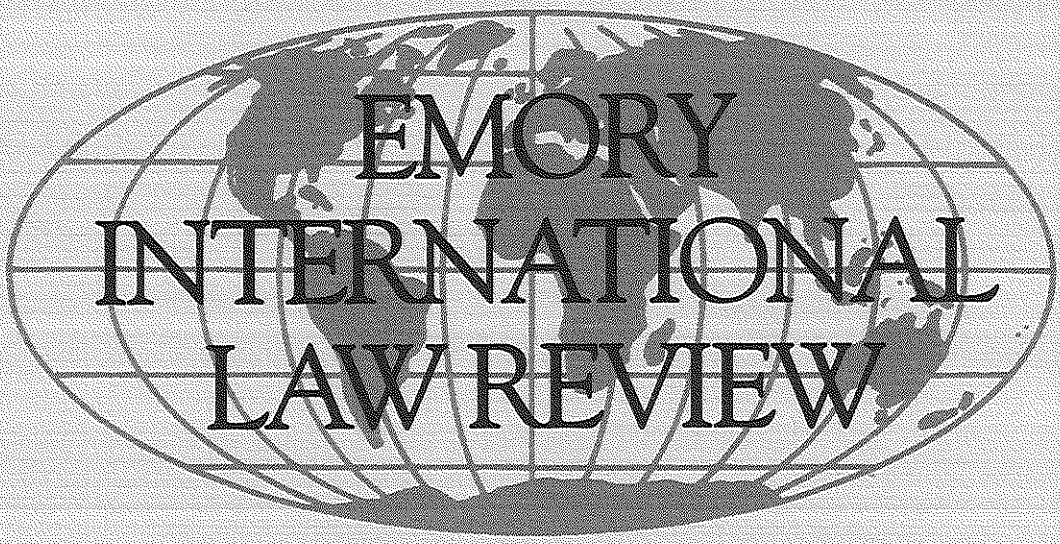

Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union

Larry Catá Backer

Reprinted from
Emory International Law Review
Volume 12, No. 3, Fall 1998

FORGING FEDERAL SYSTEMS WITHIN A MATRIX OF CONTAINED CONFLICT: THE EXAMPLE OF THE EUROPEAN UNION

Larry Catá Backer*

INTRODUCTION

Harmonization, *subsidiarity as nationalist affectation*, and *cultural solicitude* are the "communities" of basic socio-political forces which continue to shape the character of the emerging European Union (EU). Harmonization embodies the centralizing impulse of conformity with norms imposed usually at the level of greatest governmental generality in a federal system. Subsidiarity, understood as a form of solicitude for political nation-states, and cultural solicitude each embody the impulse of resistance to any norm-making authority greater than the "nation" or the "*Volk*." Where federation, nations, and *Volk* occupy the same political and geographical space, conflict on a number of levels is constant and inevitable.

The purpose of this Article is to explore the complex, contradictory, and fluid ways these "communities" of aspirations function to define and redefine the relationships among a federal Europe, its constituent nation-states, and the hodgepodge of peoples who seem averse to unity. EU constitutionalism can be most usefully thought of as shorthand for the way Community institutions, Member States, and subnational peoples, each embodying distinct visions of the meaning and limitations of union within Europe, struggle to reach some sort of equilibrium. "To the outside world, Europe may appear unified, but inside, the voices of dissent and discord are becoming louder."[1]

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* Executive Director, Tulsa Comparative and International Law Center, and Professor of Law, University of Tulsa College of Law, Tulsa, Oklahoma.

[1] Sari K.M. Laitinen-Rawana, *Creating a Unified Europe: Maastricht and Beyond*, 28 INT'L LAW. 973, 975 (1994).

This struggle is neither unique to the EU, nor to this century. Indeed, especially since the nineteenth century, Europe has served the world as a wonderfully frightening example of the sociopolitical dementia resulting from the excesses of this struggle. This dementia has taken the form of a sociopolitical multiple personality disorder in which the forces of harmonization, subsidiarity, and culture, in the form of empire, nation, and *Volk*, have produced the excesses of the last fifteen hundred years.

First, Europe has subjected itself to a fifteen-hundred-year search to recreate the *Imperium Romanum*. The goal of these repeated efforts has been to draw Europeans together under a uniform "law," the intrusiveness of which has varied with each empire. From the disintegration of the Roman Empire until the twentieth century, the Roman Catholic Church had more success in unifying Europe than any other organization. Prior to the Protestant Reformation and the rise of modernity, the Church imposed a uniform system of norms, backed by its legal system, across most of Europe. The Church, however, was not the sole entity seeking to unify and dominate Europe. The history of Europe through this century has witnessed countless political and military attempts to unify the continent. *Harmonization* is what I call the craving for normative enforceable uniformity within Europe, whether this urge to unite is expressed in political, legal, or moral terms.[2] "When I speak

[2] Within the European Union, harmonization of the sort with which I deal in this Article pervades the fundamental *Zeitgeist* of the organic documents of the EU. The reference here is to the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC TREATY]. For amendments prior to the ratification of the Treaty on European Union, see TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 801 (EC Official Pub. Office, 1987). The full text of the last amendment of the EC Treaty, the Treaty on European Union, along with the text of the EC Treaty as amended, can be found at 1992 O.J. 224, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EU TREATY]. Consider the Preamble of the EU Treaty, which speaks of laying "the foundations of ever closer union among the peoples of Europe," with the intent "to confirm the solidarity which binds Europe." As one of its tasks, the EU is to increase the "social cohesion and solidarity among the Member States." EU TREATY art. 2. *See also id.* art. 3(j) (describing the strength-

of uniformity I have generally in mind not only the situation of identical norms, but also a situation in which norms are diverse but lead to essentially identical results."[3] The impulse to harmonize tends to seek the political and geographic space of greatest generality. The power to harmonize the underlying norms which guide and limit the possibilities of lawmaking is the ultimate power of modern government. Russian socialism and German national-socialism certainly proved these points *in extremis*. How this power is shared among the levels of government in a federal system will determine the relative authority of each level.

Second, during this fifteen-hundred-year period, Europeans have also sought to preserve the independence of their particular, and by their accounts diverse, way of life. They have resisted all but the most general and theoretical understanding of themselves as Europeans. Instead, Europeans prefer to identify themselves as German, French, Swedish, and the like. Accepting this basis for political identification often leads to the conclusion that the harmonizing power of law and politics cannot be asserted within the category "Europe," but must instead devolve to Europe's political component parts. As such, the uniformity of harmonization is possible only within the confines of nation-states in which the vast majority of the people indulge in the belief that they share strong group feelings based, for example, on language, custom, and history. Each nation-state retains for itself the ultimate power to impose norms and to implement law within their respective territories. There can be no higher sovereign authority than the nation-state.

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ening of European social cohesion as an activity of the Community). *See* discussion at Part I.A, *infra*.

[3] Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1082 (1986).

The creation of the legal category "international law" serves to emphasize this point. This category provides a space in legal theory within which nation-states can differentiate, quantitatively and qualitatively, the instruments and effects of their governance from those of other "arrangements." Treated as a different and subordinate "species" within the family "law," regimes established through interstate arrangements, including those comprising the EU, can be treated as never rising to the dignity of "government." Supranational entities can then be dismissed as creatures of this law *among* nations, from which the law *of* nations is relatively insulated. As a consequence, even supranational entities like the EU can be marginalized and contained as something less than a "nation" or "federation," and the constituent nation-states of this "union" can remain the center of the political universe.[4]

The European Union's *subsidiarity* concept comprises the current embodiment of this notion and represents an attempt to preserve significance of the Member States.[5]

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[4] The German courts have expressed this notion most forcefully. They characterize the EU as a mere association of nation-states, each of which retains its full sovereign identity (*Staatenbund*) ("confederation"), rather than as a federal state, such as the United States or the German Republic (*Bundesstaat*) ("federal state"), in which the central or highest level of authority has its own national character. *See* Cases 2 BvR 2134/92 & 2159/92, Brunner v. European Union Treaty, [1994] 1 C.M.L.R. 57 (BVerfG 1993). The EU is not accorded the dignity of an independent state, but is rather a mere collection of states cooperating to attain certain limited ends.

[5] The EU Treaty added a new Section 3b. Section 3b contains three expressions of restraint on the use of power by Community institutions: to "act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein," to prohibit the Community from taking action "beyond what is necessary to achieve the objectives of the Treaty," and to observe the principle of subsidiarity. The principle of subsidiarity is set forth in the second paragraph of Section 3b:

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

Bound up in subsidiarity or national solicitude is the suggestion that supranational entities are little more than well-organized networks of legal obligations among sovereign states. Subsidiarity ultimately rejects the independent power of the networks of obligations to impose normative limits on the power of the nation, except to the extent the nation-state permits it.

Third, Europeans have a long history of elevating linguistic, religious, and ethnic similarities into something approaching nationhood. Membership in ethnic nations is a function of birth or sometimes personal choice when the acolyte is accepted into the community. This cultural separateness transcends national borders. As a consequence, multiple ethnic "nations" may inhabit one political nation-state. This subnational (or non-national) identity survives the political, dynastic, ideological, and military unions which have been cobbled together over the course of that same fifteen-hundred-year period. The result is that a "Hungarian" citizen of Slovakia carries a Slovak passport, but somehow remains "Hungarian." To a Catalan or Basque "nationalist," the entity "Spain" may be as empty as the entity "Europe."

The modern anthem of this notion is "national self-determination," though the process substantially predates the label. With good reason, Europe has demonstrated a love-hate relationship with this sort of tribal culture. Unchecked, cultural differences acquire political dimension. The recent tribal struggles in Yugoslavia remind us of the power of cultural difference. The old division between Catholic and Jewish Poland after Casimir the Great, which took the form of separate law courts, laws, norms, and the like, provides a more ancient and equally tragic example. The greater the deference to cultural or ethnic divisions, the greater the power of such groups to resist supranational and even national harmonization, and the weaker the multicultural government. Perversely, the less the deference to such ethnic realities, the greater the potential instability of

nations with multiple ethnic divisions. Today, Europe keeps potentially incompatible systems of cultural norms firmly in check. The nonpolitical and non-normative expression of culture is protected; everything else is suppressed. *Cultural solicitude* is what I call this guarded acknowledgment of the power of *Volksgeist*.

The multileveled tensions between locality, nationality, and generality provide a superior framework for understanding the character and future troubles of the union which Europeans are attempting to build, "the mysteries of [which] . . . are at least as difficult to understand as those of the Trinity."[6] These tensions are the essentially irreconcilable parameters at the core of an unchanging post-Roman *European Gemeinschaft*. I will suggest that the "new legal order" emerging with the *present* European Communities is informed and shaped by these forces to the same extent as those forces have informed and shaped all other nation-states and federations in the West. As such, the tensions and oppositions of harmonization, subsidiarity, and cultural solicitude provide an important source for understanding both how constitutionalism works in the present Community "system," and how that system will respond to sociopolitical "stimuli" in the coming years.

Parts I and II examine harmonization, subsidiarity, and cultural solicitude as the basic community of forces shaping the expression of federal organization in the West. Each acts as a variable in a matrix describing all culturally possible forms of European federalism. As the values of these variables change, so too does the character of European federalism, bouncing between the two fundamental cultural patterns of sociopolitical organization in the West. One is represented by the universalizing totalitarianism of Impe-

[6] 1 ROBERT MUSIL, THE MAN WITHOUT QUALITIES 199 (Eithne Wilkins & Ernst Kaiser trans., Perigree Books ed. 1955) (1930). Musil, of course, was making a reference to Austro-Hungarian "nationhood." I believe it applies as well to the European Union.

rial Rome. The other is most recently represented by the anarchy of Austria-Hungary's version of federalism.

Part III suggests some consequences of pan-European federal constitutionalism in the context of harmonization, subsidiarity, and cultural solicitude. European federalism provides an arena, in the form of proceduralism, in which the opposing imperatives of harmonization and national and cultural solicitude are constantly adjusted. Yet European constitutional proceduralism, as currently practiced, carries the dangers of cultural trivialization and the tendency to elevate and preserve artificial cultural expression for the amusement of dominant groups. Lastly, a proceduralism that appears to permanently situate a normative power at one level of a federal system can delegitimize the federal enterprise when shifting values reorder the power relations between federal, national, and subnational levels.

Part IV examines the ramifications of the normative instability which follow from the constant need to balance harmonization, subsidiarity, and cultural solicitude. European federalism achieves stability by providing a vehicle for expressing shifting values given to harmonization and national and cultural solicitude. It also provides a means for shifting concentrations of power between supranational, national, and subnational governments. European federalism is stable only when it allows for changes to the federal system. Such contained instability holds the promise for a stable European federation if Europeans can assert the *political will* to maintain the system.

I.

Harmonization, subsidiarity, and cultural solicitude are the variables of the matrix within which the union of Europe develops. The particular way in which a federal system is manifested, as well as the relationships between supranational, national, and subnational power, is a func-

tion of the intersection of these three parameters. Within these parameters, federal systems can assume an almost unlimited number of forms, and the form of any federal system can shift depending on the relative importance of each of the parameters in the particular system. The European Union today presents an example of one point of intersection of the values of the three parameters; the United States, GATT, and the United Nations represent still others.

Three consequences, significant for the development of the EU, flow directly from this construction. First, there is an inverse relationship between the power to set norms, inherent in harmonization, and the efficacy of subsidiarity. The power to declare fundamental rules at one level of government is the power to limit the possibility of the assertion of power by all subsidiary governments. Historically, the European Court of Justice (ECJ) has itself acquired the power to articulate fundamental norms governing all assertions of power by any government within the EU. The necessary consequence of this assertion has been to limit the discretion of subsidiary units of government, the Member States of the Community, to order their "internal affairs."[7]

Second, cultural solicitude is grounded in exceptionalism and, as such, is subversive. The gravamen of cultural solicitude is the cry: "This cannot apply to me!" But what "cannot apply"? If the inapplicable is merely incidental *and* the alternative is related to the imposition rejected, then subversion exists only as an irritant. If the inapplicable involves a rejection of norms set either at the national or supranational level, then it implies metaphysical secession. Europe has had a tragic history with secession of this type. Since the Second World War, Europe has attempted a delicate balance between permitting subnational peoples the

[7] This should not be confused with the jurisprudential notion of internal affairs, that is, the rule that "the provisions of the Treaty . . . cannot be applied to situations which are purely internal to a member-State." Case 115/78, Knoors v. Secretary of State for Economic Affairs, 1979 E.C.R. 399, 410, [1979] 2 C.M.L.R. 357, 367 (1979).

power to express their "identity" and enforcing a uniform application of "really important" sociopolitical norms at the national and federal levels. For the moment, the Member States have reduced cultural solicitude to touristic artifacts, such as colorful costumes and exotic languages. Yet within this construct lies the possibility of real redirection in the flow of power.

Third, European constitutionalism is inherently unstable. No one place within the matrix provides the perfect mix of harmonization, subsidiarity, and cultural solicitude. The optimal combination, and thus the expression of European constitutionalism, will always be a function of the values placed on the three variables by peoples with the power to implement such valuation. The particular mix of harmonization, subsidiarity, and cultural solicitude represented by any one place within the matrix will endure only for as long as the valuations producing that mix of the three variables have currency or the people implementing such a mix have the power to maintain it.

A.

For the moment, the European Community has chosen to vest great value in harmonization at the federal level. Fundamental harmonization from the top down is evidenced by the development of the ECJ's general principles of law. General principles are the most dramatic method through which government at the federal level constructs the normative limits of the power of subsidiary governments. As a result, the ambit within which subsidiarity can operate is substantially reduced.

The doctrines of Community law autonomy and supremacy effectively shift legislative power to the federal level. The doctrine of autonomy essentially posits the existence and independence of the Communities as a political unit of government. In its absence, what passes for the Commu-

nity would amount to little more than collective obligations of the constituent states. Autonomy is the name the ECJ has given to the very notion of federalism so taken for granted in other federal states. Autonomy contains the idea that the Community is set apart from its constituent states. The Community, taken as a whole (under the doctrine of unity), constitutes an independent government with concurrent competence over the territories of the constituent states.[8] Autonomy serves as a shield against Member State encroachment upon the governmental prerogatives of the Community.[9]

Having defined the complex obligations and undertakings in the Community treaties as forming a government does not resolve the question of the status of that government relative to existing nation-states. The doctrine of supremacy provides such a definition of position. While the notion of federalism does not invariably lead to the conclusion that the actions of the government of the most general jurisdiction ought to be supreme within its areas of competence, the ECJ has attempted to impose the American model on the Member States.[10] Under this conception of federalism,

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[8] *See, e.g.*, Cases 9 & 58/65, Acciaierie San Michele SpA v. High Authority, 1967 E.C.R. 1.

[9] *See, e.g.*, Case 34/73, Variola SpA v. Amministrazione Italiana delle Finanze, 1973 E.C.R. 981.

[10] *See* Case 26/62, N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Tariefcommissie, 1963 E.C.R. 1, 12, [1963] C.M.L.R. 105, 129 (1963). In now often-quoted language, the ECJ stated that

> the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Id.

the constituent states of the federative enterprise cede sovereignty upwards to the (now autonomous and independent) federal government.[11] While there may be substantial unanimity within the constituent states with respect to the validity of the principle of autonomy, there is significantly less unanimity with respect to the validity of the notion of Community supremacy.[12]

It is true that autonomy and supremacy do not provide vehicles for the assertion of limitless power. The federation can exercise power only within its areas of competence. The essence of federalism is a formal, contractually-based limitation on power among the institutional participants of the federation. Thus, while the basic level of a federal system, usually the constituent state, might claim residuary power, the higher levels of such a system usually may assert only such power as may be conceded by its constituent parts, i.e., the parts holding the residuary power. In both the EU and the United States, the residuary power resides in the State. The federal layer of government operates within the constraints of the concessions made by these residuaries. In the EU, the Commission, Council, and ECJ share significant responsibility for harmonization among the Member

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[11] *See* Case 6/64, Costa v. Ente Nazionale per l'Energia Elettrica, 1964 E.C.R. 585, 593, [1964] C.M.L.R. 425, 454 (1964). By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and, more particularly, real power stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law that binds both their nationals and themselves. *Id. See also* Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1127, [1972] C.M.L.R. 255 (1970) [hereinafter *Handelsgesellschaft*]; Case 48/71, E.C. Commission v. Italy, 1972 E.C.R. 527, [1972] C.M.L.R. 699 (1972).

[12] Macarthys Ltd. v. Smith, [1979] 3 C.M.L.R. 44 (Eng. C.A. 1979) (per Denning, MR); Cases 2 BvR 2134/92 & 2159/92, Brunner v. European Union Treaty, [1994] 1 C.M.L.R. 57 (BVerfG 1993); Case 2 BvL 52/71, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1974] 2 C.M.L.R. 540 (BVerfG 1974) [hereinafter *Solange I*].

States within the confines of the power conceded them by the Community treaties.[13]

However, the notion that neither the United States nor the EU can assert authority beyond their respective governance documents has not served to limit the expansion of federal governmental power in political cultures in which harmonization is highly valued. As in the United States, the Community institutions, and the ECJ in particular, have never hesitated to find such competence to be breathtakingly broad.[14] As Jean-Victor Louis has suggested, relying on the work of Pierre Pescatore:

> Faced with the task of interpreting a constitutional framework that gives the Community's institutions wide powers to implement its goals, the Court has gone beyond the technical rules laid down in the Treaties themselves to establish the fundamental principles on which the creation of the Community is based. . . . The principles in question are equality, freedom, solidarity and unity.[15]

The ECJ's extraordinarily broad (and some might argue EU Treaty-expanding) interpretation of, for instance, Articles 9, 30, and 48, coupled with the "discovery" of consumer protection and consumer fraud, are well known and will not be discussed here.[16]

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[13] On the institutional framework of the Community, see, e.g., D. FREESTONE & J.S. DAVIDSON, THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN COMMUNITIES (1988). The EU Treaty's emphasis on harmonization is discussed at note 2, *supra*.

[14] *See* Case C-107/94, Asscher v. Staatssecretaris van Financiën, 1996 E.C.R. I-3089, [1996] 3 C.M.L.R. 61 (1996) (although direct taxation fell within the competence of the Member States, they nonetheless had to exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on grounds of nationality).

[15] JEAN-VICTOR LOUIS, THE COMMUNITY LEGAL ORDER 50-51 (2d ed. 1990).

[16] *See, e.g.*, Case C-279/93, Finanzamt Köln-Altstadt v. Schumacker, 1995 E.C.R. I-225, [1996] 2 C.M.L.R. 450 (1996); Case C-80/94, Wielockx v. Inspecteur der Directe Belastingen, 1995 E.C.R. I-2493, [1995] 3 C.M.L.R. 85 (1995).

Formal competence, as such, does not always provide a helpful way to understand the limits of the power a federal organization can assert. Real power lies not in the EU Treaty's black letter law, but rather in inferences drawn from the document suggesting a normative governance structure. This normative governance structure provides the basic rules for reviewing all exercises of power, as well as the basic social postulates from which all other rules emerge. Just as the Ten Commandments, or perhaps even the Twelve Tables, provided the basis on which social order is built and all other actions or rules could be judged, so too, the creation of an equivalent set of basic norms permits assertion of a tremendous power to impose a normative governance structure on everyone subject to basic norms. The power need not be exercised directly. Norms are pervasive within any system in which they exist merely by the fact of their articulation and acceptance.

The "new legal order" rhetoric of the Community provides the conceptual framework for establishing norms at the Community level. Within the constitutional context, the doctrines of autonomy and supremacy provide the framework for the possibility of establishing norms at the Community level, while the development of general principles of Community law provides the substance of such norms.[17] For this purpose, the ECJ has chosen to look, not only to the general principles inherent in the EU Treaty, but also to general principles of interpretation, and more impor-

[17] The issues of the origin, use, and limitations of the concept "general principles of Community law" remain controversial in Europe. I do not discuss those questions here. For a general discussion of the genesis of principles of Community law, see, e.g., D. LASOK & J.W. BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 179-209 (5th ed. 1991); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW 115-33 (1996); JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 71-79 (1993); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

tantly, to the general principles that the ECJ finds are (or have become) common to the laws of the Member States.[18]

Concessions of power to the federal level may be taken as well as given. The single most important concession of this type has been taken by the ECJ, not by the political bodies, which have embarked on the ambitious project of creating the normative foundation for social and political union. In the form of juridically crafted fundamental principles of Community law, this appropriated concession of power creates the framework for all political and social discussion. This appropriation is intentional. The ECJ has not shrunk from conceding, on occasion, that the real basis for determining "fundamental principles" lies outside the express language of the EU Treaty.[19] Consequently, the exercise of this power has been problematic for the ECJ, especially when it has asserted the power to impose conduct norms in the arena of "human rights."[20] The ECJ has made it quite

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[18] In *Case 4/73, Firma J. Nold v. E.C. Commission*, 1974 E.C.R. 491, [1974] 2 C.M.L.R. 338 (1974), the ECJ identified the sources from outside the EU Treaty for the construction of general principles of Community human rights:

> [T]he Court is bound to draw inspiration from constitutional traditions common to Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected from the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated[,] or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

1974 E.C.R. at 507, [1974] 2 C.M.L.R. at 354.

[19] Weiler, *supra* note 17, at 1105.

[20] *See id.* There is only one reference to "general principles" in the primary law. Article 215(2) of the EC Treaty provides for EEC liability in noncontractual matters "in accordance with the general principles common to the laws of the Member States." EC TREATY art. 215(2). *See also* LOUIS, *supra* note 15, at 120 (suggesting that Article 215(2) is a specific reference to a term of general applicability). However, the ECJ may have taken inspiration from other sources. *See, e.g.*, LASOK & BRIDGE, *supra* note 17, at 180 (Article 173 permits the ECJ to annul an act of the Community which infringes "the Treaty or any rule of law relating to its application").

clear that it retains the authority to determine the scope of those general principles of Community law applicable to the Member States and all who reside within them.[21] In effect, an organ of the supranational entity now reserves for itself the power to determine the extent of its power to define the conduct parameters of all subordinate entities.[22] This is a very neat trick, one which significantly increases the power of the EU for the purposes of doing "good things," but also one permitting a substantial intrusion on the autonomy of the Member States.[23] The ECJ has the discretion to determine the baseline and permissible deviation from Community standards[24] through the Court's power to declare "fundamental principles of Community law."[25]

Thus, general principles of Community law serve as a limiting principle for Member State autonomy, even with respect to areas where the Member State has legislative authority.[26] The United States equivalent is the enuncia-

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[21] *See* Weiler, *supra* note 17.

[22] Certainly, since *Stauder*, the ECJ has asserted that fundamental rights are "enshrined in the general principles of Community law and protected by the Court." Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419, 425, [1970] C.M.L.R. 112, 119 (1969).

[23] ECJ supervision also permits the institutions of the supranational entity to resist intrusions into their power from potentially competing organs of norm making. Thus, for example, the ECJ has resisted permitting the EU from acceding to the Council of Europe's 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. *See, e.g.*, Giorgio Gaja, *Case Law*: Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 33 COMMON MKT. L. REV. 973 (1996).

[24] *Handelsgesellschaft*, 1970 E.C.R. 1127, [1972] C.M.L.R. 255 (1970).

[25] Case C-13/94, P. v. S. & Cornwall County Council, 1996 E.C.R. I-2143, I-2165, [1996] 2 C.M.L.R. 247, 263 (1996). For a discussion of the interpretive and supraconstitutional utility of principles in continental (and especially European) law, see J. Iguartua, *Sobre "Principios" y "positivismo Legalista,"* 14 REVISTA VASCA DE LA ADMINISTRACIÓN PÚBLICA (1986). *Cf.* LON L. FULLER, THE MORALITY OF LAW 106-18 (rev. ed. 1969). Emiliou suggests following four applications of general principles in constitutional interpretation: (i) to guide interpretation of primary law, (ii) to guide the exercise of power under the primary law, (iii) to provide criteria for determining the legality of acts, and (iv) to fill in gaps in primary or secondary law to prevent injustice. EMILIOU, *supra* note 17, at 121.

[26] Joxerramon Bengoetxea suggests how general principles, in the form of norms, assume supraconstitutional dimension:

tion of federal constitutional principles as against the power of both federal and state political units. General federal constitutional principles supply the interpretative norms American courts apply to interpret legal codes.[27] *Romer v. Evans*[28] exemplifies the ECJ's constitutional perspective. In *Romer*, the U.S. Supreme Court held that an amendment to Colorado's Constitution, enacted in a state referendum, violated the Equal Protection Clause of the federal Constitution.[29] The amendment precluded all governmental action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[30] Colorado, like any American state, has the legislative authority to amend its constitution by popular referendum. General principles of American constitutional law, however, prevented Colorado from violating the harmonizing norms of the principle of equal protection.[31]

Interpretive principles of American constitutional law, like general principles of Community law, are examples of *metaharmonization*—norms intended to limit the range of acceptable action by subordinate governments. Subgroups

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> Political or ethical principles sometimes enter into the legal system disguised as supra-systemic principles allegedly referred to or implied by valid norms of the system or by formal or interpretive consequences of these. If such principles are incorporated into the legal system, e.g. through a court decision, they might be considered as reasons guiding further decisions, for principles are regarded as general norms having an explanatory and justificatory force in relation to particular decisions or to particular rules for decisions.

BENGOETXEA, *supra* note 17, at 75 (citing D.N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 260 (1978)).

[27] Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles in Constitutional Cases in* Hendricks *and* M.L.B., 33 TULSA L.J. 135, 160-61 (1997).

[28] 517 U.S. 620 (1996). For a discussion of this case, see Larry Catá Backer, *Reading Entrails:* Romer, VMI *and the Art of Divining Equal Protection*, 32 TULSA L.J. 361 (1997).

[29] *Romer*, 517 U.S. at 635-36.

[30] *Id.* at 624 (quoting COLO. CONST. art. II, § 30(b)).

[31] *Id.* at 634-35.

are not permitted to transgress the boundaries of these general principles. This form of lawmaking is impervious to the logic of subsidiarity as a general principle of comity and does not recognize the imperatives of ethnic cultural norms which may be at variance with those general principles of equality, freedom, and fundamental human rights. This is outside of what Americans conceive as issues of federalism. General principles such as equality and "human rights" contain the power, as well as the ambiguity, of the Decalogue.

Harmonization within the European Union's "new legal order" is coercive. It suggests the limits of lawmaking to which the constituent states of the Community must adhere; it supplies boundaries to delineate the conduct norms of this supranational *polis*. Harmonization regularizes and levels national differences. This unity resembles the *Académie Français'* project to harmonize French language usage. Harmonization also has another function: it limits the Member States' power. Within the European Union, for example, the principle of equality substantially limits the power of political and economic institutions to engage in a number of activities once thought unproblematic. Harmonization exists at all political levels, with its normative power increasing the "higher" the political level at which it is deployed. Harmonization within Catalonia, for example, lacks the normative power harmonization enjoys in the European Union.

B.

The centripetal forces operating at the federal level do not go unchecked. Subsidiarity as a political doctrine has been developed to serve as a formal limitation on the power to harmonize at the federal level. Subsidiarity is arrayed by statist nationalists against pan-Europeanism.[32] Subsidiar-

[32] LUISA ANTONIOLLI DEFLORIAN, LA STRUTTURA INSTITUZIONALE DEL NUOVO

ity limits Community power and counters the doctrines of supremacy and autonomy. Yet, subsidiarity operates merely as a form of exceptionalism. It serves as a political check on the judicially enunciated doctrines of Community autonomy and supremacy. As we have seen, autonomy and supremacy suggest the *effect* of norm-making at the federal level on the now-subordinate political levels. These doctrines do not, however, suggest the parameters of that norm-making power. Nor do they necessarily suggest the standards by which the federal institutions ought to measure the need to use their norm-making power.

As a creature of politics, subsidiarity functions best at the Community institutional level and is most effective when the Member States renegotiate the nature of their relationship with the federal entity. The Maastricht Treaty is littered with the detritus of this process, in the form of the various protocols negotiated by individual Member States or the exemption of Member States from newly assertable federal power.[33] The process leading to the draft Amsterdam Treaty reflects the effectiveness of subsidiarity as shorthand for political bargaining between the layers of the European federal state.[34] Ironically, the Amsterdam Treaty also produced a proposed protocol on subsidiarity.

> Subsidiarity is now a legal concept, and the Protocol will undoubtedly give rise to case law. Moreover, laying to rest any doubts on this score, it confirms the dynamic view of subsidiarity; i.e. that the level at which

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DIRITTO COMUNE EUROPEO: COMPETIZIONE E CIRCOLAZIONE DEI MODELLI GIURIDICI 63-106 (1996).

[33] *See, e.g.*, EU TREATY, *supra* note 2; Protocol on Social Policy & Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, [1992] 1 C.M.L.R. 719, 776 (1992); Protocol on the Acquisition of Property in Denmark, [1992] 1 C.M.L.R. 719, 740 (1992); Protocol on Portugal, [1992] 1 C.M.L.R. 719, 772 (1992); Protocol on France, [1992] 1 C.M.L.R. 719, 775 (1992).

[34] Michel Petite, *The Treaty of Amsterdam* (visited Jan. 11, 1999) <http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-2-.html>.

> it is appropriate to act can vary according to the circumstances . . . and confounds the view of subsidiarity as the repatriation of powers to the national capitals.[35]

At the federal level, the arena of subsidiarity is the Council and, to a lesser extent, the Commission. Here, subsidiarity acts on the legislative process "as a focus for arguments about the political desirability of Community action."[36] The power to focus political discourse does not guarantee devolution from the federal to the Member State level. The pattern, at least at the level of the Community, has been to consider and reject as inappropriate the devolution of legislating to the Member State level. Member States, however, continue to press the point, with true meaning or implications of subsidiarity remaining elusive. The Member States contend that whether the Community may act in a given situation always requires an initial determination of whether the action could not be sufficiently achieved through action taken at the Member State level.[37] Subsidiarity is, however, relevant only in the areas of shared competence between Member States and the Community. In areas of exclusive Community competence, it plays no role. The EU Treaty is unhelpful in defining areas of exclusive and joint competence. One could argue broadly that any area covered by the EU Treaty would be an exclusive Community competence. The only exceptions would be in those areas where the EU Treaty expressly gives the Member States a role to play.[38] Conversely, areas of exclu-

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[35] *Id.* at 15.

[36] STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 170 (1995).

[37] *Id.* at 170-71; Case C-233/94, Germany v. European Parliament & E.U. Council, 1997 E.C.R. I-2405, [1997] 3 C.M.L.R. 1379 (1997) (holding that subsidiarity must be considered in lawmaking at the Community level, but no detailed justification is required when the Community decides to act).

[38] The examples that readily come to mind include Article 126 on vocational training and Article 128 on cultural solicitude. EU TREATY, *supra* note 2.

sive Community competence are limited to those areas in which the Member States may not legislate.[39]

At best, subsidiarity suggests direction. Where harmonization suggests the content of law and norm-making, subsidiarity provides the formula for society to determine the level of generality for making political and societal decisions. To the extent it devolves decisions to the national or subnational level, subsidiarity works against harmonization's supremacy at the supranational level. Although subsidiarity suggests direction, it suggests no content. Rather, at its broadest level of interpretation, subsidiarity suggests that harmonization, and even coercive harmonization, is good. It suggests, however, that such power may only be most sparingly used at the most general level of European government. An expansive, if theoretical, subsidiarity champions an older status quo, that of the post-Reformation nation-state as the locus of all norm-setting.

The reality, however, may be somewhat different. Decisions such as the *Working Time Directive* case[40] or *Cornwall County Council*[41] leave room for neither subsidiarity nor the peculiarities of Member State legal norms. "In so far as the law seeks to regulate relations in society, it must on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science."[42] If one takes a very broad view of the meaning of exclusive Community competence, the issue of subsidiarity becomes irrelevant. That certainly might be seen as the essence of the *Working Time Directive* case, where the ECJ explained that, as Article 118a vested the power to harmonize in the Council, the

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

[40] Case C-84/94, United Kingdom v. E.U. Council, 1996 E.C.R. I-5755, [1996] 3 C.M.L.R. 671 (1996).

[41] Case C-13/94, P. v. S. & Cornwall County Council, 1996 E.C.R. I-2143, [1996] 2 C.M.L.R. 247 (1996).

[42] *Id.* 1996 E.C.R. at I-2149, [1996] 2 C.M.L.R. at 252-53.

Council's determination to harmonize under Article 118a "necessarily presupposed Community-wide action."[43] Likewise, in *Cornwall County Council*, if the principle of equality is covered under Article 119 of the EU Treaty and if the Equal Treatment Directive is grounded in Article 119, then the entire field of equal treatment is within the exclusive competence of the Community. It would then follow that neither the Council nor the ECJ would have to justify its decision in light of the subsidiarity principle. If this is so when harmonization is explicitly provided in the black letter of the EU Treaty, then subsidiarity is even less relevant in those situations where the ECJ attempts to construct overarching *European* norms in the form of general principles. For the ECJ, there is no place for the Member States in the construction of general principles of law, except indirectly as founts of such principles.

How useful is subsidiarity in the face of the centralizing legislative power of the EU? The EU uses its courts to create norms to regulate the internal actions of the Member States; these courts also interpret limiting principles, such as subsidiarity, which are also the product of centralizing legislation. Subsidiarity itself concedes power to the center and away from the Community's Member States. Therefore, subsidiarity must assume a role within the federal legislative process which is also subordinate to the fundamental principles on which the Community operates. As Bernard has noted, "Subsidiarity is concerned with the means of furthering those [common] values [shared between central and local institutions] but cannot provide a way out of fundamental conflicts about the values themselves."[44] As only the central authority can resolve value conflicts, the discipline of harmonization and hegemony become necessary. "This is inevitable. In society as it is today, in which customs and morals are changing rapidly,

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[43] *United Kingdom*, 1996 E.C.R. at I-5809, [1996] 3 C.M.L.R. at 674.

[44] Nicolas Bernard, *The Future of European Economic Law in the Light of the Principle of Subsidiarity*, 33 COMMON MKT. L. REV. 633, 651 (1996).

citizens are guaranteed ever wider and deeper protection of their freedoms."[45] Thus, subsidiarity may well work against its own interest. In this view, subsidiarity implicitly assumes that the state is little more than a mere geopolitical entity.

The ECJ's great "general principles" cases demonstrate that the ECJ has quite consciously assumed the role of a centralizing cultural authority.[46] In such a role, the ECJ provides a strong indication of the value of the principle of subsidiarity as a source of protection of Member State autonomy against the power to declare general principles of Community law.[47] Quite simply, subsidiarity is irrelevant in connection with the consideration of the most basic questions affecting a supranational grouping. The doctrine of subsidiarity is solicitous of Member State norm-making power only *after* the supranational entity has created the fundamental norms for interpreting and constraining such power.[48] Once basic choices are made at the federal level, subsidiarity is free to come into play. Subsidiarity is a tool of legislative implementation, not of core legislative formulation.

C.

Cultural solicitude is the stepsister of harmonization and subsidiarity. Ignored until recently, it contains the possibilities of revolution and poses the greatest potential threat to the nation-state since the dismemberment of the Roman Empire. Cultural solicitude, *in extremis*, contains the possibility of a European retribalization. This concept expresses the desire for dismembering multinational nation-states in the name of self-determination. This concept rep-

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[45] *Cornwall County*, 1996 E.C.R. at I-2149, [1996] 2 C.M.L.R. at 252.
[46] Weiler, *supra* note 17, at 1105.
[47] Bernard, *supra* note 44, at 644, 651, 663.
[48] *Id.*

resents both *Gemeinschaft*, community, and the national-socialist understanding of that term, *Volksschaft*. Cultural solicitude has assisted the dismemberment process which, in its last iteration, began in 1918 with the dissolution of many old imperial federations. After repeated use and misuse in the 1930s and 1940s, cultural solicitude lay dormant during the Cold War. Retribalization as self-determination is regaining momentum at the close of the century, though it appears at times in a more benign form. One need only contemplate Spanish devolution and Czechoslovak or Yugoslav dissolution to understand how cultural solicitude ignores national borders.

Within a federal structure, cultural solicitude challenges the neat little directional patterns set up under the "rule" of "subsidiarity." More ominous, perhaps, cultural solicitude owes no allegiance to the foundational norm structure of the supranational organization. This failure of allegiance is most apparent when supranational norms contradict the practices of a particular "culture." As tends to be the case in today's Europe, a national or supranational entity's harmonizing power levels cultural difference. Perversely, absent agreement that "culture" is subject to the "rule of law," emanating from superior political institutions, subnational *Volk* may well become the most powerful force in the coming century.

Within the EU, solicitude for the peculiarities of subnational cultural practices currently receives short shrift. Article 128 of the EU Treaty is evidence of the marginal place accorded cultural solicitude within the EU.[49] More an artifact of propaganda than a source of "*Volk*" power, Article 128 brazenly announces quite hyperbolically that the "Community shall contribute to the flowering of the cultures of the member states."[50] What Article 128 potentially

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[49] EU TREATY art. 128.

[50] The main thrust of Article 128 is in the form of an ambiguous command to the Community: "The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the

gives, the Member States may take away by, for example, their continued resistance to adding a protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms covering minority and cultural rights. The expression of culture at any level other than the national level is also tightly controlled. For the moment, even the suggestion that Council action under Article 128 be subject to qualified majority voting has been rejected. The Draft Treaty of Amsterdam preserves the unanimity requirement.[51] Thus, political space for subnational expression is limited to a sort of "photographic opportunity" solicitude. Europe still heeds the lessons of "self-determination" effectively used to carve up Czechoslovakia in the 1930s and Yugoslavia in the 1990s.

Where the issues touch on matters deemed to implicate a fundamental characteristic of the European "character" (the supranational character, if you will), then subnational cultural idiosyncrasies may not intrude. "To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role."[52] This refers, however, to society in the aggregate and, in reality, cloaks the command: "assimilate in fundamental matters or be cast aside." The proposition is not wrong, for there would be something disturbing in a federation run on the principle of "smallest common denominator." But we

same time bringing the common cultural heritage to the fore." *Id.* art. 128(1). The Community is also required to "take cultural aspects into account in its actions under other provisions of [the EU Treaty]." *Id.* art. 128(4). The Community, however, is limited to the enactment of "incentive measures" and is specifically prohibited from "any harmonisation of the laws and regulations of the member-states" in its efforts "to contribute to the achievement of the objectives referred to in this Article." *Id.* art. 128(5). "Flowering of culture" is defined as improving and disseminating the history of the European peoples, conserving and safeguarding cultural heritage, noncommercial cultural exchanges, and artistic and literary creation. *Id.* art. 128(2).

[51] Petite, *supra* note 34, at 34.

[52] Case C-13/94, P. v. S. & Cornwall County Council, 1996 E.C.R. I-2143, I-2149, [1996] 2 C.M.L.R. 247, 252 (1996).

should not fool ourselves into believing that, at least with respect to fundamental matters, cultural solicitude for subnational groupings ought to have much weight. Thus, when commentators consider the democratic value of ECJ jurisprudence, they ignore the peculiarities of ethnic cultural solicitude. Hjalte Rasmussen makes the typical argument that the ECJ's activism in cultural and political matters is democratic to the extent that it reflects the will of the people better than the Member States' representatives in Community institutions.[53]

Moreover, even where solicitude for culture acquires national dimensions, the concerns of such cultural sensibilities must defer to federal norms. The "general principles" cases of the ECJ demonstrate the effectiveness of cultural sensitivity as a second order concern. Consider the "cultural integrity preservation" cases of the ECJ under Article 30. In those cases, the ECJ opted to "colonize" national and cultural sentiment. Public morality and national and subnational culture are all important concerns. The overarching principles inferable from the EU Treaty constrain these concerns.[54]

Left in the wake of the dynamism of cases like *Cable Televison Broadcasts* are the cultural norms one might otherwise think should have informed the court's decision. Those are the cultural norms of minorities rejecting the fundamental norms crafted at the level of the Community as a whole. Cultural solicitude, thus, remains marginal. Yet perversely, even the definition of that margin must be a matter of foundational concern. The definition of the margin cannot be left to the idiosyncrasies of the subnational culture and its "conflict of laws" rules. Rather, that definition, much like the definition of subsidiarity, must be crafted at the federal level. As thus crafted, cultural solici-

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[53] HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 101-02 (1986).

[54] Case C-11/95, E.C. Commission v. Belgium, 1996 E.C.R. I-4115, [1997] 2 C.M.L.R. 289 (1996).

tude and the protection of subnational minority ethos become the ultimate residuum. This reduction follows from the inherent circularity of our understanding of what *necessary* solicitude of culture means. Consider again the circularity of the requirement in Article 128 that the "Community shall contribute to the flowering of the cultures of the member-states, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."[55] The oppositions lying just below the surface of this provision are essentially irreconcilable unless we read Article 128 to require the flowering of "culture" only to the extent consistent with a federally determined European "common cultural heritage."

At stake are the concepts of a common basis for conceiving social justice and European integration. The fact that "in Community law there is no precise provision *specifically* and literally intended to regulate the problem"[56] has not prevented the court from imposing on all subnational cultures a harmonizing conception of "the great value of equality."[57] This equality comes from

> principles and objectives of Community social law, the statement of reasons for the directive underlining 'the harmonisation of living and working conditions while maintaining their improvement' and also the case law of the Court itself, which is ever alert and to the fore in ensuring that disadvantaged persons are protected.[58]

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[55] EU TREATY art. 128(1).
[56] *Cornwall County*, 1996 E.C.R. at I-2157, [1996] 2 C.M.L.R. at 260.
[57] *Id.*
[58] *Id.*

II.

The values assignable to the variables of harmonization, subsidiarity, and cultural solicitude are limited at the point where the value of one reduces the others to zero. These "zero points" form the walls of the matrix within which a multi-governmental federal structure is possible. Within these zero points stand three great experiments in European harmonization, each an attempt to cobble together a federation on the basis of "multi-cultural ideals." Two of these experiments stand as the great bookends of modernity. On one end of the twentieth century stands that now apocryphally tragicomical kingdom-empire of Austria-Hungary. On the other stands the emerging union of Western Europe. The former had little holding it together other than the dynastic ambitions of the Hapsburg family. The latter was constructed as a great experiment in expiation for the sins of national-socialism and as a behavior modification program for nations addicted to self-destruction. Two other European experiments in governance merit mention. One, national-socialist Germany, sought to create a land empire with governance based on race hierarchy principles. The other, the former Soviet Union, was based on the notion that eventually all government would wither away. Neither can be considered an experiment in federalism, except perhaps as farce.

Overshadowing all European federations is the Roman "federation." Republican, and later imperial, Rome was the first successful European union, despite its ultimate overcentralization and inability to adjust to change. Each of these federations share many underlying similarities and frailties. The ways in which these federal systems have mediated between the pulls of harmonization, subsidiarity, and cultural solicitude suggest the nature of the tensions. The histories of these federations demonstrate how unsuccessfully mediated tensions can destroy any supranational Western government.

Reading contemporary accounts of European "citizenship" and the contemporary sociopolitical psychoanalysis which passes for theorizing about the "internationalism" of the emerging "European Union," I cannot help but recall Robert Musil's description of Austro-Hungarian nationhood in his satirical novel, *Der Mann ohne Eigenschaften* ("The Man Without Qualities"):

> This sense of Austro-Hungarian nationhood was an entity so strangely formed that it seems almost futile to try to explain it to anyone who has not experienced it himself. It did not consist of an Austrian and Hungarian part that, as one might imagine, combined to form a unity, but of a whole and a part, namely of a Hungarian and an Austro-Hungarian sense of nationhood; and the latter was at home in Austria, whereby the Austrian sense of nationhood actually became homeless. The Austrian himself was only to be found in Hungary, and there as an object of dislike; at home he called himself a citizen of the kingdoms and realms of the Austro-Hungarian Monarchy as represented in the Imperial Council, which means the same as an Austrian plus a Hungarian minus this Hungarian, and he did this not, as one might imagine, with enthusiasm, but for the sake of an idea that he detested, for he could not endure the Hungarians any more than they could endure him, which made the whole connection more involved than ever. As a result, many people simply called themselves Czechs, Poles, Slovenes or Germans. . . . It entirely suffices if it is noticed that the mysteries of this dualism (such is the technical expression) are at least as difficult to understand as those of the Trinity; for the historical process more or less everywhere resembles a juridical one, with hundreds of clauses, appendices, compromises and protests, and it is only to this that attention should be drawn. All unsuspectingly the common man lives and dies in the midst of it all, and lucky for him that it is so; for if he were to realise in what a process, what an action, he is involved, with how many lawyers, what

> costs and motives, he might be driven to persecution mania, whatever country he lived in.[59]

Here is the paradox of Europe, condensed within the borders of that doomed Austro-Hungarian experiment in multinational federalism. The Imperial machinery in Vienna unsuccessfully attempted to impose an "imperial" universalism within a heterodox community because it lacked the power to act as the instrument of transborder harmonization. Though "imperial," it always appeared as "merely" Austrian and therefore incapable of successful appeal to universalism. Ironically, solicitude for the "common person" was lost after 1918 in the wake of the rejection of the universalism offered through Vienna as the heterodox population of Austria-Hungary rushed to establish tribal nations, each with national minorities ripe for exploitation. An empire without some minimum power to create and enforce norms loses the power to bind its parts together. Against the normative power of the metastate are arrayed the formidable powers of the traditional nation-state. Set against both, appearing at once the friend of one and then the other, are the *Volk* populations, whose identities do not necessarily correspond to the realities of political borders and which seek to play nation against supranation.

Europe is leery of both Austria-Hungary's mistake and the disastrous aftermath of the disintegration of that transnational empire—a semi-tribal system of nation-states cannibalizing each other and their minorities. Europe longs for the certainty and repose of the ancient *Imperium Romanum,* but with the economic stability of Rome's most successful modern iteration, the uncomfortably contemporary *Imperium Americanum*. Yet, the fear of empire counters this longing. Europeans understand that the process of "binding" is not painless. The shadow of Rome demonstrates the coercive power of unity. Similarly, the story of the emasculation of the American states since the nine-

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[59] MUSIL, *supra* note 6, at 198-99.

teenth century serves as a modern cautionary tale. That aspect of European unity is one that Europeans have resisted since the fall of the first empire. Gibbon's description of the potentially choking power of transnational harmonizing power amply expresses the basis for this resistance:

> The division of Europe into a number of independent states, connected, however, with each other, by the general resemblance of religion, language, and manners, is productive of the most beneficial consequences to the liberty of mankind. A modern tyrant, who should find no resistance either in his own breast, or in his people, would soon experience a gentle restraint from the example of his equals, the dread of present censure, the advice of his allies, and the apprehension of his enemies. The object of his displeasure, escaping from the narrow limits of his dominions, would easily obtain, in a happier climate, a secure refuge, a new fortune adequate to his merit, the freedom of complaint, and perhaps the means of revenge. But the empire of the Romans filled the world, and when that empire fell into the hands of a single person, the world became a safe and dreary prison for his enemies. The slave of imperial despotism . . . expected his fate in silent despair. To resist was fatal, and it was impossible to fly.[60]

Europe thus remains mistrustful of the Roman Empire, which its migrating peoples formally destroyed in the fifth century A.D. Europe prefers the comfortable weakness of Austria-Hungary within which a community of sovereignties would enforce comfortable and malleable universalizing social and political norms. At least since Althusius in the seventeenth century, European political theory has focused on the optimal size and constitution of political associa-

[60] 1 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 72-73 (Modern Library ed. 1932) (1776).

tions.[61] Since that time, Europeans have rejected a Catholic religion providing universal norms. The alternative for many involved borrowing from the Roman model. The Roman model carries with it the potential for creating a strong centralizing institution able to impose norms on Europe. Europeans fear that, uncaged, supranational institutions will succeed to the power of *imperator* and subvert national and popular sovereignty. Europe still feels the need to control any universalizing secular power.

In the West, federalism has provided the answer to these inquietudes. The idea of associations based on covenants and hierarchies of covenants, imitating the covenant between God and humankind, is deeply embedded in European Christian thought.[62] Its development remained significantly more theoretical in Europe than in the United States. In Europe, statist theory, exemplified in the work of Jean Bodin, positing that sociopolitical power flows from the top down, supplied the basic justification for the modern nation-state.[63] Harmonization becomes more consequential at the most general level of political power. Until the seventeenth century, harmonization as norm-setting was the province of European religious establishments. From the rise of the European nation-state until the early twentieth century, and with the exception of that closely knit federation of states across the Atlantic, the most general level for harmonization was the large nation-state. Only in the United States, covenantal notions and social contract theory revived the idea that hierarchies of governments, deriving their power from and through the hierarchy, became the Republic's foundation of a multistate federation.

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[61] JOHANNES ALTHUSIUS, POLITICA: POLITICS METHODICALLY SET FORTH AND ILLUSTRATED WITH SACRED AND PROFANE EXAMPLES at ix (Frederick S. Carney trans. & ed., 1964) (1614).

[62] Carl J. Friedrich, *Preface* to ALTHUSIUS, *supra* note 61, at ix-xi.

[63] *See generally* JEAN BODIN, THE SIX BOOKS OF THE COMMONWEALTH (Richard Knowles trans., 1606) (Kenneth D. McRae 1962).

Since 1945, European nation-states increasingly have sought protection from a variety of ills and threats within the ambit of federations denominated "multinational" organizations. As such, federation as hierarchies of covenants has finally returned to Europe as an antidote to the post-Austro-Hungarianization of Europe and as protection against the creation of another centralized *European Imperium*. The formal character of such organizations has been the subject of lively "territorial" debate among commentators. These debates better reflect academic divisions in the study of law (international law, constitutional law, public law, private law, etc.) than the realities of these organizations. In the course of the debate on the federal character of the United States and the EU, it *has* become clear that all such organizations behave like federations. Moreover, all federations do not behave in the same manner.[64] Supranational organizations can fall anywhere within a spectrum, from highly integrated international federations, like the United States, to very loosely integrated federations, like the United Nations. The political imperatives of the second half of the twentieth century have been the accretion of norm-making power to the federal nation, be it the federal government of the United States, the EU, or even GATT.[65] The only exception, as Ugo Mattei has suggested,

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[64] PRESTON KING, FEDERALISM AND FEDERATION 133-41 (1982); Ivo Duchacek, *Perforated Sovereignties: Towards a Typology of New Actors in International Relations, in* FEDERALISM AND INTERNATIONAL RELATIONS: CONFLICT AND COOPERATION 1, 1-3 (Hans J. Michelmann & Panayotis Soldatos eds., 1990).

[65] John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 904 (1996). For GATT, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994). Even the North American Free Trade Agreement has elements of the ceding of sovereignty we have come to associate with the creation of federal unions. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296-456 & 605-800 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA]. *Cf.* Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850 (1996-97). On differences between NAFTA and the system of the Euro-

lies in legal systems that he dubs "traditional," such as Islamic legal systems.[66] Yet even within such systems, the federative power of Islam may well shift norm-making power to the religious federation at the expense of the political. The fact that this is a battle that Catholic pontiffs fought and lost less than one thousand years ago does not make the battle any less real in the Islamic world today.

The character of these federations, including the relationships between federation, subfederation, and populace, is quite dynamic over time. The United States provides an excellent example of how centripetal forces in the American federation have worked over the course of the last two hundred years. A civil war violently crushed the independence of the American states. In this century, the federal judiciary's acquisition of the power to articulate norms limiting states' legislative power and popular sovereignty further reduced state independence. Yet today, a substantial reassessment of the vertical distribution of power, as well as of the power of the federal judiciary to articulate fundamental norms, is occurring. Thus, the coming century may see another readjustment to the distribution of power within the tightly integrated American federation.

The EU is an example of a dynamic federation standing somewhere between the closely integrated United States federation and the loose structure of "international" organizations. The resemblance of the Community to either the United States or United Nations[67] models is more evidence of the unstable character of federations than of uncertainty

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pean Union see, e.g., Frederick M. Abbott, *NAFTA and the Future of United States–European Community Trade Relations: The Consequences of Asymmetry in an Emerging Era of Regionalism*, 16 HASTINGS INT'L & COMP. L. REV. 489 (1993).

[66] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 36 (1997).

[67] *See generally* Richard Bellamy & Dario Castiglione, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe*, 16 LAW & PHIL. 421 (1997); J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L. L.J. 411 (1996).

about the peculiar characteristics of the Community.[68] It has become commonplace to believe that the character of the EU has "progressed" from a limited and loosely knitted international organization to something more integrative and "federal."[69] Yet, though the EU has progressed toward a more integrated federal system, it has always been a federal system in nature. Thus understood, the experiment in European federalism is neither sui generis nor unaffected by history, politics, and culture.

Federalism must balance its three fundamental political elements—the centripetal force of federal "nation," the centrifugal forces of constituent "nations," and the imploding forces of subnational *Volk* nations. Over the course of a history a fraction as long as that of the United States, the latest European federation has demonstrated a remarkable ability to shift the power relationships within it. But this shifting is done within the confines of Roman imperialism and Austro-Hungarian disintegration.

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[68] McGinnis, *supra* note 65, at 904. *Cf.* Catherine Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in the Political Architecture of Europe*, 16 LAW & PHIL. 377 (1997). Consider the comments of John McGinnis in this regard:

> The role of the nation state in the regime of international federalism, with its relatively free trade and open capital markets, is in fact beginning to approximate the role of the state in the original Constitution of the United States. Just as nation states today have surrendered substantial control over their economic autonomy through trade and exchange accords, the founding states also gave up substantial control over their economic affairs by acceding to the Constitution and its economic provisions, such as the Commerce Clause. Moreover, after the signing of the Constitution, the states formally and—with the notable exception of the Civil War—actually foreswore both the use and the threat of use of force against one another, just as today nation states in the West are formally and actually foreswearing the use of force against one another.

McGinnis, *supra* note 65, at 904.

[69] *See, e.g.*, Jenna Bednar et al., *The Politics of European Federalism*, 16 INT'L REV. L. & ECON. 279 (1996); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

Europe's challenge in the twenty-first century will be to determine whether the modern federal republic of Europe will follow the path of Austria-Hungary, Rome, or a different path. The relationships among citizen, Member State, and Community are always complex, sometimes contentious, and usually tentative. Perhaps that is why commentators take refuge in the less tangible world of international law when describing the moorings of the EU. This is ironic in light of the ECJ's generation-long crusade to convince us that the better mooring might be the American model: an Enlightenment social contract by which the people, through their states, transferred a limited sovereignty to the American federal government. Harmonization is good to the extent it is a process realized by creating unitary enlightened norms. Harmonization is even "better" when used to unify Europe painlessly. For years, Europe has been striving for a unified normative structure in which to shape its politics. I suggest the outline of that structure in the section which follows.

III.

The ECJ's vision for the relationships among harmonization, subsidiarity, and cultural solicitude presents a clear picture of where within the matrix of political imperatives the ECJ would place the relationship between Communities, Member States, and subnational groups. This articulation also highlights the consequences of having chosen this particular place in the matrix. For the moment, and for the purpose of constructing an important unit of government, the Communities have placed great emphasis on harmonization at the highest federal level. National and cultural solicitude have been given short shrift; and, of the two, national solicitude receives greater deference than cultural deference to the eccentricities of subnational groups. Yet, this particular place on the matrix is unstable. There is no real guarantee that the structure the ECJ chooses will

endure. The following part discusses the reasons for this instability and my sense of the current configuration's permanence.

Our birthright as social animals is an unquenchable *will to order*.[70] We seek connection with others, which leads to order and power. We replicate ourselves in multiple form in this way.[71] Groups, in this sense, are very much like the Borg, a society of beings portrayed in *Star Trek*.[72] The Borg were a race which had attained the highest degree of communitarian development on a number of levels. Borg society consisted of humanoid beings who, shortly after birth, were joined with a number of mechanical components. The result was a being part-human, part-machine, and intimately connected to all others in the "collective," meaning the community in which all were expected to function. Each being became an undifferentiated, but individual, part of the Borg community. The Borg believed this to be the perfect social state of being. The Borg were also fairly militant about this belief. The collective's primary mission was assimilative and expansionist. The Borg felt compelled to share their perfect form of social organization with other groups. Since perfection was inexorable, all other life forms had to assimilate or be destroyed. The Borg presented us with an exaggerated version of our own rendering of the nightmare of an imperial conformity: human and machine in near perfect integration within each body, the individual subsumed within the collective, and a "passive-aggressive" defensive mechanism for community protection.

The curse of our individuality, disconnected at the most basic level from others, is that we resist connectivity at the

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[70] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) (examining the effect of penal institutions and the power to punish in modern society).

[71] For a discussion of how popular culture is "replicated," i.e., subject to the hermeneutical exercise of life, see Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996).

[72] *See, e.g.*, STAR TREK: FIRST CONTACT (Paramount Pictures 1996).

individual and group level. Connectivity implies subordinating individualism, the basis of human life. Individuals come, however, to the text of group normativity individually.

> When I claim that gender is inevitably personal as well as cultural, I do not mean only that people create individualized cultural or linguistic versions of meaning by drawing upon cultural or linguistic categories at hand. Rather, perception and meaning are psychologically created. As psychoanalysis documents, people use available cultural meanings and images, but they experience them emotionally and through fantasy, as well as in particular interpersonal contexts. Individuals thereby create new meanings in terms of their own unique biographies and histories of intra psychic strategies and practices.[73]

This idea has been expressed well in the context of the "culture" of legal education, "[t]hus no one is ever exposed to the totality of a culture; culture is collectively filtered through the particularities of individual experience. Furthermore, individuals differ in the extent to which they conform to norms, and situations differ in the extent to which they elicit conformity."[74] The impossibility of uniformity of interpretation, in itself, ensures that normativity can never be uniform or immutable.

The manifestation of that social *will to order* permeates all human relationships. It is as effective at personal and familial levels as it is at the level of national and global in-

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[73] Nancy J. Chodorow, *Gender as a Personal and Cultural Construction*, 20 SIGNS: J. WOMEN IN CULTURE & SOC. 516, 517 (1995) (discussing cultural replication through action in the context of gender theory). *See also* Backer, *supra* note 71, at 529 ("we practice culture through an endless attempt at replication").

[74] L. Ameda Obiora, *Neither Here nor There: Of the Female in American Legal Education*, 21 L. & SOC. INQUIRY 355, 385 (1996) (commenting on the practice of culture and its expression in the context of legal education). *See also* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

teraction. The resistance to *every particular imposed order* emanates from the will to order. Resistance as an individual or subgroup negates the power to order the larger collective. Resistance is expressed through life experience, the vagaries of interpretation, or military conflict. Our political systems internalize these tensions without hope of resolution. Harmonization expresses social ordering; culture suggests resistance; and subsidiarity evidences mediation among collectives.

Harmonization, subsidiarity, and protection of "group" culture are a political shorthand for a "*proceduralist understanding of law.*"[75] The American parallel here is to the proceduralist jurisprudence of commentators like Herbert Wechsler and Antonin Scalia.[76] Proceduralism works, but only within the framework established by *someone*—that is, as *metaprocess*. The contest for the acceptance and construction of metaprocess itself reflects tensions at the lower levels. It is only in this regard that Rosenfeld's notion of "comprehensive pluralism" makes sense. Such comprehensive pluralism, shorthand for harmonization-subsidiarity-cultural solicitude, takes the form of

> a dynamic system that depends on the concurrent work of thrust and counterthrust which is propelled by the permanent tension generated by the friction between its negative and positive work . . . and has an important negative role to play—it can be vital in [the] struggle against the permanent entrenchment of any particular set of first order norms. . . . [It] can also play a limited, but nonetheless crucial, role on the positive front. By exposing particular inequities

[75] Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 776 (1996) (emphasis added). For thoughtful commentary on Habermas's proceduralism, see Michel Rosenfeld, *Preface: Habermas on Law and Democracy*, 17 CARDOZO L. REV. 767 (1996).

[76] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

> through its leveling mechanisms and by revealing concealed inequities through the reversal of perspectives, [it] can channel [the] need for contested first order norms toward more encompassing, widely shared, and less oppressive alternatives.[77]

The necessary consequences of the tensions inherent in our late twentieth century federative political enterprise are thus exposed. The most significant of these are trivialization, the paradox of process, and the preservation of artificial culture.

A.

When subnational culture, Member State, and community interests conflict, only one may prevail. But which one? The answer tends to be the supranational unit. *Commission v. Belgium*[78] provides a glimpse of the ECJ's understanding of the hierarchy and positioning of harmonization, subsidiarity, and culture. In that case, Belgium sought to justify its system of prior authorization for cable retransmission of television programs from other Member States (arguably in contravention of the relevant Community directive) on the basis of the cultural protections afforded under Article 128. Indeed, Belgium argued that legislative action by the Community must be construed in light of Article 128 of the EU Treaty, relating to culture, as inserted into the EU Treaty by the Treaty on European Union. The ECJ found the argument unacceptable:

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[77] Michel Rosenfeld, *Can Rights, Democracy, and Justice be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 824 (1996).

[78] Case C-11/95, E.C. Commission v. Belgium, 1996 E.C.R. I-4115, [1997] 2 C.M.L.R. 289 (1996).

> As is apparent form [sic] the seventeenth and eighteenth recitals in the preamble to Directive 89/552, that directive also pursues cultural objectives, in particular by means of the system laid down in Articles 4 and 5. It is true that, under Article 128(1) of the Treaty, the Community is to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore, and that, under Article 128(4), it is to take cultural aspects into account in its action under other provisions of the Treaty. However, that Article does not in any way authorise the receiving State, by way of derogation from the system established by Directive 89/552, to make programmes emanating from another Member State subject to further controls.[79]

Likewise, subsidiarity is a secondary principle, available only in residue form after the Community institutions decide whether Community action is required. The initial decision to act, or not act, always remains with the "superior" government. The ECJ gave the Belgian government's subsidiarity argument short shrift:

> The Belgian Government maintains that, according to the principle of subsidiarity laid down in the second paragraph of Article 3b E.C., it is at liberty to intervene in cultural matters, provided that it does not fail to observe its obligations under Community law. As has already been pointed out in paragraph [34] above, Member States are obliged, in accordance with Article 2(2) of Directive 89/552, to ensure freedom of reception and not to restrict the retransmission on their territory of television broadcasts from other Member States

[79] *Id.* 1996 E.C.R. at I-4168, [1997] 2 C.M.L.R. at 334.

> in the fields coordinated by that directive. It follows—as, moreover, the Belgian Government itself concedes—that a Member State cannot evade that obligation under Directive 89/552 relying on the second paragraph of Article 3b of the Treaty.[80]

In the area of fundamental rights, the supranational unit has also sought to usurp primacy, which remains open at least in the eyes of the Member States' courts. For instance, German courts continue to reserve the power to review and judge the activities of the Community institutions[81] in light of basic German ideas of fundamental rights and German interpretations of the powers of Community institutions under the EU Treaty.[82] This stands in stark contrast to the ECJ's pronouncement of its supreme power to determine the scope and enforcement of fundamental social norms.[83] The practical effect of these decisions is not

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[80] *Id.* 1996 E.C.R. at I-4168-69, [1997] 2 C.M.L.R. at 334-35.

[81] *See, e.g.*, Cases 2 BvR 2134/92 & 2159/92, Brunner v. European Union Treaty, [1994] 1 C.M.L.R. 57 (BVerfG 1993). The German court took the position that it, and not the Community institutions, had the authority to determine the validity of actions taken by Community institutions. The court suggested that, were it to disapprove of an action of the Community, such action could not be enforced in Germany, whatever the legal effect of the Community action in the other Member States of the EU. "Accordingly the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them." *Id.* at 89. *See also* Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Even Closer Union,"* 31 COMMON MKT. L. REV. 235 (1994) (discussing the case and its constitutional challenge of the Maastricht Treaty).

[82] For earlier versions of this position, see *Handelsgesellschaft*, 1970 E.C.R. 1127, [1972] C.M.L.R. 255 (1970); *Solange I*, [1974] 2 C.M.L.R. 540 (BVerfG 1974).

[83] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (No. 2), 1978 E.C.R. 629, 644, [1978] 3 C.M.L.R. 263, 283 (1978) ("[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."); Case 314/85, Firma Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 4199, [1988] 3 C.M.L.R. 57 (1987).

> Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that

only limited to the rights of "marginalized" groups, but also reaches core economic regulations. For example, the fundamental Community law principle of privacy underlies the recent push to develop EU-wide regulation of data protection.[84]

When read carefully, these decisions demonstrate the ECJ's understanding of subsidiarity and the solicitude for cultural difference as serving merely a decorative function in any field in which the courts and Community institutions choose to speak. Subsidiarity and cultural solicitude are given voice during periods of norm genesis when a "margin of appreciation" acts to restrain system-wide pronouncements of these norms. Yet even when subsidiarity and cultural solicitude provide a basis for legal expression, such expression remains bound by supranational norms. For example, linguistic sensitivity is permitted expression, even under objectively odd circumstances, as long as such expressions do not breach the overriding Community norm of equal treatment. This was the case with the imposition of an Irish language requirement upon teachers in Ireland, even where that language would rarely be used either for instruction or in everyday conversation.[85] Limitations on expression protect the culturally sensitive (at least in France) film industry as well.[86]

In effect, cultural currency is only at the margin as something picturesque because of its difference. When cultural difference becomes serious and violates fundamental Anglo-

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where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

Id. 1987 E.C.R. at 4231, [1988] 3 C.M.L.R. at 80.

[84] Ulrich U. Wuermeling, *Harmonisation of European Union Privacy Law*, 14 J. MARSHALL J. COMPUTER & INFO. L. 411, 414-15, 419-20 (1996).

[85] Case 379/87, Groener v. Minister for Educ., 1989 E.C.R. 3967, [1990] 1 C.M.L.R. 401 (1989).

[86] Cases 60-61/84, Cinéthèque S.A. v. Fédération Nationale des Cinémas Français, 1985 E.C.R. 2605, [1986] 1 C.M.L.R. 365 (1985).

European norms, such as fundamental human and sexual rights, solicitude for difference ends. Such conduct is not picturesque or tourist-worthy. At this point, the requisites of harmonization will take precedence. Even subsidiarity has been said to presuppose "a background of shared objectives or values [necessary] in order to determine what can be regarded as a 'failure' of the lower-level entities."[87] The *Working Time Directive* case is instructive in this regard. In that case, the ECJ rejected Britain's attempt to invoke the "spirit of subsidiarity" to challenge the Working Time Directive. Advocate General Philippe Léger dismissed the contention in a passage worth noting:

> By relying on the principle of subsidiarity, therefore, the applicant is disputing as a matter of principle the possibility of the Council taking action in the area covered by the contested directive, and not the extent of that power which, for its part, is conditional on compliance with the principle of proportionality.
>
> . . . .
>
> Thus, in view of the fact that the objective provided for in Article 118a is harmonization, there is no doubt that the aim of the contested directive can be better achieved by action at Community level than by action at national level.
>
> The argument alleging failure to comply with the principle of subsidiarity must therefore be rejected.[88]

But why must assignment to the supranational unit necessarily follow in a regime now obeisant to the principle of subsidiarity? The answer, I think, is historical as well as political. Europe continues to suffer from the consequences of its collective conduct during the 1933-45 period. Cultural

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[87] Bernard, *supra* note 44, at 633, 635.

[88] Case C-84/94, United Kingdom v. E.U. Council, 1996 E.C.R. I-5755, I-5784, [1996] 3 C.M.L.R. 671, 699-700 (1996) (emphasis omitted).

solicitude on a national scale has had a nasty habit of racializing national and religious minorities. Difference has a way of becoming hubris. Part of Europe's healing process necessarily has involved the construction of the belief that difference is basically cosmetic and that general principles of conduct and outlook unite all peoples of Europe. Curran's description of the basis for the émigré construction of essentialism and universalism in comparative law provides a compelling rationale for the same tendencies in the construction of baseline general principles of Community law.

> The émigré comparatists intended the denial of difference to be the theoretical underpinning of societal and legal tolerance of difference. The émigrés' personal experiences led to their faith in the fundamental similarity of all humans, and to their belief in the perniciousness of according legal recognition to differences in religious or ethnic origin. Their commitment to a theory of inclusion did not, however, extend to an inclusion of others' differentiating attributes, but to a leveling absorption, a homogeneity to be born of erasure of difference rather than a homogeneity of common genetic background. The émigrés' approach is reminiscent of Montaigne's, whose legendary humanism of inclusion did not necessarily signify a tolerance of difference so much as an erasure of it through assimilation.[89]

Difference must be trivialized. Cultural solicitude must appear little more than appreciation of cinema production.[90] I suspect that this is a healthy course.

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[89] Vivian Grosswald Curran, *Cultural Immersion, Difference & Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 74 (1998).

[90] *Cinéthèque S.A.*, 1985 E.C.R. 2605, [1986] 1 C.M.L.R. 365. "It must be conceded that a national system which, in order to encourage the creation of cinematographic works irrespective of their origin, gives priority, for a limited initial period, to the distribution of such work through the cinema, is so justified." *Id.* 1985 E.C.R. at 2626, [1986] 1 C.M.L.R. at 385-86.

B.

Trivializing subsidiary groups within a federal system would appear to strengthen the highest level of any supranational system. Yet privileging the harmonization of norms at the supranational level, especially human rights, in a system that requires comity for advancing the principles of subsidiarity and cultural solicitude, can also weaken a supranational system. As the gulf between norm-creating at the supranational level and behavior at subsidiary levels increases, the ties of loyalty and obedience by subsidiary groups may weaken as well.

Privileging assimilative supranational systems of normative (and particularly human) rights is important where the object of the system is maintaining a *process* which must always, in order to succeed, produce some sort of agreement. This underlies some of the current thinking of European commentators. Some commentators speak of the need for a duty to shoulder the "European, and *uniquely* European, heritage of an idea of democracy" which carries with it a number of choices and limits on the forms of acceptable cultural norms within political expression.[91] Others have argued that the universalism of Enlightenment ideas ought to be embraced as "pragmatic social constructions."[92]

Thus, process is the key to managing the multiple and discordant voices comprising European federalism. It follows that a process-based system becomes destabilized whenever one voice is treated as *primus inter pares.* First, process appears to be uncontrolled. It may seem little more than an exercise of ad hoc politics. For example, there is very little, other than self-control, which prevents the ECJ from fashioning such general principles of Community law in accordance with the personal beliefs and political inclina-

[91] JACQUES DERRIDA, THE OTHER HEADING: REFLECTIONS ON TODAY'S EUROPE 78-79 (1992).

[92] ERNESTO LACLAU, EMANCIPATION(S) 103-04 (1996).

tions of the judges. This certainly is an accusation frequently hurled at the Justices of the American Supreme Court. In this sense, process elevates one institution to a position where it can operate substantially unchecked. Tradition is the usual answer given to arguments of arbitrariness or *ultra vires* acts. The ECJ, like other Community institutions, is constrained by the general language and design of the EU Treaty, the legal and constitutional traditions of the Member States, and evolving notions of right. In considering whether it was possible or advisable to create a "national culture" exception to the Article 30 prohibition on imposing quantitative restrictions on trade, Advocate General van Gerven noted that:

> Nevertheless, here too, in order to prevent an undesirable proliferation of grounds of justification, I consider that as close a connection as possible must be sought with the grounds provided for in Article 36 EEC, the objectives of Community law recognised in the European Treaties and the fundamental rights which form part of the Community legal order, in the light of which those grounds and objectives must be construed.[93]

That approach may be well and good, but the ECJ, in particular, retains the power of *interpretation*, substantially unchecked. Can the notion of ECJ "infallibility" in matters of Community "faith" lag far behind? Certainly, applying traditional European values would normalize this quasi-religious idea as a tool of government. That Europe could accept the idea of governmental infallibility in matters of "principles" is not far-fetched. The subsidiarity concept itself is religiously derived.[94]

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[93] Case C-169/91, Stoke-on-Trent City Council & Norwich City Council v. B & Q plc, 1992 E.C.R. I-6635, I-6478, [1993] 1 C.M.L.R. 426, 455-56 (1992) (emphasis and footnotes omitted).

[94] *See, e.g.*, Bermann, *supra* note 39. Bermann explains that

If indeed this interpretive power may be exercised arbitrarily, who is to control arbitrariness? Ultimately, only the constituent parts of the unity can control arbitrariness. This control requires the assertion of the Member States' political power within the supranational system. A hint of this control is observable in the process leading to the draft Treaty of Amsterdam. But such control is both difficult and extraordinary. The Member States would find it difficult to spend all of their time fighting over revisions to the basic documents of the EU. The process from Maastricht to Amsterdam already evidences some of this fatigue. Moreover, the price of control can be instability and breakup of the supranational entity itself. Arbitrariness can thus serve not only as the locus of hegemony, but also as a point of instability in system-building.

Instability can also follow from the process of unmasking power and developing resistance to it. The ECJ's "general principles" jurisprudence unequivocally delineates the real locus of power in the EU system. The blandishments of subsidiarity and cultural solicitude are window dressing when the supranational institutions confront issues of importance to them. The power of ECJ interpretation is the power to normalize and colonize. Its pronouncements become the standard of behavior throughout the Union. As the expected basis of behavior and background norm, the ECJ's conduct standards replace the Member States' standards. This power excludes those who will not play by the

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> Advocates of subsidiarity in the European Community trace the concept to twentieth-century Catholic social philosophy, citing a 1931 Papal Encyclical of Pius XI entitled *Quadragesimo anno*. According to that document, subsidiarity requires that "[s]maller social units . . . not be deprived of the possibility and the means for realizing that of which they are capable [and] [l]arger units . . . restrict their activities to spheres which surpass the powers and abilities of the smaller units." . . . Community leaders were content to distill from the ecclesiastical literature on subsidiarity a very rudimentary but quite suggestive concept.

Id. at 339 (footnotes omitted).

"rules." For those who do not wish to "play," the only choice is "exit." Here, Weiler's use of Hirschman's three-variable model of corporate governance—voice, exit, and loyalty—within federations proves useful.[95] In my analysis, "loyalty" is evidenced only by acceptance of the norms within which all governments must function in the European "federation." The Catholic analogue, of course, is bound up in the notion of "obedience." "Voice," the power to participate in the creation or modulation of those norms, is available only to those who demonstrate obedience to the norms, as well as the norm-declaring institutions. "Exit" is an option that exists in theory; the threat of exit should (but need not) act as a means of limiting the tyranny of "obedience."

Federations facing critical "exit" problems are unstable. The United States taught us that lesson in the period leading to the American Civil War. The Yugoslavians, now citizens of more "cleansed" nations, proved the effectiveness of instability by first participating in the demolition of a multicultural empire at the beginning of the twentieth century and then by demolishing a smaller version of that political empire at the close of the century. Stability depends, as the German and Italian courts remind us, on the continued congruence of developing Community norms with those of the nations and subnational groups subjected to such norms.[96] As deviation widens, the possibilities of conflict, and perhaps readjustment of the relationship between harmonization, subsidiarity, and cultural solicitude, increase as well. Instability is always "just around the corner" from every norm-creating decision of the ECJ.

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[95] *See* Weiler, *supra* note 69, at 2410-12; ALBERT O. HIRSHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

[96] *See, e.g.*, Cases 2 BvR 2134/92 & 2159/92, Brunner v. European Union Treaty, [1994] 1 C.M.L.R. 57 (BVerfG 1993); Case 2 BvR 197/83, *Re* Application of Wünsche Handelsgesellschaft, [1987] 3 C.M.L.R. 225 (BVerfG 1986); Case 183, Frontini v. Ministero delle Finanze, [1974] 2 C.M.L.R. 372 (Corte cost. 1973).

C.

Having unmasked the instability of centralized power, it becomes easy to see how the solicitude of a centralizing force for the cultural differences of its constituent parts will destroy the essence of those cultures. See the solicitude of cultural difference for what it is—a *zookeeper's approach to culture*. This approach to culture contains within it the possibility of what Jürgen Habermas describes as "administrative preservation" of cultures, like forms of endangered species.[97] That certainly is the implication of a cynical reading of Derrida's definition of the European democratic hegemonic norm as including "respecting differences, idioms, minorities, singularities, but also the universality of formal law, the desire for translation, agreement and univocity, the law of the majority, opposition to racism, nationalism and xenophobia."[98] In effect, we see difference within a cage. Difference thrives only within the strong walls of a hegemonic foundationalism which prevents much freedom for cultures to be as they may have to be.[99] Where stability and the expression of minority norms are important, this is a desirable outcome. Yet, this outcome is hardly what could have been envisioned by the leftist or radical politics under which these notions are hawked. What we approach here are the Lockean ideas of toleration read somewhat more generously than in the past.[100] Harmony and preservation of the whole may well require some

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[97] Jürgen Habermas, *Struggles for Recognition in Constitutional Law*, 1 EUR. J. PHIL. 128, 142 (1993).

[98] DERRIDA, *supra* note 91, at 78-79.

[99] Thus, while cultures may be permitted a certain latitude with respect to preservation of language, national costume, and gastronomic eccentricities, "important" differences, say, religious practice, can be much more troublesome. This is especially the case when the troublesome religious difference arises from what may be conflated with "invasion" from "outside" Europe. Consider the problem posed by the wearing of the *hidjab* by Muslim women in France. *See* Lakeisha S. Townes, *French Don't Veil Resentment of Muslim Tradition*, TAMPA TRIB., May 5, 1996, at 25.

[100] But this is line drawing and not fundamental change. *See* John Locke, *A Letter Concerning Toleration*, *in* 33 GREAT BOOKS OF THE WESTERN WORLD 1 (Mortimer J. Adler ed., 2d ed. 1990) (1689).

sort of basic assimilation on the part of all peoples sharing a common geographic space.

This approach can be criticized on two grounds. First, the very act by a dominant group of using dominant norms to *preserve* the cultures of others is an effective means of subordinating the very group the dominant group means to *preserve*. This is the exercise of raw power—the power to define and to regulate. The purpose of such preservation is not so much solicitude for the culture preserved as it is for the benefit of the culture preserving. Some American critical race theorists suggest this without understanding the irony of their suggestion. Thus, preserving "older" cultures is "vitally need[ed]—not just to pique a jaded taste—but for [the] very survival" of the harmonizing culture.[101]

Second, the resulting culture will inevitably be an artificial construct of a second order. The artificiality results from maintaining cultural norms from without rather than from the free exercise of cultural practice from within. Understood properly, the temporal expression of culture at any one time is what I call popular culture. Popular culture represents merely an implementation of the *possibilities* inherent within culture, not the impossibility of a totality of the possibilities of culture itself. Anglo-Europeans necessarily *practice* culture through an endless attempt at replication. In this sense, popular culture can be understood as the "prejudices" (what I would characterize as value choices) of the extant communal tradition. This is the fundamental nature of our interpretive community.[102] "[W]e constantly constitute and reconstitute our tradition, our culture, and our community as we engage in hermeneutic

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[101] RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 141 (1996).

[102] HANS-GEORG GADAMER, TRUTH AND METHOD 302-06 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad 2d rev. ed. 1989); Stanley Fish, *Is There a Text in this Class?*, *in* IS THERE A TEXT IN THIS CLASS? 303-04 (1980); Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, *in* LEGAL QUERIES (Sarah Beresford et al. eds., forthcoming 1998).

actions. This constant reconstitution always is simultaneously constructive *and* destructive."[103] Solicitude for culture ought necessarily to permit cultures to change and to *disappear*, without interference. "All the constitutional state can do is make possible this hermeneutic accomplishment of the cultural reproduction of lifeworlds. A guarantee of survival would necessarily rob members of the very freedom *to say yes or no* that is required today to make cultural heritage one's own and to preserve it."[104]

Thus, the construction and maintenance of a politics of cultural solicitude is an inherently dangerous and unstable exercise. This exercise requires balancing the imperatives of mongrelization implicit in the approximation of basic conduct norms at the Community level with the union-shattering potential of cultural expression through law and politics. Such balancing will always be unsatisfactory; it can never be adequately or permanently achieved within a Europe of developing cultures of unequal political or numerical strength. Minority communities now resist approximation more vociferously. This resistance has been gathering momentum since the nineteenth century in Europe and has become a worldwide phenomenon since 1945.

> Developing societies, like minority groups in the U.S., need protection first, and the opportunity to assimilate—*mongrelize*, as Salman Rushdie puts it—later. If the world community does not afford them the chance to do this, cosmopolitanism will injure them, set back their development, while it aids the cause of the most privileged.[105]

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[103] Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 188 (1996).

[104] Habermas, *supra* note 97, at 128, 142.

[105] DELGADO, *supra* note 101, at 145 (citation omitted).

Europe today is prepared to accept the inevitability and consequences of cultural dominance. The Member States, however, must also accept that the basis of this dominant *European* culture will shift, as it has shifted in the past, as the institutions of the Community attempt to discern those norms which ought to be common to all Member States. At the same time, this emerging *European* political culture must accept the dual nature of its dominance. Within the EU there must exist a sociopolitical sphere within which the Community cannot tolerate deviance. Yet, the context of that sociopolitical sphere will change as commonly held views about the acceptable extent of assimilation and difference change with each political generation. In other words, today's optimum normative framework for the European federation cannot be expected to form the basis for tomorrow's optimum relationship between federal, state, and local power.

IV.

The previous discussion should make plain that the notion of *contained conflict* is built into all federal systems faced with the irreconcilable goals of harmonization, subsidiarity, and protection of insular cultures. The power to harmonize at the Community level necessarily is opposed to that of the nation-state seeking to preserve deeply held incompatible norms. The power of Community and nation are opposed to that of subnational groups attempting to free themselves of the constraints of ever-larger bands of assimilation. The Community system is built to contain, not eliminate, the conflict inherent in the crisscrossing imperatives of harmonization, national, and subnational solicitude. This is a containment of conscious design—a metaphorical caging of the dragon that ought not be killed *or* freed. To kill the dragon is to reimpose Imperial Rome. To free the dragon is to accept the model of Austria-Hungary, and with it the inevitability of the breakup of empires or

communities and the shattering of Europe into a thousand warring camps. Therefore, containment reflects both the mistrust of harmonization, subsidiarity, and insularity, as well as the mistrust of the absence of any of them. While it is important to prevent the severe reconstitution of choking centralizing hegemony (even the Soviets could not carry it off), it also is important to avoid the multiplication of impermeable borders.

This dragon of contained conflict, inherent in a system of overlapping power, carries negative and positive potentialities. The negative potentialities include subordination as an independent concept. Subordination is a negative value in itself; in the West, it has become invariably "bad." Yet subordination is a necessary component of human social organization; it may therefore also be "good," and if not good, at least acceptable given the evils of the alternatives. The necessity for disagreement always leaves the door open to subordination. Someone's norms must always be the basis for determining what is acceptable and what is not, and domination is born with the making of that choice. The "bad" is perhaps in the abuse of necessary subordination. Yet, as we have seen, in a system in which harmonization is always opposed by national and subnational solicitude, abuse itself can be policed. Thus, containment, rather than freedom or death of the dragon, increases the likelihood of benign subordination, even as it makes subordination on some levels inevitable.

Indeed, there seems to be a level of subordination which most Western thinkers are not only willing to accept, but also insist on imposing on all cultures. This level is called basic, or human, rights.

> The universalistic content of basic rights is not restricted by the ethical permeation of the legal order; rather, it thoroughly penetrates nationally specific contexts. It is for this reason that the legal neutralization of value conflicts, which would otherwise frag-

> ment the political community, requires that the justice aspect *have a privileged position*.
>
> . . . In Germany, for example, the rights of young Turkish women must, if necessary, be enforced against the will of fathers who appeal to the prerogatives of their culture of origin.[106]

We have come to believe that a transcultural truth in human rights exists which exceeds any damage from the imposition of our interpretation of those rights on other cultures. We tend to argue in favor of imperialism and the necessity of a colonizing spirit built on human rights as "one of the essential elements of democracy precisely because . . . [it is] grounded on the idea of the abstract individual."[107]

The problem is that even basic or human rights pose severe problems of identification and interpretation. The Irish abortion cases provide a rich example of the tensions arising from identification and enforcement of European rights in the face of strongly held dissenting views.[108] The answer for the Irish, of course, was a political settlement between Ireland and the federal government. The EU agreed to disagree with Ireland with respect to the normative approach to fetuses.

This is a worldwide problem for federalism. Consider the views of Islamic thinkers on this point. David Westbrook has provided a thoughtful review of the relationship of Islam to the global (Western-origin) human rights enterprise. He argues, in part, that Islam views public international law as a foreign law to which it must react, and that Islam has set for itself the task of constructing an alternative (and

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[106] Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, 17 CARDOZO L. REV. 1477, 1498 (1996).

[107] RENATA SALECL, THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM 119 (1994).

[108] *See, e.g.*, Case C-159/90, Society for the Protection of Unborn Children Ireland Ltd. v. Grogan, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991).

competitive) vision.[109] Of course, this project is closely tied to the danger of trivializing difference or of the creation of limited spheres of acceptable difference. In the headlong plunge of federal and "international" organizations to impose a harmonizing series of supranational norms, it is dangerous to forget that such norms may be created at the expense of what may well be significant differences of interpretation or even of acceptable norms. If the norm-building project of the supranational entity proceeds in the absence of consensus, then it must be prepared to enforce its norms—one way or another. If the supranational entity ruthlessly enforces the norms, however, we run the risk of killing the dragon. If the supranational entity is willing to permit variance with respect to the norm, it runs the risk of reducing the norm to a rhetorical flourish, substantially unenforceable. Unenforceable rhetoric, of course, frees the dragon.

Negative aspects flow from rejecting subordination within systems seeking to assimilate different people—instability and violence. This is the dragon unleashed, power uncontrolled. This is the classic paradox: how much tolerance can a tolerant society have for intolerance? At some point, harmonization and cultural solicitude become irreconcilable. Europe's answer is to cultivate sensitivity, even if it is only at the margin.[110] Harmonization *can be* tempered by flexible margins of appreciation. Consider the possibilities of something as basic as the exceptionalism of Article 36, the workings of which are reproduced in the interpretive jurisprudence of the ECJ in other provisions of the EU Treaty. Thus, for example, national rules regarding the permissible hours of operations of business establishments

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[109] David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819 (1993).

[110] Thus, under Jürgen Habermas's process-based constitutionalism, only those willing to "play by the rules" ought to be permitted into the circle of discourse. Habermas, *supra* note 97, at 128. Renata Salecl speaks of democracy creating a space in which it will become self-perpetuating, where the anti-democratic will have no real effect. SALECL, *supra* note 107, at 37.

may well "reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics."[111] Consider also the acceptance by the Community of the Member States' power to opt-out of approximation requirements, at least on a limited basis. Either of these approaches, taken to an extreme, can destroy the federation. Ironically, the refusal to permit any national "margins of appreciation" or "opt-outs" can also destroy the federation.

Thus, only a shifting moderation can avoid the dangers arising from the perceived ineffectiveness of exceptionalism or the basic assault on core principles of conduct on which the union is based. Principles of deference may not be able to trump the general principle of equal treatment. While in "principle, it is for each member-State to determine in accordance with its own scale of values, and in the form selected by it, the requirements of public morality in its territory,"[112] the State may give effect to that morality only to the extent the Community principle of equal treatment is not violated.[113] Similarly, with respect to protections of French cinematic efforts,

> cultural aims may justify certain restrictions on the free movement of goods provided that those restrictions apply to national and imported products without distinction, that they are appropriate to the cultural aim which is being pursued and that they constitute

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[111] Case C-145/88, Torfaen Borough Council v. B&Q plc, 1989 E.C.R. 3851, 3851-52, [1990] 1 C.M.L.R. 337, 364 (1989) (Sunday closing laws). The ECJ carefully noted, however, that exceptionalism of this sort was subject to continuing review and could be modified upon a finding that Community law, practice, or custom had changed.

[112] Case 34/79, Regina v. Henn & Darby, 1979 E.C.R. 3795, 3813, [1980] 1 C.M.L.R. 246, 272 (1979) (challenging the U.K. rule restricting importation of Danish sex films and magazines).

[113] Case 121/85, Conegate Ltd. v. H.M. Customs & Excise, 1986 E.C.R. 1007, [1986] 1 C.M.L.R. 739 (1986) (with respect to inflatable erotic sex "dolls").

> the means of achieving them which affects intra-Community trade the least.[114]

Where deference or accommodation is impossible, either the dominated culture will change, or it will go underground. Alternatively, a new relationship between harmonization and deference will be negotiated. In the limiting case, subcultural groups can attempt to exit the union. Exiting, however, does not eliminate the problem; it merely reconfigures it. As the "ethnic" nations of Eastern Europe discovered after 1918, to their dismay, their success in escaping the yoke of Austria-Hungary (or Russia or Germany) merely created the means by which the new Czech, Polish, Slovak, Hungarian, or "Yugoslav" masters could impose norms on their own subnational ethnic "minorities." It is hard to contain the conflict, but it may well be impossible to escape it.

Containment is not merely positive; it is also ultimately inescapable. The conflict between harmonization, national solicitude, and subnational solicitude exists at every conceivable level of political organization. The advantages of a consciously crafted system of domestic oppositions, like the federal system of the European Communities, are magnified. A significant advantage of contained conflict is the acceptance of the impermanence of values. The nature of the federal union can change to reflect the modulation between the relative importance of each of the values. The Community approach to harmonization, subsidiarity, and cultural solicitude is not static. Over the course of a mere thirty years, the EU has evolved into something far more "top heavy" than when it began, and it will continue to evolve. The evolution will be apparent in changes in the relative value of harmonization at the Community level versus na-

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[114] Cases 60-61/84, Cinéthèque S.A. v. Fedération Nationale des Cinémas Français, 1985 E.C.R. 2605, 2625, [1986] 1 C.M.L.R. 365, 384 (1985) (challenge to French laws restricting the timing of release of home videos of motion pictures exhibited in France).

tional or subnational solicitude. The system of containment encourages this sort of modulation. Modulation implies ever-shifting patterns of dominance and subordination, acceptable assimilation, and the nature of minimum criteria for group definition. In effect, the system not only contains subordination and dominance, but it also shifts the nature and effect of containment. The United States achieves the same result through the patterns of politics inherent in a fluid federal system.[115]

Moreover, EU federalism permits the possibility of shifting centers of power within the federal system from the top to the bottom, and then back. The intergovernmental conference system, which resulted most recently in the Maastricht Treaty and in the proposed Amsterdam Treaty, is effective because it incorporates the possibility for change into the core of the federation's normative structure. Thus, the EU system often permits the Member States to attempt to renegotiate the power at different levels of governance within the federation, as well as the nature of normative "first principles" which should guide all Community action. This system, of course, is superimposed on a system in which the ECJ and the Community institutions are constantly deriving and interpreting general normative principles. The instability of modulating power through multiple process systems can actually lead to stability if the modulations can be contained.

> Practical rationality in the face of diversity is as much a matter of recognizing, respecting, and accommodating differences as one of transcending them. Arrangements shaped by the former concern are no less practically rational than those shaped by the latter, and just political arrangements will normally be shaped by both, as well as by negotiation and compromise.[116]

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[115] Bermann, *supra* note 39, at 331.

[116] Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Ana-*

There is some truth to the notion that solicitude for minority culture can occur only within the framework of a traditional territorially based nation-state in the Western European model. Any other model built on closure poses severe problems for democracy and, perhaps, even for fundamental rights.[117]

The danger of contained conflict is its inherent instability. Contained conflict is possible only where there is the quite conscious political will to condone, as well as to police and perhaps to suppress, conflict.

> The idea of the state as a multicommunal civil society is thus challenged from below by schismatic movements. Meanwhile, a parallel phenomenon of growing interdependence is also challenging the state as insufficient to meet the needs of the third millennium. In response, states are moving into closer association, delegating parts of their sovereignty to supranational authorities dealing with environmental issues . . . .[118]

Subsidiarity is itself a malleable concept that is as easy to use *against* the Member State by its constituent parts as it is to use against the federation by the Member States.[119] We have begun to see the effects of this process in Europe. The remnants of yesterday's empires are beginning to feel pressures to dissolve, or at least reconstitute themselves into smaller scale models. For example, authority in Spain and England has begun devolving down to its more ancient constituent parts.

Thus, the inevitability of dissent is regulated in two ways within the normative framework of the principles of har-

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lytical Distinctions, 17 CARDOZO L. REV. 1083, 1124 (1996).

[117] LACLAU, *supra* note 92, at 28-29.

[118] Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 360 (1996).

[119] Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 635-39 (1994).

monization, subsidiarity, and cultural solicitude. When dissent is characterized as benign and does not contradict the core norm, it is permissible. Where dissent expresses fundamental disagreement with the normative structure, it will be suppressed, unless the normative structure is itself changed. We suppress unequal treatment of women within Europe and the United States. Yet, the universal or fundamental principles on which we base our society remain to be universally accepted. Hence, Saudi Arabians might suggest that unequal treatment of women works to the benefit of women by providing them with space to reach their full potential, free of the harassing possibilities of contact with men.[120] Inevitably, it is easiest to kill or free the dragon. At least we in the West have come to understand that contained subordination in an unstable state is the 'freest' we can hope to be. Yet, we have also demonstrated that it is likely impossible for us to maintain such a state for a long period of time. Rome and Austria-Hungary constantly beckon Western intellectuals, politicians, and demagogues.

As a biblical people, our theology is based on ideas of equilibrium and stasis. Our biblical foundations present a series of endless and unchanging covenants. In this cultural ambit, instability is a punishment for "sin," i.e., failing to properly implement or maintain the covenant. To deliberately support a system based on controlled instability is, at best, a culturally tense affair; it may even be well beyond us. Most supranational federative institutions have not deliberately confronted both the dangers and possibilities inherent in creating and *maintaining* complex political systems. Yet, to order complex interindividual and intergroup relationships under the rubric of multigroup representative democracy requires a strong-willed determination to embrace and control instability. Subsidiarity and cultural solicitude contribute to that necessary instability. Systems without these opposing forces sink into routinized,

[120] Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587, 596-97 (1995).

mindless traditionalism and a barbarism with which Europe is all too well-acquainted. To avoid the ruin of Austria-Hungary or the tyranny of Rome, Europeans must accept a constitutionalism whose parameters will never be set. While this may be a perilous enterprise, the rewards may well be worth the risks.

CONCLUSION

I have attempted to provide a perspective that overcomes the blindness of European constitutional theory to the complex web of relationships shaping and reshaping political Europe. That blindness, of course, is merely another manifestation of the tendency of Western thought to gravitate to centers of power. In a sense, theory is the ultimate sycophant. People theorize about the actual and desired sources of power. Today, power flows, or should flow, from the Community institutions. Everything else is darkened. Theory treats the nation-state and subnational populations as objects impeding the orderly flow of power from the Community institutions, which must in some manner ingest and digest this power. Power begets power. It becomes common to assume that while *Dassonville*[121] makes perfect sense, *Keck*[122] is aberrational.

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[121] Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, [1974] 2 C.M.L.R. 436 (1974) (Belgian law requiring importers to furnish a certificate of origin created in the country of origin for certain types of liquor violated Community prohibitions against quantitative restrictions under Article 30). In *Dassonville*, the ECJ announced that "all trading rules enacted by member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." *Id.* 1974 E.C.R. at 852, [1974] 2 C.M.L.R. at 453-54. Here we have the ECJ announcing a hugely expansive reading of the powers ceded to the supranational level with respect to the power to regulate the movement of goods from one subordinate unit of the supranational system to the other. For a discussion, see, e.g., Eric L. White, *In Search of the Limits to Article 30 of the EEC Treaty*, 26 COMMON MKT. L. REV. 235 (1989).

[122] Cases C-267 & 268/91, Criminal Proceedings Against B. Keck & D. Mithouard, 1993 E.C.R. I-6097, [1995] 1 C.M.L.R. 101 (1993) (Member State legisla-

Such theorizing results from our longing for permanent equilibrium. This notion is best understood in the West by the terms Eden, Death, or Paradise. Most theory is static. Borrowing, perhaps consciously and unconsciously, from the form and theatre of the old and new covenants, theory attempts to promote comprehensive, two-dimensional, fully informed, immutable, explanatory, and normative structures. Worse yet, theory is usually bound up in philosophical messianism.[123] European constitutionalism is no exception. Consequently, such theory posits process, but not movement. In line with its messianic underpinnings, the process is little more than a relentless progression to some state of perfection. Marxists provide a wonderful example of the crippling nature of that sort of theorizing.[124]

The Community fits easily within European traditions of statecraft. At the same time, the emerging federation contains a great potential for overcoming the traditional limitations of European supranational political entities. That potential is best realized if the structure of the Community is treated as a moving target composed of periodic equilibrium between three contradictory impulses—the assimilative impulse of harmonization, the political impulse of the nation-state, and the ethnic impulse of subnational cultural groups. Stability for any European federation must be gauged by its tolerance of movement. Movement is sparked by the recognition that substantial segments of the Com-

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tion affecting *modalités des ventes* does not violate Community prohibitions against quantitative restrictions under Article 30 unless such legislation in law or fact discriminates in favor of citizens of the legislating state). For discussion of *Keck*, see, e.g., Damian Chalmers, *Repackaging the Internal Market—The Ramifications of the* Keck *Judgment*, 19 EUR. L. REV. 385 (1994); L. Gormley, *Reasoning Renounced? The Remarkable Judgment in* Keck & Mithouard, EUR. BUS. L. REV., Mar. 1994, at 63; Norbert Reich, *The 'November Revolution' of the European Court of Justice:* Keck, Meng, *and* Audi *Revisited*, 31 COMMON MKT. L. REV. 459 (1994).

[123] For a discussion of messianism in jurisprudence, see Larry Catá Backer, *By Hook or By Crook: The Drive to Conformity and Assimilation in Liberal and Conservative Poor Relief Theory*, 7 HASTINGS WOMEN'S L.J. 391, 429-39 (1996).

[124] For a taste of this theorizing from a source, see, e.g., V.I. LENIN, THE STATE AND REVOLUTION (1917).

munity no longer believe the Community is representing their interests. Movement is evidenced by wholesale violation of norms. After all, as we have come to understand, "[i]f a *court* is forced to condone wholesale violation of a norm, that norm can no longer be termed law."[125] The subsequent readjustment of norms, through the EU Treaty or ECJ interpretation, inevitably results in the perpetuation of a successful federal system.

The relationship between harmonization and national and cultural solicitude is quite similar to the relationship between the Communities and the Member States in connection with Community directives. Directives are commands from the highest level of the federation to its constituent parts. They impose an "obligation of result," yet give the constituent governments substantial discretion as to the form and manner of implementation. However, this discretion is limited by (i) the guidelines gleaned from the directive itself, (ii) the requirement that the result ensure that the directive is fully effective in accordance with its objectives, and (iii) the obligation to choose the most appropriate form and method of implementation in the context of the national system in which this must be done.[126] Harmonization or assimilation of basic norms of the general substantive principles of Community law has become the first principle, the ultimate directive, of European law. Difference will be celebrated as long as it conforms to the foundational norms of the Communities. The imperative of equality may command the creation of a norm of equality between men and women. The nationalist affection subsumed under the rubric of subsidiarity may devolve the details of that norm to the nation-state, even if the result is to prevent the federal body from constructing implementation

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[125] Mauro Cappelletti et al., *Integration Through Law: Europe and the American Federal Experience*, *in* INTEGRATION THROUGH LAW 3, 39 (Mauro Cappelletti et al. eds., 1986).

[126] Deirdre Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights*, 27 COMMON MKT. L. REV. 709, 715-16 (1990).

principles in conformity with its vision of the norm. Yet, cultural deference may immunize particular subnational groups from conforming either to the general norm or to its particular manifestation as the policy adopted by a Member State of the EU.

Europe ought to reconcile itself to constant sociopolitical flux. Political and legal theory must adjust to a reality where flux is the norm, punctuated by brief periods of stasis. The parameters of that flux are dictated by the relationships among the three "communities"—harmonization, subsidiarity, and cultural solicitude—which, by nature, operate simultaneously and at cross purposes at all political levels of the federation. Europe both desires and fears some sort of eternal transnational order. The nations of Europe traditionally have sought to create transcultural normative structures for their own populations. But these nations have also been supratribal collections of different "ethnic" nations, all of which have long memories, and many of which collectively appear to find oppressive the hand of hegemony in *national* norm-making. Subnational groups, in turn, will resist national hegemony by affirming the power of the supranational entity to dictate norms. Nobody knows where this will end, but as long as the game continues, a stable federal Europe is possible.