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### Of Power and Responsibility: The Political Morality of Federal Systems

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# VIRGINIA LAW REVIEW

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VOLUME 90

MAY 2004

NUMBER 3

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## ARTICLE

### OF POWER AND RESPONSIBILITY: THE POLITICAL MORALITY OF FEDERAL SYSTEMS

*Daniel Halberstam\**

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## INTRODUCTION

[T]he global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of *learning* from an opinion by the German or French constitutional court. Nor would the typical scholar — assuming, contrary to fact, that she could follow the natives’ reasoning in their alien tongues. If anything, American practice and theory have moved in the direction of emphatic provincialism.<sup>1</sup>

**I**N comparative constitutional discourse, Americans are from Mars and Europeans from Venus; we eagerly tell our European counterparts about the U.S. constitutional experience, but rarely do we listen when they talk to us about their own. Whereas Europeans routinely examine U.S. constitutionalism as an illuminating point of comparison or contrast, as Americans, we seem convinced that we have nothing to learn from looking abroad. This Article challenges that assumption. In particular, it argues that American courts and scholars have overlooked an important alternative to the dominant interpretation of the division of powers in the United States by ignoring the theory and practice of federalism in the European Union and in Germany.

The dominant approach to the division of powers in the United States is what this Article terms an “entitlements” approach. This approach takes a federal constitution as granting each level or unit

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<sup>1</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771, 772–73 (1997); cf. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L.J. 223, 225 (2001) (noting the absence of comparative analysis in U.S. court decisions).

of government a set of regulatory tools that may be used without regard to whether the exercise of these powers serves the system of democratic governance as a whole. On this view, public powers are much like liberal individual entitlements used freely in market transactions.

The entitlements view supports regulatory competition as well as cooperation, but leaves the choice between competition and cooperation to the institutional actors' self-interested political calculus. Ultimately, each level of government may employ the regulatory tools within its domain to serve its own political interests. Under the entitlements view, this is as it should be: Federalism is all about arms length relations among competing political institutions. As in classical economics, an individual unit need not consider the well-being of any other for the system as a whole to flourish.

For example, under the entitlements approach Congress may regulate the movement of goods and persons across state borders for any reason or no reason at all, simply because the Constitution enumerates this regulatory technique.<sup>2</sup> Exceptions to this rule are themselves entitlements, such as the right on the part of the states to be free from "commandeering" and to be immune from federally imposed individual damages actions.<sup>3</sup> To be sure, the distribution of these entitlements, whether they should be mutually exclusive or overlap, and whether they should be controlled by the United States Supreme Court, are matters of ongoing scholarly debate.<sup>4</sup> So, too, there are individual rights limits to the exercise of

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<sup>2</sup> See *United States v. Darby*, 312 U.S. 100, 118, 123 (1941); *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942); *Katzenbach v. McClung*, 379 U.S. 294, 302–05 (1964); *Perez v. United States*, 402 U.S. 146, 154–55 (1971); *F.C.C. v. Beach Communications*, 508 U.S. 307, 315–16 (1993); and *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), which together suggest even more broadly that Congress may regulate economic activity for any reason whatsoever and regardless of the consequences of such regulation for the system as a whole. The added requirement that the activity, when aggregated with similar activity across the nation, "substantially affect" interstate commerce is—even after *Lopez*—practically committed to Congress's discretion, as long as the regulated activity is "economic in nature." See *United States v. Morrison*, 529 U.S. 598, 610–13 (2000).

<sup>3</sup> See *Printz v. United States*, 521 U.S. 898, 905–09, 925–29 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144, 161 (1992).

<sup>4</sup> For just a small sampling of an enormous debate about these issues, see, for example, Jesse H. Choper, *Judicial Review and the National Political Process* 175–84 (1980); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 *Sup. Ct. Rev.* 71; Jesse H. Choper & John C. Yoo, *The*

these prerogatives. Nevertheless, as far as federalism and democracy are concerned, the entitlements view posits that the Constitution demands no further general inquiry into the systemic effects of the regulatory act. Once the objectively defined regulatory technique, scope of subject matter jurisdiction, or immunity has been delegated to a certain institution, that body may exercise its entitlement at will.

Contrast this with the dominant approach in the European Union and in Germany, which this Article calls a “fidelity” approach. This view insists that each level or unit of government must always act to ensure the proper functioning of the system of governance as a whole. This fidelity approach to the division of powers holds public institutions to a duty to act responsibly and to promote the well-being of the entire political system. This vision is one of public power as public trust, with the understanding that all units of government owe some allegiance to the public as a whole. In this model, a duty of loyalty to the other actors and institutions within the federal system tempers institutional actors’ political self-interest.

Applying this precept, a fidelity-oriented European Court of Justice (“ECJ”) has required member states to pay damages to individuals for the proximate harm caused by the state’s material and grave violations of community law.<sup>5</sup> Also using a fidelity approach, the German *Bundesverfassungsgericht* (“federal constitutional court”) ordered a constituent state to ban a local referendum on nuclear weapons, because the *Grundgesetz* (“Basic Law” or constitution) expressly delegated the subject of defense to the federal government without providing the federal government with the

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Scope of the Commerce Clause After *Morrison*, 25 Okla. City U. L. Rev. 843 (2000); Edward S. Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1 (1950); Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000); Caleb Nelson, Preemption, 86 Va. L. Rev. 225 (2000); Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 Iowa L. Rev. 1 (1999); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954); Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 Geo. Wash. L. Rev. 139 (2001).

<sup>5</sup> Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1993).

power to supervise localities.<sup>6</sup> Similarly, the ECJ recently prohibited the European Community from using its market harmonization power to enact a directive banning certain forms of tobacco advertisement.<sup>7</sup> The ECJ explained that the directive at issue relieved only minor burdens on trade and was thus impermissibly designed to regulate health and welfare, a subject expressly not delegated to the Community. According to the court, the Community's invocation of its market harmonization power was unwarranted in light of the proper purpose that harmonization plays in the European federal system.

Once identified abroad, it is possible to identify a similar "fidelity" approach in an undercurrent of U.S. constitutional jurisprudence and scholarly contributions. A series of disparate, and often marginalized, constitutional doctrines and theories in the United States also seek to temper the self-interested exercise of power with a general concern for the federal enterprise as a whole. The Supreme Court's dormant Commerce Clause cases, for example, allow states to regulate interstate commerce, but hold that state regulation cannot discriminate against interstate commerce and at times must balance the burdens on interstate commerce against the local benefits of the regulatory measure.<sup>8</sup> Similarly, a fidelity approach seems to underlie the rule that Congress must not condition the entry of a state into the Union on the relocation of the applicant state's capital.<sup>9</sup> Although Congress may decide whether to admit a state at all, this "greater" power does not include the "lesser" power to restrict the location of a state's capital at will. As the Court held, imposing such a restriction on an incoming state would impermissibly lead to that state's second-class statehood.<sup>10</sup>

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<sup>6</sup> Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [federal constitutional court decisions] 8 (1958), 122 (F.R.G.) (*Hessen Referendum*).

<sup>7</sup> Case C-376/98, *Germany v. Parliament & Council*, 2000 E.C.R. I-8419, [2000] 3 C.M.L.R. 1175 (2000).

<sup>8</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See generally *infra* Section III.B (discussing the development of the fidelity approach in Supreme Court jurisprudence since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

<sup>9</sup> *Coyle v. Smith*, 221 U.S. 559 (1911).

<sup>10</sup> *Id.* at 580 ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.").

But while this alternative conception of federalism based on fidelity is not entirely absent in the United States, its significance pales in comparison to that of the dominant U.S. approach based on entitlements. Neither scholarship nor doctrine has seized on the undercurrent of fidelity as a coherent alternative to the dominant U.S. entitlements approach, even though the two approaches yield substantially different outcomes in particular cases.

Accordingly, this Article will conduct a comparative investigation of federalism disputes in Germany, the European Union, and the United States, in order to understand better the promise and perils of fidelity as an alternative to the entitlements approach to federalism. Because of the prevalence of entitlements jurisprudence in the United States and of fidelity jurisprudence in Germany and in the European Union, the comparative venture will help us distinguish more clearly between, and evaluate the significance of, the fidelity and entitlements approaches than would the investigation of any single jurisdiction.

The comparative analysis will also demonstrate that judges and scholars in Germany, the European Union, and the United States who (either implicitly or explicitly) employ the concept of fidelity do so in two significantly different ways. While fidelity always entails the claim that an institution must temper its political self-interest with a general concern for the federal enterprise as a whole, the question remains what the federal enterprise as a whole demands in any given case. Here, this Article will distinguish between a “conservative” and a “liberal” vision of fidelity. These labels do not necessarily correspond to any particular social agenda, but rather reflect the basic interpretive attitude toward democratic politics within the federal system.<sup>11</sup>

The “conservative” vision of fidelity seeks to contain politics by counteracting the diversity of policies and interests inherent in a divided power system. This approach ultimately imposes on actors and institutions a unitary alignment of interests that mimics the ex-

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<sup>11</sup> For example, “conservative” fidelity is associated with the socially conservative German Chancellor Otto von Bismarck and the social conservative constitutional theorist Rudolf Smend, see *infra* Section I.A., but “conservative” fidelity is also used by a “progressive” European Court of Justice seeking to advance the cause of European integration, see *infra* Section II.A.2. In each case, the aim is to suppress democratic politics within the federal system.

istence of a unitary system of governance. On this view, federalism and the broad democratic engagement to which it gives rise are no more than an embarrassment to the proper functioning of the system as a whole.

As this Article will show, much of the ideology originally justifying the conservative vision of fidelity in Germany is rooted in just such a fear of democracy.<sup>12</sup> Over the course of German constitutional history, a conservative view of fidelity repeatedly served to mute political debate and democratic conflict, facets of democratic existence that scholars, judges, and sometimes even politicians viewed as too disorderly and threatening to the system. At its worst, both in Germany and in the European Union, the theory and practice of conservative fidelity have suggested a forced unitary alignment of interests that, in effect, spelled the end of federalism itself.<sup>13</sup>

The “liberal” vision of fidelity, in contrast, promotes rather than suppresses productive democratic conflict throughout the federal system. It recognizes that one of the prime virtues of federalism lies in generating vibrant democratic interaction by a greater number of constituencies and elected politicians regarding the needs of the political system as a whole. The liberal vision of fidelity thus capitalizes on the insight of the entitlements approach—that democratic struggle and debate within a federal system are valuable safeguards of liberty and lead to concrete, positive policy outcomes. The liberal vision of fidelity parts company with the entitlements approach, however, where the latter protects formally valid invocations of regulatory tools, regardless of their effect on democratic engagement within the federal system as a whole. Instead, the liberal vision of fidelity holds that no institution enjoys powers for its own sake, but only as part of a division of powers justified with reference to the system as a whole. The Article will conclude that we should recognize the liberal vision of fidelity as a promising approach to deciding intergovernmental power disputes in federal systems, including the United States.

The remainder of this Article will be divided as follows. Part I will critically examine the theory and practice of fidelity in German

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<sup>12</sup> See *infra* Section I.A.

<sup>13</sup> See *infra* Part I & Section II.A.2.



constitutional law. The German experience is helpful because it provides both the most prominent discussion of fidelity in constitutional theory<sup>14</sup> and the most dramatic examples of the dangers of a conservative vision of fidelity for democratic federalism. This Part will also challenge the prevailing German academic account of fidelity by revealing even within the German constitutional tradition a liberal vision of fidelity that supports, rather than undermines, constructive intergovernmental policy engagement.

Part II will turn to the case law of the European Court of Justice, which uniquely illustrates the dramatic range of duties that liberal fidelity may impose on institutional actors within a federal system. This gradation of intrusions into what might otherwise be considered an institution's "autonomy" stands in marked contrast to the binary entitlements approach (under which an institution may act either at will or not at all). This Part will also take issue with E.U. scholars' uncritical acceptance of a general "duty of cooperation." In particular, this Part will argue that the ECJ, as well as the European Council, have at times invoked a conservative vision of fidelity that resembles the one first seen in Germany.

With this comparative background, Part III will turn to the United States. This Part will first suggest that debates about the revival or final demise of the dual federalism doctrine tend to overlook that the "entitlements" element constitutes a separate feature of that doctrine, and that this feature survives largely unchanged into present times. Despite the pervasive dominance of the entitlements approach, however, this Part will demonstrate that there are substantial areas of U.S. constitutional jurisprudence in which the Supreme Court, like its European and German counterparts, reaches beyond entitlements to a fidelity approach to federalism.

Finally, Part IV will take stock of the comparative constitutional enterprise. Against those who argue that comparative constitutional inquiries are irrelevant to domestic constitutional interpretation, this Part will point to the lessons gained in this case from the comparative venture. In particular, it will emphasize that the com-

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<sup>14</sup> There are prominent discussions of "fidelity" in U.S. constitutional theory as well, but in the United States, the term "fidelity" has so far not been used in the sense proposed by this Article. See, e.g., Symposium, *Fidelity in Constitutional Theory*, 65 *Fordham L. Rev.* 1247 (1997) (discussing various understandings of "fidelity" in contemporary theory regarding U.S. constitutional interpretation).

parative analysis highlights: (1) the theoretical and practical coherence of the three different approaches to federalism; (2) the interpretive liberty that courts have in choosing whether to adopt one or another of these approaches to federalism; (3) the fact that the choice between these approaches does not map neatly onto one between centralization and decentralization, or between judicial intervention and judicial restraint; and (4) the dramatic consequences for federalism and democracy of each. This Part will close with a brief comparative analysis of the adjudication of preemption and subsidiarity as case studies in liberal fidelity.

#### I. CONSERVATIVE AND LIBERAL FIDELITY IN GERMANY

The German constitutional tradition provides the most prominent discussion of fidelity in the form of *Bundestreue* (“federal fidelity”).<sup>15</sup> This Part examines that tradition and argues that German constitutional theory and practice in fact contain two hitherto unacknowledged (and indeed diametrically opposed) visions of fidelity: one liberal and one conservative. Germany’s experience with the conservative vision, which has dominated its constitutional landscape, is particularly instructive. It highlights the potential dangers of using fidelity to counteract federalism’s principal promise, that of maintaining a variety of forums for democratic deliberation and decisionmaking.

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<sup>15</sup> Many authors, such as Professor David Kommers, translate *Bundestreue* as “federal comity.” See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 69 (2d ed. 1997). This mistakenly emphasizes the idea of friendship over faithfulness. It also misses the deep connection between federalism and fidelity, reflected in the fact that their respective latin roots *foedus* (“covenant”) and *fides* (“faith”) are closely related. For comparative discussions of *Bundestreue* in U.S. academic literature, see David Currie, *The Constitution of the Federal Republic of Germany* 77–78 (1994); Kommers, *supra*, at 69–90; Jackson, *supra* note 1, at 279–87; Clifford Larsen, *States Federal, Financial, Sovereign and Social: A Critical Inquiry Into an Alternative to American Financial Federalism*, 47 *Am. J. Comp. L.* 429, 436, 474, 476–77 (1999); Martin A. Rogoff, *The European Union, Germany and the Länder: New Patterns of Political Relations in Europe*, 5 *Colum. J. Eur. L.* 415, 419, 428 (1999); Mark Tushnet, *What Then is the American?*, 38 *Ariz. L. Rev.* 873, 879–81 (1996).

*A. Fidelity in Theory*

The German theory of *Bundestreue* has roots in the conservative political ideology that Chancellor Otto von Bismarck and others deployed to protect the unity of the newly created German Reich of 1871.<sup>16</sup> The *Reichsverfassung* (“Imperial Constitution” or “RV”) was a complex product of treaties between the Prussia-dominated North German Federation and the four southern German states, and subsequent constitutional legislation passed by the newly constituted federal legislative assemblies.<sup>17</sup> The constitution thus did not create a wholly original political system, but instead established a new form of governance among pre-existing governments and princes. Reflecting these contractual, intergovernmental origins of the constitutional regime, the preamble to the *Reichsverfassung* referred to the German Reich as an “everlasting Federation” among the various German heads of state.<sup>18</sup>

With distinctly feudal overtones, Bismarck played upon this contractual intergovernmentalism, stating that “[t]he German Reich has its solid foundation in the *Bundestreue* of the princes, which harbors the guaranty of its future.”<sup>19</sup> Much like the oaths of homage and fealty that held together the decentralized power arrange-

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<sup>16</sup> For a very brief historical sketch of the constitutional founding of Germany, see Currie, *supra* note 15, at 1–8; Jochen A. Frowein, *Integration and the Federal Experience in Germany and Switzerland*, in *Integration Through Law: Europe and the American Federal Experience* 573, 574–81 (Mauro Cappelletti et al. eds., 1986). For a longer, though still succinct account of German constitutional history surrounding the founding of the Reich, see 3 Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, at 702–808 (1963) [hereinafter Huber, *Verfassungsgeschichte*].

<sup>17</sup> The constitutional norms underlying the monarchy founded in 1871 are accordingly not contained in any single consolidated text, but may be found in the law concerning the constitution of the German Reich (and its incorporated text, the *Reichsverfassung*), and certain treaty provisions that continued in force after the founding. See 2 Ernst Rudolf Huber, *Dokumente zur Deutschen Verfassungsgeschichte* 289 (1961) [hereinafter Huber, *Dokumente*]. This Article follows the usual practice of referring to the *Reichsverfassung*, which provided the bulk of the substantive constitutional norms, as the empire’s constitution.

<sup>18</sup> 2 Huber, *Dokumente*, *supra* note 17, at 290 (“ewiger Bund”); 3 Huber, *Verfassungsgeschichte*, *supra* note 16, at 788–89 (noting this aspect of the preamble, but suggesting that the Reich should be properly understood as a federal state instead of a federation among princes).

<sup>19</sup> Otto von Bismarck, *Speech before the Bundesrat* (Apr. 1, 1885), in Heinrich von Poschinger, *Die Ansprachen des Fürsten Bismarck, 1848–1894*, at 118 (Stuttgart 1895).

ments of medieval feudalism,<sup>20</sup> fidelity to the union would now bind the princes to the newly established realm and its Prussian emperor. The *Bundesrat* (“Federal Council”), which was composed of representatives of the constituent state governments, echoed this sentiment: “The federated governments are committed without exception to uphold the treaties, which serve as the basis for our legal institutions, with uncompromising fidelity . . . .”<sup>21</sup>

The constitutional scholar Rudolf Smend seized upon these aspects of *Bundestreue* in his path-breaking essay in 1916 on the existence of “unwritten constitutional law” in the German constitutional monarchy.<sup>22</sup> Smend emphasized that the constitution of 1871 was an intergovernmental contractual arrangement, not a popularly ratified instrument, and that the new regime still bore the characteristics of a diplomatic arrangement among monarchs. This “diplomatic style” of the German constitution, he contended, was reflected in a practice of mutual respect and cooperation among its institutions of governance.<sup>23</sup>

Smend proceeded to derive unwritten constitutional norms from the basic institutional architecture of the new system. As Smend put it, he was simply “unveiling” the functional relationship among institutions of governance from the organizational manifestation of that relationship in the text. For example, Article 8, Paragraph 3 of the *Reichsverfassung* provided for the creation of a foreign affairs

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<sup>20</sup> Cf. Hartmut Bauer, *Die Bundestreue* 31–35 (1992) (discussing origins and precursors to *Bundestreue*); Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 *Am. J. Int'l L.* 1, 5–7 (1995) (discussing examples of medieval treaty practice relating to duties of homage and fealty).

<sup>21</sup> *Annalen des Deutschen Reichs für Gesetzgebung, Verwaltung und Statistik* 350, 351 (Günter Hirth ed., Munich & Leipzig 1886).

<sup>22</sup> Rudolf Smend, *Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat*, in *Festgabe für Otto Mayer* 245 (1916); cf. Heinrich Triepel, *Die Reichsaufsicht* 451 (1917) (noting a similar, but unidirectional, duty of constituent states to heed the interests of the Reich).

<sup>23</sup> Smend, *supra* note 22, at 248, 260–61. For example, according to Smend, Bismarck (at least rhetorically) presented himself not as the leader of a superior central government, but as the agent of the collectivity of the constituent states. *Id.* at 260. Smend also highlighted the existence of specific practices of cooperation and consideration among the central and constituent governments, such as the consultation and information of state governments that took place with regard to foreign affairs. *Id.* at 248–50.

committee in the *Bundesrat*.<sup>24</sup> Smend argued that this provision “only seemingly creates an organizational institution, whereas it principally seeks to produce a functional relationship between the Reich and [the constituent] individual States, namely that of obligatory regular consultation between the leadership of the Reich and the governments of the individual states in foreign affairs.”<sup>25</sup> From this and similar aspects of the constitutional architecture and inter-institutional practice, Smend concluded that the various members of the federation owed a duty of allegiance and cooperation to one another. In Smend’s words, each member of the federated entity “owes a duty of federal and ‘contractual’ fidelity to the others and to the whole, and must, in this sense, fulfill its constitutional obligations and exercise its corresponding constitutional rights.”<sup>26</sup>

The link to monarchy in Smend’s original theory was both necessary and explicit. He argued that the demands of *Bundestreue* could not be spelled out in the text of the constitution because “a certain federal courtesy” must be employed when addressing the royal heads of the constituent states.<sup>27</sup> Whereas republican constitutions need not mince words when imposing obligations on constituent state officials, the *Reichsverfassung* could not use the same tone in addressing crowned heads of state. Thus, to soothe the princes, the German constitution “dressed up” the obligations it imposed, contemplating that the constituent states would carry out their duties in the spirit of international diplomacy.<sup>28</sup>

The idea of *Bundestreue* was accordingly invoked to make up for real gaps in power by muting the partisanship of individual actors within the system. Although the constituent states were formally subordinated to the Reich, the success of the federal enterprise depended upon the actual administrative and political support of formerly sovereign princes and kings as well as their governments and supporters. Structurally, the Reich was dependent on the con-

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<sup>24</sup> Reichsverfassung [RV] [Imperial Constitution], art. 8, para. 3, reprinted in 2 Huber, *Dokumente*, supra note 17, at 293.

<sup>25</sup> Smend, supra note 22, at 250.

<sup>26</sup> Id. at 260–61.

<sup>27</sup> Id. at 266.

<sup>28</sup> Id.

stituent states via the *Bundesrat*'s assent to federal legislation<sup>29</sup> and for their administrative resources in the execution of the bulk of federal law.<sup>30</sup> The Reich was further dependent on political support in the popularly elected *Reichstag* ("Imperial Parliament"), whose democratic nature was at odds with the basic monarchical character of the overall system. The dependence of the central government on these disparate interests severely limited the effectiveness of the Reich and threatened its very existence.<sup>31</sup> Accordingly, the hope was to coax support for the Reich from the constituent states by committing all government actors to mutual consideration and respect.

The demise of the constitutional monarchy after World War I and the creation of the Weimar Republic in 1919 posed a challenge for the continued significance of *Bundestreue*. Most important, the Weimar Republic specifically rejected both monarchism and intergovernmentalism (that is, the idea that the overall system was based on an intergovernmental contractual arrangement among constituent sovereigns). Whereas the princes had come together to form the German Reich with the Prussian king as their emperor,

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<sup>29</sup> Indeed, in addition to coequal legislative powers, the *Bundesrat* also exercised certain quasi-executive and judicial powers, such as the supervision of constituent state execution of the laws, participation in the Reich's conduct of foreign affairs, and settling disputes among the constituent states. See 3 Huber, *Verfassungsgeschichte*, supra note 16, at 848–60.

<sup>30</sup> The Reich was a system of vertical federalism in which most federal laws were carried out by constituent state administrative bodies. See RV art. 4. See generally Paul Laband, 2 *Staatsrecht des Deutschen Reiches* 203–10 (5th ed. 1911) (discussing this feature of the legal architecture of the Reich).

<sup>31</sup> The Reich's financial difficulties reflect this problem well. On the one hand, the Reich had the formal power to raise taxes to cover its own expenses. See RV art. 4, para. 2; arts. 35, 38, 70. On the other hand, the constitution provided for a peculiar mechanism of constituent state contributions to make up for temporary budgetary shortfalls at the central level. See RV art. 70, cl. 2. Although the former provisions should have made the Reich fiscally independent and rendered reliance on the latter provision superfluous, neither transpired. Instead, throughout most of its existence, the Reich was heavily in debt and remained generally dependent on state contributions, because an alliance of monarchists and constituent state governments prevailed over centralizing democrats to prevent the passage of direct Reich taxes sufficient to cover budgetary outlays. The persistent strength of the monarchist-constituent state alliance thus maintained the Reich's dependence on constituent state budgetary contributions. See Stefan Koriath, *Der Finanzausgleich zwischen Bund und Ländern* 309–24 (1997). For contemporary criticism of this situation, see Paul Laband, *Direkte Reichsteuern: Ein Beitrag zum Staatsrecht des Deutschen Reiches* (1908).

the “German people” were now the authors of the *Weimarer Reichsverfassung* (or “WRV,” the “Imperial Constitution of Weimar”)<sup>32</sup> and the constitutional republic it established. To be sure, the new constitution still embraced federalism and expressed solicitude for the interests of the constituent states (now termed “*Länder*”).<sup>33</sup> But the absence of contractual intergovernmentalism and the foundation of the new republic on popular sovereignty<sup>34</sup> led to criticism of the continued relevance of the idea of *Bundestreue*. Critics argued that now all rights and duties of the various elements of the federal system could be, and indeed were, simply spelled out in the republican constitution itself. As one scholar put it: “[M]ystical twilight between the constituent states’ legal and political influence on the power of the Reich has given way to a situation of clear legal relations among all *Länder* and the Reich.”<sup>35</sup>

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<sup>32</sup> “The German *Volk*, unanimous in its tribes and inspired by the will to renew and to strengthen its Reich in freedom and justice, to serve the domestic and foreign peace and to promote societal progress, has given itself this Constitution.” Weimarer Reichsverfassung [WRV] [Imperial Constitution of Weimar] pmb., reprinted in 3 Huber, *Dokumente*, supra note 17, at 129.

<sup>33</sup> The text of the Weimar Constitution specifically employed the German “*Länder*” (literally, “Lands”) to mark the break from the former system in which the empire was composed of “*Staaten*” (that is, “States”). The legal significance of this change is rather uncertain, especially because the nature of the *Länder* is not specified in the constitution. The suggestion of greater unity than existed in the previous regime among the *Staaten*, however, is clear. At the same time, the Weimar Constitution imposed an obligation on the Reich to heed the “preservation of the viability of the *Länder*,” WRV art. 8, required the consideration of *Länder* interests in certain affairs (such as inland waterways, see WRV art. 97, cl. 3), created institutional structures, such as the *Reichsrat* (“Imperial Council”), to include the *Länder* in the governing of the Reich’s affairs, see WRV arts. 60–77, and, at least in theory, embraced the vertical distribution of legislation and execution, see WRV art. 14. In short, although the Weimar Constitution aspired to create greater affinity among the Reich’s constitutive units than had existed under the prior regime, the new system was nonetheless distinctly federal in nature.

<sup>34</sup> The constitution of 1919 was adopted by a popularly elected national assembly, and the Preamble stated that “[t]he German people . . . has given itself this Constitution,” WRV pmb., and Article 1 declared that “[t]he power of the state emanates from the people,” WRV art. 1.

<sup>35</sup> Kurt Behnke, *Die Gleichheit der Länder im deutschen Bundesstaatsrecht* 66 (1926), quoted in Bauer, supra note 20, at 75. More generally, these critics asserted that the creation of a republican constitution and the clarification of mutual rights and obligations between the *Länder* and the Reich rendered resort to unwritten, quasi-contractual, and fuzzy principles such as *Bundestreue* superfluous. See Bauer, supra note 20, at 73–76.

Rudolf Smend, however, offered a new basis for the importance of *Bundestreue*, by focusing more generally on the nature of the constitutional enterprise.<sup>36</sup> In his view, a constitution differed from ordinary law not simply in the difficulty with which it is passed, but also in its basic function, which is to integrate political life within the state. On this account, the Reich and the *Länder* enjoyed power only as part of the larger political enterprise. As Smend put it:

The basic idea of the common organization of Reich and *Länder* generates the ‘general federal legal principle’ of an attitude conducive to a union [“*bundesfreundliche Haltung*”]: the Constitution commits the Reich and the *Länder* not only to formal correctness vis-à-vis one another in the fulfillment of their public legal duties and even inconsiderate application of formal legal entitlements, with the potential invocation of procedural guarantees through federal supervision and the constitutional court, but commits [the Reich and the *Länder*] to agreement [“*Einigkeit*”], and to the continual search and creation of a good relationship that is conducive to a union.<sup>37</sup>

Smend’s theoretical point was a specific reaction against Hans Kelsen’s and Paul Laband’s strictly positive accounts of public law.<sup>38</sup> Along with the positivists, Smend rejected the idea that the state was a real entity that existed prior to the constitution. At the same time, he disagreed with the positivists’ strictly formal analysis

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<sup>36</sup> Smend was not alone in arguing that *Bundestreue* could be carried over to the new republic despite the change in the underlying theory of the state. For example, in an important work, Karl Bilfinger pursued the idea that *Bundestreue* could still be based on the notion of a quasi-contractual relationship among the federated parties. Karl Bilfinger, *Der Einfluß der Einzelstaaten auf die Bildung des Reichswillens* 39–46 (1923). Bilfinger’s argument was essentially an argument about original intent. Even though the constitution was not actually based on a contractual arrangement among the constituent *Länder*, he argued that the debates and negotiations that led to the new constitutional text demonstrated that the founders sought to treat the new constitutional structure as though it was an intergovernmental arrangement. For a critical review of this argument, see Stefan Koriath, *Integration und Bundesstaat: Ein Beitrag zur Staats- und Verfassungslehre Rudolf Smends* 199–200 (1990).

<sup>37</sup> Rudolf Smend, *Verfassung und Verfassungsrecht*, reprinted in *Staatsrechtliche Abhandlungen* 119, 271 (2d ed. 1968) (citations omitted).

<sup>38</sup> On the remarkable Weimar debates about legal theory, see Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (1997); Weimar: A Jurisprudence of Crisis (Arthur J. Jacobson & Bernhard Schlink eds., 2000).



that understood the state purely in terms of procedural legality. In particular, Smend insisted that constitutional theory must take account not only of formal law, but also of the state as a social phenomenon. Accordingly, he suggested that the constitution at once framed and gave rise to the necessary spiritual unity of daily actions and experiences that ultimately formed the “real association of wills” that was the state.<sup>39</sup>

Smend’s sociological vision of the state harbored both conservative and liberal sensibilities that mirror the rivaling conceptions of fidelity today. On the conservative side, Smend appeared as an unreformed monarchist intent on providing a constitutional basis for integrating the German national community.<sup>40</sup> This nostalgic vision argued for the harmonization of interests within the federal system for the sake of political unity in an effective German state. Picking up on these attitudes, Hans Kelsen issued a vituperative critique of

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<sup>39</sup> Smend, *supra* note 37, at 127; see also *id.* at 136 (citing Ernest Renan’s famous locution). Smend also described the state as the “unifying fusion” [“einigender Zusammenschluß”] of the spiritual life and experience of citizens. (The English translation here is borrowed from Caldwell, *supra* note 38, at 124.) For a blistering attack on the redundancy of this term and of Smend’s theory of integration more generally, see Hans Kelsen, *Der Staat als Integration: Eine prinzipielle Auseinandersetzung* (1930).

<sup>40</sup> For example, Smend discusses governance in terms of “dominion” (“*Herrschaft*”) and elaborates on the role of leadership (“*Führertum*”) as a means of “personal integration” and representation of the people as a whole. Smend, *supra* note 37, at 142–48. Smend also criticizes Kelsen’s positivism and the liberal individualist movement in particular. See, e.g., *id.* at 144 n.6; see also *id.* at 153 n.20 (quoting Carl Schmitt with approval and noting: “The secret voter is just the individual of liberal thinking, which is alien to the state, who is not integrated and also does not require integration.”). Smend hails the trappings of the monarchy as a particularly effective mode of integration, see *id.* at 145, 163, waxes nostalgic about the former emperor who symbolized German integration despite the failure of the Constitution of 1871 to provide the necessary constitutional platform for such a function, *id.* at 228–30, and emphasizes the compatibility of monarchy and democracy, *id.* at 218–23. Smend frequently discusses the integrative function in connection with the project of unifying the German nation. See, for example, his references to the “*nationale Volksgemeinschaft*,” that is, national community of the Volk, and the German nation state. *Id.* at 226–30. He also makes an obscure reference to Eastern European Jews, who he implicitly suggests are “unsuited for integrating functions” within German public life. *Id.* at 145 & n.12. And he occasionally even makes reference to what he considers important insights of fascism. See *id.* at 157, 175; cf. *id.* at 206 n.3 (suggesting that the idea of integration is synonymous with “the most vigorous penetration by the state of all social spheres for the general purpose of gaining all vital powers of the body politic for the state as a whole”) (internal quotation marks and citation omitted). Carl Schmitt interprets this latter passage as favoring a totalitarian state. See Carl Schmitt, *The Concept of the Political* 25 (George Schwab trans., Rutgers Univ. Press 1976) (1932).

Smend's theory of integration and even placed the latter in the camp of the proto-fascist, antiparliamentarian Carl Schmitt.<sup>41</sup>

But it is important to recognize that even as a conservative, Smend was not Schmitt, whose illiberal theory of the state rested on the romantic notion of the identity between political representation and the singular political entity of the people.<sup>42</sup> Schmitt believed that the people formed a real political entity with a discernible singular will prior to the creation of the state,<sup>43</sup> and that the legitimacy of government lay in the "re"-presentation of this will in government.<sup>44</sup> Schmitt thus inevitably set parliamentary democracy up for failure. By design, parliament provides the forum for expression of a multitude of viewpoints and for negotiation among a multiplicity of factions coming together within the procedural constraints of a constitutional republic. Accordingly, parliament cannot serve the kind of "re"-presentation of the sovereign will that Schmitt had in mind.<sup>45</sup>

In contrast to Schmitt, Smend viewed social cohesion as the politically chosen product, not the precondition, of active collective

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<sup>41</sup> See, e.g., Kelsen, *supra* note 39, at 53, 58, 76. Kelsen acknowledges that Smend does not openly embrace dictatorship as did Schmitt, but Kelsen nonetheless insists that Smend's views amount to an "apology for dictatorship." *Id.* at 76–77.

<sup>42</sup> See, e.g., Schmitt, *supra* note 40, at 39 (linking sovereignty with the unity of will in the distinction between friend and enemy); see also Oliver Lepsius, *Staatstheorie und Demokratie* in der Weimarer Republik, in *Demokratisches Denken in der Weimarer Republik* 366, 379 (Christoph Gusy ed., 2000) (discussing Schmitt's view of democracy).

<sup>43</sup> See, e.g., Carl Schmitt, *Verfassungslehre* 61, 238 (1928).

<sup>44</sup> *Id.* at 235. Although Schmitt's critique was perhaps triggered by a sober assessment of the role of reasoned deliberation in modern parliamentary discourse, his conceptual approach betrays almost mystical sensibilities: "The word 'identity' denotes the existential aspect of the political unity of the Volk in contrast to any normative, schematic, or fictive equations. Democracy presupposes a Volk that, as a whole and in all particulars of its political existence, is kindred in itself, and has the will to political existence." *Id.*

<sup>45</sup> Schmitt was vehement in his opposition to pluralism. See, e.g., Schmitt, *supra* note 40, at 40–41; Carl Schmitt, *Die Geistesgeschichtliche Lage des Heutigen Parlamentarismus* (5th ed. 1979); Carl Schmitt, *Der Hüter der Verfassung*, 71–91 (1931). Indeed, Schmitt championed the extra-constitutional expression of the singular, unconstrained sovereign will through a dictatorial magistrate as well as the elimination of everyday politics from the domestic arena. See David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* 80–82 (1997). For a more charitable interpretation of Schmitt on this score, see Peter Lerche, *Föderalismus als nationales und internationales Ordnungsprinzip* 66 (*Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler*, Heft 21, 1964).

self-determination within a constitutional democracy.<sup>46</sup> He hailed democracy as “supported by an active citizenry that is as broad as possible and experiences the state as its own and shapes the state’s future.”<sup>47</sup> Furthermore, he criticized the authoritarian state for acting “in the name of systems of meanings and political values that the ruled no longer experience as their own, the product of their own creation, or actively endorsed by them.”<sup>48</sup> Thus even in arguing for unity and harmony within the federal system, Smend based his argument on some vision of democratic approval.

More important, Smend specifically focused on democratic conflict as the core of political integration, and this aspect of his theory resonates distinctly with a liberal conception of fidelity. In particular, Smend pointed to the forums of democratic interaction and the processes of negotiation and conflict resolution that lie at the heart of creating and reaffirming a sense of unity regarding the political enterprise as a whole. Again arguing against the positivists for a sociological vision of the state, he wrote:

Elections, parliamentary negotiations, the formation of cabinets, referenda: these are all integrating functions. In other words, they are justified not simply . . . because representatives . . . are designated as authoritative actors . . . . Nor because . . . good decisions and good leaders will be hereby selected. This fails to illuminate . . . the primary meaning of these procedures: they integrate, i.e. do their part to create the particular political individuality of the people as a whole and thus the precondition for its legally tangible activity, whether substantively good or ill.<sup>49</sup>

As Smend emphasized, this integrative function “does not depend on whether parliament reaches decisions or whether, in particular, it reaches good decisions, but on the fact that the parliamentary dialectic leads to group formation, association, and the formation of a particular common political attitude within parliament and among the citizenry sharing this experience.”<sup>50</sup> This common politi-

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<sup>46</sup> See Smend, *supra* note 37, at 160–70.

<sup>47</sup> *Id.* at 222.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 154.

<sup>50</sup> *Id.* Smend further explains that accordingly, in a parliamentary democracy, the people “gain their existence as a political people, as a sovereign association of wills,

cal attitude, in turn, need not be substantive harmony regarding policy choices, but a shared commitment to the political institutions of democracy as forums for the resolution of conflicts among the people.

Indeed, for Smend, as for his liberal contemporary Hermann Heller, democratic conflict would be productive only when conducted under certain conditions of political equality. For example, the more liberal Heller had argued that negotiations among conflicting political factions must be conducted with “the belief in the existence of a common foundation for discussion and thus in the possibility of ‘fair play’ for one’s domestic political opponents, with whom one thinks one can come to an agreement by excluding naked force.”<sup>51</sup> Echoing this statement, the more conservative Smend wrote a year later that the integrative function of democratic conflicts depended upon several factors: “on the presence of multiple, more or less equally matched opponents as bearers of this dialectic — on the presence of common foundations and thus the intention to conduct the fight in an integrating manner — finally on embracing the populace through this fight.”<sup>52</sup>

Thus, Smend and Heller focused less on abstract ideals of liberty than on the practical genesis of the social relations necessary to a working democracy.<sup>53</sup> Neither was simply a utopian advocate of pacified, harmonious public life. To the contrary, they would agree with Weber that “the essence of all politics . . . is conflict.”<sup>54</sup> Yet unlike Weber, each focused on the importance of the role and

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primarily from the particular political synthesis, through which it continually establishes anew its existence as a reality of state.” Id. (“*Volk*” is here translated as “people” because Smend is emphasizing the acquired political nature of a people and its relation to the state as a political entity.)

<sup>51</sup> Hermann Heller, *Politische Demokratie und Soziale Homogenität*, reprinted in 2 *Gesammelte Schriften* 421, 427 (Christoph Müller ed., 1992) (Heller’s original uses the English “fair play”); cf. Dyzenhaus, *supra* note 45, at 191 (quoting the same passage but with a different translation).

<sup>52</sup> Smend, *supra* note 37, at 201–02.

<sup>53</sup> This preoccupation with the creation of a democratic community should come as no surprise, given that they were writing in the midst of a supposed parliamentary democracy that had been in continual crisis since its inception. In particular, the focal point for Weimar theorists was the troubled *Reichstag*, the potential of which Heller and Smend sought to place in a charitable light.

<sup>54</sup> Max Weber, *Parliament and Government in Germany Under a New Political Order*, reprinted in *Weber: Political Writings* 130, 173 (Peter Lassman & Ronald Speirs eds., Cambridge Univ. Press 1994) (1918).

meaning of community in politics. Heller principally emphasized the fragile existence of community as the substratum of democratic politics and occasionally alluded to the role of politics in creating that community. Smend, in turn, made the creation of community through politics the main focus of his theory.

In reading Smend, then, we find the two principal understandings of fidelity that remain with us today: first, the conservative conception of fidelity as harmony among all units of the federal system; and second, the more liberal conception of fidelity as a commitment to democratic conflict, in which the equality of participants and the balance of powers must be observed. As we shall see from the application of these ideas in practice, the first is in tension with the idea of federalism, for it seeks to overcome the division of powers itself; the second, in contrast, naturally celebrates the division of powers as enhancing democracy.

### *B. Fidelity in Practice*

The dangers of understanding fidelity as a forced unitary alignment of interests are well illustrated by the short and troubled life of the Weimar Republic. Here, the conservative vision dominated both politics and law to the detriment of democracy and the sustainability of the system as a whole. Throughout much of the Weimar period, the persistent cacophony of factional party politics in Parliament led to vast delegations to the executive branch coupled with parliamentary influence over the appointment of executive personnel.<sup>55</sup> This combination of interests was a deliberate attempt to calm the otherwise highly fractious Weimar politics and create effective governance through unity. By destroying any real sense of government and opposition, however, and by shifting the locus of substantive decisionmaking to the nonpublic chambers of the executive branch, the Weimar system left the electorate behind. Parliament was denuded of its ability to deliberate, negotiate, and de-

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<sup>55</sup>The *Ermächtigungsgesetze* ("Empowerment Laws") of October 13, 1923, and December 8, 1923 effectuated such delegations of power. See *Ermächtigungsgesetz vom 8 Dezember 1923*, v. 8.12.1923 (RGBl. I S.1179); *Ermächtigungsgesetz vom 13 Oktober 1923*, v. 13.10.1923 (RGBl. I S.943).

cide about substantive policies, and it thereby lost any promise of maintaining a meaningful democratic dialogue with the public.<sup>56</sup>

The jurisprudence of the *Staatsgerichtshof* (the Reich's "state supreme court")<sup>57</sup> also reflected this vision of fidelity as harmony. The most prominent case involved the notorious *Preußenschlag* ("Prussia Coup"), in which President Hindenburg deposed the ruling social-democratic *Land* government of Prussia and appointed the conservative Chancellor von Papen as *Reichskommissar* ("Imperial Commissioner") based on the emergency powers of Article 48.<sup>58</sup> When the Prussian government challenged the takeover in court, the Reich argued that the intervention was necessary to preserve public order and security and was justified by Prussia's violation of its duty of fidelity to the Reich.<sup>59</sup> The echoes of high theory were no accident: Hermann Heller represented Prussia; Counsel for the Reich was Carl Schmitt.<sup>60</sup>

In particular, the Reich argued that Prussia's Interior Minister Carl Severing had issued speeches critical of Reich policy and

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<sup>56</sup> See generally Christoph Möllers, *Das parlamentarische Gesetz als demokratische Entscheidungsform—Ein Beitrag zur Institutionenwahrnehmung in der Weimarer Republik*, in *Demokratisches Denken in der Weimarer Republik*, supra note 42, at 415 (discussing lawmaking in the Weimar Republic). On the Weimar Republic's ambivalence toward political parties, see, for example, Peter Pulzer, *Democracy and the Party System in Weimar Germany*, in *Demokratie: Modus und Telos* 191, 194–95 (Andrei S. Markovits & Sieglinde K. Rosenberger eds., 2001).

<sup>57</sup> The *Staatsgerichtshof* had jurisdiction over legal disputes between public institutions of governance, including controversies based on constitutional law. See generally Willibald Apelt, *Geschichte der Weimarer Verfassung* 281–86 (2d ed. 1964) (discussing the *Staatsgerichtshof*'s constitutional role in the Weimar Republic).

<sup>58</sup> This was just the latest invocation of the power of *Reichsexekution* ("imperial execution [of the laws]") during the Weimar Republic. See Apelt, supra note 57, 170–72. For a brief discussion of the *Preußenschlag*, see 7 Huber, *Verfassungsgeschichte*, supra note 16, at 1015–38. The Reich based its actions in part on Article 48, Paragraph 1 of the Weimar Constitution, which provided: "If a *Land* does not fulfill the duties that it bears pursuant to the constitution or laws of the Reich, the Reichs-President may, with the help of the armed forces, call upon the *Land* to do so." WRV, art. 48, para. 1, reprinted in 3 Huber, *Dokumente*, supra note 17, at 136. The other argument, and the one that ultimately prevailed, was based on the second paragraph of Article 48, which authorized emergency measures to protect "public security and order." Id. art. 48, para. 2, reprinted in 3 Huber, *Dokumente*, supra note 17, at 136.

<sup>59</sup> For a transcript of the proceedings and a reprint of the decision, see *Preussen Contra Reich vor dem Staatsgerichtshof: Stenogrammbereich der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10. bis 14. und vom 17. Oktober 1932 (1933)* [hereinafter *Preussen Contra Reich*].

<sup>60</sup> See id. at 1.

failed to take the necessary measures to combat communist riots within the *Land*.<sup>61</sup> In addressing this argument, the *Staatsgerichtshof* gave considerable credence to the conservative idea of fidelity as political harmony:

It may be admitted, that in times of utmost political tensions, *Land* Ministers' particularly sharp public attacks against the politics of the Reich may under certain circumstances be found to violate the duty of fidelity. That the Minister is not acting in his official capacity, but as a private person or member of a political party, does not alone preclude the possibility of viewing such attacks as a *Land's* breach of duty.<sup>62</sup>

Although the court stopped short of finding a violation of *Bundestreue* in this case,<sup>63</sup> the Reich nonetheless won on other grounds. In the court's view, the repeated clashes in the streets between the National Socialists and the Communists threatened the very existence of the constitutional republic.<sup>64</sup> This, in turn, provided a sufficient basis for the President to invoke his emergency powers under Article 48, Paragraph 2 of the Weimar *Reichsverfassung* to preserve public order by taking over the administration of Prussia.<sup>65</sup>

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<sup>61</sup> Id. at 403–06.

<sup>62</sup> V Die Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich und des Reichsgerichts auf Grund Artikel 13 Absatz 2 der Reichsverfassung 30–31 (Hans-Heinrich Lammers & Walter Simons eds., Georg Stilke 1934) [hereinafter Rechtsprechung]. Severing's worst statement appears to have been to urge his audience to vote against the government in a speech about the upcoming Reichstag elections: "On July 31, let us chase away the von Papen government and its national socialist accessories." *Preussen Contra Reich*, supra note 59, at 32; cf. Koriath, supra note 36, at 226 n.751 (highlighting the same remark). As for the charge that Prussia had failed to combat communism, the court held that it was unclear whether Prussia acted reasonably in light of political pressures or was motivated by any "internal lack of freedom" or "weakness with regard to the communists." V Rechtsprechung, supra, at 59; *Preussen Contra Reich*, supra note 59, at 513. Thus, here, too, Prussia could not be charged with having failed in its duties toward the Reich.

<sup>63</sup> The court held:

The examination of Minister Dr. Severing's remarks reveals, however, that even when considered in the light of the entire situation at the time, they do not overstep the bounds of the required restraint in such a manner, that they could be viewed as a breach of duty on the part of the *Land* vis-à-vis the Reich.

V Rechtsprechung, supra note 62, at 31.

<sup>64</sup> See *Preussen Contra Reich*, supra note 59, at 513–14. See also, 7 Huber, *Verfassungsgeschichte*, supra note 16, at 1012–14.

<sup>65</sup> WRV, art. 48, para. 2, reprinted in 3 Huber, *Dokumente*, supra note 17, at 136.

Within a year after the Reich took over Prussia, the National Socialists came to full power and completely transformed the federal republic into a centralized dictatorship.<sup>66</sup> The initial blow was the passage of a new *Ermächtigungsgesetz* (“Empowerment Law”), transferring the executive and legislative power, including the power to change the constitution, to Hitler’s government.<sup>67</sup> The newly empowered government then quickly eliminated federalism, passing two laws “zur Gleichschaltung der Länder mit dem Reich,” which destroyed all independence of the *Länder* from the central government.<sup>68</sup> Soon thereafter, a government edict prohibited the existence of all parties other than that of the Nazis.<sup>69</sup> A subsequent Nazi-engineered plebiscite and so-called *Reichstag* “elections” led to an official proclamation of ultimate political harmony: “[T]ranscending all domestic political boundaries and oppositions, the German Volk has coalesced into a single indissoluble inner unity.”<sup>70</sup>

The *Reichstag* and *Reichsrat* (with its delegates from the now politically neutralized *Länder* governments) unanimously passed legislation to restructure the Reich and turn the *Länder* into administrative units of the central government.<sup>71</sup> Having thus eliminated the structural significance of the *Länder*, the government disbanded the *Reichsrat*.<sup>72</sup> Finally, on August 1, 1934, the government issued a law that would merge the offices of the President and the Chancellor upon the death of President Hindenburg.<sup>73</sup> When Hindenburg passed away the next day, the centralized dictatorship was

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<sup>66</sup> See Apelt, *supra* note 57, at 435–39. For the classic account of the Nazi ascendancy to power, see Karl D. Bracher, *The German Dictatorship: The Origins, Structure, and Effects of National Socialism* (Jean Steinberg trans., Praeger Publishers, Inc. 1970).

<sup>67</sup> Gesetz zur Behebung der Not von Volk und Reich, v. 24.3.1933 (RGBl. I S.141). The Empowerment Laws were passed with the two-thirds majority necessary to alter the constitution.

<sup>68</sup> Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich, v. 7.4.1933 (RGBl. I S.173); Vorläufiges Gesetz zur Gleichschaltung der Länder mit dem Reich, v. 31.3.1933 (RGBl. I S.153–54).

<sup>69</sup> Gesetz gegen die Neubildung von Parteien, v. 14.7.1933 (RGBl. I S.479).

<sup>70</sup> Gesetz über den Neuaufbau des Reiches, v. 14.7.1933 (RGBl. I S.75).

<sup>71</sup> *Id.*

<sup>72</sup> Gesetz über die Aufhebung des Reichsrats, v. 14.2.1934 (RGBl. I S.89).

<sup>73</sup> Gesetz über das Staatsoberhaupt des Deutschen Reichs, v. 1.8.1934 (RGBl. I S.747).



complete. As the Nazi regime unfolded, legal discourse pervasively appealed to the idea of harmony to suppress any form of political pluralism within the state.<sup>74</sup>

With the founding of modern Germany on the ashes of the Third Reich, federalism, democracy, and *Bundestreue* rose again.<sup>75</sup> Although the principle of *Bundestreue* was not mentioned in the text of the *Grundgesetz* (“GG”), Germany’s modern federal architecture contains several cooperative structures of governance.<sup>76</sup> For example, the *Grundgesetz* generally provides that federal laws are carried out by the constituent states (*Länder*) “as a matter of their own concern.”<sup>77</sup> The federal legislature itself is composed of the popularly elected *Bundestag* (“federal parliament”), and the *Bundesrat*, a federal council comprising representatives of the *Länder* executives. Moreover, to ensure that the *Länder* carry out their obligations to implement federal law, the federal government has various (albeit limited) powers of supervision over, and direc-

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<sup>74</sup> See generally Michael Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (Müchener Universitätsschriften Juristische Fakultät, Band 15, 1974) (discussing Nazi era use of “public welfare” as a regulative ideal to suppress political dissent). For a discussion of the connection between the Nazi use of the idea of “public welfare” and the constitutional theories of Heller and Smend, see *id.* at 198–232. Both Smend and Heller objected to this destruction of federalism and political pluralism, whereas Schmitt became its notorious champion. See Caldwell, *supra* note 38, at 142–44.

<sup>75</sup> For a brief historical sketch of the founding of the Federal Republic of Germany, see Currie, *supra* note 15; John Ford Golay, *The Founding of the Federal Republic of Germany* (1958). For the classic description of *Bundestreue* in the modern Federal Republic, see Hermann-Wilfried Bayer, *Die Bundestreue* (1961).

<sup>76</sup> On German federalism generally, see Currie, *supra* note 15.

<sup>77</sup> *Grundgesetz* [GG] [Constitution] art. 83 (F.R.G.). In some cases, the central legislature is restricted to passing only so-called “framework laws” (*Rahmengesetze*), which the *Länder* must flesh out legislatively before implementing them by administrative, executive, or judicial action. See GG art. 75. The *Grundgesetz* further declares that in carrying out federal laws as a matter of their own concern, “the *Länder* . . . provide for the institution of the agencies and the administrative procedures insofar as federal laws passed with the consent of the *Bundesrat* do not provide otherwise.” GG art. 84(1). Even where the *Länder* carry out federal laws “as agents of the Federation, the institution of the agencies remains a matter for the *Länder*, insofar as Federal laws passed with the consent of the *Bundesrat* do not provide otherwise.” GG art. 85, para. 1. In only very limited cases, does the federal government itself provide for the execution of federal law and policy. GG arts. 86–91. Finally, in a limited set of cases, the *Grundgesetz* envisions the federal and *Land* governments working together on “common tasks,” such as university and regional economic infrastructure. GG art. 91a–b.

tion of, the *Länder's* executive functions.<sup>78</sup> Should all else fail, the federal government may, with the consent of the *Bundesrat*, “take the necessary measures to hold the *Land* to the fulfillment of its duties by way of federal coercion.”<sup>79</sup>

In addition to this general scheme of “intertwined” federal governance,<sup>80</sup> there are several specific provisions that presume a heightened degree of cooperation among the various units of government.<sup>81</sup> Most prominent, perhaps, is the system of mutual financial assistance, known as *Finanzausgleich*. Under these provisions of the *Grundgesetz*, the central government has the power to re-allocate public revenue among the *Länder* to accommodate differences in the financial strength and needs of the various *Länder*.<sup>82</sup>

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<sup>78</sup> GG arts. 84–85. See generally Jochen Frowein, *Die Selbständige Bundesaufsicht nach dem Grundgesetz* (Bonner Rechtswissenschaftliche Abhandlungen, Band 50, 1961) (discussing powers of federal supervision of *Länder* implementation of federal law).

<sup>79</sup> “To carry out this federal coercion, the federal government or its commissioner has the right of instruction with regard to all *Länder* and their agencies.” GG art. 37, para. 2. This provision has never been used.

<sup>80</sup> The term is a translation of Fritz Scharpf’s “*Verflechtung*.” See, e.g. Fritz W. Scharpf, *Theorie der Politikverflechtung*, in *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik* 13 (Fritz W. Scharpf et al. eds., 1976) (analyzing cooperative structures of German governance); see also *Interorganizational Policy Making: Limits to Coordination and Central Control* (Kenneth Hanf and Fritz W. Scharpf eds., Sage, London: 1978); Fritz Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 36 *Law & State* 7 (1988) (comparing joint governance in Germany and the European Union).

<sup>81</sup> The federal government’s general power over foreign relations, for example, is subject to the requirement that “[b]efore entering into any treaty that affects the special circumstances of a Land, that Land is to be consulted in timely manner.” GG art. 32. Similarly, members of the federal executive branch may participate in sessions of the *Bundesrat*, and the *Bundesrat* must, in turn, be apprised of the direction of executive branch affairs. GG art. 53. Federal agencies are required to employ civil servants from all *Länder* in reasonable proportions, GG art. 36, para. 1, and federal laws regulating military service must consider the division of the Federation into *Länder* and their “specific circumstances of *Land*-compatriotism,” GG art. 36, para. 2. The *Grundgesetz* spells out a duty of mutual “legal and administrative assistance” among federal and state agencies, GG art. 35, and requires mutual assistance among the *Länder* in cases of natural disasters and security emergencies, GG arts. 35 & 91.

<sup>82</sup> GG arts. 106–07. See generally Koriath, *supra* note 31 (discussing the German system of revenue sharing); Larsen, *supra* note 15 (analyzing Germany’s “financial federalism” and contrasting it with America’s financial relationship between the federal government and the states).

Similarly, a recent amendment imposes a duty of cooperation on the *Bund* and the *Länder* in the context of European integration.<sup>83</sup> The new version of Article 23 GG imposes mutual consultation requirements on the Federal Government and the *Länder* in European matters affecting *Länder* concerns. Moreover, it envisions that in matters principally affecting exclusive *Länder* competences, “[t]he Federation shall delegate the exercise of the rights that the Federal Republic of Germany holds as a member of the European Union to a representative of the *Länder* designated by the *Bundesrat*.”<sup>84</sup> In the context of representing Germany in the E.U. Council, the amendment further imposes a duty of coordination among the parties involved and requires the consideration of the interests of the whole. In particular, the amendment notes that “[t]he rights [under this provision] are exercised with the participation and agreement of the Federal Government; in doing so, the responsibility of the Federation [*“Bund”*] for the state as a whole is to be heeded.”<sup>85</sup>

And yet, in developing the general principle of *Bundestreue*, Germany’s *Bundesverfassungsgericht* (“Federal Constitutional Court”) has not relied on any of these provisions. Nor has the court resorted to a holistic interpretation of this collection of clauses for the derivation of an overarching functional principle. As Professor David Currie has noted, the *Bundesverfassungsgericht* developed *Bundestreue* “[i]ndependent of the detailed provisions dividing governmental authority between the Federation and the *Länder*.”<sup>86</sup> As we shall presently see in more detail, the court has consistently relied on the more abstract idea of the federal state as the primary

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<sup>83</sup> Because the Federal Executive represented Germany in the E.U. Council, *Länder* interests were increasingly compromised as the European Union reached ever more deeply into domestic affairs. Because the *Länder*, through the *Bundesrat*, had a voice in federal laws affecting their interests, that voice was comparatively weakened by shifting policy issues to the European level. As a result of *Länder* pressure, and the difficulty in obtaining the necessary cooperation from the *Länder* in implementing European Union law, the *Grundgesetz* was finally amended to provide for better representation of *Länder* interests at the European level. See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* 213, 242–44 (Kalypso Nicolaidis & Robert Howse eds., 2001).

<sup>84</sup> GG art. 23, para. 6.

<sup>85</sup> *Id.*

<sup>86</sup> Currie, *supra* note 15, at 77.

justification for the mutual concern and respect that it demands from the components of the Federation.<sup>87</sup>

Like the Weimar *Reichsverfassung*, the modern *Grundgesetz* was not based on a contractual arrangement among monarchs or sovereign states, but traced itself instead to an exercise of the German people's "constituent power."<sup>88</sup> Nonetheless, the *Bundesverfassungsgericht* drew on Smend's original elaboration of *Bundestreue* in the context of the German monarchy as support for the continued importance of that principle in the modern republic. As one of the court's first decisions put it, the norm of *Bundestreue* was inherent in the idea of federalism itself:

Corresponding to the principle of the federal state . . . is the constitutional duty that the components of the Federation maintain fidelity to one another as well as to the larger whole, that the Federation maintain fidelity to the component parts, and that they all reach mutual understanding. The basic principle of federalism applicable in the federal state thus contains the legal duty, on the part of the Federation and all its components, of "conduct congenial to the Federation," i.e. all participants in the constitutional legal "alliance" are called upon, corresponding to the nature of this alliance, to cooperate and to contribute to its strengthening and to its protection and that of the well-understood concerns of its components.<sup>89</sup>

As this statement suggests, the *Bundesverfassungsgericht* was intent on applying fidelity not only for the benefit of the federal government, but also to protect the constituent states. In this first case, for example, the court invoked the principle of *Bundestreue* to interpret a federal law governing housing subsidies. As the court saw

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<sup>87</sup> BVerfGE 4 (1954), 115 (140); see also Bauer, *supra* note 20, at 145 (citing examples of justification).

<sup>88</sup> GG pmb. The idea that the German people exercised their constituent power in giving themselves the *Grundgesetz* is in some tension with the way that ratification took place. In particular, the *Grundgesetz* was ratified not by popular conventions that were especially selected for this purpose, but by pre-existing *Länder* parliaments. See, e.g., Peter H. Merkl, *The Origin of the West German Republic* 51–54, 159–60 (1963); cf. Bauer, *supra* note 20, at 109 nn.12–13 (noting that some scholars have suggested that the Federal Republic was a creation of the *Länder*, not vice versa); Koriath, *supra* note 36, at 251 (discussing the connection between *Länder* involvement in the creation of the Federal Republic and the idea of *Bundestreue*).

<sup>89</sup> BVerfGE 1 (1952), 299 (315) (citing Smend, *supra* note 22, at 261).

it, the statute's requirement that federal funds be dispersed "in agreement with" the *Länder* was merely an expression of the constitutional principle of equality among the federal system's constituent states and of the corresponding duty of fidelity. Interpreting the statute in light of these constitutional background principles, the court inferred two rules. On the one hand, the Housing Ministry could not distribute funds absent the unanimous consent of the *Länder*. On the other hand, the *Länder* could only raise material objections to the proposed distribution as opposed to arbitrarily withholding their consent.

Even in protecting the *Länder*, however, the *Bundesverfassungsgericht* here opted for the conservative vision of fidelity as harmony. In other words, the court did not protect the ability of the *Länder* to make autonomous policy decisions, but rendered central government action contingent on the constituent states' consent. Similarly, the court held in another case that the Federation violated *Bundestreue* when it failed to consult and negotiate with all *Länder* whose interests were at stake in the creation of a national television network.<sup>90</sup> By selectively including only some of the *Länder* governments in the development of the proposal, the Federation impermissibly presented a minority of *Länder* with a fait accompli. In the court's view, fidelity required all parties to come together and attempt in good faith to reach agreement about the project.

At its most extreme, a conservative vision of *Bundestreue* in modern Germany specifically assisted in suppressing democratic debate. The *Land* of Hessen, for example, violated the principle of *Bundestreue* when it failed to prevent local jurisdictions within that *Land* from carrying out referenda on atomic weapons.<sup>91</sup> Under the *Grundgesetz*, that subject matter fell within the Federation's jurisdiction and was beyond the power of local jurisdictions. At the same time, however, the Federation lacked the power to intervene directly. According to the court, it was therefore incumbent upon the *Land* in which the offending local jurisdiction was situated, to

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<sup>90</sup> BVerfGE 12 (1961), 205 (254–59).

<sup>91</sup> BVerfGE 8 (1958), 122. The local referenda proposed to ask citizens such questions as "Should armed forces be equipped with atomic weapons, and atomic missile bases be established, on German soil?" *Id.* at 125.

act affirmatively to safeguard the Federation's interests and suppress the local referendum.

The *Bundesverfassungsgericht* has thus generally sought an approach to federalism that emphasizes harmony over democratic dissonance.<sup>92</sup> Whether protecting the Federation or the *Länder*, the court usually seeks to bring actors together, rather than ensuring their political independence from one another in an effective system of federal governance. Even in enforcing the decentralization inherent in Germany's vertical division of federal legislation and *Land* administration, the court's decisions have generally fostered a kind of harmonized decentralization without ensuring democratic diversity at the local level.<sup>93</sup>

There are instances, however, in which the *Bundesverfassungsgericht* has indeed used fidelity jurisprudence in a way that promotes a more liberal vision of federalism. In the civil servants' salaries case, for example, the court struck down a federal framework law that sought to prevent competition among the *Länder* and between the *Länder* and the Federation in civil servant compensation.<sup>94</sup> Here, the *Grundgesetz* expressly gave the Federation the power to issue framework laws regarding "the legal relations [*Rechtsverhältnisse*]" of *Länder* civil servants. The court, however, construed this provision narrowly in light of the importance of the civil service to the statehood of the *Länder*.<sup>95</sup> The court held that a federal law harmonizing maximum salaries of civil servants throughout the federal system did not leave the *Länder* sufficient

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<sup>92</sup> For the classic critique, see Konrad Hesse, *Der Unitarische Bundesstaat* (1962). As many others do, Professor Hesse (who had studied with Smend) properly criticizes the *Bundesverfassungsgericht* for this harmonizing use of *Bundestreue* while failing to appreciate the possibility and existence of liberal uses of *Bundestreue* that increase the opportunity for democratic conflict within the federal state. See *id.* at 9–10; cf. Koriath, *supra* note 36, at 258–80 (criticizing *Bundestreue* for its harmonizing effects as well); Christian Pestalozza, "Formenmißbrauch" des Staates (Münchener Universitätsschriften Reihe der Juristischen Fakultät, Band 28, 1973) (same).

<sup>93</sup> For an incisive description of this phenomenon, see Stefan Oeter, *Integration und Subsidiarität im deutschen Bundesstaatsrecht* 403–60 (*Jus Publicum: Beiträge zum öffentlichen Recht*, Band 33, 1998).

<sup>94</sup> The *Grundgesetz* provides the Federation with three kinds of legislative power: *ausschließliche Gesetzgebung* ("exclusive legislative power"), GG art. 73, *konkurrierende Gesetzgebung* ("concurrent legislative power"), GG art. 74, and the right to issue *Rahmenvorschriften* ("framework prescriptions" or "framework laws"), GG art. 75.

<sup>95</sup> BVerfGE 4 (1954), 115 (136).

discretion to determine their own salary structures and tailor them to local needs. In the court's view, the uniformity prescribed by the federal law ran contrary to the diversity inherent in the federal structure of the state.<sup>96</sup>

The court did not, however, thereby hand the *Länder* a complete entitlement to determine civil service salaries at will, as an entitlements approach might have urged. This would have been particularly troublesome, given that under Germany's revenue sharing system, one *Land's* expenditures may affect another's resources. Instead, in structuring civil service salaries, the *Länder* would also have to heed the principle of *Bundestreue*:

Just as the Federation is given its authorities only for the well-being of the whole, so, too, the *Länder* must subordinate their decisional freedom to the consideration of the common welfare. A federal state can only exist, if the Federation and the *Länder* heed the fact that the degree to which they can make use of formally existing competences is determined by mutual consideration.<sup>97</sup>

Here, the court did not insist on "mutual consideration" in order to harmonize substantive *Länder* policy choices, as a conservative vision of fidelity might have suggested. Instead, the "mutual consideration" was necessary only to preserve the fiscal viability of the system as a whole:

The unwritten constitutional principle of *Bundestreue* results in a legal restriction on the exercise of legislative competences within the federal state—for the Federation and the *Länder*. Where the effects of a legal regulation are not limited to the territory of the [regulating] *Land*, the *Land* legislator must consider the interests of the Federation and the remaining *Länder*. . . . Given that the Federation and the remaining *Länder* also have civil servants, the *Länder*, according to the basic principle of *Bundestreue*, must, in regulating the salaries of their own civil servants, in any event take into consideration the circumstances of salaries in the Fed-

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<sup>96</sup> Id. at 140–41.

<sup>97</sup> Id. at 140–42.

eration and the *Länder* so as to avoid a shock to the entire financial structure of the Federation and the *Länder*.<sup>98</sup>

Within these broad parameters, then, *Bundestreue* specifically allows each *Land* to determine the makeup and structure of its own civil service, including salaries that might be competitive with what other *Länder* or the Federation are willing to pay. Here, *Bundestreue* specifically preserves policy diversity throughout the federal system.

When the *Grundgesetz* was subsequently changed to provide the Federation with express concurrent legislative power over compensation for state civil servants,<sup>99</sup> the court again drew on a liberal fidelity approach to preserve some measure of *Länder* autonomy regarding the structure of their civil service systems. Citing the constitutional prohibition on amendments “affecting the division of the Federation into *Länder*,”<sup>100</sup> the court held that no constitutional amendment could compromise the essential “state quality” of the *Länder*.<sup>101</sup> The court noted the difficulty of determining the essentials of statehood, but held that, at a minimum, the guaranty protected a *Land*’s “ability freely to determine its organization.”<sup>102</sup> The decision warned that federal legislation under the *Grundgesetz*’s new Article 74 might threaten this aspect of *Länder* autonomy. In particular, such federal laws might limit the ability of a *Land* to develop “new offices and forms of organization” and could “bring a *Land* into a state of dependency on the Federation when realizing reforms that pertain to that *Land*’s administrative structure.”<sup>103</sup>

Once again, the court appealed to the principle of *Bundestreue* to ensure that the Federation would not compromise the statehood of the *Länder* in the exercise of the new federal powers over civil service compensation. To be sure, the specific constitutional

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<sup>98</sup> Id. at 140.

<sup>99</sup> GG art. 74a; see, e.g., BVerfGE 34 (1972), 9 (12–13).

<sup>100</sup> GG art. 79, para. 3.

<sup>101</sup> BVerfGE 34 (1972), 9 (19).

<sup>102</sup> Id. at 19–20. The court held that, at a minimum, each state must retain “the ability freely to determine its organization, including the fundamental organizational decisions contained in the *Land*-constitution, as well as the guaranty of the constitutional allotment of an appropriate share of the federal state’s gross revenue.” Id. The revenue guaranty was not relevant to the present case and grows out of Germany’s constitutional system of revenue sharing.

<sup>103</sup> Id. at 20.



change required the court to recognize expanded federal powers in this area. But the court nonetheless read federal harmonization legislation narrowly as restricting only plain salary competition among the *Länder* while allowing *Länder* to depart from the federal compensation scheme whenever a *Land* created offices with new responsibilities.<sup>104</sup> The court thus specifically refused to read the federal legislation to prohibit all *Länder* departures from the unifying federal salary scheme. In the court's view, the more sweeping reading suggested by the federal government was untenable, since federal harmonizing legislation "cannot and must not" regulate this field in all its details.<sup>105</sup> In other words, "the *Länder* must retain room to make salary . . . regulations that cannot be dismissed in the context of reforms to their administrative and bureaucratic organization."<sup>106</sup>

In summary, the German experience to this day contains two prominent traditions of fidelity. The first is the conservative vision of fidelity as harmony. Since federalism by definition gives effect to divisions within a political system, this approach views federalism and democracy as being in tension with one another. The second, liberal understanding of fidelity, in contrast, views democracy and federalism as mutually reinforcing. As Stefan Oeter recently put it:

If one . . . understands democracy . . . in terms of a graduated construction of the state from the bottom up, in which governance requires constant legitimation through the continually renewed consent of the governed, in the sense of delegating the state performance of functions to a higher level, the principle of the federal state rather strengthens democracy than coming into conflict with the latter.<sup>107</sup>

The liberal understanding of constitutional fidelity draws on this vision of democracy and seeks to preserve—not overcome—the division of powers and the institutional engagement to which federalism gives rise.

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<sup>104</sup> See *id.* at 32–35 (discussing teacher salaries at various public schools).

<sup>105</sup> *Id.* at 45.

<sup>106</sup> *Id.*

<sup>107</sup> Oeter, *supra* note 93, at 569–70.

## II. FIDELITY IN THE SERVICE OF EUROPEAN INTEGRATION

Fidelity figures prominently in the European Union as well. In contrast to Germany's *Grundgesetz*, the founding treaties of the European Union partially specify the existence of such a duty. At the urging of the German delegation,<sup>108</sup> the drafters of the Treaty of Rome in 1957 included in what was then Article 3 of the Treaty Establishing the European Economic Community ("EEC Treaty") (later Article 5 and now Article 10 of the Treaty Establishing the European Community ("EC Treaty")) a general requirement that member states "take all appropriate measures" to ensure, and "abstain from any measure" that could compromise, the success of that treaty.<sup>109</sup>

The EC Treaty's explicit focus on member states' duty of cooperation is best understood in light of the institutional architecture of the Union. Like Germany, the European Union is basically a system of vertical federalism, which means the constituent states administer the central government's laws.<sup>110</sup> In contrast to Ger-

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<sup>108</sup> See Marc Blanquet, L'Article 5 du Traité C.E.E. 8-9 (Bibliothèque de droit International et Communautaire, Tome 108, 1994).

<sup>109</sup> Consolidated Version of the Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340/03) (1997) [hereinafter EC Treaty] art. 10. Article 10 reads:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Id. Much later, the Treaty on European Union imposed a similar obligation of "loyalty and mutual solidarity" on member states acting in the sphere of common foreign and security policy. Consolidated Version of the Treaty on European Union, Nov. 10, 1997, O.J. (C 340/02) (1997) [hereinafter EU Treaty] art. 11(2). For additional specific duties of cooperation, see, for example, EC Treaty arts. 5, 125, 127(1), 137(2)(a), and 274 and EU Treaty arts. 16, 19, 29, 30, and 34. For a similar duty under the European Coal and Steel Community, see Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, O.J. (C 191) 44 (1992) [hereinafter ECSC Treaty], art. 86. See also Case C-390/98, H.J. Banks & Co. v. Coal Auth. & Sec'y of State for Trade & Indus., 2001 E.C.R. I-6177, para. 121, [2001] 3 C.M.L.R. 51 (2001) (finding in Article 86 of the ECSC Treaty a principle of cooperation among the member states that corresponds to that found in Article 5 (now 10) of the EC Treaty); Case C-128/92, H.J. Banks & Co. v. British Coal Corp., 1994 E.C.R. I-1209, para. 62(4) (opinion of Advocate General Van Gerven) (discussing the duty of cooperation contained in Article 86 of the ECSC Treaty).

<sup>110</sup> There are some notable exceptions to this division of power, as in the case of competition law, which the Commission administers itself. For a general introduction to European Union law, see Jo Shaw, *Law of the European Union* (3d ed. 2000). For

many, however, the European Union does not have the general power to tax and has only limited resources of its own. Furthermore, its member states control what is still the most important legislative chamber (the Council), and each is the home to a largely self-contained “public sphere” of civic engagement.

The duty of cooperation has often served to keep the fragile European enterprise afloat. The European Court of Justice (“ECJ”) has broadly called upon constituent members to heed “the solidarity which is the basis . . . of the whole of the Community system.”<sup>111</sup> It has also appealed to the duty of cooperation in support of many foundational judgments integrating the Union. Indeed, the prominence of this duty in the jurisprudence of the ECJ has led one scholar to label Article 10 (formerly Article 5) of the EC Treaty the “[c]ore” of the European Union’s constitutional system.<sup>112</sup>

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an introduction to European federalism, see Michael Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (2000); David McKay, *Federalism and European Union: A Political Economy Perspective* (1999). For a comparative introduction to federalism in the European Union, see Mauro Cappelletti et al., *Introduction to Integration Through Law: European and the American Federal Experience*, supra note 16, at 3; Robert Howse and Kalypso Nicolaidis, *The Federal Vision, Levels of Governance, and Legitimacy*, in *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, supra note 83, at 1; David McKay, *Designing Europe: Comparative Lessons from the Federal Experience* (2001); Terrance Sandalow and Eric Stein, *On the Two Systems: an Overview*, in *1 Courts and Free Markets 3* (Terrance Sandalow & Eric Stein eds., 1982).

<sup>111</sup> Joined Cases 6 & 11/69, *Commission v. France*, 1969 E.C.R. 523, para. 16, [1970] C.M.L.R. 43 (1969).

<sup>112</sup> John Temple Lang, *The Core of the Constitutional Law of the Community—Article 5 EC*, in *Current and Future Perspectives on EC Competition Law 41* (Laurence Gormley ed., 1997). For a sampling of prominent reviews of the duty of cooperation, see, for example, Ole Due, *Der Grundsatz der Gemeinschaftstreue in der Europäischen Gemeinschaft nach der Neueren Rechtsprechung des Gerichtshofs* (1991); Armin Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (2001); Michael Lück, *Die Gemeinschaftstreue als allgemeines Rechtsprinzip der Europäischen Gemeinschaft* (1992); Henry G. Schermers & Patrick J. Pearson, *Some Comments on Article 5 of the EEC Treaty*, in *Festschrift für Ernst Steindorff 1359* (Jürgen F. Baur et al. eds., 1990); Armin von Bogdandy, *Kommentar zu Artikel 5 EGV*, in [Altband I] *Das Recht Der Europäischen Union* (Eberhard Grabitz & Meinhard Hilf eds., Maastrichter Fassung, 2000); John Temple Lang, *The Duties of National Authorities Under Community Constitutional Law*, 23 *Eur. L. Rev.* 109 (1998) [hereinafter Lang, *Duties of National Authorities*]; John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 *Common Mkt. L. Rev.* 645 (1990) [hereinafter Lang, *Community Constitutional Law*]. A portion of the 2000 European F.I.D.E. Congress was also devoted to this subject. See 1 XIX F.I.D.E.

This Part shows that the European approach differs from the dominant German approach in that the ECJ has usually seized on fidelity to ensure effective governance, not political harmony. To be sure, the duty of cooperation has occasionally been used in a conservative quest for political harmony here as well. And the ECJ does use rhetoric that suggests a conservative vision of fidelity as mutual consideration of substantive policy interests. Mostly, however, the ECJ has not used fidelity to calm primary policy disputes. Instead, it has found obligations of cooperation in situations in which the treaties' peculiar division of powers would have otherwise rendered the system of governance structurally ineffective. In short, although the ECJ (and the European Council) have occasionally employed a conservative version of fidelity, E.U. practice is generally consistent with a liberal version of fidelity.

The European experience also highlights the symmetrical potential of liberal fidelity, that is, the use of liberal fidelity to protect both the central government and the constituent states. Initially, the ECJ's fidelity approach served to bolster an otherwise notoriously weak central government at the expense of constituent state autonomy. Many early decisions used the duty of cooperation to support member state, not Community, obligations. In the European Union, judicial appeals to fidelity were thus originally made to support a certain degree of centralization of power within the federal system.

As the European Union has become more powerful, however, the ECJ's tendency to favor centralization over decentralization has waned and the symmetrical potential of liberal fidelity has begun to unfold. Much as the German *Bundesverfassungsgericht* has done, the European Court of Justice has ventured well beyond the text of the EC Treaty and expanded the Community institutions' duties of assistance and restraint. Rejecting the argument that Article 10 of the EC Treaty suggests a more limited duty, the ECJ declared that the provision is merely the manifestation of a more general, mutual duty binding all of the Community systems' public actors alike.<sup>113</sup> Indeed, as both the Treaty of Nice and the draft

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Congress, The Duties of Co-operation of National Authorities and Courts and Institutions Under Article 10 (2000).

<sup>113</sup> See, e.g., Joined Cases C-213/88 and C-39/89, *Luxembourg v. Parliament*, 1991 E.C.R. I-5643, para. 29, [1994] 1 C.M.L.R. 351 (1991) (stating that "under the rule im-

Treaty Establishing a Constitution for Europe confirm, fidelity should be seen today as a mutual duty binding all parts of the Union alike.<sup>114</sup>

Finally, the European experience is uniquely instructive in illustrating the wide range of duties that liberal fidelity may impose on institutional actors throughout the system. A careful review of these obligations demonstrates the striking difference between the breadth and nuance of a fidelity-based doctrine and the binary nature of an entitlements approach (according to which powers may be exercised either at will or not at all). To highlight this difference, this Part examines the range of fidelity-based obligations in the European Union within a framework that reveals their varying intrusions on the autonomy of the obligated institution or government.

In contrast to prior commentary on Article 10 of the EC Treaty, this Part distinguishes between duties of assistance and duties of restraint in so far as possible.<sup>115</sup> This rough distinction aids the comparative analysis, since U.S. jurisprudence distinguishes sharply between preemption (which is generally accepted) and duties of assistance (which are generally rejected).<sup>116</sup> In particular, the discussion groups duties that seem to call for assistance in the category of duties of restraint whenever the assistance is only a condition of action (in U.S. parlance, conditional preemption). The reason for this classification is that the background rule that does most

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posing mutual duties of sincere cooperation on the Member States and the Community institutions, as embodied in particular in Article 5 of the EEC Treaty [now Article 10 of the EC Treaty]"

<sup>114</sup> See Treaty of Nice, Mar. 10, 2001, O.J. (C 80) 1, 77 (2001) (declaring that duty binds Community institutions in their interactions among one another); Conference of the Representatives of the Governments of the Member States, Treaty of Nice, Approved Provisional Text, Dec. 12, 2000, SN 533/00, at 21 (describing duty of sincere cooperation as being "reflected in" Article 10 of the EC Treaty); Draft Treaty Establishing a Constitution for Europe, July 18, 2003, O.J. (C 169) 1, 9 (2003) [hereinafter EU Draft Const.] art. 5(2) ("Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Constitution."), available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (on file with the Virginia Law Review Association).

<sup>115</sup> Cf., e.g., Lang, *Community Constitutional Law*, supra note 112, at 670 & n.62 (failing to distinguish between positive and negative aspects of the duty).

<sup>116</sup> See generally, Adler & Kreimer, supra note 4 (discussing commandeering, conditional funding, and conditional preemption).

of the normative work in conditional preemption is one of restraint, not assistance, even though the resulting rule (for example, “take action only after consulting with the Commission”) often looks like it requires an affirmative act. True affirmative acts, however, are indeed frequently required, as the following discussion shows.

#### *A. Duties of Assistance*

Two lines of decisions address duties of assistance in the European Union. First, a series of ECJ judgments have sought to vindicate the effectiveness of the European Union’s legal system without muting democratic conflict about primary policy decisions. These judgments seek to counteract obstructionism where the primary policy decision is normatively committed to another institution or forum. These judgments, accordingly, reflect a liberal fidelity approach in that they preserve democratic conflict within the federal system while ensuring the effectiveness of the legal regime as a whole.

The second set of judgments involving duties of assistance, in contrast, reaches well beyond the idea of effectiveness and indeed seeks to calm primary policy disputes. This set of judgments thus echoes the conservative vision of fidelity that has marked much of the German case law on *Bundestreue*. The ultimate effect of this second set of cases is to counteract federalism itself. Each set of decisions is discussed in turn.

##### *1. Protecting Legal Effectiveness*

Perhaps the most basic duty of assistance articulated by the ECJ in the course of protecting legal effectiveness is a duty of information; that is, the requirement that member states must provide documentation and informational assistance to Community institutions monitoring the effective implementation of Community law. For example, when the Commission was investigating whether Greece had violated the EC Treaty by requiring certain currency permits in connection with the importation of cereals from other member states, Greece was obliged to respond to the Commis-

sion's information requests.<sup>117</sup> National authorities had the information and the Greek government never indicated that it had encountered difficulties in complying with the request. It nevertheless failed to provide the information. Reviewing Greece's inaction, the court held that "by deliberately failing to communicate to the Commission the text of the [national] regulations applicable to cereal imports and the information . . . concerning the foreign currency permits granted and cereal imports [a]ffected . . . the Hellenic Republic . . . failed to fulfil its obligations under Article 5 of the EEC Treaty [now Article 10 of the EC Treaty]."<sup>118</sup>

The Community itself is under an analogous obligation to provide information to a member state. For example, when the Netherlands was investigating violations of Dutch law implementing Community rules on fishing quotas, it sought information from the Commission regarding those violations. After the Commission denied its request, the Netherlands's legal authorities sued in the ECJ for an order to compel the Commission's assistance. The court held that "[i]t is incumbent upon every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorizing its officials to give evidence in the national proceedings."<sup>119</sup> Thus, when the effective-

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<sup>117</sup> Case 240/86, *Commission v. Greece*, 1988 E.C.R. 1835, [1989] 3 C.M.L.R. 578 (1988).

<sup>118</sup> *Id.* at para. 28. Although in this case, Greece might have indeed avoided the affirmative duty to provide information by abstaining from requiring currency permits in the first place, this duty of providing information extends generally to all situations in which the Commission is monitoring compliance with Community law. In other words, the duty to provide information to the Commission in this situation is independent of whether the member state's underlying duty was to refrain from obstructing Community trade, or to take positive action to implement a Community directive. See also Case C-40/92, *Commission v. United Kingdom*, 1994 E.C.R. I-989, para. 35 (finding that the United Kingdom should have notified the Commission about its changes to milk marketing programs); Case 274/83, *Commission v. Italy*, 1985 E.C.R. 1077, para. 42, [1987] 1 C.M.L.R. 345 (1985) (linking reporting requirement of a Community directive to Article 5 of the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. II [hereinafter EEC Treaty] (now Article 10 of the EC Treaty)); Case 96/81, *Commission v. Netherlands*, 1982 E.C.R. 1791, para. 7 (same).

<sup>119</sup> Case C-2/88, *Imm, Zwartveld & Others (I)*, 1990 E.C.R. I-3365, para. 22, [1990] 3 C.M.L.R. 457 (1990). Because the Commission failed to establish "imperative reasons" which would justify its refusal to produce the information and witnesses, the Court ordered the Commission to comply with Netherlands' request. Case C-2/88 *Imm, Zwartveld & Others (II)*, 1990 E.C.R. I-4405, para. 12.

ness of the implementation of Community law was at stake, Community institutions would have to oblige as well. Similarly, member states must provide information to other member states, as in the case of changes in administrative practices that, in the absence of advance notification, might constitute an obstacle to intra-Community trade,<sup>120</sup> or where informational cooperation is necessary to implement a regulation.<sup>121</sup>

Beyond this basic duty of information, the court has articulated duties to consult Community institutions and consider the Community's interests. Although these duties often sound as though they seek to achieve substantive policy agreement, they primarily address structural power gaps in the implementation of Community law. Given the vertical division of powers in the Union, the absence of these duties might indeed spell the end of the federal legal regime itself.

For example, although member states may plead absolute impossibility as a defense in failing to carry out a community directive, the national government must go beyond merely informing the Commission of the failure. Instead, it must also consult with the Commission and cooperate in an attempt to find a solution to the implementation problem.<sup>122</sup> Similarly, the court held in *Luxembourg v. Parliament* that the member state governments had “not yet discharged their obligation to determine the seat of the institutions in accordance with the provisions of the treaties.”<sup>123</sup> In taking

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<sup>120</sup> Case 42/82, *Commission v. France*, 1983 E.C.R. 1013, paras. 35–38, [1984] 1 C.M.L.R. 160 (1983).

<sup>121</sup> Case C-251/89, *Athanasopoulos v. Bundesanstalt für Arbeit*, 1991 E.C.R. I-2797, para. 57, [1994] 1 C.M.L.R. 669, 704 (1991) (holding that Article 5 (now 10) requires informational cooperation among member states in the implementation of Regulation No. 1408/71).

<sup>122</sup> Case 94/87, *Commission v. Federal Republic of Germany*, 1989 E.C.R. 175, paras. 8–12; See also Case C-183/91, *Commission v. Greece*, 1993 E.C.R. I-3131, para. 19 (noting that member states have a “duty of genuine cooperation” that requires them to work with the Community to overcome difficulties related to implementing Community directives); Case C-217/88, *Commission v. Federal Republic of Germany*, 1990 E.C.R. I-2879, para. 33, [1993] 1 C.M.L.R. 18 (1990) (finding that the F.R.G. failed to work with the Commission to find an appropriate solution to the difficulties involved with implementing measures on compulsory distillation and thus breached the duty of cooperation).

<sup>123</sup> Case 230/81, *Luxembourg v. Parliament*, 1983 E.C.R. 255, para. 36, [1983] 2 C.M.L.R. 726 (1983). Article 216 (now 289) of the EC Treaty provided that “[t]he seat



interim action to determine the seat of Community institutions, member states must take into account the interests of the institution concerned. Here, as well, the relevant interests to be considered are not substantive policy interests, but those concerning the institution's operational autonomy and basic ability to function. Accordingly, any interim decisions must "have regard to the power of the Parliament to determine its internal organization," and "must ensure that such decisions do not impede the due functioning of the Parliament."<sup>124</sup>

As in the case of the duty of information, the court went beyond the text of the EC Treaty here to find a similar duty governing the relationship among the various Community institutions. For example, when the Parliament sued the Council for failing to comply with the consultation procedure laid out in Article 43 (now 37) of the EC Treaty, the court held that "inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions."<sup>125</sup> Thus, where the Council urgently needs to pass particular laws, it must nonetheless go through the regular legislative procedures and "use all the possibilities available under the Treaty and the Parliament's Rules of Procedure" to obtain the Parliament's input.<sup>126</sup> The Parliament, in turn, may not exploit the EC Treaty's consultation procedure as a means for unduly delaying or effectively blocking the legislative process. Accordingly, the court has held that where a request for expedited process is justified,<sup>127</sup> the Parliament must neither ignore the proposal nor adjourn "based on reasons wholly unconnected with the contested [legislative measure] and [without] tak[ing] into account the urgency of

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of the institutions of the Community shall be determined by common accord of the governments of the Member States."

<sup>124</sup> Case 230/81, *Luxembourg v. Parliament*, 1983 E.C.R. 255, at para. 37.

<sup>125</sup> Case C-65/93, *Parliament v. Council*, 1995 E.C.R. I-643, para. 23, [1996] 1 C.M.L.R. 4 (1995).

<sup>126</sup> *Id.* at para. 26. See also Case 138/79, *SA Roquette Frères v. Council*, 1980 E.C.R. 3333, para. 36 (explaining the steps the Council can take in order to make sure that it obtains the opinion of the Parliament).

<sup>127</sup> See *Parliament v. Council*, 1995 E.C.R. I-643, at para. 24, [1996] 1 C.M.L.R. 4 (1995).

the procedure and the need to adopt” the measure before a certain deadline.<sup>128</sup>

The obligations of information, consultation, and consideration are thus not free-standing, generalized duties of harmonizing interests throughout the Community. They apply instead only when a particularized legal relationship exists between the member state and the Community on a specific matter. Thus, when a member state is under a primary obligation not to hinder the free movement of goods, it will be under a secondary duty to provide information to the Commission supervising member state compliance. Where a member state must implement a directive, it must consult with the Commission to overcome potential obstacles to implementation. Where the Council must consult with the Parliament, both institutions have a duty to make the consultation procedure effective. These duties are therefore consistent with liberal fidelity in that they require cooperation only in situations in which a primary duty already commits the member state to the accomplishment of the substantive goal specified in the EC Treaty.<sup>129</sup>

More intrusive than these duties of information, consultation, and consideration, are the requirements of active compliance. As the court established in its landmark trilogy of *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*,<sup>130</sup> *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*,<sup>131</sup> and *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*,<sup>132</sup> Community law is supreme vis-à-vis the laws of the member states. This means, of course, that when member state and Community law conflict, the latter takes precedence. What is less clear from the point of view of supremacy, however, is whether member states must simply accept this su-

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<sup>128</sup> Id. at paras. 26–27.

<sup>129</sup> Cf. von Bogdandy, supra note 112 (noting supplemental character of the duty of cooperation).

<sup>130</sup> Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963).

<sup>131</sup> Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, 1964 E.C.R. 1141, [1964] C.M.L.R. 425 (1964).

<sup>132</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, [1978] 3 C.M.L.R. 263 (1978).

premacry and give way to Community law, or whether they must do more.

In the United States, the basic approach is one of simple preemption: When in conflict, federal law trumps state law. In the tradition of clear legal entitlements, it is irrelevant in the United States what the constituent states do in response to a conflict between state and federal law. Such conflicts are solved by applying, whenever necessary, to federal or state courts for declaratory relief or for the vindication of the substantive rules contained in federal law.

The ECJ ventures beyond this basic approach of preemption. It frequently requires that member states affirmatively repeal national laws and regulations that conflict with Community law. As the ECJ held long ago, albeit without express reliance on Article 5 (now 10):

[A]lthough the objective legal position is clear, . . . the maintenance . . . of the wording of [national regulations that are in conflict with Community law] gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law.<sup>133</sup>

The court has emphasized that this holds true “even if the Member State concerned acts in accordance with Community law.”<sup>134</sup>

Accordingly, the court has held that the offending member state does not meet its obligation by simply interpreting national laws to eliminate a positive conflict with the EC Treaty.<sup>135</sup> In the court’s view, administrative practices are “by their nature . . . alterable at will by the authorities and . . . not given appropriate publicity,” which, in turn, leads to an unacceptable state of uncertainty for the persons concerned.<sup>136</sup> The court thus demands that member states

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<sup>133</sup> Case 167/73, *Commission v. France*, 1974 E.C.R. 359, para. 41, [1974] 2 C.M.L.R. 216 (1974).

<sup>134</sup> Case C-185/96, *Commission v. Greece*, 1998 E.C.R. I-6601, para. 32, [2001] 1 C.M.L.R. 28 (1998).

<sup>135</sup> Case C-367/98, *Commission v. Portugal*, 2002 E.C.R. I-4731, paras. 40–41, [2002] 2 C.M.L.R. 48 (2002).

<sup>136</sup> *Id.* at para. 41. See also Case C-151/94, *Commission v. Luxembourg*, 1995 E.C.R. 3685, para. 18 (holding that administrative rulings are not sufficient to fulfill a member state’s obligation to eliminate conflicts between domestic laws and the laws of the

adopt “binding domestic provisions having the same legal force as those which require [amendment].”<sup>137</sup>

Such active compliance also does not express a conservative vision of fidelity as harmony, regardless of whether opting for active compliance makes sense in the European Union.<sup>138</sup> Though such compliance clearly diminishes the range of a member state’s permissible actions, the mandate for active compliance does not seek to suppress political dissent. Instead, it attempts to ensure the effectiveness of the federal legal system by demanding clear legal rules throughout the system.

In addition to complying with Community law, member states also have a duty of effective implementation. This obligation derives principally from the basic mechanism of the directive, which orders member states to implement certain policies and norms, as specified in Article 249 (formerly Article 189) of the EC Treaty. The ECJ frequently invokes Article 10 of the EC Treaty in addition, however, to clarify that member states must take all appropriate measures to implement directives. This duty requires not only that member states pass formal implementing legislation, but also that they ensure the directives’ practical effectiveness.<sup>139</sup> Article 10 further provides the legal basis for recognizing the direct effect of an improperly transposed directive when the state’s obligations

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Community, and that binding domestic provisions are needed to avoid creating uncertainty).

<sup>137</sup> Commission v. Portugal, 2002 E.C.R. I-4731, at para. 41.

<sup>138</sup> Opting for active compliance over the U.S. method of simple adjudication may make some sense in the European Union, where the idea of precedent may be less known or effective. For example, some member states in the European Union have a tradition of parliamentary sovereignty or statutory positivism that runs counter to the idea of precedent. Even in modern Germany, where the idea of judicial review is widely accepted, a tradition of incorporating constitutional court decisions into positive statutory law persists. Even the ECJ itself has only gradually moved toward a system of precedent. See G. Frederico Mancini & David T. Keeling, From *CILFIT* to *ERT*: The Constitutional Challenge facing the European Court, 11 Y.B. Eur. L. 1 (1991). Whether due to traditions of parliamentary supremacy or statutory codification, legal certainty might reasonably be enhanced throughout the European Union by a requirement of active compliance. For a discussion of whether this requirement makes sense in the context of international trade disputes, see World Trade Organization, United States—Sections 301–310 of the Trade Act of 1974—Report of the Panel, WT/DS152/R (Dec. 22, 1999), available at <http://docsonline.wto.org>.

<sup>139</sup> Case C-336/97, Commission v. Italy, 1999 E.C.R. I-3771, para. 15 (opinion of Advocate General Jacobs).

with regard to an individual are sufficiently clear.<sup>140</sup> Conversely, the court has invoked Article 10 as support to hold that regulations, which paradigmatically operate by direct application in the member states,<sup>141</sup> need indeed not be complete, but may require member states to undertake implementing measures as well.<sup>142</sup>

Perhaps the most prominent duty to assist in the effective implementation of Community policies is the requirement that member state courts afford effective remedies for breaches of Community law. Initially, the court appeared to demand only that national courts vindicate Community law claims on the “same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.”<sup>143</sup> In these cases, the court emphasized that Community law did not create “new remedies” in member state courts, but simply required member state courts to assist in the vindication of Community law on a nondiscriminatory basis.<sup>144</sup> At the same time, however, the court also noted that member state procedures must not “render impossible in practice” the vindication of applicable Community law.<sup>145</sup> Over the years, the tension between these two principles played out in favor of Community law.<sup>146</sup> The requirement to provide ac-

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<sup>140</sup> Case C-190/87, *Oberkreisdirektor des Kreises Borken v. Handelsondernemng Moormann BV*, 1988 E.C.R. 4689, [1990] 1 C.M.L.R. 656 (1988). On the concept of direct effect generally, see *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Jolande M. Prinssen & Annette Schrauwen eds., 2002); Sacha Prechal, *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts* (1995).

<sup>141</sup> See EC Treaty art. 249.

<sup>142</sup> See Case 137/80, *Commission v. Belgium*, 1981 E.C.R. 2393, para. 9; See also Case C-217/88, *Commission v. Federal Republic of Germany*, 1990 E.C.R. I-2879, para. 34, [1993] 1 C.M.L.R. 18 (1990) (holding that the F.R.G. did not fulfil its obligations under the EC Treaty when it failed to order prompt enforcement of and punish violations of mandatory wine distillation laws).

<sup>143</sup> Case C-158/80, *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, 1981 E.C.R. 1805, para. 44, [1982] 1 C.M.L.R. 449 (1981).

<sup>144</sup> *Id.*

<sup>145</sup> Case 265/78, *H. Ferwerda BV v. Produktschap voor Vee en Vlees*, 1980 E.C.R. 617, para. 9, [1980] 3 C.M.L.R. 737 (1981).

<sup>146</sup> See, e.g., *Joined Cases 205 and 215/82, Deutsche Milchkontor GmbH v. Federal Republic of Germany*, 1983 E.C.R. 2633, para. 19, [1984] 3 C.M.L.R. 586 (1983) (holding that “the rules and procedures laid down by national law must not have the effect of making it virtually impossible to implement Community regulations and national legislation must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes”); Paul Craig &

cess to member state courts has increased, and the original respect for the procedural autonomy of member state legal systems has waned.

The original rule (against preventing the practical impossibility of vindicating Community rights) has now led to a requirement of procedural adequacy and effectiveness, demanding that member states provide remedies that go beyond what they would have provided in analogous claims based on their own national laws.<sup>147</sup> For example, the ECJ requires national courts to provide interim relief, even if such relief goes beyond national legal traditions, as in the case of British courts entertaining actions for preliminary injunctions against the Crown.<sup>148</sup>

The ECJ further articulated a duty of compensation that stands in stark contrast to the dominant U.S. entitlements approach. A member state must provide individual litigants access to its courts for claims of compensation arising from that state's own serious breaches of Community law. The United States Supreme Court has rejected analogous claims for state liability based on the view that such actions would violate a core part of state dignity, which the states did not surrender at the Founding.<sup>149</sup> The ECJ, in contrast,

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Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 213–54 (3d ed. 2003); Gráinne de Búrca, *National Procedural Rules and Remedies: The Changing Approach of the Court of Justice, in Remedies for Breach of EC Law 37* (Julian Lonbay & Andrea Biondi eds., 1997); John Temple Lang, *The Duties of National Courts under Community Constitutional Law*, 22 *Eur. L. Rev.* 3 (1997) (discussing national courts' obligations to fully apply Community law); Walter van Gerven, *Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?*, 32 *Common Mkt. L. Rev.* 679 (1995).

<sup>147</sup> See Craig & de Búrca, *supra* note 146, at 226. In a series of cases beginning with *von Colson v. Nordrhein-Westfalen*, the court held that even where a directive did not specify the sanctions attached to an individual's violation of Community law, member states must choose penalties and procedures that properly vindicate the Community norm. Case 14/83, *von Colson v. Nordrhein-Westfalen*, 1984 E.C.R. 1891, para. 26, [1986] 2 C.M.L.R. 430 (1984); Case 177/88, *Dekker v. Stichting Vormingscentrum*, 1990 E.C.R. I-3941, para. 24–26. Any fine imposed must, for example, not be nominal, but contribute to the deterrence of the unlawful conduct. *Von Colson*, 1984 E.C.R. at para. 23; Case 13/78, *Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen*, 1978 E.C.R. 1935, [1979] 1 C.M.L.R. 562 (1978).

<sup>148</sup> Case C-213/89, *The Queen v. Sec'y of State for Trans. ex parte Factortame, Ltd.*, 1990 E.C.R. I-2433, [1990] 3 C.M.L.R. 562 (1990).

<sup>149</sup> See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); cf. James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*,

simply ruled that the effectiveness of Community law (and hence the project of European integration) would be undermined absent this form of redress. Reiterating member states' duties to ensure that Community law "take full effect," the court concluded that the offending state may be held liable for the consequences of the unlawful act or omission. The court held that all this was confirmed by the duty of cooperation "under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under Community law."<sup>150</sup> Among these obligations, the ECJ held, is one "to nullify the unlawful consequences of a breach of Community law."<sup>151</sup>

Finally, the court also seized on the duty of cooperation to impose a duty of intervention on member states. Here, member states must curb private action that undermines the goals of the Community. Thus, when France failed to take sufficient action to curb the violence by farmers aimed at agricultural imports from other member states, the court invoked Article 5 (now 10) to explain that France was under a duty to "take all necessary and appropriate measures to ensure that that fundamental freedom [that is, the free movement of goods] is respected on their territory."<sup>152</sup>

The scope of the duty of intervention has yet to be fully delineated. On its face, the decision could be limited to requiring only "nondiscriminatory" enforcement of Community norms alongside similar national norms,<sup>153</sup> or it could require "effective" protection of Community norms, regardless of how the member state treats analogous violations of purely national norms. As in the case of judicial remedies, the ECJ seems to be leaning toward the latter view:

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51 Am. J. Comp. L. 237 (2003) (contrasting U.S. approach of originalism in Eleventh Amendment jurisprudence with E.U. approach to member state liability).

<sup>150</sup> Joined Cases C-6/90 & 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, para. 36, [1993] 2 C.M.L.R. 66 (1991).

<sup>151</sup> *Id.*

<sup>152</sup> Case C-265/95, *Commission v. France*, 1997 E.C.R. I-6959, para. 32.

<sup>153</sup> For example, France argued that "it put into effect, under conditions similar to those applicable to comparable breaches of domestic law, all necessary and appropriate means to prevent actions by private individuals that impeded the free movement of agricultural products and to prosecute and punish them for such actions." *Id.* at para. 21. In reciting the facts, the court did not expressly respond to this assertion. *Id.* at paras. 1-14.

It is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law . . . .<sup>154</sup>

Thus, the treatment of analogous breaches of domestic law does not appear to be the measure of the duty. Instead, the duty focuses on the member state's ability to draw on its entire arsenal of enforcement powers to curb the objectionable action and to assist in bringing about the Community goal—in this case, that of an internal market.<sup>155</sup>

Even this stronger reading requiring member state intervention to curb private action indicates a genuine concern about effectiveness of the law, not harmony in politics. To be sure, this interpretation essentially blurs the public/private distinction, or, as it is known in U.S. constitutional law, the state action divide.<sup>156</sup> It views the integrated market itself, not merely the prohibition on state-sponsored obstacles to an integrated market, as the goal of the treaty. Accordingly, private actions, as well as public actions, are seen as undermining the EC Treaty.<sup>157</sup> Even on this stronger view, however, the court has not used the duty of cooperation to suppress political disagreement about the goals of integration. For example, the ECJ specifically held that Austria had not violated its duties under the EC Treaty when it failed to prevent a demonstration that temporarily blocked a vital transit route for goods.<sup>158</sup>

In summary, the duties of information, consultation, consideration, compliance, implementation, compensation, and intervention

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<sup>154</sup> *Id.* at para. 56.

<sup>155</sup> The court stopped short of calling the farmers' actions themselves illegal. See *id.* at para. 30. The court had previously held, however, that concerted private activity may violate the free movement provisions of the EC Treaty. See, e.g., Case 36/74, *Walrave v. Ass'n Union Cycliste Int'l*, 1974 E.C.R. 1405, [1975] 1 C.M.L.R. 320 (1974).

<sup>156</sup> See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>157</sup> The development of this idea has been gradual. See *Walrave*, 1974 E.C.R. 1405 (discussing private collective agreements); Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano S.p.A.*, 2000 E.C.R. I-4139, [2000] 2 C.M.L.R. 1120 (2000) (considering individual employment contracts twenty-six years after *Walrave*).

<sup>158</sup> See Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659, [2003] 2 C.M.L.R. 34 (2003).



all address the peculiar gaps of power in the European system of governance. They are largely compatible with the liberal understanding of fidelity in that they promote effective democratic federalism.<sup>159</sup> Put another way, each of these duties implicitly distinguishes between the substantive policy choice and the effectiveness of decisionmaking or implementation. The decisions recognizing these duties do not seek to harmonize interests at the substantive policymaking stage. Instead, they help the European Union overcome debilitating obstructionism both at the input level, for example in gathering necessary information, and at the output level, such as in the enforcement of E.U. policies. Absent these decisions, the European Union's vertical division of powers would have rendered the central government largely ineffective and the project of European integration hopeless.

## 2. *The Quixotic Quest for Harmony*

A second set of decisions regarding assistance and affirmative cooperation uses the purported goal of effectiveness to impose harmonious political relations among the various actors throughout the federal system. These decisions fundamentally take issue with federalism itself or, more accurately, with the current state of European integration in the particular areas in question. In other words, these decisions try to create political unity where the institutional architecture calls for pluralism. Here, opting for unity should be the outcome of negotiation and debate, not court fiat. A liberal fidelity approach would in these cases have called for the preservation of points of political tension and democratic engagement among the various levels of government. The ECJ's conservative approach, however, insists on harmony even where there is none.

The most notorious duty of assistance that exemplifies this problem in the European Union is one we might call the duty of "stewardship."<sup>160</sup> Here, the court demands that member states act as trus-

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<sup>159</sup> The question may indeed be raised whether the duty to go beyond the nondiscriminatory treatment of Community law claims compromises policy engagement among the different levels of government in the European Union. For the most part, however, the duties discussed here (as opposed to those discussed in the next Section) do not meaningfully compromise such disputes.

<sup>160</sup> For a general defense of this duty, see Matthias Pechstein, *Die Mitgliedstaaten der EG als "Sachwalter des gemeinsamen Interesses"* (1987).

tees for the Community. A common variety of trusteeship occurs when member states are barred by positive Community action from acting in any way other than as trustees for the Community interests.<sup>161</sup> This latter form of trusteeship is what in U.S. parlance would be called conditional preemption, and it is generally less problematic depending on how the duty is triggered.<sup>162</sup> In the case of conditional preemption, the constituent state is free not to act at all, but if it acts, it must do so in a particular manner. Stewardship, in contrast, is more dramatic. First, it is triggered by Community inaction, and second, it precludes inaction on the part of member states.

Stewardship is thus the affirmative obligation to take action on behalf of the Community. It differs from the ordinary duties of assistance (where inaction is not an option either) in that stewardship requires a member state to formulate and implement policy on its own where the political institutions of the Community have failed to take action, including any action instructing the member states on what to do. This issue arose prominently, for example, when the Commission sued the United Kingdom for failing to protect the endangered herring stock in waters subject to the United Kingdom's jurisdiction. Although the Community was empowered to act and had indeed acted in the past, it failed to reauthorize conservation measures due to policy disagreements in the Council.<sup>163</sup> The court held that, as a result, "it was for the Member States, as regards the maritime zones coming within their jurisdiction, to take the necessary conservation measures in the common interest."<sup>164</sup> The court noted that "so far as the facts are concerned it is not in dispute that according to the available scientific opinions recognized by all parties a total ban on fishing was required."<sup>165</sup> Moreover, Ireland had been able to take conservation measures within a

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<sup>161</sup> Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, [1971] C.M.L.R. 335 (1971) (European Road Transport Agreement).

<sup>162</sup> See Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 *Vill. L. Rev.* 1015 (2001).

<sup>163</sup> The Commission argued that the failure was due, at least in part, to the U.K. position. Case 32/79, *Commission v. United Kingdom*, 1980 E.C.R. 2403, [1981] 1 C.M.L.R. 219 (1980).

<sup>164</sup> *Id.* at para. 15.

<sup>165</sup> *Id.* at para. 25.

few days of the expiration of the Community restrictions.<sup>166</sup> Accordingly, the United Kingdom “had a legal duty under Community law to prohibit all direct fishing” for the herring in its own waters.<sup>167</sup> In other words, the political deadlock at the Community level meant that the member states (according to the court) were under a duty to act as stewards for the interests of the Community.<sup>168</sup>

The protocol on subsidiarity, which was concluded as part of the Treaty of Amsterdam, potentially expands this duty in a slightly different way.<sup>169</sup> The protocol on subsidiarity can be read to impose

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<sup>166</sup> Id. at para. 18.

<sup>167</sup> Id. at para. 23.

<sup>168</sup> Cf. Case C-141/78, *France v. United Kingdom*, 1979 E.C.R. 2923, para. 8, [1980] 1 C.M.L.R. 6 (1979):

Performance of these duties [of Article 5 (now 10) of the EC Treaty] is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States.

Since *Commission v. United Kingdom* and *France v. United Kingdom*, the ECJ has ruled that there is “no general principle requiring the Member States to act in the place of the Council whenever it fails to adopt measures falling within its province.” See Case C-165/88, *ORO Amsterdam Beheer BV v. Inspecteur der Omzetbelasting, Amsterdam*, 1989 E.C.R. 4081, para. 15 (emphasis added). In making this statement, however, the ECJ neither overruled, nor even discussed, its prior holding in *Commission v. United Kingdom*. That earlier ruling might also be distinguished by the fact that member state inaction threatened to cause irreparable harm to a Community interest. See Due, supra note 112; Hatje, supra note 112. Professor von Bogdandy suggests that the court has not recognized the duty, but notes that there is no problem in principle with such a duty. See von Bogdandy, supra note 112, at 19. Professor Lang suggests two other cases are in this category: Case C-355/90, *Commission v. Spain*, 1993 E.C.R. I-4221 and Case C-3/96, *Commission v. Netherlands*, 1998 E.C.R. I-3031. See John Temple Lang, *The Duties of National Authorities and Courts Under Article 10 E.C.: Two More Reflections*, 26 Eur. L. Rev. 84, 89 & n.22 (2001). These latter cases, however, are not properly “stewardship” cases, as this Article has termed the fisheries case, in that a specific Community directive demanded the member state action in the cases cited by Professor Lang.

<sup>169</sup> The protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1, 105, 107 (1997) [hereinafter *Treaty of Amsterdam*], provides:

Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 [now 10] of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the

a duty on member states to address a problem that the Community has identified but, on account of the subsidiarity principle, not addressed itself. In other words, where the Community has exercised restraint because member states could address a given problem, the latter might be seen as incurring an obligation to take action. The suggestion is not that the Community should issue a directive to be implemented subsequently by the member states,<sup>170</sup> but that the Community would not act at all, and that the member states would then address the problem themselves.

By misunderstanding subsidiarity as a concern only about instrumental rationality, the protocol imposes an obligation of stewardship on the member states. If subsidiarity means allowing the unit of government that is closest to the people to take action whenever possible, then the principle must necessarily also include the substantive decision not to address (or recognize something as) a “problem” at all. By requiring the member states to take action, however, the protocol suggests that the idea of subsidiarity does not apply to the initial determination of whether a problem exists or needs action. Instead, according to the protocol, subsidiarity only applies to the means for addressing an issue. Understood in this way, the protocol threatens to impose harmony in the absence of political negotiation and debate about a given issue.

The final form of active cooperation that warrants discussion here is that of political support. Perhaps due to the difficulty of enforcing these requirements judicially, this question has largely been the subject of academic debate rather than judicial decisions. For example, former Advocate General Walter van Gerven has argued that Article 10 of the EC Treaty requires member states to cooperate with the Community even “at the general level of facilitating the formation of Community policies.”<sup>171</sup> In a related vein, Pro-

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Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

The suggestion that member states are called upon to act, as opposed to reaching their own decision whether to act at all, is reinforced by paragraph 5 of the protocol, which provides that Community action is justified when “the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system.” *Id.* at 106.

<sup>170</sup> This suggestion is contained in a separate protocol on framework directives.

<sup>171</sup> Walter van Gerven, *The Full Dimension of Article 10 EC Treaty*, in 1 XIX F.I.D.E. Congress, *supra* note 112, at 9 (2000) (emphasis omitted).

fessor John Temple Lang has suggested that when negotiating in the Council, the duty of cooperation prohibits member states from “insisting on ‘linkage’ between unrelated measures and insisting that one measure should not be adopted by the Council until another unrelated measure [has] been agreed.”<sup>172</sup> Sitting Advocates General have, at times, echoed these sentiments,<sup>173</sup> implying that member states should be required to advance Community integration when meeting in the Council.<sup>174</sup> The court, however, has not had an opportunity to address whether such a duty exists.

This duty of political support, if recognized, would be a classic instance of “conservative” fidelity, even though it would be deployed here to further the “progress” of European integration. Regardless of the particular policy aim, the duty of political support is a naked attempt to force an alignment of interests upon the diverse actors within the system. It seeks to prevent the expression of intensity of preferences via logrolling, and to prohibit member states and their representatives from opposing further integrative measures in the Council.<sup>175</sup> Not only would acceptance of this duty spell the end of federalism, it would spell the end of democracy as well.

### *B. Duties of Restraint*

This Part analyzes how the fidelity and entitlements approaches have been used to restrain the exercise of powers in the European Union by focusing on one illustrative doctrinal arena: market regulation. In dealing with this issue, the ECJ has broadly shifted from an entitlements to a liberal fidelity approach. To be sure, the court has not expressly announced this change with reference to Article 10 of the EC Treaty or any underlying “solidarity” or “duty of cooperation.”<sup>176</sup> Nonetheless, the ECJ has engaged in a doctrinal shift

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<sup>172</sup> Lang, *Community Constitutional Law*, supra note 112, at 663.

<sup>173</sup> See Case C-32/79, *Commission v. United Kingdom*, 1980 E.C.R. 2403, 2460, [1981] 1 C.M.L.R. 219, 236–37 (1980) (opinion of Advocate General Reischl).

<sup>174</sup> Cf. von Bogdandy, supra note 112, at 20 (discussing and rejecting this view).

<sup>175</sup> A more difficult question is whether the blanket refusal to participate in any negotiations passes the point of permissible linkage. Accordingly, several commentators have suggested that the “Luxembourg agreement” as well as France’s “empty chair” policy leading up to that agreement, violated the duty of cooperation. Hatje, supra note 112, at 67; Lang, *Community Constitutional Law*, supra note 112, at 662–63.

<sup>176</sup> Other restraint cases, however, do refer to this duty. See, e.g., Case C-208/80, *Lord Bruce of Donington v. Aspden*, 1981 E.C.R. 2205, para. 14, [1981] 3 C.M.L.R. 506

that favors interpreting rights and duties with a view to the integrity of the federal system as a whole.<sup>177</sup>

The court's early jurisprudence effectively granted the Community an absolute entitlement to regulate the market. The central element of this entitlement was the relationship between the provisions on market harmonization (former Articles 100 and 100a, now Articles 94 and 95 of the EC Treaty) and the free movement of goods (former Articles 30 and 36, now 28 and 30 of the EC Treaty).<sup>178</sup> The central case was the 1974 landmark judgment of *Procureur du Roi v. Dassonville*, which interpreted the scope of Article 30's (now 28) prima facie rule against quantitative restrictions on the movement of goods.<sup>179</sup> In interpreting this provision, the court famously held: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or

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(1981) (prohibiting member state taxes on European Parliament Members' receipt of travel reimbursements, since this violates the "Article 5 [now 10] . . . duty not to take measures which are likely to interfere with the internal functioning of the institutions of the Community").

<sup>177</sup> The following discussion elides the issue whether the duty of restraint is "supplemental." In other words, it does not distinguish between instances in which a power does not extend to cover a given action and instances in which the formal power exists but fidelity then prohibits the otherwise empowered actor from acting. This distinction, which appears to derive from German *Bundestreue* doctrine, is a prominent feature of German commentary on Article 10 of the EC Treaty and the duty of cooperation. See, e.g., Lück, supra note 112, at 97–98 (discussing *Bundestreue* and Article 10 of the EC Treaty and emphasizing that the basic inquiry into whether an actor lacks competence is separate from an inquiry into whether fidelity imposes on that actor any additional duties of restraint). Focusing on whether fidelity is "supplemental" in this way tends to obscure the role of fidelity as an interpretive principle in understanding the scope of powers. Insisting that fidelity is merely supplemental and plays no role in interpreting the scope of powers also obscures the similarity between the cooperation and restraint jurisprudence. This is because the European Union's restraint jurisprudence rarely speaks of restraint as being a "supplemental" duty, but simply holds that certain actions are not encompassed by the underlying power. Although the idea of a "supplemental" duty may be a helpful heuristic, for present purposes it is not important whether the decision to restrain an actor is rhetorically presented as part of the inquiry into the underlying power or a supplemental inquiry into a separate duty of restraint. The important question here is whether the analysis incorporates an understanding of the functioning of the system as a whole, and what that understanding of the needs of the federal system is.

<sup>178</sup> Many articles of the EC Treaty were renumbered by the Treaty of Amsterdam.

<sup>179</sup> Case C-8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, [1974] 2 C.M.L.R. 436 (1974). Article 30 (now 28) of the EC Treaty provided: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”<sup>180</sup>

The *Dassonville* decision had two dramatic consequences. The first was its prohibitory potential, in that the holding subjected virtually every member state market regulation to ECJ review and veto. That is, once a member state regulation was caught in the net of Article 30 (now 28), the court would have to review the regulation to determine whether it fell within one of the treaty’s exceptions or justifications.<sup>181</sup>

Second, under *Dassonville*, the broad reach of Article 30’s (now 28) prima facie rule provided the foundation for a broad interpretation of the Community’s harmonization power of Article 100 (now 94).<sup>182</sup> As Professor Joseph Weiler recently pointed out, any member state regulation falling within the *Dassonville* formula became fair game for market harmonization legislation under Article 100 (now 94).<sup>183</sup>

The effects of this original entitlements jurisprudence were tempered by two well known factors. In the political arena, the market harmonization provision at the time required unanimity in the Council.<sup>184</sup> In other words, the Community could not exploit the *Dassonville* power potential without the consent of all the member states. In the judicial arena, the court held five years later in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis*

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<sup>180</sup> *Dassonville*, 1974 E.C.R. 837, at para. 5.

<sup>181</sup> For example, Article 36 (now 30) of the EC Treaty provided for express exceptions/justifications to the prima facie rule in Article 30 (now 28):

The provisions of Articles 30 [now 28] and 34 [now 29] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

EC Treaty art. 36 (now 30).

<sup>182</sup> “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.” EC Treaty art. 100 (now article 94).

<sup>183</sup> J.H.H. Weiler, *Epilogue to The EU, The WTO and the NAFTA: Towards a Common Law of International Trade?* 201, 216 (J.H.H. Weiler ed., 2000).

<sup>184</sup> For the classic analysis of this dynamic, see Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 *Y.B. Eur. L.* 267, 286–88 (1981).

*de Dijon*),<sup>185</sup> that nondiscriminatorily applicable measures could be justified not only by the express exceptions of Article 36 (now 30), but also by so-called “mandatory requirements.”<sup>186</sup> In other words, member states could generally argue that an important government interest justified the trade-inhibiting measure in question.

And yet, these tempering factors of law and politics only further undermined effective democratic federalism. Neither central nor constituent governments could take decisive regulatory action or engage in democratic policy struggles with one another. On the one hand, centralized political power was stymied by the unanimity requirement. On the other, member state regulations were broadly subject to judicial review. Moreover, *Cassis de Dijon* effectively sought to harmonize substantive policy interests throughout the union by examining whether a member state’s reasons for a regulation outweighed the regulatory burden on Community trade.<sup>187</sup>

The subsequent introduction of majority voting for market harmonization measures and the rising case load of the ECJ, however, changed this calculus.<sup>188</sup> With *Dassonville*’s power potential liberated from the political constraints of unanimity, the need for court action to integrate the market lessened while pressure to contain central political power grew. With an exponential rise in its docket, the ECJ also felt the need to limit its involvement in reviewing member states’ trading rules.<sup>189</sup> Accordingly, the court reconsidered both its *Dassonville* entitlements approach as well as its *Cassis de*

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<sup>185</sup> Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979).

<sup>186</sup> See *id.* at para. 8.

<sup>187</sup> See *Cassis de Dijon*, 1979 E.C.R. 649, at para. 8 (“Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”).

<sup>188</sup> See EC Treaty art. 100a (added by the Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1) (now Article 95 of the EC Treaty).

<sup>189</sup> Miguel Póiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution 98–99* (1998). Moreover, as then-Professor Miguel Maduro has argued, the member states had “internalized” certain basics regarding the idea of a common market, which meant that judicial review could now be relaxed. *Id.* at 98–102.



*Dijon* approach of unifying the political assessment of regulatory policies.<sup>190</sup>

A decisive step toward a liberal fidelity approach to market regulation powers came in the landmark decision of *Criminal Proceedings against Keck and Mithouard*.<sup>191</sup> In the seminal paragraph, the court held:

[C]ontrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment . . . so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.<sup>192</sup>

According to the court, “Such rules . . . fall outside the scope of Article 30 [now 28] of the Treaty.”<sup>193</sup> In short, as long as a member state’s regulation of selling arrangements did not discriminate against out-of-state products or traders, such regulations would not be subject to review.

The new *Keck* rule thus signaled the court’s retreat both from *Dassonville*’s prohibitory rule and from the *Dassonville* power formula. Because such trading rules are not justified under, but instead “fall outside,” the EC Treaty, such rules cannot automatically serve as the predicate for positive Community harmonization legislation. For this restoration of federalism to be complete, however, the court needed to ensure that the EC Treaty’s harmonization provisions themselves would not allow an end run around the *Keck* limitation of *Dassonville*’s power formula.

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<sup>190</sup> This development was foreshadowed in decisions. See Case C-145/88, *Torfaen Borough Council v. B & Q plc*, 1989 E.C.R. 3851; see also Weiler, *supra* note 183, at 225–29 (discussing this development).

<sup>191</sup> Joined Cases C-267 & C-268/91, *Criminal Proceedings against Keck and Mithouard*, 1993 E.C.R. I-6097, [1995] 1 C.M.L.R. 101 (1993).

<sup>192</sup> *Id.* at para. 16.

<sup>193</sup> *Id.* at para. 17.

The final step in moving to a liberal fidelity approach in this area came in the recent tobacco advertising decision,<sup>194</sup> in which the ECJ for the first time struck down a Community rule as exceeding the Community's market harmonization power.<sup>195</sup> Germany had sued the Parliament and Council, arguing that Council Directive 98/43 ("Tobacco Directive"),<sup>196</sup> which regulated the advertising and sponsorship of tobacco products, was an improper use of Article 100a (now 95) of the EC Treaty. In Germany's view, the Directive did not eliminate any appreciable barriers to Community trade and hence was principally aimed at protecting human health, a subject over which the treaties gave the Community no direct powers.<sup>197</sup> The United Kingdom filed a brief in defense of the directive, arguing for an entitlements view of the provision. In the United Kingdom's view, any inquiry into the "principal objective" of the provision was unworkable, as was an examination of whether its effect was "appreciable."<sup>198</sup> As far as the United Kingdom was concerned, Article 100a (now 95) of the EC Treaty conferred an entitlement on the Community to pass any measure "concerned with the establishment and functioning of the internal market," and in its view, the Directive "falls into that category."<sup>199</sup>

The court rejected the United Kingdom's suggestion of deferring entirely to the formal features of the directive. The court explained that another provision of the EC Treaty, which granted the Community certain limited powers over public health, expressly refrained from adding the power to issue harmonizing legislation "designed to protect and improve human health."<sup>200</sup> Thus, Article 100a (now 95) could not be used to "circumvent" this limitation.<sup>201</sup>

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<sup>194</sup> Case C-376/98, *Federal Republic of Germany v. Parliament & Council*, 2000 E.C.R. I-8419, [2000] 3 C.M.L.R. 1175 (2000).

<sup>195</sup> *Id.* at paras. 31–32.

<sup>196</sup> 1998 O.J. (L 213) 9.

<sup>197</sup> *Id.* at paras. 12–32.

<sup>198</sup> *Id.* at paras. 58–60, 66.

<sup>199</sup> *Id.* at para. 61.

<sup>200</sup> *Id.* at para. 77 (citing EC Treaty art. 129, para. 4).

<sup>201</sup> *Id.* at para. 79. For a similar approach in other contexts, see, for example, Case C-155/91, *Commission v. Council*, 1993 E.C.R. I-939 (examining the "aim and content" of a waste disposal measure to determine whether its basis is the provisions governing environmental measures or those governing market harmonization). Cf. Case C-106/96, *United Kingdom v. Commission*, 1998 E.C.R. I-2729, at para. 36, [1998] 2 C.M.L.R. 981 (1998) (holding that Commission cannot "circumvent application of the

The court allowed that the choice among various potential market harmonization measures may indeed be based on health considerations, but held that ultimately any measure based on Article 100a (now 95) “must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.”<sup>202</sup>

In the court’s view, the Tobacco Directive did not satisfy this test. The directive failed to facilitate the movement of some products, simply eliminated trade in others, and established only minimum (as opposed to maximum) regulatory standards with regard to yet a third group of products. The directive could therefore not be said to have as its object the elimination of obstacles to free movement of goods and services. As for eliminating distortions of competition, the court noted that in order to warrant reliance on Article 100a (now 95), any such distortion must be “appreciable.”<sup>203</sup> Otherwise, in the court’s view, the powers of the Community would effectively be limitless, which would undermine the idea that

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principle that a basic [spending] act must first be adopted merely by limiting the scope of the action in question while carrying it over from one year to the next”); Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. 5755, at para. 45, [1996] 3 C.M.L.R. 671 (1996) (stating that, because the “principal objective” of a working-time directive was the protection of the health and safety of workers, none of the EC Treaty’s market harmonization provisions “could have constituted the appropriate legal basis for its adoption”).

<sup>202</sup> Case C-376/98, *Federal Republic of Germany v. Parliament*, 2000 E.C.R. I-8419, at para. 84.

<sup>203</sup> *Id.* at para. 106 (citing Case C-300/89, *Commission v. Council (Titanium Dioxide)* [1991] E.C.R. I-2867, at para. 23, [1993] 3 C.M.L.R. 359). More specifically, the court noted that for advertising agencies and producers of advertising media generally, the effects on intra-Community competition of being able to advertise for tobacco products in the member state in which such firms were established were only “remote and indirect.” *Id.* at para. 109. Put another way, the court found that the effects on such an economic actor of a local advertising ban would not place them at an “appreciable” disadvantage when competing with their counterparts in member states that allow such advertising. *Id.* Thus, if the idea of a limited enumeration of powers was to be preserved, not every difference in the regulatory regimes of the various member states could justify intervention based on market integration. *Id.* at para. 107. And whereas in some situations, such as racing events, the effects of different regulatory regimes for tobacco ads may indeed lead to the relocation of events, this appreciable “distortion” of competition did not justify the broad directive as a whole. *Id.* at paras. 110–11. Finally, with regard to the promotion and sale of tobacco products, the difference in regulatory regimes did not distort competition of enterprises from different member states, but simply affected the forms of competition for all operators doing business within any given member state. *Id.* at para. 113.

the Community is one of enumerated powers.<sup>204</sup> In short, the formal assignment of powers under Article 100a (now 95) could destroy the principle of divided powers, if that assignment was not tempered by a jurisprudence mindful of federalism itself.<sup>205</sup>

With the tobacco decision, then, the ECJ completed its reversal in approach from the original *Dassonville* entitlements formula. The Community still can, by majority vote, impose policies when they are specifically aimed at eliminating obstacles to Community trade. But this power does not yield complete Community ownership of the market arena. A member state's trading rules that do not discriminate against products or traders from other member states will not automatically be subject to judicial review or positive Community preemption. Thus, neither level of government has a complete entitlement over a substantively defined regulatory domain.

### III. FIDELITY AND ENTITLEMENTS IN THE UNITED STATES

In contrast to the German *Bundesverfassungsgericht* and the European Court of Justice, the United States Supreme Court has not constructed a general doctrine of fidelity to hold the system of divided power together. To be sure, individual provisions of the U.S. Constitution suggest specific duties of mutual cooperation and respect, especially among the states and for the Union.<sup>206</sup> In gen-

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<sup>204</sup> *Id.* at para. 107.

<sup>205</sup> Indeed, the ECJ's decision in this case might be viewed as a reaction to the famous Maastricht decision by the *Bundesverfassungsgericht*, in which the German court threatened to step in should the Community take action beyond its powers. See BVerfGE 89 (1993), 155 (187–88); see also, Bruno Simma, J.H.H. Weiler & Markus Zöckler, *Kompetenzen und Grundrechte* 68–83, 161 (1999) (arguing that the Tobacco Directive is *ultra vires* and that upholding the Directive may provoke a constitutional crisis with national courts reviewing the legality of the Community measure).

<sup>206</sup> Article IV, which collects many of these obligations, provides, for example, that States give "Full Faith and Credit" to each other's official acts and records, U.S. Const. art. IV, § 1; that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," *id.* art. IV, § 2, cl. 1; and that states comply with each others' requests for extradition, *id.* art. IV, § 2, cl. 2. In addition to the Extradition Clause, the Fugitive Slave Clause provided for a similar obligation to deliver up slaves that had fled to another state. *Id.* art. IV, § 2, cl. 3. The latter clause is, of course, superseded by the passage of the 13th Amendment. *Id.* Amend. XIII. Article IV further provides that changes to existing state boundaries may not be made without the consent of the affected state and Congress, and that Congress shall "guarantee to every State . . . a Republican Form of Government, and shall protect each of

eral, however, the text and structure of U.S. federalism endows each level of government with independently effective institutions of government. The U.S. system provides each level of governance with full powers of taxation, legislation, execution, and adjudication, whereas Germany and the European Union do not. Accordingly, it is tempting to agree with the entitlements view that, in the United States, no level or unit of government needs to consider the interests of any other. This idea resonates, moreover, with James Madison's famous argument in Federalist No. 51, that excesses in governance are best controlled by dispersing power and relying on the self-interest of diverse governmental actors as checks against one another.<sup>207</sup>

And yet, U.S. theory and doctrine contains several challenges to this dominant idea. Even within the Madisonian framework, the separation of powers is only a means to an end—the creation of a successful union. As Madison wrote in Federalist No. 46: “The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>208</sup> Based on the comparative investigation so far, it should come as no surprise that the visions competing with the dominant entitlements approach are twofold: The first seeks to harmonize the interests within the federal system, whereas the second seeks to preserve the diversity of democratic forums within an effective system of federal governance. As the following discussion shows, these competing ideas are not isolated instances of aberrant decisions, but represent coherent alternatives to the prevailing entitlements view.

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them against Invasion” and upon request, against “domestic Violence.” *Id.* art. IV, § 4. The Constitution further envisions that each state will appoint and maintain a militia, which Congress may regulate and call upon (under the direction of the President as Commander-in-Chief) to execute federal law and to protect the nation against foreign and domestic violence. See *id.* art. I, § 8, cl. 15; *id.* art. II, § 2, cl. 1.

<sup>207</sup> The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>208</sup> *Id.* No. 46, at 315 (James Madison). The agents and the people in this picture should not, however, be viewed as static entities, related by simple hierarchy. This would fall prey to the Schmittian metaphysical fallacy regarding democracy. Instead, the people and their institutional agents are continually in flux and in the process of creating one another.

*A. Entitlements Jurisprudence*

The dominant entitlements approach to federalism can be traced back in the case law to Chief Justice Marshall's classically nationalist conception of the Commerce Clause power. Writing for the Court in *Gibbons v. Ogden*, Marshall held that the power to regulate commerce "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>209</sup> Marshall's idea was that where Congress has some power as a matter of formal text, such as the power to regulate interstate commerce, Congress is under no additional general duty to avoid unnecessary or harmful intrusion on state power. The restraints on Congress are not to be found in any general constitutional duty of fidelity to the federal enterprise as a whole, but rather in the political process. As Marshall noted, "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, . . . the sole restraints on which they have relied, to secure them from its abuse."<sup>210</sup> Thus, in *Gibbons*, Marshall does not suggest any constitutionally grounded concern for the federal system as a non-textual restraint on the federal government's exercise of its Commerce Clause powers.<sup>211</sup> Once the object of the regulation pertains to interstate commerce, the power of regulation "is vested in Congress as absolutely as it would be in a single government."<sup>212</sup>

In contrast to the ECJ's approach in the tobacco decision,<sup>213</sup> the Supreme Court here did not suggest a nuanced review to prevent this particular enumeration of powers from negating the division of powers itself. To be sure, the decision acknowledged that "[t]he enumeration presupposes something not enumerated."<sup>214</sup> It took the classic entitlements view, however, that "that something, if we regard the language or the subject of the sentence, must be the ex-

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<sup>209</sup> 22 U.S. (9 Wheat.) 1, 196 (1824).

<sup>210</sup> *Id.* at 197.

<sup>211</sup> To be sure, Marshall's statement may leave it open that a constitutionally grounded concern for the states could play a part in political deliberations. In the judicial arena, however, Marshall holds that such a concern is misplaced.

<sup>212</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 197.

<sup>213</sup> See *supra* notes 194–205 and accompanying text.

<sup>214</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 195.

clusively internal commerce of a State.”<sup>215</sup> With this decision, then, the stage had been set for a prominent entitlements response to intergovernmental power disputes in the U.S. federal system.

For the next century, the Court dealt with tensions between the federal and state levels of government by carving up jurisdictional entitlements. The goal was to enable each level of governance to be completely and independently effective within separate substantively defined areas.<sup>216</sup> Under the classic doctrine of “dual federalism,” these spheres would not overlap. Where states could act, they could ordinarily do so without fear of federal preemption. And where the federal government could act, it would not need to consider the interests of the states or of the federal system as a whole. Add to this the immunity each level of government enjoyed from regulation or taxation by the other,<sup>217</sup> and the idea of an absolute separation of federal and state spheres of action emerged: “There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement.”<sup>218</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> See, e.g., Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 *Duke L.J.* 1513 (2002) (noting the difficulty of transposing dual federalism jurisprudence into modern times); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *Yale L.J.* 619 (2001) (criticizing dual federalism). For example, one of the most prominent distinctions between local and national economic activity was that drawn between manufacturing and production, on the one hand, and interstate commerce on the other. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (distinguishing between production and commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (distinguishing manufacturing from commerce).

<sup>217</sup> See, e.g., *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (invalidating provisions of the federal bankruptcy code as applied to states and their political subdivisions); *Panhandle Oil v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (holding that a state may not tax the sale of goods to the federal government); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870) (declaring unconstitutional a tax by Congress on the salary of a state judge); *Dobbins v. Comm’rs of Erie County*, 41 U.S. (16 Pet.) 435 (1842) (finding a state tax on a federal officer’s salary to be an impermissible intrusion on congressional power); *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819) (holding that state governments have no right to tax the constitutional means employed by the federal government to execute its powers).

<sup>218</sup> *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 406 (1871). See also *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1859) (declaring that “the powers of the General Government, and of the State, although both exist and are exercised within the same territo-

Although scholars have long suggested that the era of dual federalism ended with the Court's New Deal shift in jurisprudence,<sup>219</sup> the idea of full regulatory entitlements persists to this day, at least insofar as federal powers are concerned. The New Deal ended the substantively defined areas of protected state sovereignty even as substantively defined areas of federal authority remained. Within the newly conceived realm of broad federal power, the federal government reigned supreme, without any constitutional duty to consider the well-being of the federal system as a whole. As the Court said in *United States v. Darby*, "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."<sup>220</sup>

Thus, with regard to federal power, courts since the New Deal continued to ask only whether or not a particular activity was within "the plenary power conferred on Congress by the Commerce Clause."<sup>221</sup> The New Deal had simply expanded the judicially recognized sphere of the federal government's authority. The consequences and manner of exercising federal powers were still beyond judicial control. In other words, as far as federal powers were concerned, the New Deal shift was not an abandonment of jurisdic-

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rial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres").

<sup>219</sup>See Daniel J. Elazar, *The American Partnership: Intergovernmental Cooperation in the Nineteenth-Century United States* 22–23 (1962); James F. Blumstein, *Federalism and Civil Rights, Complementary and Competing Paradigms*, 47 *Vand. L. Rev.* 1251, 1274–76 (1994); Erwin Chemerinsky, *Rethinking State Action*, 80 *Nw. U. L. Rev.* 503, 543 (1985); Corwin, *supra* note 4; Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 *Hastings Const. L.Q.* 483 (1998). But see Young, *supra* note 4, at 167–77 (suggesting an exception to the demise of dual federalism in the sphere of external relations).

<sup>220</sup>312 U.S. 100, 115 (1941). An argument might be made that the plenary power doctrine only properly applies to invocations of the Commerce Clause power directly, that is, unaided by the Necessary and Proper Clause. The Supreme Court, however, has never indicated any such limitation. Even if the Supreme Court had, the contrast with the European Union would remain striking. The tobacco case, see *supra* notes 194–205 and accompanying text, expressly interpreted the market harmonization provisions, not their use only in conjunction with EC Treaty art. 308, which provides certain supplemental powers, much as the Necessary and Proper Clause does in the United States.

<sup>221</sup>312 U.S. at 115.



tional entitlements, but largely an increase in the allocation of federal government entitlements.<sup>222</sup>

With regard to state powers, the modern Court has at times similarly rejected the existence of a generalized background principle that would require institutional actors to view themselves as participating in a common enterprise of governance. In *Nevada v. Hall*,<sup>223</sup> for example, the Court held that California could open its courts to suits against the state of Nevada without any consideration of the effects this would have on its sister state. The Court specifically dismissed Nevada's argument "that the Constitution implicitly establishes a Union in which the States are not free to treat each other as unfriendly sovereigns, but must respect the sovereignty of one another."<sup>224</sup> Although specific provisions of the Constitution expressly limited the exercise of state powers, the Constitution, so the Court held, did not contain any general principle that one state heed another's interests:

The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end.<sup>225</sup>

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<sup>222</sup> As Professor Charles Black has noted:

Here is one of the most important questions conceivable, with respect to the legal basis of federalism. Is there an *implied* limitation on the federal powers, to the effect that they shall not be used to deal with some matters under state authority? The prevalent modern answer is negative. But the grave corollary is that federalism has no basis in firm constitutional law. The federal powers—over commerce, taxation, the post, the armed forces, the currency, patents and copyrights, maritime affairs, and so on—can be used to coerce *any* result, however "local," unless such an implied limitation exists, and the concept of a *legally defined* federalism, judicially umpired, has then no substance.

Charles Black, *Perspectives in Constitutional Law* 25 (1970).

<sup>223</sup> 440 U.S. 410 (1979).

<sup>224</sup> *Id.* at 424–25.

<sup>225</sup> *Id.* at 425–26 (quoting *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 590 (1839)).

The opinion explained that since California in this instance had clearly “declared its will . . . [n]othing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada.”<sup>226</sup> In other words, California was free to deal with Nevada at arm’s length, and the fact that the two states were part of a larger union did not carry with it any obligation of mutual concern or respect.

The Rehnquist Court’s federalism jurisprudence presents an interesting struggle with this legacy. The current majority has sought to revive some limitation on federal powers in an effort to enhance the states’ role within the federal system. But while this effort might facially appear as an attempt to install some kind of duty of fidelity to states’ interests, a duty that so many opinions from *Gibbons* to *Darby* reject, the Court refuses to appeal systematically to any generalized principle of making the federal system work as a productive whole. Instead, the Court frequently seems preoccupied with protecting state autonomy as an end in itself. In other words, the Court generally relies less on a vision of the legitimate role of the states within the overall system of democratic federal governance than on appeals to what the states did or did not “surrender” upon joining the Union.<sup>227</sup>

As a result, the current Court regularly institutes limitations on powers using an entitlements jurisprudence that harkens back to the old notion of dual federalism. The Court announces bright-line jurisdictional entitlements that federal and state governments may exercise in disregard of the effects on the structure of federalism as a whole. This basic approach characterizes much of the present

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<sup>226</sup> *Id.* at 426.

<sup>227</sup> See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Printz v. United States*, 521 U.S. 898, 918–19 (1997); cf. James E. Pfander, *supra* note 149 (contrasting historical turn in U.S. Eleventh Amendment jurisprudence with the ECJ’s focus on the *aquis communautaire*). The U.S. focus on protecting state autonomy as an end in itself pervades much of the scholarly debate about state autonomy as well. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 *Mich. L. Rev.* 390 (1998); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 *Va. L. Rev.* 1617 (1997). For an argument considering the role of states in serving the system of federal governance as a whole, see Halberstam, *supra* note 162; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813 (1998).

Court's federalism jurisprudence, whether the issue is one of powers or immunities.

*United States v. Lopez*<sup>228</sup> provides a good illustration. In *Lopez*, the majority expressed its deep concern over what it thought was the limitless nature of the federal government's assertion of power under the Commerce Clause. In the Court's view, federal regulation of the possession of guns near schools could not be based on a generalized argument about the "costs of crime" or impact on "national productivity."<sup>229</sup> On such a theory, "it is difficult to perceive any limitation on federal power," even in areas such as criminal law, family law, or education.<sup>230</sup> To embrace the government's view, then, would ultimately "require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated."<sup>231</sup>

The Court's response to this problem, however, is simply to create a new formal entitlement. Pursuant to *Lopez* and its progeny, the federal Commerce Clause now extends to (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) "economic" activities.<sup>232</sup> While the latter activities must "substantially affect" interstate commerce,<sup>233</sup> this additional question of the magnitude or quality of the effect is, in reality, committed to Congress's discretion once the activity itself is of an "economic nature."<sup>234</sup>

The distinction between "economic" and "non-economic" activity does not bear much relation either to the constitutional text or the preservation of democratic governance within the federal system. Nothing in the Necessary and Proper Clause suggests that the "economic nature" of the regulated activity (to the extent this is a useful concept at all) is either necessary or sufficient to place an activity within Congress's powers ancillary to the regulation of inter-

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<sup>228</sup> 514 U.S. 549 (1995).

<sup>229</sup> *Id.* at 564.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 567.

<sup>232</sup> *Id.* at 558–60.

<sup>233</sup> *Id.* at 559.

<sup>234</sup> *United States v. Morrison*, 529 U.S. 598, 610–12 (2000); cf. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (allowing Congress to reach local activity whenever such activity, aggregated with like instances elsewhere, exerts a substantial impact on interstate commerce); *Perez v. United States*, 402 U.S. 146, 154 (1971) (same).

state commerce. Nor does arbitrarily declaring one sliver of social activity categorically out of bounds help much to contain the federal government or to increase democratic engagement over contested boundaries within the federal system. Requiring a clear statement or detailed findings, in contrast, would be far more promising in terms of increasing the political salience of federal action and fostering democratic engagement on the issue of federal powers.<sup>235</sup> Nonetheless, according to *Lopez* and *Morrison*, as with the various entitlements of earlier times, Congress continues to reign supreme in this newly defined jurisdictional realm. In short, although the motivation for the doctrinal change in *Lopez* was akin to a concern about fidelity,<sup>236</sup> the doctrinal manifestation was one of formal jurisdictional entitlements.

The comparison with the development of ECJ case law on the harmonization provisions highlights the constitutional policy choice that underlies *Lopez*. Prior to *Lopez*, the United States Supreme Court had not struck down a single federal law for having overstepped the bounds of the Commerce Clause in sixty years. Likewise, prior to the tobacco decision, the ECJ had not struck down a single provision of Community law for having exceeded the bounds of the harmonization provisions since the Community's inception. In each case, the foundational text sought to delegate a limited set of powers to the central government. In each case, the aggressive exercise of market regulation powers threatened to neu-

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<sup>235</sup> Cf. William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597–98 (1992) (noting that a strong case can be made for clear statement rules but raising normative concerns about such rules); Philip P. Frickey, The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and *United States v. Lopez*, 46 Case W. Res. L. Rev. 695, 720 (1996) (advocating reliance on Congressional findings); Barry Friedman, Legislative Findings and Judicial Signals: A Positive Political Reading of *United States v. Lopez*, 46 Case W. Res. L. Rev. 757, 758–59 (1996) (defending Frickey's clear statement argument but noting that *Lopez* neither adopted nor rejected it); Robert A. Schapiro & William W. Buzbee, Unidimensional Federalism: Power And Perspective In Commerce Clause Adjudication, 88 Cornell L. Rev. 1199, 1272–74 (2003) (discussing significance of clear statement rules and findings).

<sup>236</sup> Professor Lawrence Lessig describes *Lopez* as grappling with “interpretive fidelity,” which he describes as the “translation” of an original understanding of the division of powers to fit modern circumstances. Lawrence Lessig, Translating Federalism: *United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 129–30. As Lessig explains, however, his idea of fidelity is a “version of . . . originalism,” and thus quite different from the idea of fidelity explored in this Article. *Id.* at 127.

tralize these limitations and undermine federalism. Both decisions are self-conscious reactions to this expansion of central power. Indeed, the ECJ might have been emboldened by the specific example of the U.S. Supreme Court in *Lopez* on this score.<sup>237</sup> And yet, the two courts chose characteristically different paths in responding to this common problem. Whereas *Lopez* redefined the formal scope of federal and state entitlements to power, the tobacco decision inquired into the purpose of the central legislation.<sup>238</sup>

Turning to other recent federalism decisions, we see that the choice of entitlements frequently characterizes the current Supreme Court's approach here as well. Indeed, the Court's Tenth and Eleventh Amendment decisions regarding state autonomy and immunity, respectively, are the most dramatic modern extension of the idea of separation and independence within our federal structure. Here, too, the Court was acting on a general concern for the states, yet with an eye towards state autonomy as an end in itself. On the one hand, the judgments are based on unwritten "essential

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<sup>237</sup> Not only did the tobacco decision follow *Lopez* in time, but it also came shortly after the Supreme Court and the European Court of Justice had begun their by-now regular meetings to exchange views on the business of high courts.

<sup>238</sup> To be sure, the text of the European harmonization provision at issue contained a strong suggestion of a purpose-based inquiry. See EC Treaty art. 95. Nevertheless, the ECJ could well have yielded to the United Kingdom's proposal of a more formalistic evaluation of the purpose that would have deferred to the Community legislator, and effectively conferred on the Community an entitlement to act. See, for example, the United Kingdom's argument in that case, C-376/98, *Federal Republic of Germany v. Parliament & Council*, 2000 E.C.R. I-8419, paras. 58–65. Similarly, in the United States, the absence of specific purpose-based language in the Constitution has not prevented the Court from adopting a purpose-based inquiry elsewhere. See *infra* notes 287–300 and accompanying text for a discussion of the dormant Commerce Clause. See also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *Yale L.J.* 441, 487, 494–98 (2000) (discussing Court decisions related to Congress's power to enact anti-discrimination legislation under Section 5 of the Fourteenth Amendment). Nor do clear statement rules or other procedural evidentiary devices derive in any meaningful manner from the constitutional text. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that Congress must plainly state its intent in order to regulate the retirement age of state judges); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (explaining that shifting presumptions are appropriate in Equal Protection cases because of the practical difficulty of determining legislative "intent"). Nonetheless, the Court in *Lopez* and *Morrison* rejected all of these options in favor of the formal distinction between "economic" and "noneconomic" activity.

postulates<sup>239</sup> of our constitutional structure. On the other hand, the lens of decision is usually not the functioning of the system as a whole, but the Court's understanding of an original bargain struck among the states.<sup>240</sup> The result is a set of cases that stands for the antithesis of fidelity.

*New York v. United States*<sup>241</sup> and *Printz v. United States*,<sup>242</sup> for example, proclaim that states need not assist the federal government in the regulation of private parties, regardless of the federal need or the lack of burden on the states. Should the federal government seek the cooperation of the states, it must, under *New York* and *Printz*, entice the States to consent by exercising its power of preemption or the purse. These decisions are motivated by the Court's recognition of some duty of respect for the integrity of the states and the preservation of lines of democratic accountability in a federal system—both valuable goals from the perspective of fidelity. And yet, the Court does not explain how commandeering impairs these goals in a way that preemption does not, or why a prohibition on unfunded mandates would not similarly protect state fiscs.

As with *Lopez* and *Morrison*, the Court's anticommandeering decisions work in practice as complete, bright-line "entitlements."<sup>243</sup> The exercise of such an entitlement is not subject to any continuing duty of fidelity to the functioning of the system as a whole, and federal law attempting to enter this realm is strictly prohibited. This betrays that ultimately, in the Court's view, federal commands are prohibited not because of considerations of effective democratic federalism, but simply because "[i]t is the very *principle* of separate state sovereignty that such a law offends."<sup>244</sup>

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<sup>239</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 919 (1997) (Tenth Amendment); *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (Eleventh Amendment).

<sup>240</sup> See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751–52 (2002); *United States v. Morrison*, 529 U.S. 598, 618 (2000); *Alden v. Maine*, 527 U.S. 706, 755–56 (1999); *Printz*, 521 U.S. at 918–19; *Lopez*, 514 U.S. at 567.

<sup>241</sup> 505 U.S. 144 (1992).

<sup>242</sup> 521 U.S. 898 (1997).

<sup>243</sup> See Hills, *supra* note 227, at 819 (referring to *New York* as an "entitlement" rule); see also Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 173, 178–79 (March 2001) (discussing the *Printz* entitlement with regards to the *Grundgesetz*).

<sup>244</sup> *Printz*, 521 U.S. at 932.

Similarly, the Court's recent sovereign immunity decisions, from *Seminole Tribe*<sup>245</sup> through *Federal Maritime Commission*,<sup>246</sup> categorically hold that Congress cannot use its Article I powers to authorize individuals to sue a state for damages without that state's consent. Here, too, the decisions are not grounded in any compelling constitutional text.<sup>247</sup> Here, too, the cases are born out of general solicitude for the interests of the states. And here, too, the Court fails to consider the states as part of the larger constitutional enterprise of effective democratic federal governance.

The Court arrives at its decisions in this area by resorting to a vague historical conception of the rights that states allegedly retained at the founding as well as to an antidemocratic and highly formalized understanding of state dignity as unaccountability. Although some idea of state "dignity" may well be coherent, the idea that such "dignity" should preclude accountability to individual citizens for a state's deliberate illegal actions is far from compelling within a conceptual framework of democratically legitimate institutions of governance.<sup>248</sup> Nor does this jurisprudence seriously consider the impact of this entitlement on the effectiveness of federal law.<sup>249</sup>

The United States Supreme Court's Tenth and Eleventh Amendment cases also stand in striking contrast to the analogous doctrines of the European Court of Justice. Certainly, there are structural reasons why the U.S. Supreme Court should be more reluctant than the ECJ to allow the central government freely to

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<sup>245</sup> *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>246</sup> *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

<sup>247</sup> Indeed, the Court has expressly acknowledged that its decisions in this area extend beyond the text of the Constitution. See, e.g., *Alden v. Maine*, 527 U.S. 706, 727 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999).

<sup>248</sup> See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 *Stan. L. Rev.* 1921, 1950–58 (2003).

<sup>249</sup> Various Supreme Court opinions simply stipulate that the alternative of an *Ex Parte Young* action for prospective injunctive relief should suffice to protect the effectiveness of federal law. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (Kennedy, J., dissenting); *Seminole Tribe*, 517 U.S. at 72 n.16 (1996). Here, too, some lessons might be gained from the European experience, which moved from a purely injunctive regime of "stop, or I shall have to say stop again" to one of judicial imposition of damages specifically to improve the effectiveness of central law vis-à-vis member states. See Commission Communication, *Better Monitoring of the Application of Community Law*, Nov. 12, 2002, COM(02)725, final, at 19–20.

“commandeer” the constituent states. For example, the lack of representation of state governments in the U.S. Senate when compared to member state representation in the E.U. Council, the relative size of the U.S. central executive and bureaucracy compared to that of the European Union, and the fundamental precept of vertical federalism in the European treaties all suggest institutional reasons for welcoming “commandeering” in the European Union but not in the United States.<sup>250</sup> Nonetheless, the categorical nature in which this reluctance manifests itself in the United States suggests an underlying constitutional policy choice on the part of the judiciary that does not seem justified simply by these differences in institutional architecture.<sup>251</sup> Moreover, in the area of constituent state sovereign immunity, there are no relevant textual or structural differences at all to help justify the transatlantic difference in approach.<sup>252</sup>

The irony in this comparison is that the United States Supreme Court treats the various levels of government as permanently hostile adversaries that have reached a bargain in a historically situated arms-length deal, whereas the European Court of Justice views the various actors as fundamentally joined in a common enterprise. And these different approaches persist, despite the fact that as a formal matter, the U.S. Constitution was ratified in the name of a single people who arguably transcended the separate sovereignty of the states, whereas the E.U. treaties were expressly concluded as sovereign actions of the individual member states.

### *B. Fidelity Jurisprudence*

An entitlements approach dominates discourse in the United States on federalism. Nevertheless, a constitutionally grounded concern for the common enterprise is more than occasionally dis-

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<sup>250</sup> See generally, Halberstam, *supra* note 83 (exploring the differing roles of commandeering in the European Union, Germany, and the United States through a discussion of the distinctive institutional dynamics of each federalist system).

<sup>251</sup> *Id.* at 234 (noting the rejection in the United States of a distinction between “framework” laws, which preserve a meaningful element of constituent state discretion, and other laws that do not).

<sup>252</sup> For an insightful comparison on this point, see James E. Pfander, Member State Liability and Constitutional Change in the United States and Europe, 51 *Am. J. Comp. L.* 237 (2003).



cernible. The following analysis seeks to demonstrate that this concern presents a common thread in a series of cases that are otherwise not generally thought to manifest a coherent approach to constitutional interpretation. As with fidelity jurisprudence in the European Union and Germany, two variations of fidelity underlie this line of cases: first, fidelity as the creation of harmony, and second, fidelity as the preservation of an effective democratic federal union.

The basic idea of fidelity in U.S. federalism jurisprudence can be traced back to *McCulloch v. Maryland*, which lays down the general test for examining the constitutionality of an act of Congress under Article I: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>253</sup> Although in practice the Court has since turned this approach into a formal legal entitlement, the original formulation reflected a more searching review—one that focused on the “spirit” of constitutional federalism as well as on the purpose of the law under review.

As Justice Marshall explained, the assertion of a purpose would have to be made in good faith. In addition, the political process was not the only limit to checking formally valid federal regulation of interstate commerce, contrary to what *Gibbons v. Ogden* would later suggest.<sup>254</sup> The Court’s opinion in *McCulloch* warned:

[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.<sup>255</sup>

This statement, then, lays out an alternative to the territorial conception of powers under the entitlements approach. Instead of allowing an actor free reign to regulate whenever the subject of regulation falls within a particular jurisdictional field, *McCulloch* promises an inquiry into the bona fides of the regulatory act.

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<sup>253</sup> 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>254</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>255</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 423.

The fate in the United States of this alternative inquiry in reviewing the exercise of enumerated powers (as opposed to the violation of individual rights)<sup>256</sup> has been mixed. Since *United States v. Darby*,<sup>257</sup> the Court has frequently rejected reliance on legislative motive.<sup>258</sup> Nevertheless, the Court continues to struggle with motive review as well as the idea of tempering formally valid exercises of power based on their effects on the federal system as a whole.

For example, the Supreme Court has suggested, though not rigorously applied, a fidelity approach to enumerated powers in addressing the federal treaty, taxing, and spending powers. To the extent the exercise of these powers can achieve the effect of “ordinary” legislation, such exercise may circumvent the substan-

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<sup>256</sup> When adjudicating constitutional prohibitions, such as those spelled out in the First and Fourteenth Amendments, the Court frequently resorts to an examination of Congress’s purpose or intent. The Court conducts a classic motive-based inquiry, for example, in Equal Protection Clause challenges, in which the critical inquiry concerns the presence or absence of discriminatory motive. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (conducting an inquiry into the presence or absence of a racially discriminatory motive). Similarly, in First Amendment speech and religion cases, purpose or intent may play a role, albeit one that is slightly more contested. Motive or purpose review has had a mixed reception in the Court’s jurisprudence under both the religion and speech clauses. See, e.g., *Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753, 763–67 (1995) (discussing “endorsement” test and importance of “reasonable observer” in Establishment Clause challenge); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533–34 (1993) (discussing motive and purpose review in free exercise challenge); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (establishing “purpose” inquiry under the Establishment Clause). With respect to the Speech Clause, compare *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“the purpose of Congress . . . is not a basis for declaring . . . legislation unconstitutional”) with *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (reviewing whether a law “was designed to suppress certain ideas that the City finds distasteful”).

<sup>257</sup> 312 U.S. 100 (1941).

<sup>258</sup> Cf., e.g., Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731, 776–80 (2003) (discussing motive based inquiries that seek to revive this aspect of *McCulloch*); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 Harv. J.L. & Pub. Pol’y 31, 39 (1998) (suggesting purpose inquiry based on *McCulloch*’s original formulation). On the role of purpose review in constitutional law more generally, see Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95; Elena Kagan, *Private Speech, Public Purpose: The Role Of Governmental Motive In First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1143–60 (1986).

tive enumeration of powers designed to limit the authority of the federal government.<sup>259</sup> Accordingly, in each case, the question arises whether the federal power simply designates a particular procedure, such as concluding a treaty, taxing, or spending,<sup>260</sup> or whether the power is subject to substantive limitations as well. Arguing against substantive limitations is the view that raising revenue and concluding treaties are both sufficiently onerous as to eliminate any serious risk of federal overreaching. At the same time, however, especially with the increase of available federal revenue since the passage of the Sixteenth Amendment<sup>261</sup> and the dramatic expansion of international agreements, scholars and litigants have raised concerns about the federal balance of power in these areas.<sup>262</sup> In each case, the Court has responded by rejecting an entitlements approach that would examine only the formal procedural contours of the federal measure.

In addressing the Treaty Clause, for instance, the Court has acknowledged the breadth of federal power while purporting to limit its use to objectively “proper” purposes. Thus, in *Missouri v. Holland*, Justice Holmes noted that the Treaty Clause indeed allowed for federal action, including congressional implementing legislation, even where the federal government could not have acted by

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<sup>259</sup> For a more in-depth look at the consequences on domestic law of federal governments exercising their spending and treaty powers in areas of state or provincial jurisdiction, see Ronald Watts, *The Spending Power in Federal Systems: A Comparative Study* (1999); *The Effect of Treaties in Domestic Law* (Francis G. Jacobs & Shelley Roberts eds., 1987).

<sup>260</sup> These powers are “procedural” in that they specify modes of action that may, at least prima facie, cut across different substantive areas of activities. They are also procedural in that the Constitution provides for special rules of enactment in each case. See U.S. Const. art. II, § 2, cl. 2 (Treaty Clause); *Id.* art. I, § 7, cl. 1 (Revenue Clause).

<sup>261</sup> The Sixteenth Amendment did not necessarily change the powers of the federal government to raise unapportioned income taxes, but certainly settled the debate over whether the federal government had that power and thus ushered in an era of a greatly expanded federal budget. To trace the effect of the Sixteenth Amendment on the Court’s treatment of the federal taxing power, compare the following cases: *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429 (1895); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Eisner v. Macomber*, 252 U.S. 189 (1920).

<sup>262</sup> See, e.g., Lynn A. Baker, *Conditional Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995); Bradley, *supra* note 227, at 391–95; David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 33–34 (1994); Goldsmith, *supra* note 227, at 1622–23; Lessig, *supra* note 236, at 168; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 634 (1993).

statute alone.<sup>263</sup> Use of this broad power to adopt and implement a treaty on migratory birds was justified because “the States individually are incompetent to act,” and the treaty served “a national interest of very nearly the first magnitude . . . [that] can be protected only by national action in concert with that of another power.”<sup>264</sup> The Court’s subsequent discussions of the Treaty Clause have reiterated the idea that the clause “extend[s] to all proper subjects of negotiation between our government and other nations,”<sup>265</sup> and that it “cover[s] all subjects that properly pertain to our foreign relations.”<sup>266</sup> Despite this rhetoric, however, the Supreme Court has never struck down a treaty on the grounds that it failed to advance a national purpose.<sup>267</sup>

The Court has similarly grasped at a fidelity approach to prevent the federal taxing power from circumventing limitations of the federal government’s regulatory powers. For example, before the New Deal, when the Commerce Clause was held to preclude direct federal regulation of child labor,<sup>268</sup> Congress passed a law imposing a ten percent excise tax on the annual net profits of every employer who knowingly employed any children in the production of certain goods. In *Bailey v. Drexel Furniture Co.* the Court struck down this effort because it looked too much like the prohibition that Congress (at the time) could not have imposed directly.<sup>269</sup> In the Court’s view, allowing Congress to spell out detailed regulations

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<sup>263</sup> 252 U.S. 416, 434 (1920).

<sup>264</sup> *Id.* at 433, 435. In this case, the federal interest was the containment of externalities and averting a tragedy of the commons. The regulatory subject, Holmes emphasized, was “birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away,” and it was, accordingly, “not sufficient to rely upon the States” to protect this natural resource. *Id.* at 434–35.

<sup>265</sup> *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

<sup>266</sup> *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

<sup>267</sup> Indeed, as Professor David Golove notes, the Court was quite lenient in its review on that point in *Missouri v. Holland* itself, where the treaty with Canada had been pursued as part of a strategy to ward off potential challenges to domestic legislation on the subject rather than an original interest in solving an international problem at the international level. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 *Mich. L. Rev.* 1075, 1256 (2000) (“If ever the federal government could be charged with bad faith in making a treaty, this had to be the case.”).

<sup>268</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>269</sup> 259 U.S. 20, 37 (1922) (“Its prohibitory and regulatory effect and purpose are palpable.”), overruled by *United States v. Darby*, 312 U.S. 100 (1941).

for any area beyond its otherwise enumerated powers and to enforce such regulations simply by taxing noncompliance “would . . . break down all constitutional limitation of the powers of Congress.”<sup>270</sup>

Although the New Deal expansion of Federal Commerce Clause powers sharply curtailed the practical importance of this question,<sup>271</sup> the constitutional difficulty of “identifying” taxes that impermissibly circumvent the enumeration of federal powers persists.<sup>272</sup> Over the years, the Court has suggested conflicting approaches, at times recognizing the “purpose and effect” of a purported tax,<sup>273</sup> and at other times disavowing any inquiry into the “wrongful purpose or motive [that] has caused the [taxing] power to be exerted”<sup>274</sup> or into the “consequences arising from the exercise of the lawful authority.”<sup>275</sup> Professor Laurence Tribe summa-

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<sup>270</sup> *Bailey*, 259 U.S. at 38.

<sup>271</sup> Today, most taxes will be triggered by what the Court would deem “economic activities,” thus rendering the concern about taxes that regulate beyond the Commerce Clause practically insignificant. Cf. *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969) (“A statute does not cease to be a valid tax measure because it deters the activity taxed . . .”); *Bailey*, 259 U.S. at 38 (“Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial . . .”); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869) (holding a federal tax on notes issued by state banks to be constitutional).

<sup>272</sup> See, e.g., *United States v. Kahriger*, 345 U.S. 22, 29 (1953) (“In that area of abstract ideas, a final definition of the line between state and federal power has baffled judges and legislators.”).

<sup>273</sup> *Bailey*, 259 U.S. at 38 (“They do not lose their character as taxes because of the incidental [regulatory] motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”); see also *United States v. Constantine*, 296 U.S. 287, 296 (1935) (noting that the “decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned . . . are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State.”).

<sup>274</sup> *McCray v. United States*, 195 U.S. 27, 56 (1904); see also *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (“Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”); *United States v. Doremus*, 249 U.S. 86, 93–94 (1919) (“If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.”).

<sup>275</sup> *McCray*, 195 U.S. at 59; see also *Sonzinsky*, 300 U.S. at 514 (“[Courts] will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.”).

rizes the vacillation between a jurisprudence of fidelity and one of entitlements as follows:

- (1) A tax is a valid revenue measure if it achieves its regulatory effect through its rate structure or if its regulatory provisions bear a ‘reasonable relation’ to its enforcement as a tax measure.
- (2) A tax is a regulatory tax—and hence invalid if not otherwise authorized—if its very application presupposes taxpayer violation of a series of specified conditions promulgated along with the tax.<sup>276</sup>

The Court’s federal spending power decisions also reach for a fidelity approach. Under *South Dakota v. Dole*, conditional federal spending measures must heed certain precepts to prevent the evisceration of the limited enumeration of federal legislative powers.<sup>277</sup> In rejecting a procedural entitlements approach to federal spending, the Court demands that (1) federal funds be spent only to further “the general welfare” of the United States,<sup>278</sup> (2) any conditions on the receipt of the funds be related to “the federal interest in particular national projects or programs,”<sup>279</sup> (3) the States must “exercise their choice knowingly, cognizant of the consequences of their participation,”<sup>280</sup> and (4) the lure of money must not “pass the point at which ‘pressure turns into compulsion.’”<sup>281</sup>

*Dole*’s first two requirements may both be understood as checking the purposes of the federal measure. To be sure, judicial review of whether spending occurs for a legitimate “national” or an improper “local” purpose is notoriously difficult.<sup>282</sup> *Dole*’s second re-

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<sup>276</sup> Laurence H. Tribe, *American Constitutional Law* 844 (3d ed. 2000) (citations omitted).

<sup>277</sup> 483 U.S. 203 (1987).

<sup>278</sup> *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937)).

<sup>279</sup> *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

<sup>280</sup> *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

<sup>281</sup> *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). The final requirement that the spending program not violate “other constitutional provisions” is not relevant for present purposes.

<sup>282</sup> This restriction finds its origin in Article I, § 8, which provides that the Congress shall have the power to “lay and collect Taxes . . . to pay the Debts and provide for the Common Defence and general Welfare of the United States.” U.S. Const. art. I, § 8. This clause has been mainly taken to suggest that the federal government’s power to tax is not limited to raising revenue and spending funds in support of the exercise of another power expressly conferred upon Congress in Article I, Section 8. Instead, Congress may lay and collect taxes for any purpose that furthers the “general Wel-

quirement, however, that federal conditions on the receipt of money be germane to a legitimate federal interest in the program, may have some purchase.<sup>283</sup> A germaneness requirement could, for example, insist that the federal government actually spend funds on the declared purpose to which the condition is related.

On the theory that appropriating funds is politically costly, insistence on such a nexus might limit the otherwise endless radiation of regulatory effects of conditional spending decisions.<sup>284</sup> Moreover, it would do so by increasing the transparency of democratic bargaining surrounding the contested expansion of federal influence. For example, Congress could not condition the receipt of federal funds to build interstate highways on a state's abolition of the death penalty. Nor could it simply reword the grant to be the "federal highway and abolition of state death penalties program," if the actual funds may be spent only on building highways. In order to demonstrate that the purported purpose is a bona fide reason for the expenditure, federal funds would have to be appropriated for, and spent on, the achievement of that purpose.<sup>285</sup> In short, under a serious nexus requirement, the more Congress wishes to affect regulation beyond its otherwise enumerated powers, the more it must openly raise money to do so.

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fare" of the nation. In the words of Hamilton, Story, and the Supreme Court, the Constitution should be read as ruling out taxes and expenditures that are made for purely "local" purposes. See *United States v. Butler*, 297 U.S. 1, 64-67 (1936); see also Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1497-98 (1987) (arguing in favor of the Hamiltonian view of the spending power). Nonetheless, the difficulty of enforcing this limitation has led the Supreme Court to question "whether 'general welfare' is a judicially enforceable restriction at all." *Dole*, 483 U.S. at 207 n.2.

<sup>283</sup> Indeed, in her dissent in *Dole*, Justice O'Connor championed the germaneness requirement as the principal avenue along which to contain the federal spending power. In her view, the federal government "has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent." *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief of Amici Curiae National Conference of State Legislatures, et al., at 19-20). Professor Lynn Baker has developed Justice O'Connor's idea by elaborating the difference between "reimbursement" and "regulatory" expenditures, only the former of which would be constitutional. See Baker, *supra* note 262, at 1962-79.

<sup>284</sup> Cf. Regan, *supra* note 258, at 1194 (suggesting this as a reason for relaxed review of a State's spending decisions under the dormant Commerce Clause).

<sup>285</sup> Cf. Baker, *supra* note 262, at 1962-79 (developing a similar proposal albeit with more stringent conditions on link between purpose and expenditure and without consideration of the political cost to Congress of the appropriation).

*Dole's* third and fourth prongs, in turn, specifically protect the dynamic interaction between the federal government and the states. They ensure that the states opt to participate in the program despite the attendant federal regulation of matters that would otherwise lie within the state's domain. To be sure, the coherence of the idea of coercion may be questioned in this context,<sup>286</sup> but the idea of knowingly choosing to accept a grant despite its regulatory implications is certainly sound. In any event, both requirements seek to ensure that the imposition of the condition is ultimately the result of constructive political engagement between the federal government and the states.

The symmetrical potential of fidelity, however, means that a fidelity approach to containing the regulatory reach of spending measures may be equally applied to the states. When a state purchases products or services, it, too, may condition the receipt of funds on compliance with certain criteria. When these criteria have regulatory effects that radiate beyond the spending state's borders, the state's spending decision may stand in tension with governing norms on state regulation of interstate commerce. Here, in turn, a fidelity approach may work to constrain the states.

The Court's background dormant Commerce Clause doctrine, against which such state regulation is generally reviewed, is itself one of the most prominent instances of U.S. fidelity jurisprudence. Under the classic formulation in *Pike v. Bruce Church Inc.*, "[w]here the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>287</sup> In short, *Pike* rejects the old entitlements view of mutually exclusive spheres of federal and state powers in favor of a fidelity-based approach to constitutional interpretation, in which every institution must always act with a view to the proper functioning of the system as a whole.

What is more, the general *Pike* formulation embodies both conservative and liberal variations of fidelity, although the Court in

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<sup>286</sup> See *Env'tl. Def. Ctr., Inc. v. EPA*, 319 F.3d 398, 409–14 (9th Cir. 2003).

<sup>287</sup> 397 U.S. 137, 142 (1970).



practice only enforces one.<sup>288</sup> At its core, *Pike* is usually taken to suggest a two step inquiry: (1) whether the state regulation discriminates against interstate commerce, and (2) whether the regulatory burden on interstate commerce is outweighed by the local benefits of the measure. Only the first test, however, preserves the policy diversity that promotes constructive democratic engagement within a federal system. The second step of balancing the harms and benefits throughout the system, in contrast, is a naked effort to contain democratic politics by harmonizing the interests throughout the system. As Professor Donald Regan has convincingly suggested with regard to the movement of goods, such a mandate for the virtual representation of out-of-state interests in the state's regulatory process is antithetical to the U.S. system of federalism itself.<sup>289</sup> And indeed, the Court usually pursues only the antidiscrimination inquiry even when it purports to be doing more.<sup>290</sup>

Apart from being driven by efficiency concerns, the general prohibition on so-called "discrimination" against out-of-state economic interests is based, as Professor Regan has argued, on the concept of a union.<sup>291</sup> It serves both as the expression of a national ideal as well as the practical survival of the federal system as a whole. Without a commitment on the part of the states to the common enterprise, the Union may quickly fall apart by virtue of escalating isolationism and trade wars that plagued the states under the Articles of Confederation.<sup>292</sup> Here, then, the Court rejects the *Nevada v. Hall* suggestion that there need not be any "greater de-

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<sup>288</sup> For brief comparisons between the dormant Commerce Clause jurisprudence and the principle of *Bundestreue*, see Jackson, *supra* note 1, at 284; Tushnet, *supra* note 15, at 880–81.

<sup>289</sup> Regan, *supra* note 258, at 1118–19, 1164–66.

<sup>290</sup> See *id.* at 1211–52; cf. Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 *Tax Law.* 37, 45–46 (1987) (“[T]he commerce clause forbids state taxes from discriminating against interstate commerce—a doctrine more firmly entrenched and consistently applied than any other it has enunciated in this field . . .”).

<sup>291</sup> Regan, *supra* note 258, at 1113.

<sup>292</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (arguing that the Commerce Clause “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation”).

gree of comity, and friendship, and kindness towards one another, than . . . between foreign nations.”<sup>293</sup> Instead, sounding much like his counterparts in Germany and the European Union, Justice Jackson noted that the Court’s dormant Commerce Clause jurisprudence has sought to ensure that commitment of the state to one another and thereby “advance[] the solidarity and prosperity of this Nation.”<sup>294</sup>

In grappling with the problem of state spending, in turn, the Court has once again vacillated between an entitlements and a fidelity approach. Cases such as *Reeves v. Stake*,<sup>295</sup> for example, appear to take the entitlements view. Here, the Court upheld South Dakota’s policy of limiting the sale of cement from a state-owned cement factory to South Dakota residents against a dormant Commerce Clause challenge. The Court explained that the usual prohibition against state protectionism did not apply where the state was acting as a “market participant,” citing the “long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”<sup>296</sup>

Other cases can be read as rejecting this entitlements approach and reaching instead for a fidelity approach to constrain the troublesome regulatory effects of state purchasing decisions. The 1984 decision of *South-Central Timber Development v. Wunnicke*, for example, struck down Alaska’s requirement that timber purchased from the State would have to be processed before being exported.<sup>297</sup> Then-Justice Rehnquist and Justice O’Connor argued in favor of upholding this regulation based on an entitlements view, suggesting a blanket exemption of state purchasing decisions from dormant Commerce Clause restrictions.<sup>298</sup> The Court, however, disagreed. In the plurality’s view, this “downstream” condition went beyond merely participating in the market: “Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading

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<sup>293</sup> *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

<sup>294</sup> *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

<sup>295</sup> 447 U.S. 429 (1980).

<sup>296</sup> *Id.* at 438–39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

<sup>297</sup> 467 U.S. 82 (1984).

<sup>298</sup> *Id.* at 101–02 (Rehnquist, J., dissenting).

partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity.”<sup>299</sup> In the plurality’s view, this covert attempt at regulating interstate commerce was subject to the usual rules governing state regulation of interstate commerce. As such, the “protectionist nature of Alaska’s local-processing requirement” rendered the law objectionable.<sup>300</sup>

Finally, in the area of intergovernmental tax and regulatory immunities, the Court has also moved from an entitlements approach to a fidelity approach over the years.<sup>301</sup> During the classic dual federalism era, the fundamental assumption of mutual distrust among the federal government and the states led the Court to curtail severely the ability of the federal government to tax or regulate the states and vice versa. *Collector v. Day*, for example, forcefully expressed this idea in holding that Congress was prohibited from taxing state judges’ salaries.<sup>302</sup> Drawing a parallel to *McCulloch*’s famous holding prohibiting state taxation of the operations of the federal bank, the Court held:

[T]he means and instrumentalities employed for carrying on the operations of [state] governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should [similarly] be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.<sup>303</sup>

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<sup>299</sup> *Id.* at 99.

<sup>300</sup> *Id.* at 100.

<sup>301</sup> The notable exceptions are, of course, the anticommandeering and sovereign immunity rules.

<sup>302</sup> *Collector v. Day*, 78 U.S. (11 Wall.) 113, 127 (1870).

<sup>303</sup> *Id.* at 125–26 (1870). The Court also stated:

It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

*Id.* at 127.

This approach, then, rejected the idea of state and federal governments as legitimately engaging one another in the project of democratic governance and set out instead to separate entitlements to govern with as little mutual interference as possible.

Along with the New Deal shift in Commerce Clause jurisprudence came a shift in the case law on intergovernmental regulatory and tax immunities.<sup>304</sup> In these latter areas, the new approach moved away from separating state and federal governments and toward a simple antidiscrimination norm.<sup>305</sup> Under this new approach, for example, the Court has allowed federal taxes imposed in a nondiscriminatory manner on private individuals, even when those individuals derive their taxed income from dealings with state governments.<sup>306</sup> Under the Court's modern view, there is little risk that a nondiscriminatory tax will destroy the ability of the states to function, because "the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents."<sup>307</sup> Accordingly, the Court has allowed the federal government to impose a nondiscriminatory tax even directly upon the states,<sup>308</sup> although it has suggested in dictum that such taxes might be unconstitutional where they "tap[] a source of revenue . . . uniquely capable of being earned only by a State,"<sup>309</sup> or substantially com-

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<sup>304</sup> See, e.g., *Graves v. New York*, 306 U.S. 466 (1939) (upholding a nondiscriminatory income tax on an employee of the federal government); see also *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938) (upholding a state tax on an out-of-state business operating in the state under a federal contract); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (holding that businesses operating under government contracts are not automatically immune from state taxation).

<sup>305</sup> Cf. Jackson, *supra* note 1, at 283–86 (comparing the antidiscrimination principle in modern U.S. intergovernmental tax immunity to *Bundestreue*).

<sup>306</sup> See *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (upholding a nondiscriminatory application of the federal income tax to an employee of a state governmental entity).

<sup>307</sup> *South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988). Justice O'Connor argued in dissent that this does not in fact consider the practical effects of such taxes. Her approach would not be limited to considering the effects of the particular tax in question, but would consider instead whether the kind of tax imposed, as a general matter, poses a threat to state government. See *id.* at 533 (O'Connor, J., dissenting) ("Although Congress has taken a relatively less burdensome step in subjecting only income from bearer bonds to federal taxation, the erosion of state sovereignty is likely to occur a step at a time.").

<sup>308</sup> *New York v. United States*, 326 U.S. 572 (1946).

<sup>309</sup> *Id.* at 582. But see *id.* at 586 (Stone, C.J., concurring) (questioning the viability of this distinction).

promise an activity “indispensable to the maintenance of a state government.”<sup>310</sup>

Likewise, the Court’s doctrines of federal tax and regulatory immunity have softened since the New Deal. To be sure, *McCulloch*’s rigid rule that a state may not levy taxes directly on the federal government or its instrumentalities still remains in force today.<sup>311</sup> But modern federal tax immunity has been specifically confined to those circumstances. In the absence of a congressional act to the contrary, the modern test holds that federal “tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.”<sup>312</sup> States may thus tax (and regulate) private parties doing business with the federal government, as long as they do not “discriminate against the United States or those with whom it deals.”<sup>313</sup>

Current intergovernmental tax immunity doctrine, then, still represents a mix of the fidelity and entitlement approaches. The absolute prohibition against directly taxing federal instrumentalities is similar to the older entitlements jurisprudence, which precluded certain actions simply because they touched upon the operations of another level of government. The nondiscrimination rule, in turn, which prevents one level of government from singling out another as a disfavored taxpayer, ultimately enforces a pur-

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<sup>310</sup> *Gerhardt*, 304 U.S. at 419 (dictum); cf. *New York*, 326 U.S. at 586–87 (Stone, C.J., concurring) (regarding the governmental/proprietary distinction as “untenable,” and asserting that “a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State’s performance of its sovereign functions of government”). But see *Baker*, 485 U.S. at 525 n.15 (questioning the viability of the essential/nonessential functions distinction).

<sup>311</sup> This rule applies to nondiscriminatory taxes as well, as was the case in *McCulloch* itself. Congress can, of course, always indicate its willingness to submit to state taxation.

<sup>312</sup> *United States v. New Mexico*, 455 U.S. 720, 735 (1982). Congress may expand this immunity, but must take political responsibility for doing so. *Id.* at 737–38.

<sup>313</sup> *Baker*, 485 U.S. at 523. A roughly analogous doctrine governs state regulation of federal instrumentalities. See, e.g., *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion).

pose-based rule of fidelity to the common enterprise not unlike that employed in dormant Commerce Clause jurisprudence.<sup>314</sup>

The adoption of an antidiscrimination rule in modern state tax immunity parallels modern state immunity from federal regulation as well. Thus, under the doctrine first developed in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>315</sup> the federal government may subject the states to “generally applicable laws” that extend equally to private parties.<sup>316</sup> Although the Court did not explain the significance of the *Garcia* criterion, the distinction echoes that underlying modern intergovernmental tax immunity decisions. In both cases, generally applicable laws are less dangerous to state autonomy because states’ interests are represented by their private political proxies in the federal legislative process.<sup>317</sup> Also, generally applicable laws are less likely to be the result of a federal design of

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<sup>314</sup> Cf. *Davis v. Michigan*, 489 U.S. 803, 808, 813 (1989) (noting that federal law waiving state tax immunity of its employees as long as that tax does not discriminate “because of the source of the pay or compensation” is “coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity”) (quoting 4 U.S.C. § 111); *New York*, 326 U.S. at 583 (alluding to dormant Commerce Clause analogy). But see Laurence Claus, *Budgetary Federalism in the United States of America*, 50 *Am. J. Comp. L.* 581, 584 (Supp. 2002) (arguing that “the purpose of intergovernmental immunity is not to promote ‘fairness,’ but to reduce the risk of state taxation undermining relational imperatives of the federal system”). “Fairness,” however, need not be an end in itself. Indeed, the Court uses nondiscrimination in order to limit the negative effect of intergovernmental taxes. That fidelity to the common enterprise—the recognition that another government cannot be treated unfavorably simply because it is “foreign”—serves as a proxy for the Court is perhaps best illustrated by its decisions in *Davis*, 489 U.S. 803, and *Barker v. Kansas*, 503 U.S. 594 (1992). In each of these cases, the Court invalidated a state tax that treated federal employees on par with all other state residents except retired state employees. Although the political process argument should have found that the federal employees in both cases enjoyed plenty of proxies in the state electorate, the fact that the state treated its own employees better than the federal government’s employees was held to be unconstitutional.

<sup>315</sup> 469 U.S. 528 (1985).

<sup>316</sup> *New York v. United States*, 505 U.S. 144, 160 (1992).

<sup>317</sup> See *Baker*, 485 U.S. at 525 n.15; see also D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 *Nw. U. L. Rev.* 577, 648–51 (1985) (arguing that nondiscriminatory taxes preserve political accountability). Similarly, the Fair Labor Standards Act (FLSA) treated state and local government employees no differently from federal government workers. FLSA, 29 U.S.C. § 203(x) (Supp. IV 1975); see also *Nat’l League of Cities v. Usery*, 426 U.S. 833, 838 (1976) (discussing FLSA).

self-aggrandizement through the evisceration or usurpation of the organizational capacities of the states.

The fear of federal aggrandizement through laws that single out state governments for regulation may also underlie the Court's recently heightened scrutiny of laws passed under Section 5 of the Fourteenth Amendment. Here the Court shifted from extreme deference, which has come to characterize the review of Article I measures, to a more rigorous examination of the justifications for laws passed pursuant to Section 5. Instead of asking whether Congress employed means "plainly adapted" to a legitimate federal end under characteristic "rational basis" review, the Court requires that Congress's Section 5 laws be "congruen[t] and proportiona[l]" to preventing or remedying a constitutional violation as identified by the Court.<sup>318</sup> As Professor Evan Caminker has pointed out, the difference in strictness of the means-ends review applied to federal laws passed pursuant to Article I and Section 5 cannot be justified by a textual or historical reading of the relevant enabling provisions in the Constitution.<sup>319</sup> Placing these cases in the context of fidelity in intergovernmental relations, however, suggests that the Court may be concerned about the tremendous federal power to single out the states for direct regulation. Given that this is the very premise for Congressional action under Section 5, the Court may be especially interested in ensuring that Congress's act be "really calculated to effect any of the objects entrusted to the government."<sup>320</sup>

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<sup>318</sup> Compare *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966) (holding that part of the Voting Rights Act was "appropriate legislation" under Section 5 of the Fourteenth Amendment and that the proper standard for reviewing a congressional assertion of that authority is a deferential one), with *City of Boerne v. Flores*, 521 U.S. 507, 520, 533 (1997) (holding that Congress did not have the power under Section 5 of the Fourteenth Amendment to enact the Religious Freedom Restoration Act of 1993 because the statutory remedy was not "congruen[t] and proportiona[l]" to the constitutional violation as identified by the Court).

<sup>319</sup> Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 *Stan. L. Rev.* 1127 (2001).

<sup>320</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). As Professors Post and Siegel point out, the test employed by *City of Boerne* "ultimately seeks to ascertain congressional intent." Post & Siegel, *supra* note 238, at 457. This is not to say that such an interpretation is constitutionally justified as a matter of original intent. See Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747, 818–27 (1999) (arguing that Section 5 of the Fourteenth Amendment was drafted to provide for a strong congressional role in setting standards for the protection of fundamental rights).

## IV. FORMALISM, FUNCTIONALISM, AND FIDELITY: LESSONS FROM THE COMPARISON

In the United States, scholars and judges debate the value of comparative constitutional inquiries. To be sure, many agree that a glance beyond one's borders may be helpful in crafting a constitution. After all, Madison did it in writing our own.<sup>321</sup> Also, comparative examinations during foundational periods provide welcome opportunities to share U.S. constitutional wisdom with the world. So it was with Germany, and so it may be with the European Union today. But the debate runs hot as soon as the suggestion is made that the United States can learn from the comparative enterprise as well. Even some of the Supreme Court Justices who routinely participate in comparative exchanges sharply reject the idea that U.S. constitutional interpretation might be affected by an examination of foreign constitutional traditions.<sup>322</sup> Although the period of design may be open to outside wisdom, so this argument goes, the period of interpretation is not.

As with most debates about methods of constitutional interpretation, the argument over the value of comparativism is difficult to assess in the abstract.<sup>323</sup> Some constitutional provisions may be so

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<sup>321</sup> See William Lee Miller, *The Business of May Next: James Madison and the Founding 15* (1992).

<sup>322</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997). Justice Scalia, writing for the majority, wrote:

Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.

*Id.* at 921 n.11.

<sup>323</sup> For discussions of the significance of comparative constitutional inquiries in particular areas of constitutional law, see, for example, Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 *U. Pa. J. Const. L.* 583 (1999); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 *Oxford J. Legal Stud.* 499 (2000); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *Yale L.J.* 1225 (1999) (analyzing government-funded speech). For some of the most systematic and incisive comparative investigations of the law and policy of federalism in the United States and the European Union, see *Courts and Free Markets: Perspectives from the United States and Europe*, *supra* note 110; *The Federal Vision: Legitimacy and Levels of Governance*, *supra* note 83; *Integration Through Law*, *supra* note 16.



specific as to answer the interpretive question at hand.<sup>324</sup> Others may be based on particular traditions that clearly differ from those found elsewhere.<sup>325</sup> Yet others may be intimately tied to a particular institutional architecture that is not replicated abroad.<sup>326</sup> Accordingly, this Article refrains from any systematic critique of the arguments surrounding comparativism in constitutional interpretation. Instead, it tries to illustrate the value of comparativism with regard to one basic issue: understanding the interpretive methods available for adjudicating intergovernmental power disputes.

### *A. The Landscape of Interpretive Practice*

The comparative account highlights first and foremost the conceptual coherence of three different approaches that are present in each of the systems reviewed here: an entitlements approach, a conservative fidelity approach, and a liberal fidelity approach. The different understandings of federalism that inhere in the various judicial decisions across these systems and over the course of time are not just random variations in judicial attitude. Instead, as the discussion has shown, the decisions can be meaningfully grouped into the three principally different approaches identified at the outset of this investigation. Each approach is present in each system. Each approach has predictable manifestations in doctrine. And each approach has important ramifications for public policy, though not along the simple lines of urging centralization over decentralization or judicial intervention over abstention.

Second, the comparative discussion shows that the relevant foundational texts of these systems do not control the constitutional

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<sup>324</sup> The obvious (and usual) examples here are the age and the term of office of the President. See U.S. Const. art. II, § 1, cls. 1, 4. For an argument about the unsettled nature of even these provisions, however, see Louis Michael Seidman, *Our Unsettled Constitution* 147–49 (2001).

<sup>325</sup> See, e.g., James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *Yale L.J.* 1279 (2000) (comparing the protection of dignity in Germany, France, and the United States); Jonathan Zasloff, *The Tyranny of Madison*, 44 *UCLA L. Rev.* 795 (1997) (arguing that the theory undergirding the U.S. Constitution—that political liberty is best guaranteed by a government checked and balanced against itself—can succeed only when certain conditions exist, such as a robust civil society, a sense of political community, and a relative consensus on values).

<sup>326</sup> See Halberstam, *supra* note 83 (examining central government commands to constituent state governments in the European Union, Germany, and the United States).

policy choice between an entitlements and a fidelity approach to federalism. Nor do they control the choice between a conservative and a liberal understanding of fidelity. Although a foundational text could presumably seek to prescribe one or another of these approaches, none of the texts of the systems reviewed here apparently does. Indeed, in both the European Union and Germany, courts have expanded duties of cooperation well beyond the contours of any provision in their foundational texts.<sup>327</sup> And in the United States, the dominant entitlements approach does not flow meaningfully from any textual provision either.<sup>328</sup> Moreover, courts in each of these systems have felt at liberty to switch from one to another of these approaches over time, without attendant changes in any constitutional text that would have addressed this question. Sometimes even the same court will, during a single constitutional era, take fundamentally different interpretive approaches to different constitutional provisions.

Third, by situating the various approaches within the institutional architecture of each system, the comparative discussion helps us understand the current dominance of fidelity jurisprudence in the European Union and Germany and of entitlements jurisprudence in the United States. In the European Union and in Germany, the daily operations of the central and constituent state governments are constitutionally intertwined. Constituent state governments are represented in the central government's decisionmaking bodies, central government policies depend on constituent state execution, central executive and judicial branches are minuscule, and taxes are largely collected by one level for the entire system. The intertwined architecture of constitutional federalism in these two systems naturally highlights the fact that each institution plays a particular part in the constitutional governance of the system as a whole. Accordingly, in the European Union and in Germany, the idea of resolving conflicts by bringing together the various institutions in harmonious cooperation suggests itself. In the United States, in contrast, the federal and state governments each have their own legislative, executive, and judicial personnel, complete with the powers to tax and spend. Here, the independent constitutional effectiveness of the federal and state levels of

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<sup>327</sup> See *supra* Section I.B & Part II.

<sup>328</sup> See *supra* Section III.A.

government obscures the fact that each level similarly plays only a part in the common enterprise of governing the whole. Consequently, the dominant tendency in U.S. jurisprudence has been to view the projects of federal and state governance as essentially distinct and to solve intergovernmental conflicts by trying to establish clear boundaries between the two.

Fourth, the comparative account suggests that courts opting for one or another of these approaches have tended to do so unreflectively. Indeed, for the most part, the approaches identified here are theoretical constructs attributed to judicial actors based only on inferences from their actual statements and actions. Although courts then and now may occasionally reject one approach and adopt another, they usually make this constitutional policy choice without acknowledging their interpretive liberty to do so. Perhaps most important, they do so without exploring the meaning and systemic effects of adopting one approach over another. In short, they resort to one or another of these approaches not as a reflectively chosen interpretive theory or method but as reflexively accepted ideology or political morality.<sup>329</sup>

### *B. Which Political Morality of Federalism?*

In bringing the various political moralities of federalism to the surface, this Article hopes to begin an open discussion about their significance and value. Here, too, the comparative account may be useful. It highlights the pragmatic promise and danger of the various interpretive approaches by focusing our attention on the particular conception of federalism and democracy underlying each.

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<sup>329</sup> Cf. David Gauthier, *The Social Contract as Ideology*, 6 *Phil. & Pub. Aff.* 130 (1977) (exploring this notion of ideology in the context of the conception of social relations as contractual). In this regard, the ideology of federalism today is analogous to the ideology of individualism underlying the United States Supreme Court's decisions in the early part of this century with regard to liberty of contract. See *Lochner v. New York*, 198 U.S. 45 (1905); cf. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *Yale L.J.* 1006 (1987) (examining constitutional rights in a post-*Lochner* world and characterizing the public-private distinction as a socially constructed boundary that balances conflicting values); Cass R. Sunstein, *Lochner's Legacy*, 87 *Colum. L. Rev.* 873 (1987) (arguing that *Lochner* is best understood not as a case of judicial activism but rather as a reflection of the *Lochner* Court's conviction that government may not constitutionally alter the common-law distribution of entitlements).

If, for example, federalism is viewed as the product of an arm's length bargain among otherwise hostile adversaries to overcome historically situated political obstacles, then the entitlements approach to federalism may be best suited to the project. If, however, federalism is understood as creating something more—be it the creation of a polity, the political integration of previously separate polities, or the joining of institutional actors in a common enterprise of governance—then the fidelity approach may be more appropriate.<sup>330</sup>

Under a fidelity approach, the critical question becomes whether the project of federalism is viewed as a static or dynamic enterprise. The former view is well captured by Professor William Riker's famous definition of federalism as "a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions."<sup>331</sup> This view tends to focus on the "optimal" allocation of substantive powers.<sup>332</sup> Once that allocation has been found, the object is to protect the powers of each level of government from challenge by any other. Although this approach may indeed result in intergovernmental cooperation, and even Professor Morton Grodzins's notable "marble cake" federalism,<sup>333</sup> any such coopera-

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<sup>330</sup> See, e.g., Neil Walker, *After the Constitutional Moment*, Federal Trust Online Papers No. 32/03, at 10–12 (November 2003), at [http://www.fedtrust.co.uk/uploads/constitution/32\\_03.pdf](http://www.fedtrust.co.uk/uploads/constitution/32_03.pdf) (discussing constructivism in European constitutionalism) (on file with the Virginia Law Review Association). A similar debate pervades the discussion of international law. See, e.g., Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 *Colum. J. Transnat'l L.* 19 (2000); Phillip A. Karber, "Constructivism" as a Method in International Law, 94 *Am. Soc'y Int'l L.* 189 (2000); Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 *Chi. J. Int'l L.* 93, 95–98 (2000); Anne-Marie Slaughter, *Taking Stock: A Retrospective on Abbott's Prospectus*, 25 *Yale J. Int'l L.* 278 (2000).

<sup>331</sup> William H. Riker, *Federalism*, in 5 *Handbook of Political Science* 93, 101 (Fred I. Greenstein & Nelson W. Polsby eds., 1975). Similarly, Professor Kenneth Wheare's classic formulation is in the same vein. See K.C. Wheare, *Federal Government* 2 (2d ed. 1963) (focusing on "independen[ce]" of central and constituent state governments from one another).

<sup>332</sup> See, e.g., Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *Yale L.J.* 1196 (1977) (discussing the race-to-the-bottom argument).

<sup>333</sup> Morton Grodzins, *The American System: A New View of Government in the United States* 8, 60–152 (Daniel J. Elazar ed., 1966).

tion takes place entirely on the terms dictated by the level of government holding the final regulatory entitlement over the subject matter at issue.<sup>334</sup> On this understanding of federalism, fidelity suggests the muting of any politics that attempt to challenge the settled hierarchy of the system.

Against this static approach, however, we may reach for a more dynamic understanding, which we might call “liberal democratic federalism.” This more fluid approach is evident, for example, in the writings of Professor Daniel Elazar, who describes federalism as “the fundamental distribution of power among multiple centers . . . , not the devolution of powers from a single center or down a pyramid.”<sup>335</sup> This challenge to more settled understandings of hierarchy in constitutional law is (re)emerging more broadly in recent constitutional scholarship in the United States.<sup>336</sup> The idea is perhaps most prevalent, however, in contemporary European constitutionalism, which Professor Joseph Weiler has described as based on the principle of “[c]onstitutional [t]olerance.”<sup>337</sup> This notion highlights the fact that in European federalism the necessary mutual obedience and coexistence is not based on hierarchical subjugation within a conventional state structure, but a result of repeated, voluntary acceptance of the necessary discipline that holds the Community system together. But even in a statist federal system such as the United States, we can strive to interpret hierarchies as contestable and functions as “shared . . . without regard to neat allocations of responsibility.”<sup>338</sup> Professor Kalypso Nicolaidis expresses the idea nicely:

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<sup>334</sup> Edward Corwin’s seminal article on the demise of dual federalism describes this kind of cooperation. See Corwin, *supra* note 4.

<sup>335</sup> Daniel J. Elazar, *Contrasting Unitary and Federal Systems*, 18 *Int’l Pol. Sci. Rev.* 237, 239 (1997); cf. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 186–87 (1999) (discussing Professor Riker’s and Professor Elazar’s definitions of federalism).

<sup>336</sup> See, e.g., Seidman, *supra* note 324; Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Larry Kramer, *Foreword: We The Court*, 115 *Harv. L. Rev.* 4 (2001).

<sup>337</sup> See J.H.H. Weiler, *Federalism Without Constitutionalism: Europe’s Sonderweg*, in *The Federal Vision: Legitimacy and Levels of Governance*, *supra* note 83, at 54, 62–70.

<sup>338</sup> Richard H. Leach, *American Federalism* 15 (1970).

[T]he federal vision *does not describe an end-state, or even a series of equilibria, but a process*. There is no *teleology* of federalism, a centralizing or decentralizing trend, or even the possibility of finding a stable status quo for a significant period of time. Instead, political communities will oscillate endlessly between the poles of unity and autonomy as they search for the appropriate scale of their collective endeavour.<sup>339</sup>

Liberal democratic federalism accordingly seeks to preserve constructive policy engagement among the various levels and units of governance throughout the system. Remarkably, this idea is already present in Smend's perceptive remark about the Weimar Constitution, which applies, *mutatis mutandis*, to all three systems discussed here: "The Constitution's legal system of a federal state prescribes not a definite intrinsic character that the Reich and the *Länder* should have, but instead their integrative interplay."<sup>340</sup>

Implicit in the idea of liberal democratic federalism is a vision of democracy as the preservation of diverse, semi-autonomous forums in which citizens can engage with one another with a reasonable degree of political equality.<sup>341</sup> This view takes a moderate position in the debate about deliberative democracy and its

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<sup>339</sup> Kalypso Nicolaidis, Conclusion: The Federal Vision Beyond the Federal State, *in* The Federal Vision: Legitimacy and Levels of Governance, *supra* note 83, at 439, 444. There is a real question, then, whether the distinction between "integrative" and "devolutionary" federalism may be sensibly maintained over time. See Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 *Am. J. Comp. L.* 205, 206 (1990) (contrasting federalism in the United States and the European Community, which integrates "previously independent or confederally related component entities," with federalism in Belgium and Canada, which seeks to "redistribute[] the powers of a previously unitary State among its component entities"). On the view of federalism discussed in the text, even "integrative" federal systems, such as the European Union, Germany, and the United States, go through subsequent "devolutionary" phases. Conversely, one might expect devolutionary federal systems, such as Canada and Belgium, to go through subsequent (re)integration as well.

<sup>340</sup> Smend, *supra* note 37, at 273.

<sup>341</sup> This view accordingly celebrates what Professor Habermas calls "constitutional patriotism," that is, the commitment to the constitutionally established democratic forums for negotiating political conflicts. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 500 (William Rehg trans., The MIT Press, 1996). But it focuses less on ascertaining the normative conditions of equality that, in Professor Habermas's view, give rise to pristine, democratically legitimizing interactions and instead focuses on the practical genesis of such patriotism in the maintenance of diverse forums for civic political engagement.

alternatives.<sup>342</sup> It accepts that democratic engagement properly consists of bargaining, as well as arguing,<sup>343</sup> and focuses attention instead on the notion that liberty is preserved best by maintaining a diversity of democratic spheres within which to do both. This variety of forums allows a citizen to become a member of several “issue publics,” each responding to different aspects of a citizen’s interests or identities,<sup>344</sup> and each providing a manageable arena for individual political engagement.<sup>345</sup>

Most important for purposes of liberal democratic federalism, the multiplicity of political forums serves to create what we might call multiple political “disequilibria” throughout the system of governance as whole.<sup>346</sup> Put another way, issue publics created through these various arenas of democratic engagement interact with one another (again, both deliberatively and on the basis of bargaining) to (re)consider decisions taken within each. Liberal democratic federalism sees political disequilibria and the democratic conflicts to which they give rise as desirable, not as signs of a disease to be contained. Thus, political factions, organized interest groups, formally organized parties, constituent states, localities, water districts, school districts, unions, employer associations, professional associations, private clubs, and families all generate their own spheres of meaning and value and yet interact with one another to contribute to the overall civic engagement that ultimately legitimizes public governance.

Liberal democratic federalism celebrates this dispersion of public attention away from a single majoritarian body politic. Federal-

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<sup>342</sup> See, e.g., *Deliberative Politics: Essays on Democracy and Disagreement* (Stephen Macedo ed., 1999).

<sup>343</sup> See, e.g., Jeremy Waldron, *The Dignity of Legislation* 124–66 (1999).

<sup>344</sup> Cf. Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in *Ideology and Discontent* 206, 245–46 (David E. Apter ed., 1964) (defining issue publics).

<sup>345</sup> The point is at least as old as de Tocqueville’s famous observation that “[l]ocal institutions are to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it.” Alexis de Tocqueville, *Democracy in America* 63 (George Lawrence trans., J.P. Mayer ed., 1988); see also *id.* at 162 (linking local politics to general political discourse).

<sup>346</sup> I borrow the term “disequilibria” from Albert O. Hirschman’s economic critique of the theory of balanced growth in developing nations. See Albert O. Hirschman, *The Strategy of Economic Development* 65 (1958) (discussing economic development as a “chain of [d]isequilibria”).

ism, on this view, naturally furthers the project of democracy by constitutionally preserving multiple points of democratic engagement throughout the system. Federalism and democracy are therefore not in conflict with one another, but mutually reinforcing values. And thus, fidelity to liberal democratic federalism endeavors to unfold the divided power system's full potential by fostering just such constructive democratic engagement among the units and levels of governance throughout the system.

### *C. Implementing Liberal Democratic Federalism*

Adhering to a liberal democratic political morality of federalism is, of course, not the exclusive province of the courts. To the contrary, liberal fidelity may infuse all exercises of public power throughout a federal system. In the European Union, for example, the idea of subsidiarity, even when not judicially enforced, may provide a self-regulative political ideal that furthers liberal fidelity by fostering interaction between the Community and the member states about the needs of the system as a whole.<sup>347</sup> Similarly, in the United States, federal politicians may further liberal fidelity by defeating federal laws that hastily seek to squelch deep democratic engagement throughout the nation on controversial subjects.<sup>348</sup>

Courts can, however, assist in enforcing a liberal democratic political morality of federalism when the political branches go astray. This need not challenge the limits of judicial competence, as the review of decisions in all three systems has suggested. For example, if the federal system was designed with a view to preserving democratic intergovernmental engagement, then judicial review to examine whether the various powers are being exercised for their proper purpose should naturally further liberal fidelity. A variety of purpose-based rules can thus help ensure that actors remain

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<sup>347</sup> See, e.g., George Bermann, *Taking Subsidiarity Seriously*, 94 *Colum. L. Rev.* 331, 378–86 (1994) (discussing European practice of subsidiarity as a legislative precept, and the Commission's review of legislative proposals).

<sup>348</sup> See, e.g., Tim Christie, *Efforts to Stop the Oregon Suicide Law May Return with New Congress*, *Register Guardian* (Eugene, Or.), Dec. 18, 2000, available at 2000 WL 31018807 (describing how Senator Ron Wyden helped defeat a federal law prohibiting the use of federally-controlled substances in the commission of physician-assisted suicide, which had been legalized in Oregon pursuant to two state-wide referenda) (on file with the Virginia Law Review Association).



faithful to their respective roles within the federal system as a whole.

Liberal fidelity's most basic purpose review would be the application of a nondiscrimination rule, as in U.S. dormant Commerce Clause cases,<sup>349</sup> United States Supreme Court decisions regarding federal and state taxation and regulation,<sup>350</sup> and decisions by the high courts of the European Union and Germany.<sup>351</sup> Under such a rule, no institution or level of governance may single out another for disfavored treatment simply for being "other."

Somewhat more challenging would be purpose-based rules such as the now largely defunct U.S. rule against impermissible regulatory taxation and the E.U. rule that market harmonization provisions not be used to impose health measures.<sup>352</sup> In the United States, such a purpose-based rule might successfully be revived after *Lopez* if Congress, for instance, decided to place a high excise tax on the possession of guns within 1,000 feet of a school and coupled this tax with stringent reporting obligations and criminal penalties for noncompliance. In all such cases, particular attention might be paid to excluding certain reasons for action.<sup>353</sup>

Excluded reasons review with an eye toward preserving democratic intergovernmental engagement might also govern more difficult issues such as executive commandeering in the United States. Here courts might allow the practice as long as Congress is not simply shifting the costs of enforcement to the states. For example, if Congress temporarily enlisted the states to conduct background checks to prevent gun sales to felons pending the creation of a federal database that Congress commissions and funds at the same time Congress enlists and pays for state assistance, little is likely to be gained in terms of policy engagement by allowing the states to refuse this request. If, at the other extreme, Congress directs the

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<sup>349</sup> See supra notes 287–300 and accompanying text.

<sup>350</sup> See supra notes 301–17 and accompanying text.

<sup>351</sup> See, e.g., supra notes 191–93 and accompanying text.

<sup>352</sup> See supra notes 268–76 and accompanying text (prohibition on taxes that impermissibly aim at regulating matters beyond Congress' reach). The European rule on checking the purpose of market harmonization measures is discussed supra notes 194–205 and accompanying text (the Tobacco Decision).

<sup>353</sup> See Joseph Raz, *Practical Reason and Norms* 178–99 (1990); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *Hastings L.J.* 711 (1994).

states to carry out a given federal program without any reasonable funding attached to that command, one might conclude that Congress is undermining democratic engagement by simply shifting the costs of the program to the states. Even these latter judgments do not seem categorically more difficult than those involved in conjuring up a distinction between “economic” and “noneconomic” activities and applying that distinction to a particular dispute.

Moreover, liberal fidelity would not always counsel courts to render direct substantive judgments about the propriety of other institutions’ actions. Instead, a court might use proxies for the presence of improper motives. For example, regarding the limits on conditional federal spending programs in the United States, a liberal fidelity minded court would not give up on enforcing the *Dole* factors, but seek to strengthen them through alternative inquiries. Thus, a court might check the bona fides of the spending decision by insisting that federal funds must indeed be appropriated for, and spent on, the achievement of the condition that is being imposed on recipient states.<sup>354</sup> Even though this approach might still allow the federal government to control significant aspects of state policy, it would preserve democratic intergovernmental engagement better than a blanket federal entitlement to attach conditions to the receipt of federal funds.

Finally, and most important, a liberal fidelity approach would frequently suggest that the substantive judgment about the needs of the federal system should itself be the subject of broad democratic engagement. In these cases, definitive court pronouncements on the respective limits of central and constituent state power may be antithetical to the constructive intergovernmental engagement that the federal system is designed to produce. Here, a court adhering to liberal fidelity would reject intricate substantive limitations on jurisdiction in favor of crafting basic process rules for democratic engagement on the underlying issue of regulatory jurisdiction.

#### *D. Preemption and Subsidiarity: Case Studies in Liberal Fidelity*

The problems of preemption and subsidiarity illustrate liberal fidelity’s insistence on constructive democratic engagement. Consider preemption first. Difficult questions about the scope of exclu-

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<sup>354</sup> See *supra* notes 277–86 and accompanying text.

sive central government powers and the extent to which central government actions displace constituent state authority seriously plague all three systems.<sup>355</sup> Here, liberal fidelity generally counsels against automatic exclusivity of central government powers as well as inviolability of specific substantive areas of constituent state authority, in favor of preserving constructive democratic policy engagement between the different levels of government.

For example, even in the United States where the federal government can be fully effective on its own, the federal system as a whole may benefit from constituent state participation.<sup>356</sup> Thus, even in a highly sensitive arena, such as foreign affairs, state policy initiatives may prompt the federal government to overcome bureaucratic inertia and place an otherwise neglected issue on the federal agenda for deliberation and decision. Once the federal government has taken positive action to make policy on any given subject, the states can always be made to step aside insofar as their actions are incompatible with the enunciated federal rule. The

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<sup>355</sup> For the U.S. debate, compare, for example, Cass L. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 469 (1989) (presenting the interpretive canon that would require Congress to signal preemption by a clear statement), with Caleb Nelson, *Preemption*, 86 *Va. L. Rev.* 225–31 (2000) (challenging this canon). For the E.U. debate, compare, for example, A.G. Toth, *A Legal Analysis of Subsidiarity*, in *Legal Issues of the Maastricht Treaty* 37, 39–43 (D. O’Keefe & P.M. Twomey eds., 1994) (theorizing that the subsidiarity principle will rarely be applied because the Community exercises exclusive competence in most areas), with Josephine Steiner, *Subsidiarity under the Maastricht Treaty*, in *Legal Issues of the Maastricht Treaty*, supra, at 49, 57–58 (suggesting that subsidiarity will be excluded only where the Community has actually exercised its authority). The European Draft Constitution is ambiguous as currently written, and might be taken to suggest the immediate preemption of an entire policy area that is regulated (even only in part) by the Union unless the Union specifically hands authority back to the member states. Compare EU Draft Const. art. 11, cl. 2 (stating that in areas of concurrent competence, “The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence”) with *Making It Our Own: A Trans-European Proposal on Amending the Draft Constitutional Treaty for the European Union* (2004) (suggesting revision of proposed Article 11), available at <http://www.umich.edu/~iinet/euc/Academics/MichiganPaperSeries.html> (on file with the Virginia Law Review Association). For the German debates, see, for example, Stefan Oeter, *Kommentierung der Art. 72*, in 2 *Das Bonner Grundgesetz* 2249, 2262–67 (Hermann von Mangoldt et al. eds., 4th ed. 2000).

<sup>356</sup> See Halberstam, supra note 162.

same should be true for much domestic regulation.<sup>357</sup> Putting aside the question whether preemptive legislation should always be subject to a “clear statement rule,” the automatic preemption of constituent states’ regulatory authority where their actions are not substantively incompatible with positive central government policy is contrary to this conception of federalism as intergovernmental engagement.

Furthermore, in interpreting positive central government action, a court enforcing liberal fidelity might hesitate before allowing central government elites with nontransparent bureaucratic power to preempt local political decisions reached under conditions of widespread and intense democratic engagement. This occurred, for example, when Attorney General John Ashcroft tried to reinterpret the Controlled Substances Act as allowing the Drug Enforcement Agency to withhold prescription drug licenses from physicians who assist their patients in the commission of suicide in pursuance of Oregon’s law.<sup>358</sup> The district court examining the dispute noted that Congress had failed to pass an amendment to the Controlled Substances Act that would have addressed physician-assisted suicide.<sup>359</sup> Accordingly, the court barred the Attorney General from simply reinterpreting the Controlled Substances Act “to stifle an ongoing ‘earnest and profound debate’ in the various states” on that issue.<sup>360</sup>

Similarly, liberal fidelity argues for submitting the problem of subsidiarity (which has also plagued the European Union, Germany, and the United States in one form or another)<sup>361</sup> to vigorous

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<sup>357</sup> See generally, Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process* (Jan. 2004) (unpublished manuscript, on file with the Virginia Law Review Association).

<sup>358</sup> See *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002).

<sup>359</sup> Cf. *supra* note 348 and accompanying text.

<sup>360</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1079 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

<sup>361</sup> In the United States, for example, the idea of what is national and what is local has bedeviled the Supreme Court since its decision in *Cooley v. Board of Wardens*, 53 U.S. 299 (1851), which expressly sought to implement that idea. See *id.* at 319–20 (distinguishing between matters that are “in their nature national, or admit only of one uniform system,” and those that are “local” and thus best left to “different systems of regulation, drawn from local knowledge and experience, and conformed to local wants”). And it continued to plague the Court in *United States v. Lopez*, 514 U.S. 549 (1995). See Lessig, *supra* note 236. In Germany, the Allied Forces originally sought to impose a similar requirement that central government powers be exercised only where necessary. See GG art. 72, para. 2 (1949); Golay, *supra* note 75, at 60–61;

political interaction among the different levels of government. And here, too, courts can help. The widely recognized difficulty of substantively adjudicating subsidiarity need not lead to a central government entitlement to invoke its enumerated powers at will. Although such an entitlement would render subsidiarity a political issue, it would not ensure that there is political engagement on the subject. In contrast, a rule requiring the central legislator to state clearly the need for central legislation, as the ECJ has adopted in adjudicating the Community Treaty's subsidiarity provision, might.<sup>362</sup> As George Bermann has suggested, "casting subsidiarity in procedural rather than substantive terms will best allow the Court of Justice to promote respect for the values of localism without enmeshing itself in profoundly political judgments that it is ill-equipped to make and ultimately not responsible for making."<sup>363</sup>

The draft Treaty Establishing a Constitution for Europe contains an intriguing procedural innovation in this regard. The draft Protocol on the Application of the Principles of Subsidiarity and Proportionality demands that the Commission (1) provide a detailed justification of legislative proposals with regard to the principle of subsidiarity, (2) transmit proposals to member state parliaments, (3) take into account member state parliaments' reasoned objections, and (4) give reasons for adhering to a legislative proposal to which a substantial minority of member states have objected on

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Merkel, *supra* note 88, at 120; Christian Pestalozza, Artikel 72, in 8 *Das Bonner Grundgesetz* 81 (Hermann von Mangoldt et al. eds., 3d ed. 1996). The *Bundesverfassungsgericht*, however, quickly pronounced that provision nonjusticiable. See, e.g., BVerfGE 2 (1953), 213 (224), BVerfGE 1 (1952), 264. After the *Länder* recently sought to revive the original test by a constitutional amendment that made subsidiarity clearly justiciable, the *Bundesverfassungsgericht* once again gave the principle short shrift. See BVerfG 2 (2002), 106 (62) (upholding federal regulation of professionals providing care for the elderly); Kurt Faßbender, Eine Absichtserklärung aus Karlsruhe zur legislativen Kompetenzverteilung im Bundesstaat, 6 *Juristen Zeitung* 332 (2003). For a discussion of subsidiarity in the European Union, see Bermann, *supra* note 344.

<sup>362</sup> See, e.g., Case C-233/94, *Germany v. Parliament & Council*, 1997 E.C.R. I-2405, [1997] 3 C.M.L.R. 1397 (1997). The ECJ, however, adopted a rather lenient procedural requirement in rejecting the suggestion that Community measures must make "express reference" to subsidiarity. *Id.* at para. 28.

<sup>363</sup> Bermann, *supra* note 347, at 391; cf. Jackson, *supra* note 1, at 285 (noting similarity between rules derived from *Bundestreue* in Germany and "clear statement" rules in the United States); Tushnet, *supra* note 15, at 880 (same).

subsidiarity grounds.<sup>364</sup> This novel mechanism recognizes the intensely political nature of subsidiarity judgments without handing one level of government a clear entitlement over the issue. Instead, the new protocol protects federalism by forcing salient democratic intergovernmental engagement on the matter. To be sure, the Commission is ultimately empowered to retain its legislative proposal. But the process of having to respond to the reasoned objections of member state parliaments will put significant pressure on the Commission to reconsider and forge ahead only when it can put forth a convincing justification for central government action.

Liberal fidelity, as reflected in the draft protocol, thus cautions against the more conservative approach that would ask judges to “weigh” the interests of the central government and the constituent states in any given regulatory boundary dispute.<sup>365</sup> Such judicial balancing suggests the authoritative harmonization of interests throughout the federal system in the absence of political engagement. Liberal fidelity, however, rejects the view that there is a “correct application” of the principle of subsidiarity, which a politically neutral arbiter could ultimately verify.<sup>366</sup>

More generally, the liberal fidelity approach tempers substantive judicial involvement in intergovernmental power disputes. Even where harmonization of interests is the goal, democracy depends on constructive political engagement to produce the integrative

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<sup>364</sup> EU Draft Const. art. 5(2) (“Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Constitution.”).

<sup>365</sup> For just such a balancing approach in the U.S. context, see Justice Blackmun’s controlling concurrence in *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring), overruled by *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1986).

<sup>366</sup> But see Juliane Kokott and Alexandra R  th, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 *Common Mkt. L. Rev.* 1315, 1334–35 (2003) (discussing the draft in terms of “ensur[ing] the correct application of the subsidiarity principle” and “deplor[ing]” the Convention’s failure to give national parliaments standing to challenge the Commission’s subsidiarity determination in court). Advocate General Juliane Kokott and Professor Alexandra R  th’s lament about the Convention’s failure to install the ECJ as the final arbiter of subsidiarity disputes is misplaced. As an initial matter, the ECJ’s existing authority to adjudicate subsidiarity presumably remains unchanged. Second, by neither expanding nor mentioning the court’s potential role in subsidiarity disputes, the Convention rightly emphasizes the deeply political nature of this judgment.

force necessary to sustain the constitutional system as a whole.<sup>367</sup> Accordingly, a court applying a liberal fidelity approach would refrain from substantively balancing the “central government interest” against the “constituent state interest” involved in a particular regulatory boundary dispute. Instead, after ensuring the absence of certain excluded reasons, a liberal fidelity-minded court would generally opt for a process-forcing rule.

In summary, the idea of liberal fidelity takes a skeptical view of both specific formalism and high-level functionalism in constitutional interpretation. It cautions against the formalism of jurisdictional rules that ask only, for example, whether any given activity in the United States touches on interstate commerce or in the European Union affects intracommunity trade, or whether an activity intrudes upon a realm of sovereignty reserved to the constituent states expressly or by implication. Although such formalism might, in individual cases, be justified, any such justification must ultimately be a functional one that explains the rule in terms of its vindication of democratic governance and institutional engagement in the system as a whole.<sup>368</sup> Fidelity to liberal democratic federalism equally cautions against the high-level functionalism that routinely imports policy ideals as unmediated determinants of constitutional law. Instead, liberal fidelity focuses on the particular institutional architecture of federalism and seeks to present this arrangement charitably as serving the goals of democratic governance of the system as a whole. Finally, in interpreting the divided power system, liberal democratic federalism ultimately views the distribution of powers not as a rational division of labor, but as laying the foundation for constructive mutual democratic engagement.

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<sup>367</sup> Cf. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 465–71 (1989) (criticizing “rights foundationalism” and noting that “our constitutional history is full of eloquent warnings against putting too much faith in one or another rule limiting the way that future Americans might legitimately alter their higher law”).

<sup>368</sup> Cf. Guido Calabresi, *Two Functions of Formalism*, 67 *U. Chi. L. Rev.* 479 (2000). For a functional analysis of the U.S. anticommandeering rule, see Hills, *supra* note 227.

## CONCLUSION

In a recent, highly controversial article about European and American approaches to power, Professor Robert Kagan wrote that “[o]n the all-important question of power — the efficacy of power, the morality of power, the desirability of power — American and European perspectives are diverging.”<sup>369</sup> Professor Kagan suggested that “Europe is . . . moving beyond power into a self-contained world of laws and rules” that is based on “negotiation and cooperation,” whereas the United States “remains mired in history, exercising power in the anarchic Hobbesian world.”<sup>370</sup> Kagan wrote that this explains why “on major strategic and international questions today, Americans are from Mars and Europeans are from Venus: they agree on little and understand one another less and less.”<sup>371</sup>

Professor Kagan was, of course, discussing European and American attitudes within the international arena. But he might just as well have written this passage about the currently diverging views of power and responsibility within each federal system. Indeed, for the member states of the European Union, the conceptual and geographical realm of international law is continuous with European federalism itself.

The political morality of constitutional federalism in the United States, like that of international relations, is currently dominated by the view that power may be exercised at will. This view recognizes that institutional power ought to be exercised only for enlightened purposes. But it holds that the Constitution does not impose any general duty of concern and respect for other institutions and actors within the system. Although the Constitution may have set up the institutional architecture to help contain power politically (so this view goes), the Constitution itself does not temper power with responsibility. And since our institutional architecture is fixed and unique (so the argument continues), we may teach others about our own experience, but we have nothing to learn from what others do abroad.

As in the international arena, however, this argument overlooks important countertraditions in the political morality of federalism in the United States as well as in Europe. By more carefully com-

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<sup>369</sup> Robert Kagan, *Power and Weakness*, *Pol’y Rev.*, June–July 2002, at 3, 3.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*



paring our own views to those in the European Union and in Germany, as this Article has done, we find that we have more in common than may appear at first sight: Fidelity is not the exclusive province of Europe, nor are entitlements limited to the United States. And in examining the various approaches comparatively, we see that we even have something to learn from one another: Harmony is not a proper goal of federalism, but ensuring constructive and productive democratic intergovernmental engagement is. With these lessons in mind, we may interpret power and responsibility in all three systems to serve the proper aims of democratic federalism in each.