Britain and Ireland have had to forego some of the benefits of the Schengen Instruments, such as avoiding checkpoints on borders within the EU, they were able to maintain their autonomy while simultaneously safeguarding their frontiers. Likewise, the Schengen parties ceded a portion of their national control over their borders to common control; however, they have benefited from the lack of internal checkpoints within the Schengen territory, and they also retain their ability to alter their decision and resume national control.⁹³

88. COMMUNICATION FROM THE COMMISSION, *supra* note 59, at 10.

89. *See, e.g.*, LAEKEN COUNCIL, *supra* note 70, at 13 (“Better management of the Union’s external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings.”).

90. *See supra* Part II.B.

91. *See supra* Part II.B.

92. *See supra* Part II.B.

93. Paola Michelle Koo, *The Struggle for Democratic Legitimacy Within the European Union*, 19 B.U. INT’L L.J. 111, 117 (2001) (citing Joseph H. Weiler, *After Maastricht: Community Legitimacy in Post-1992 Europe*, in SINGULAR EUROPE: ECONOMY AND POLITY OF THE EUROPEAN COMMUNITY AFTER 1992, at

In addition to the fact that the regional agreements can achieve the same benefits as federalization under the EU, centralization of immigration policies is less than desirable because it usually results in a problematic “race to the bottom,” where harmonization is achieved at the cost of stricter immigration and asylum policies.⁹⁴ Even the Schengen Instruments reflect the trend: nations, afraid of being less restrictive than the other countries, “level down [their] regulations on entry and residence of aliens in order to avoid an unwanted influx of immigrants and asylum seekers, attracted by more favorable conditions.”⁹⁵ Consequently, political refugees and economic migrants are deprived of a safe haven based purely on political motivations, rather than national requirements. In fact, many of the nations curbing their policies in order to remain comparable to other countries may actually do so to the detriment of their own needs and economy.⁹⁶ Any intergovernmental approach that induces countries to ignore not only the needs of their own citizens, but also the humanitarian needs of international refugees, must be avoided. Although regional agreements seem to pose the same problems, they do not bind the nations as tightly as entrance into EU treaties and further allow the nations to temporarily derogate from the agreement for public policy and national security reasons; thus, the countries are freer to craft and shape their policies to the dynamic needs of the world.⁹⁷

B. Decentralization of Immigration Law Maintains National Sovereignty

While ceding control to the EU institutions in matters that the EU could more effectively regulate, the nations specifically reserved the field of immigration to intergovernmental cooperation rather than centralized action.⁹⁸ The countries deliberately chose to retain the matters of immigration and naturalization for national control due to the controversial issues surrounding them.⁹⁹ Members of the EU are constantly confronted with the dilemma of ceding control to the EU for common action at the cost of preserving national sovereignty.¹⁰⁰

11, 27 (William James Adams ed., 1993)). There has been “controversial concentration of legislative and executive power in the center [of the EU] at the expense of the constituent units.” *Id.*

94. Wolf, *supra* note 44, at 229.

95. *Id.* (citing Aleidus Woltjer, *Schengen: The Way of No Return?*, 2 MAASTRICHT J. COMP. L. 256, 259 (1995)).

96. McCarthy, *supra* note 7, at 1 (“Because Europeans are not having enough babies and are living so long, the European Union would need to import 1.6m migrants a year simply to keep its working-age population stable between now and 2050.”).

97. *See supra* Part II. C (discussing the EU’s increasingly supranational tendencies).

98. TEU, *supra* note 28, at art. K.1.

99. *See supra* Part II.A.

100. Patrick P. Griffin, *The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services*, 7 COLUM. J. EUR. L. 337, 352 (2001) (“The EU by

A nation's ability to define its own immigration and naturalization policies third-country with respect to third country immigration is vital to its sovereignty.¹⁰¹ First, classification of the persons within a nation's own borders directly impacts its sovereignty. Each modern nation "formally defines its citizenry, publicly identifying a set of persons as its members and residually designating all others as noncitizens, or aliens," thus determining who bears the rights and obligations accompanying citizenship.¹⁰² By retaining the ability to establish which third country nationals may become citizens or legal residents, the state specifies who is excluded from any claim to the benefits of membership and who must incur the burdens and inconveniences of visa restrictions.¹⁰³ Thus, decentralizing the classification of third country immigrants and maintaining control at the national level reinforces national sovereignty on a fundamental level, a level that forms the very threads of a nation, the citizenry.

In addition to classification of immigrants, nations must also retain the ability to regulate the related matter of physical movement of third-country nationals. A nation's decision to allow additional immigrants to reside within its borders is vital to its ability to address the dynamic demands of its citizens and economy. It is empowered to open its own borders when its economy demands more laborers, and it is able to tighten its controls when its economy is unable to support additional workers. Perhaps most importantly, it is able to exercise discretion and distribute humanitarian relief when its citizens seek to admit relatives from third countries and to close its border to outsiders when the personal security of its citizens is threatened.¹⁰⁴ Therefore, a nation must be able to retain control over both classification of the persons within its borders and the related matter of the physical movement of third country immigrants in order to preserve its own sovereignty.

definition seeks to replace member state sovereignty with control at EU level.").

101. TOWARDS A EUROPEAN NATIONALITY I (Randall Hansen & Patrick Weil, eds., 2001) [hereinafter EUROPEAN NATIONALITY].

The importance of nationality law is beyond doubt. It gives institutional expression to the state's prerogative of inclusion and exclusion: nationality laws define those with an entitlement to a passport, and only those with such an entitlement possess the full range of rights and privileges granted by the nation-state to its citizens.

Id.

102. ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 21 (1992) [hereinafter BRUBAKER] ("These rights and obligations define a region of legal equality—what T.H. Marshall called the 'basic human equality associated with ... full membership of a community.'"); see also *Swedish Justice Minister Opposes the Idea of Common EU Border Police*, BBC MONITORING, Feb. 19, 2002, available at 2002 WL 14251275 (revealing that the Swedish Justice Minister, Thomas Bodstroem, stated, "I believe police activity is a national issue and that we should retain national control").

103. EUROPEAN NATIONALITY, *supra* note 101, at 1.

104. *Id.*

More importantly, a nation claims its very legitimacy by expressing and furthering the interests of its citizenry.¹⁰⁵ The EU's principle of Subsidiary, itself, supports the importance of the individual nation's sovereign role.¹⁰⁶ Decentralization permits nations, rather than a supranational body, to implement rules and actions at levels of government where individuals have greater involvement and are more effectively represented.¹⁰⁷ Local governments are more accountable to their population than a supranational authority.¹⁰⁸ Likewise, the more distant the exercise of authority is from its subjects, the greater the temptation to ignore the national voices.¹⁰⁹ In order to effectively represent its citizens, a nation must be able to react when necessary to their dynamic needs. If the nation vests control with a supranational authority, the decision-making body will be distant and out of touch with the particular requirements of a group of people with which it has limited or no contact. Even if the supranational body responds favorably to the citizens' needs, the response may often be considerably delayed due to the extensive chain of command involved in changing the status quo of a complex institution. Thus, many citizens will suffer while their country waits helplessly for the elusive approval of a higher institution. If the nation retains control, however, it may quickly and effectively respond to changing circumstances and more aptly avoid any unnecessary harm to its people.

Decentralization of immigration policies, therefore, allows the individual nations to maintain their identity by determining the persons able to obtain the benefits and rights of citizenship and by reacting to the changing needs of their citizenry and economy. More vitally, decentralization of immigration law permits nations to effectively, and efficiently, carry out the will of their citizenry. If the needs of their people demand uniformity across international frontiers, the nations are empowered to enter into international agreements.

Again, countries that wish to engage in common border controls can enter into regional agreements such as the Schengen Instruments. The regional

105. BRUBAKER, *supra* note 102, at 21.

106. EC Treaty, *supra* note 26, at art. 5.

107. W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT'L L. 61, 66 (1995).

108. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 340 (1994).

109. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2472-73 (1991). Professor Weiler states:

The primary factor is, at least arguably, that the European electorate (in most Member States) only grudgingly accepts the notion that crucial areas of public life should be governed by a decisional process in which their national voice becomes a minority which can be overridden by a majority of representatives from other European countries.

agreements, perhaps unlike the EU treaties, allow the parties the flexibility to cooperate in matters beneficial to them while granting them the capability to withdraw when the best interests of their citizenry so demand. The Schengen Instruments, in particular, have provisions that allow countries to derogate from the uniform policies for public policy and national security ends, and many nations have taken advantage of the provisions. Control of immigration law by the centralized EU, however, contains the inherent risk of becoming supranational law, constricting the countries from later withdrawing their consent if domestic needs require it.¹¹⁰ In an area as crucial to national sovereignty as the determination of one's own citizenry and residents, a complete cession of authority may be fatal to a country's own being.

C. EU FEDERALISM INITIALLY EMULATES UNITED STATES FEDERALISM

The federal government of the United States first began to claim control of immigration law in 1875, determining that it should be subject to a "uniform system or plan."¹¹¹ Recognizing that the Constitution delegates to Congress the broad power to govern foreign commerce, the Supreme Court unanimously determined that state control of immigration infringed on congressional authority and therefore was unconstitutional.¹¹² The Court has since repeatedly affirmed the view that the federal government has plenary and exclusive power to regulate immigration and naturalization, expressing great deference to Congress and reluctance to interfere in controlling immigration.¹¹³ Thus, the

110. Koo, *supra* note 93, at 117 (citing Joseph H. Weiler, *After Maastricht: Community Legitimacy in Post-1992 Europe*, in SINGULAR EUROPE: ECONOMY AND POLITY OF THE EUROPEAN COMMUNITY AFTER 1992, at 11, 27 (William James Adams ed., 1993)). "With gradual integration, the intergovernmental role of the EU has decreased while the supranational side has increased." *Id.*

111. *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875). "The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco." *Id.*; see also ROY L. GARIS, IMMIGRATION RESTRICTION 80 (UNIVERSITY OF NORTH CAROLINA 1919) (1927).

112. U.S. CONST. art. I, § 8, cl. 3 (establishing that Congress shall "regulate Commerce with foreign Nations"); *Henderson*, 92 U.S. 259 (invalidating a New York statute that imposed a bond or commutation tax upon ships carrying foreign passengers); see also U.S. CONST. art. I, § 8, cl. 4 (determining that Congress shall "establish a uniform rule of Naturalization"); GARIS, *supra* note 111, at 80.

113. See, e.g., *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Plyler v. Doe*, 457 U.S. 202, 224-25 (1982) ("Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Over no conceivable subject is the legislative power of Congress more complete."); *De Canas v. Bica*, 424 U.S. 351, 354 (1976); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors have been committed to the political branches of the Federal Government."); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics

United States has deemed uniform immigration policy a greater priority than individual state sovereignty.

Following in the footsteps of the United States, recent communications from the European institutions have also signaled a move toward greater uniformity on the external borders in lieu of national control.¹¹⁴ The institutions assert that centralized control of the borders will promote uniformity and help battle abuse of the immigration systems.¹¹⁵ Nonetheless, whether a uniform, federal immigration system will suit the EU as well as it has suited the United States is questionable.

Since their inception, both the United States and the EU envisioned a central government of “limited” and “enumerated” powers.¹¹⁶ Nonetheless, the EU and the United States systems are immensely divergent beyond their superficial similarity as federal systems. First, as the EU increases its membership, a potentially tremendous disparity in income may exist between the member states of the EU that is not present within the United States. Although currently the EU is composed of rich nations with similar

which Congress has forbidden.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (asserting that immigration powers “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Chiles v. United States*, 874 F. Supp. 1334, 1339 (D. Fla. 1994), *aff’d*, 69 F.3d 1094 (11th Cir. 1995) (pointing out that the Federal government’s plenary control over immigration is not disputed). Prior to 1875, the individual colonies and states individually regulated immigration matters. Robert J. Steinfeld, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 LAW & HIST. REV. 645, 647 (2001). Massachusetts passed statutes as early as 1701, preventing the landing of the “poor, vicious and infirm,” and requiring the master of each vessel to post a bond so that towns that received any “lame, impotent, or infirm persons, incapable of maintaining themselves ... would not be charged with their support.” *Id.* Likewise, due to the view that a large number of German immigrants were “strangers” who were “ignorant to our language and laws,” Pennsylvania enacted a statute that levied a tax of forty shillings on “every person being an alien born out of the allegiance of the King of Great Britain ... coming into this province by land or water” and twenty shillings on “any Irish servant or passenger upon redemption.” *Id.* at 647-48. Maryland passed an act requiring the masters of vessels “or others importing Irish Servants into this Province by Land or by Water” to furnish twenty shillings sterling “per poll.” *Id.* at 648. It was not until 1875 that the federal government asserted sole control over immigration matters, finding that a New York statute requiring the master of a vessel to post a bond to indemnify the municipalities of the state against any expense resulting from immigrants was an impermissible regulation of commerce under the Constitution. *Henderson*, 92 U.S. at 262-63.

114. See *supra* Part II.C.

115. Paul Martin, *Rising Flood: Illegal Immigrants in Europe Threaten Fortress’ Borders*, WASH. TIMES, Mar. 3, 2002, at A1.

116. Thomas C. Fischer, “Federalism” in the European Community and the United States: A Rose By Any Other Name . . . , 17 FORDHAM INT’L L.J. 389, 424 (1994) (“It is no forced analysis to suggest that [the Treaty of Rome’s reservation of power to the States] was nearly identical to the notion (expressed in the Federalist) that the U.S. central government was one of “limited” and “enumerated” powers.”).

economies,¹¹⁷ many nations considering membership have very poor economies.¹¹⁸ Both Turkey and the Balkan states have a gross domestic product (“GDP”) under \$10,001 per capita.¹¹⁹ Turkey’s domestic product equals merely 18.7 percent of the GDP of Luxembourg, the richest member of the EU.¹²⁰ In stark contrast, in the United States, the state with the lowest personal income per capita totals 51.0 percent of the richest state’s income.¹²¹

Due to the potential economic disparity between the nations in the EU, some countries may need more workers and thus wish to increase immigration, while others may wish to bar entry due to high unemployment rates. Consequently, the lack of uniformity between the individual nations will make centralized enforcement of immigration law undesirable. Although free movement of workers across internal borders may lessen a nation’s need to import workers from third countries, it may not entirely eliminate the requirement due to EU citizens’ geographical preferences.

Additionally, although neither the United States nor the EU are fully sovereign powers due to their sharing of control with their member states, the nations of the EU have not granted it as much authority as their American counterparts have granted to the United States.¹²² American federalism is based on a theory of dual sovereignty, granting both the individual states and the national government simultaneous authority over their respective areas of competence.¹²³ In the event of a conflict, however, national law trumps contrary state law, thus making national law supreme.¹²⁴

117. *EU Commissioner Tells Poland To Accelerate Economic Reforms*, ASSOCIATED PRESS, Oct. 18, 1996, available at 1996 WL 4444863.

118. Central Intelligence Agency, *Figure 1. Gross Domestic Product Per Capita (1997)*, available at <http://www.cia.gov/cia/di/products/hies/graphics/figure01a.pdf> (Apr. 8, 2002) (revealing that Turkey and the Baltic states have a gross domestic product (“GDP”) ranging from \$3001 to \$10,000 per capita).

119. *Id.*

120. Central Intelligence Agency, *GDP-Per Capital*, at http://www.odci.gov/cia/publications/factbook/fields/gdp_-_per_capita.html (last visited Apr. 08, 2002) (last visited Apr. 8, 2002). Turkey’s GDP per capita totals \$6,800, whereas Luxembourg’s GDP equals \$36,400. *Id.*

121. U.S. Dep’t of Commerce, *Bureau of Economic Analysis, Regional Accounts Data*, at <http://www.bea.doc.gov/bea/regional/bearfacts/stbf/index.htm> (last updated Oct. 24, 2001) (last updated Oct. 24, 2001). The personal income per capita of Connecticut, the richest state, totals \$40,870, whereas the personal income per capita of Mississippi, the poorest state, equals \$20,856. *Id.*

122. Bradley C. Karkkainen, Comment, *Conceptions of Fiscal Federalism: Dual and Shared Sovereignty*, 2 COLUM. J. EUR. L. 565, 571 (1996).

123. *Id.* at 565.

124. U.S. CONST. art. IV, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); Karkkainen, *supra* note 122, at 565-66.

Conversely, the EU is not currently a fully federalized system.¹²⁵ Some scholars have deemed it merely a free trade zone,¹²⁶ while others assert that it is nearing federalism but concede that it has not yet arrived because the nations have not created a dual sovereignty, permitting the EU to exercise control in areas simultaneously with the member nations.¹²⁷ The EU does, however, possess exclusive competence to preempt the laws of member states in some areas.¹²⁸

The hesitancy to cede complete autonomous control to the EU institutions is perhaps indicative of the key distinction between the EU and the United States. The EU is comprised of individual nations, sovereign in their own right, with each encompassing a distinct history and culture.¹²⁹ In stark contrast, the United States is comprised of states connected with one another from the moment of their independence or creation. The states share a common history and a common identity. Their sovereignty tracks that of the federal system of which they are a part.

Conversely, the individual members of the EU began their existence independently of the Union. They have unique cultures, languages, histories, political and social ideals, and ultimately identities.¹³⁰ In order to preserve their unique attributes, qualities that make up their very being, the nations must ensure that they maintain sovereignty in spheres directly relating to their national identities. Thus, the member nations must maintain autonomous control over their external borders. They must ensure that they do not lose control of the ability to define laws that impact the fabric of their country by granting central control to an entity capable of asserting supremacy over national interests.

IV. DECENTRALIZATION PRESERVES SOVEREIGNTY WHILE LEAVING AN OPEN DOOR FOR INTERNATIONAL, RATHER THAN SUPRANATIONAL, CONTROL

Due to the unique composition of the EU, centralized control of immigration matters would have a devastating impact on member nations'

125. Karkkainen, *supra* note 122, at 569.

126. Lerke Osterloh, *Harmonization and Public Finance in Germany and Europe*, 2 COLUM. J. EUR. L. 519, 529, 531 (1996).

127. Karkkainen, *supra* note 122, at 571.

128. CHALMERS, *supra* note 24, at 236-39; Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences To Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 424 n. 115 (1996). "The most common form of pre-emption is that of 'field occupation.'" CHALMERS, *supra* note 24, at 239. "Where Community legislation occupies a field, Member States are prohibited from enacting legislation within that field." *Id.*

129. Leyla Marrouk, *A Critique of the U.S. and EU Proposals For Improving International Enforcement of Antitrust Law*, 8 COLUM. J. EUR. L. 101, 123 (2002).

130. *Id.*

sovereignty.¹³¹ A federation composed of individual, historically and culturally distinct nations risks destroying the character of each of its members by forcing them to follow a common approach to immigration matters.¹³² At the same time, however, the EU is confronted with the dual dilemmas of achieving free movement of workers across borders and of responding to increased immigration from third countries.¹³³

This paper proposes that the EU adopt a decentralized approach to third country immigration.¹³⁴ As already indicated, although centralization is beneficial due to its uniform application in all member nations, it fails to consider the individual needs of the participants.¹³⁵ Centralization consequently impedes the nations' ability to cater their policies to the dynamic needs of their citizens.¹³⁶ Furthermore, centralization of immigration law is inconsistent with national sovereignty.¹³⁷ The proposed approach addresses the dual dilemmas of achieving free movement of workers across borders and of responding to increased immigration from third countries.¹³⁸ It allows countries to participate in a common regional policy while safeguarding their ability to impose their own immigration standards by withdrawing from the policy when their internal needs so demand.¹³⁹ Additionally, it permits the EU to tackle the issue of third country immigrants by addressing the problem at its roots.¹⁴⁰

First, in order to achieve the aim of free movement of workers across borders, the nations are free to enter into regional agreements that further common border policies.¹⁴¹ By entering into regional agreements, such as the Schengen Instruments, nations wishing to promote free movement across borders may voluntarily take part, while those placing a higher priority on autonomous immigration policies may opt out. Further, the regional agreements do not pose the same risks of ceding sole control to a supranational authority such as the EU. Unlike the EU, the Schengen Instruments create an inter-governmental agreement that achieves uniformity without centralization, rather than a federalist regime.¹⁴²

131. See *supra* Parts III.B & III.C.

132. See *supra* Part III.B.

133. *EU Justice Ministers Open Two-day Meeting on Terrorism, Illegal Immigration*, AGENCE FRANCE-PRESSE, Feb. 14, 2002, available at 2002 WL 2340020.

134. See *infra* Part IV.

135. See *supra* Parts III.A & III.B.

136. See *supra* Part III.B & III.C.

137. See *supra* Part III.B.

138. See *infra* Part IV.

139. See *infra* Part IV.

140. See *infra* Part IV.

141. See e.g., Schengen Agreement, *supra* note 44.

142. Ricou Heaton, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND. J. TRANSNAT'L L. 643, 655-56 (1992).

More importantly, the flexibility of joining a regional agreement allows nations to balance their own needs with their goal of achieving free movement across borders. A nation with a booming economy may avoid signing a common immigration agreement in order to import immigrants capable of satisfying its labor demand. Further, a nation that has entered into the intergovernmental agreement may temporarily derogate from the uniform policies in order to promote public policy or national security like many nations have already done under the Schengen Instruments. The individual requirements of the EU member nations make centralization, under a potentially supranational regime, ineffective.¹⁴³ Unlike the United States, the EU nations may potentially have extremely divergent economies and require varying amounts of immigrants to satisfy their labor demand.¹⁴⁴

Second, in order to respond to immigration from third countries, EU members should rely on individual schemes or a regional scheme. Again, each nation may tailor its scheme to its own immigration demands or choose to align with other nations with similar goals. Although a centralized immigration scheme will ensure uniform policies, it will not deter illegal immigrants. One key example of the failure of a central scheme to deter undocumented migrants is the United States' experience: illegal immigration became an issue immediately after the country sought to curb entrance and has since become more overwhelming.¹⁴⁵

Undocumented immigrants most often immigrate to a particular country due to the economic possibilities it presents.¹⁴⁶ Thus, a "fortress Europe" is unlikely to deter most would-be immigrants.¹⁴⁷ Instead, the EU should use its muscle to target the root problems of immigration. The EU should take steps to assist third countries economically; by improving the economies of third countries responsible for the immigrants, the EU will spare its own economy the pressure of illegal immigration.¹⁴⁸ Persons whose current economy presents the same possibilities as the EU would have no incentive to immigrate.¹⁴⁹

143. See *supra* Part III.C.

144. See *supra* notes 117-20 (discussing the disparity of GDP per capita between potential member states of the EU and the current member states).

145. U.S. Department of Justice - Immigration and Naturalization Service, *Illegal Alien Resident Population*, at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 19, 2001). As of October 1996, the INS estimated that five million undocumented immigrants were residing in the United States, with the number increasing by 275,000 annually. *Id.*

146. Gilberto Hinojosa, *Immigrants? It's the Economy*, SAN ANTONIO EXPRESS-NEWS, Oct. 13, 2000, at 7B (stating that "ultimately, economic forces control immigration").

147. McCarthy, *supra* note 7, at 2.

148. Wolf, *supra* note 44, at 228.

149. Some immigrants head to the EU to reunite with their family members already living there, however, most illegal immigrants leave their home countries for purely economic or political reasons. The Dublin Convention seeks to order immigration policies for political migrants. Dublin Convention, *supra* note 53.

In fact, the EU is currently attempting a similar approach with the Mediterranean States.¹⁵⁰ By 2010, the EU and the Mediterranean States have agreed to establish a free trade zone.¹⁵¹ In furtherance of the agreement, the EU nations have agreed to invest six million Eurodollars in order to boost the Mediterranean States' economies.¹⁵² The EU can thus prevent illegal immigration through means other than fortifying and unifying its external borders.¹⁵³ More importantly, the EU should not be tempted to shield itself from the needs of the international community by failing to offer a safe haven to international refugees.¹⁵⁴

Nonetheless, even though decentralization is more appropriate for regulation of external borders and third country immigration, the EU should continue its common policy in the narrow area of asylum under the Dublin Convention. The Convention allows the nations to better address the needs of refugees by coordinating the review of applications and avoiding the temptation to deny responsibility for review. Further, the Convention prevents refugees from completing multiple asylum applications in various countries. Because asylum law is a reflection of a nation's responsibility to the international community, rather than the needs of its citizens and economy, it does not raise the same sovereignty concerns as other third party immigration. Thus, the Dublin Convention contains none of the vices of centralization, but it accords the benefit of uniformity. The EU, therefore, should avoid centralization of immigration matters with the exception of the narrow area of asylum law.

V. CONCLUSION

By simultaneously decentralizing immigration law and addressing the root problems of third country immigration, the EU nations can retain an integral

150. *EU To Offer Aid To Brake Illegal Immigration*, AGENCE FRANCE-PRESSE, Sept. 8, 1999, at 1, available at 1999 WL 25102276; Wolf, *supra* note 44, at 228.

151. Wolf, *supra* note 44, at 228. The participating Mediterranean States are Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia and Turkey, plus the Palestinian autonomous Territories. *Id.* at 228 n.33.

152. *Id.* at 228.

153. Some scholars argue that Europe does not have enough immigrants and thus does not need to create a common frontier in order to strengthen its border policies. McCarthy, *supra* note 7, at 1. McCarthy writes:

Because Europeans are not having enough babies and are living so long, the European Union would need to import 1.6m migrants a year simply to keep its working-age population stable between now and 2050. With Europe's unemployment now falling, and its people increasingly sniffy about the sorts of jobs they are prepared to do, or too ill-equipped to do the high-tech ones being created, the continent's workforce is in need of renewal as never before. Immigrants tend to inject into stale, ageing countries fresh vitality, fresh energy and an uncommon willingness to work hard at unappealing jobs.

Id.

154. See *supra* Part II.A.

part of their sovereignty and tailor their immigration policies to the demands of their economies. Currently, the EU institutions have indicated an increasing desire to centralize immigration law.¹⁵⁵ They urge the creation of a common border in order to combat what they perceive as a growing problem of illegal immigration.¹⁵⁶ While centralization has the superficial benefit of unifying the EU nations' external border policies, its burdens are severe.¹⁵⁷ Centralization will compromise the countries' national sovereignty in an area that is crucial to a nation's identity.¹⁵⁸ Centralization will also cripple the individual nations' ability to alter their policies to suit the needs of a changing economy and ensuing labor demands.¹⁵⁹ Furthermore, the Schengen Instruments have demonstrated that a common border policy, if in the nations' best interests, can be achieved through a regional agreement, rather than at the direction of a supranational authority.¹⁶⁰ Most importantly, centralization will compromise the individual nations' ability to provide humanitarian aid to international refugees, by causing them to engage in a "race to the bottom."¹⁶¹

This paper asserts that both the EU nations and their citizens benefit from decentralization of immigration law. Nations wishing to advance the goal of free movement across borders can enter into regional agreements, while those whose economies demand diverse policies can regulate their borders individually. Further, the EU can address the problem of third country immigration by considering the roots of the problem, rather than fortifying its borders. By boosting the economies of third countries, the EU will benefit from lower immigration and the third countries will benefit from the investment. Consequently, the EU will no longer be forced to choose between unifying control of external borders and upholding the sovereignty of the member Nations.

155. See *supra* Part II.C (discussing the EU institutions' move toward centralization).

156. See *supra* Part II.C.

157. See *supra* Parts III.A & III.B.

158. See *supra* Part III.B.

159. See *supra* Parts III.B & III.C.

160. Schengen Convention, *supra* note 44; see also *supra* Part II.B (discussing the Schengen Instruments).

161. See *supra* notes 93-96 and accompanying text.