



FACULTY OF LAW
University of Lund

James Johnson

States?
Rights in a Union

Master thesis
20 points

Supervisor
Carl Michael Quitzow

Field of study
EG-rätt

Semester
Fall 1997

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Introduction

Unions of states can be formed for a number of reasons to accomplish different ends and objectives. There are both federal unions, which constitute nation states in themselves, as well as unions formed on an intergovernmental basis that work on an international level. It is indeed often the function of these unions that will serve to determine and demarcate the role that will be played by the individual states that are members of a union. On the international plane, the United Nations is probably the first union that comes to mind. There are numerous federal states throughout the world which include the United States of America, Canada, Australia and Germany. Depending on the type of union formed, state sovereignty and autonomy will be affected in different ways. It is how union membership affects the states that will be the subject of examination of this paper. In particular two unions will be studied: the European Union (EU) and the United States of America (USA).

The Constitution of the USA forms, without a doubt, a federal union. The Treaty on European Union (TEU), on the other hand, does not form a federal union. It is better to think of the TEU as, just as its title implies, a treaty - an agreement reached on an international plane between states. Although within the EU the EC Treaty which forms the Economic Community has loosely been referred to as a constitution primarily due to the fact that it creates its own law which is binding both upon the states and their people. It is still hard to consider the EC a "state" as it lacks a government of its own. At best the EU can be considered a loose confederation of states. However, it is probably best to think of it in terms of an intergovernmental form of cooperation to further a process of integration of its member into what someday may become an United States of Europe. This distinction between the USA and EU should always be kept in mind while the issue of states' rights within the unions is being explored.

The issue of states' rights is fundamental to any union. In the US, the implications of union membership have traditionally been discussed in terms of contract and compact theories of government. The issue of states' rights came to a head in the USA, ultimately leading to several states seceding from the union and the outbreak of civil war. If the cause of the American Civil War can be simply stated, it would be states' rights. Even if the outcome of that war did not definitively settle the question of states' rights and conflicts that arise through issues that are contingent on the exercise and division of power within the union, it did answer a lot of the questions which the people, the states and the federal government had not been able to settle. In the EU on the other hand, the issue of states' rights is an entirely different matter. This being due to the fact that the union does not unite the states in a single political body in the same fashion that the USA does but brings together the states in its union in a much looser connection. The EU can be described as bringing the states together for a common purpose as described in Articles 2 and 3 of the TEU. It is clear through the wording of these Articles that the EU is one that is to develop and evolve through a process of integration to attain "economic and social cohesion and solidarity among the States". Here states' rights can be more correctly thought of as the states' asserting themselves in the shaping of the policies and development of a level of integration that is advantageous to them in an ongoing process of uniting the states.

Purpose

The purpose of this thesis is to examine in what ways state sovereignty is affected in the different unions that are formed by the EU and the USA. The emphasis in this study being placed on the relationship of the states with one another and their relationship to the union.

Method

For the purposes of this study states' rights such be thought of as working on two planes. The first being the states exercising power within the union. In other words, their role in making the law and shaping the policy of the union and its role in the amendment process which shapes the union itself. This is the subject of the section entitled the *Legislative Process*. The second plane will be the power the union has over the states and how the use of this power encroaches upon the states' sovereignty. This topic can generally be referred to as constitutional federalism. This area covers doctrines such as enumerated and implied powers, supremacy as well as preemption. These subjects will be part of the focus of investigation in this work under the heading of *Foundations of the Unions*.

In the course of this work, the examination of states' rights will be analyzed in both the EU and USA although not in any strict comparative sense. It is enough to understand that the unions are different and serve the states and people of them in distinct manners. There will be no attempt to ascertain whether the states have more rights in one union or the other. Instead the two unions will be placed side by side and examined in related areas enlightening how states' rights are affected in these areas. In this manner the similarities and differences will be obvious and should illuminate how the states' are affected by union membership. In the end, these differences and similarities will be better understood as to how they were necessitated by concerns surrounding states' rights issues. It is the interplay of states united in common purpose while still trying to maintain a large degree of autonomy that lies at the heart of all of the issues of states' rights. How can the aims and purposes of unification be achieved without losing the individual political identity of the states? It is through the examination of the USA and EU that this question will at least be partially answered.

This study will use the constituting instruments as its starting point. The provisions of the Constitution will be the focal point of analysis in the case of the USA; the EU will be examined through the Treaties' provisions. In both cases this sort of analysis necessitates a study of the pertinent case law of the unions. It is through these cases that the framework in the constituting documents take shape and form; they are what breath life into the provisions of these instruments. If these instruments create the unions it is this case law that defines them.

Outline

First the unions themselves will be the focus of this study. What kind of unions are formed by the constituting document? Why were they created and what purposes are they to fulfill? How are its institutions formed and how are the states represented in them? The answers to these questions will be found in the section entitled *The Unions*.

The starting point here will be the historical forces that lead to the creation of these unions and how these forces helped form the union. Through the understanding of these historical forces insight can be gained into why the states opted to join the union in the first place. What were the political forces that lead to the desire to create the unions? After all, these forces were

responsible for the creating the unions and they will provide insight into why these unions are what they are. This inquiry will help shed light upon why state power is what it is in the union. Why is power distributed the way it is within the union and why are certain powers taken from the states? Ultimately this inquiry will help us understand why the states have retained or lost the power they did in the two unions.

From the historical background the focus will shift to the stated aims and purposes that the unions hope to achieve. In the section entitled Purpose, the preambles of the constituting documents will be scrutinized. After all it is in the attainment of these ends that states have seen fit to limit sovereignty and join the union. The means that will be used to achieve these ends are the ultimate determinative of states' rights and in understanding the ends the means will be better understood.

Next, the structure of the unions will be examined. What are its institutions, how are these created? Who exercises control over them? Are they extended arms of the states or independent of the states? Do the citizens of the union have any control over them? In the US Constitution, Article I vests legislative power in the USA in a bicameral Congress, Article II vests executive power in a President and Article III provides for a Supreme Court that is vested with judicial power. It is through this fundamental division of powers between the three branches of government that the US federal government is to function. In the EU there is a three pillar construction which has no correlation whatsoever with the three tradition branches of government. The EU's institutions, found in the pillar containing the three European Communities, are in reality the institutions of the European Community. It is these institutions that can be thought of in a "supranational" sense. As the European Economic Community has the greatest scope and the communities share the same institutions, the examination of these institutions will be taken from the fifth part of the EC Treaty. These institutions are the European Parliament, the Council, the Commission and the Court of Justice. In Title I, Chapter 1 of this part of the Treaty there are separate sections each of which provide for and cover one of these different institutions. In both the EU and USA, it is through these institutions that the states are represented in making law and determining policy within the union. How the members of these institution are appointed to these posts show to whom they are accountable and on whose behalf they will be making policy and passing legislation.

To fully understand how power is exerted within the unions, the legislative processes will be examined to determine to what extent the states exercise power in this process. The process of amending the constituting documents will also be looked at to provide insight into what role the states play in that process. Studying the legislative process of the unions will show how much control the states ultimately have within the union itself. In the case of the EU this topic will be divided into discussion about primary and secondary legislation. It will be the provisions in the EC Treaty's Part 5, Title 1, Chapter 2's Articles 189, 189b and 189c that will be the center of focus here and in particular the roles of the institutions in this process. In the US laws are passed according the provision in Article 1, § 7, cl. 2. The constitutional amendment process in Article V will also be covered. These provisions will be examined with particular attention being paid to the what institution has the most power in the legislative process.

After this inquiry into how law is made the focus will shift to the foundations of the unions. In what areas can the union legislate and do the states' have any power to legislate in these

areas? These aspects of federalism are usually what is referred to as enumerated powers and preemption. It answers the question of what kind of law the union has. These provisions are generally found in Part 3 of the EC Treaty and in Article I, § 8, § 9, § 10 in the US Constitution. It is only within the EU pillar that encompasses the European Communities that any idea of “federalism” may be entertained and again, as the EC Treaty has the broadest scope of the three communities, the discussion in this case will be limited to the provisions found in that Treaty. The closely related doctrines on supremacy will also be covered in this section of the paper. In this regard it is the supremacy clause of the Constitution (Article VI, cl. 2) and the supremacy doctrine the Court of Justice has developed that will command attention. It is in this section that the real nitty gritty of states’ rights come into focus. These are the “substantive” foundations of the unions.

And finally this inquiry into states’ rights will look at the judicial process of the unions. It is, in the end through the judicial process that the constituting documents are interpreted. The constitutional jurisprudence of the highest union court is the final word on states’ rights. It is also in the courts that the states will try to protect their prerogatives against encroachment. In discussing the judicial process, the structure of the judiciary will be explored to see the relationship between the courts of the unions and of the states. What role does each play within the structure? What are their functions? What is the relationship of state courts to the courts of the unions? The role of the federal court system will be the focal point in this regard when the USA is considered while the emphasis will be on state / Community court cooperation when the EU is discussed. The jurisdiction of the federal and Community courts will also be covered. What kind of cases can be heard? Who can be a party to suit before the court? These will be the topics of the section entitled *Judicial Process*.

It should be pointed out that competition law of the USA and the EC will be left outside the scope of this work. The reason being that these rules generally apply to private undertakings and only affect the states when they act as private enterprises within the market and cannot be thought of affecting the states as such. Although this distinction of the state acting as such or a private enterprise is often itself hard to ascertain and can have “constitutional” implications these will not be part of this study on states’ rights.

Also outside the scope of this work will be the foreign and security policy implications or external aspects of the union. The reason here being that generally speaking the states within the EU have retained absolute sovereignty over these areas while the federal government of the USA has exclusive authority in this area.

As can be seen by this introduction the issue of states’ rights in a union can take on many shapes and forms. By depicting the different areas of the EU and USA that are impacted by these issues, insight will be gained into what union membership implies for a state and how these two unions have solved the different problems that have arisen under these headings.

The Unions

The unions formed by the Constitution of the United States and the Treaty on European Union have some similar characteristics while being very distinct. Both unions are formed by states joining together to form the new union. Prior to the establishment of the new unions the states had previously been joined together by different forms of inter-state cooperation and unity. In fact in the case of the EU it is a very legitimate claim that the TEU formed nothing new but expanded and reorganized the previous European communities and intergovernmental cooperation that had already existed.

The differences between the impetuses that lead to the formation of both unions should not be minimized because they hold the keys to understanding the role of the member states in each. Both unions can be said to have their roots in military and economic forces. Although it can also be said that these forces came in different forms. In the USA the impetus for a union was a fear that the larger states would “prey” on the small ones or that strong foreign powers would “divide and conquer” the newly formed states. While in Europe the impetus for the union can be found in the aftermath of devastation caused by two wars. The USA wanted to maintain the unity the colonies had established during their struggle for freedom from England while the EU seeks to integrate the people of different nation states to promote their well being.

The unions themselves are very different in their nature, purpose and scope. As there can be little doubt that the US Constitution formed a federal republic it is just as certain that the same cannot be said about the EU. In fact exactly what the kind of union the EU forms is hard to say. It certainly is more than an intergovernmental body on the lines of the United Nations because it produces legislation that is legally binding upon its members, while it cannot be said that the EU forms an independent state as it lacks a governmental apparatus. At best it can be said to form a confederate state in which the members carry out the functions of the government. These distinctions will be more fully explored when the structure of the unions is discussed (infra).

To fully grasp and understand why the two unions are what they are and the role that the states have in them, it is important to have a basic understanding of the historical forces that helped to bring about the establishment of these unions and how these forces brought about the demarcation of power between the union and the member states.

Historical background

EU

The EU has been formed through a process of evolving integration. The states had long standing traditions of independence and state sovereignty. Their emergence as states has been through their identity as a people who have carved out their territory from one another. It is in fact the devastation that these struggles have caused that ultimately lead to their seeking unification in order to stop the massive destruction that is associated with modern warfare.

The idea of an united Europe is nothing new. It has been attempted by military conquest and been the topic of discussion by intellectuals since the Middle Ages. If the idea of unification can be said to have always had some degree of acceptance, the method of how this integration was to be achieved has always proven to be less agreed upon. Nationalism and protectionism have been major stumbling blocks to European integration on any level and ultimately the cause of armed conflict between the countries of Europe.

Between the first and second World War the Pan-European Union was a forum to promote the peaceful integration of Europe. The Briand Plan of 1929-30 was a proposal on a governmental level that sought to bind the people of Europe together in confederal bond in a structure of cooperation. There was however no great unity for these plans and a change of attitude would be needed if any plan would be able to succeed. This change of attitude would come in the aftermath of World War II.

The EU has its roots in the European Coal and Steel Community Treaty (ECSC). After World War II as Allied presence in Germany declined, there was concern over how to control its basic war industries. This concern led to placing French and German coal and steel production under control of an intergovernmental authority (called the “High Authority” in the Treaty). Membership in this new community was open to any European country and the process of the peaceful integration of Europe began. The community created under the ECSC was supranational in character with the contracting parties being bound by the decisions of the High Authority. In the Community an intergovernmental institution (the Council of Ministers) was to function as a political balance to the High Authority. The national parliaments also chose representatives to serve in a Common Assembly which had a consultative role in the Community. The other institution of the Community was a Court of Justice that was charged with ensuring that the law was observed.

With the signing of the European Economic Community Treaty (EEC) and European Atomic Energy Community (Euroatom) two new communities were added to this supranational cooperation. The EEC and Euroatom were based on the model found in the ECSC. The Merger Treaty and Single European Act (SEA) furthered the goals and aims of the already existing communities while the Treaty on European Union (TEU) brought all the communities under one “roof” and widened the purpose of the economic community.

The Court of Justice has been the institution that has probably provided the greatest impetus toward European integration. The Court of Justice has been the single most identifiable institution within the EU that has furthered the cause of European integration. The Court has early and often handed down decisions that have driven home not only the confederal identity of the EU but almost a federal identity of unity. Its decisions have an immediate legal effect

within the union and have curbed state sovereignty. Its rulings in the *Van Gend en Loos* case (1962), *Costa* (1964) and *Simmenthal (II)* (1978) are fundamental in understanding the EC Treaty.

USA

The seeds of US unionism and federalism were sown during the War of Independence and the difficulties of governing encountered through the weak central authority provided for under the Articles of Confederation. The delegates of the Continental Congress were well aware that independence could not be achieved without unity. Thirteen individual colonies all fighting on their own would never be able to defeat the superior military strength of Great Britain but united together in the cause of independence they would have a chance. A political poster of the day depicted a snake cut into different parts with each part given the initials of a colony with the motto “Join, or Die” on it. The Declaration of Independence stated that “these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES” but nowhere proclaims that they are united states. The idea of some kind of American unity had its roots in the united struggle for freedom which all of the original colonies faced in gaining their independence.

The first union of the USA was formed under the Articles of Confederation of 1777 which brought the recently declared independent states together in a confederacy under the title of “The United States of America” (Article I). The Articles brought the states together in a “loose” union which allowed the member states to retain their “sovereignty, freedom and independence, and every power, jurisdiction and right” not expressly delegated to the Confederacy (Article II). Under the confederacy the United States were thought of in the plural, signifying that the USA was not a sovereign nation as it is today. At best it can be said that the states joined a “firm league of friendship” to promote “their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever” (Article III). The Confederation can be said to have been a military alliance for the mutual defense of the states with state sovereignty being held almost exclusively by the states.

The Confederation was most definitely a union of states. Delegates to Congress were appointed by the states; the states levied the taxes for the expenses of the Confederacy. Congress had no authority to act upon the states or the people of the states under the Articles. When the shortcomings of the Articles were plainly and painfully evident to all and the union was disintegrating, Congress called for a convention “for the sole and express purpose of revising” the Articles of Confederation. Congress probably expected this convention to “shore up” some of the Article’s shortcomings without making any fundamental changes to them. The Convention delegates had a different vision of the union’s future. They decided to “scrap” the old Articles altogether and “overthrow” the existing government by a peaceful coup d’état. This they did in the preamble: “We the people...” They simply went over the heads of Congress to the sovereign of the new union. The Constitution would be submitted to the people of the states for ratification and not to Congress for approval. The people were going to delegate their sovereignty in the new federal union. Sixteen of the fifty-five delegates to the convention even refused to sign the Constitution, presumably on the grounds that the federal government was too strong and/or the lack of safeguards concerning individual rights (the latter objection being rectified with the adoption of the first ten Amendments commonly known as The Bill of Rights in 1791).

In the early days of the republic, the nation divided itself into two parties: the Federalists, who favored a strong central government at the expense of the state sovereignty, and the Democratic Republicans, who favored states' rights and limited central government. Many of the advocates of American independence from England were staunch opponents to the ratification of the Constitution on the grounds that it formed the basis of tyranny from which the states had so recently freed themselves. There was fierce opposition to the Constitution during the process of ratification. Underhanded methods were even employed in some instances to ensure or stave off ratification. In Pennsylvania, for instance, two opponents to the Constitution were forcibly seated "their clothes torn and their faces white with rage, in order to complete a quorum."¹ Many of the states that ratified it did so only because they felt they could not survive outside the Union and hoped that a new convention would be called to revise the Constitution². After the nine states needed for ratification of the Constitution had approved it "the last four states ratified, not because they wanted to, but because they had to."³ A federal union had been formed.

The federal powers of the Republic were strengthened at the expense of state sovereignty through the rulings of the Supreme Court under Chief Justice John Marshall. The rulings of his court form the basis of Constitutional Law in the USA. His opinions in cases like *Marbury v. Madison* (1803), *McCulloch v. Maryland* (1819) *Cohens v. Virginia* (1821), *Gibbons v. Ogden* (1824) curbed states' rights in the union and set the USA on a course to a strong federal government. The time it took the Supreme Court to chart this course demonstrates the struggle that took place in the early days of the nation in settling the question of states' rights vs. federal authority; the Marbury ruling was handed down 14 years after the ratification of the Constitution.

¹ Thomas Baily, *The American Pageant*, p. 151-152.

² i.e. weaken federal power.

³ *Ibid.*, p. 154.

The Preambles

The constituting documents of both the EU and USA state the aims and purposes of the unions that are formed under them. These statements are generally given in broad statements that can be interpreted in different ways. The statements themselves have no binding legal effect but they should not be discounted nonetheless. They are often used by the Courts that must construe the meanings of the specific passages found in the constituting documents to ascertain the “spirit” or “feeling” of the whole document. These aims and goals of the unions are in both the case of the EU and USA found in the preambles of their respective constituting documents. It is in them that one can find what each union aspires to accomplish. These are the reasons that the states have joined the unions. They are the backdrops that the rest of the document works against.

The preambles of both constituting documents can be said to be the foundation that the unions rest upon. In them, one can say that the ends the unions are to attain can be found while the rest these constituting documents specify the means that will be used to achieve their attainment. In order to understand how state sovereignty is and can be affected by a state’s entry into a union, the aims and purposes of the union must be understood to see how they can affect the member states.

The preambles of the US Constitution and the TEU reveal that some of the goals of the unions are quite similar. The preamble of the TEU is divided into Articles that, while using broad statements of purpose, go into greater detail than the US Constitution’s preamble which is very short and very general.

EU - Integration

Since the EU does not claim to be a federal union creating a national state it is not surprising that the preamble and introductory sections would reflect this. Article A in the TEU reconfirms the commitment in the preamble of the EEC Treaty which is the creation of an ever closer union of the peoples of Europe and states that the creation of the Union is a new stage in this evolution. The objectives that are to be achieved by this new Union are found in Article B:

‘to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;

to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defense policy, which might in time lead to a common defense;

to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;

to develop close cooperation on justice and home affairs;

to maintain in full the *acquis communautaire* and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Treaty.’

It is clear through the tenor of these statements that the states of the union, on the basis of cooperation and openness, will work together to achieve these ends. There is no mention of this being a constitution, the people of the union are referred to as the nationals of the member states. The states retain their sovereignty, they are the ones entrusted with bringing about the purported ideals and goals of unification.

The first passage in the above recital is the one that implies the greatest encroachment upon the rights of the states of the union. The creation of an “economic and monetary” with a single currency cannot be done without limiting state sovereignty in these areas. The area without “internal frontier” refers to the “internal market” that is referred to in Article 7A of the EC Treaty which defines it as: “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” Herein are found the four freedoms that are the ultimate goal of the common market. These statements clearly propose the creation of an economic market that shall function as if it were a single economic entity of a national state. The clear implication here is that the member states will not be able to determine and apply economic policies that will interfere with this common market. It is easy to see the reach of this fairly general statement and its implications. A common market implies that national rules in regard to tariffs,

consumer and environment protection, as well as competition rules for the common market must be uniform through out the market, if this goal is to be realized.

The other goals stated in this Article are expressed statements of an agreement to cooperate with the other member states in these areas. Goals that could just as easily been pursued on an intergovernmental plane. No definite commitment is made to achieving these goals as such; merely a commitment is made to try and achieve them: a clear policy of integration. The closer the member states can be brought together on policies in these areas the greater the extent of their future cooperation can be.

It is also clear that the Treaty does not envisage a people establishing a union. What is envisaged is an “ever closer union” of the peoples of Europe. This is not to say that the goal is ultimately to bring all the peoples so closely together that they would ever be one people, as peoples is referred to in the plural. (See also under heading *USA - One Nation* for discussion of a people in a federal union.)

The fact that the states are signing a Treaty to form the union, indicates that the union is to be one of states and that the aims and purposes are to be effectuate *through the states*. The heads of state and their representatives are the founding and contracting parties of the union.

The statements of the preamble should also always be considered against the historical background of the union. As we have seen the union’s roots were in the states’ desire to prevent war through a process of integration of the nations of Europe and this is reflected in the goals of the Treaty.

USA - One Nation

Since the preamble of the US Constitution is so short in length and broad in its statements it is best to have it in its entirety when it is to be discussed:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The first three word of this preamble, as already has been alluded to, do a lot explain what kind of union this is to be. The people of the United States are the ones, acting through their states, who are forming this union. John Marshall in his *McCulloch v. Maryland* opinion commented on the relationship of the people of the United States in relation to their states as follows:

“No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.”

The union of the USA is envisaged as a union of the citizens of their respective states forming a government that “proceeds directly from the people”. In other words a federal republic. The people have in no way surrendered any of their sovereignty, they have merely divided it between their respective state governments and the newly created general government. The last phrase of the preamble is particular enlightening on this point. “[D]o ordain and establish this Constitution for the United States of America” - clearly is a demonstration of the formation of a new government.

The general government of the USA is clearly a government of the people. “In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” Marshall (supra). This is even clearer when the method of ratification is examined (infra).

The goals and aims though very generally and broadly stated are very clear. “[A] more perfect union” shows that the states of the people are already in a pre-existing union that this constitution wants to build on and strengthen. The goals of “domestic tranquillity”, “a common defense” and “general welfare” all have ramifications on states’ rights. State sovereignty has to be encroached upon to some degree if the federal government is to attain these aims of unification.

Putting this preamble in a historical perspective it is easy to understand what the functions of this new union are to be. In order to effectuate the functions of the union it was deemed necessary that the central government be strengthened. This could only occur at the expense of state sovereignty. The people of the United States redistributed some of the states’ sovereignty and placed it in the central government.

This division of sovereignty is what is generally referred to as federalism.

Structure

The structure of the unions, that is the institutions that form the working organs of unions, can be controlled by either the states or by the people. It would be logical to assume that in a union like the USA, a union forming a national government of the people of the states, the people would exert control over its institutions; on the other hand in a union like the EU, formed by the states, the institutions would be under the control of the states.

The institutions of each union determine how the law will be made, interpreted and applied. Control over these institutions is control over of the union. The power of the unions, legislative and judicial processes will be discussed later, the focus first is on the structure of the union and the institutions that make up the union apparatus.

EU

The EU is a union of states. This is borne out by its structure and the exercise of control over its institutions. Power in the EU is exercised by representatives of the governments of the member states. It is this fact that gives rise to what is pointed out as being a democratic deficit in the EU.

Not being a government of a national state, there is no real division between the three branches of government. The TEU envisages a three pillar structure that does not share an institutional structure. The Community Treaties that form one pillar of the EU have set up an institutional framework that includes the Commission, the Council, the European Parliament and the Court of Justice (these institutions are found in the fifth part of the EC Treaty). The two other pillars of the EU concern political matters. One being the common foreign and security policy and the other for cooperation on justice and home affairs. These pillars are single institutional structures (Article C) with power resting solely in the hands of the member states (Article J and K of the TEU respectively). Albeit the Commission has a very limited initiative right and the ECJ is provided with some jurisdiction to in these areas - Article K (3)(2) (c).

When one talks about the institutions of the EU one is really referring to the institutions of the Communities which form only one of the three pillars in the EU. As far as these institution can be considered “federal” in any sense it is only the Commission, Parliament and Court of Justice that could fit this description. Due to the limited powers of the Parliament it is certainly questionable that one could think of that institution as being a federal parliament in the true sense of the word, as it lacks legislative initiative and power. Probably the most “federal” institution in the EU structure is the Court of Justice as it functions independently of the states and has real power.

It should be kept in mind that the mission of the EU is evolutionary as it is one of a continuing process of integration. The division of powers between the institutions and the structure of the union itself is probably certain to change as this process becomes more ingrained in the peoples of Europe for whose benefit the union was created.

European Parliament

The Treaties envision the Parliament as being the representative of the people of the member states in the Community (Article 137). The Parliament consists of 626 members (MEPs) who are elected by direct elections conducted according to the rules determined by each state for their own elections to five year terms. Each state is assigned a number of places in the Parliament based on its population. In accordance with the principle that the EU is a union of states the Parliament lacks any real legislative power and its role is primarily consultative. It does however in certain instances have veto powers and has increased its powers through its own initiative. Originally the members of the Parliament (earlier called the Assembly) were also members of their national parliaments (see Art. 138 EEC, Art. 21, ECSC and Art. 108 Euroatom) strengthening the idea of a union of states. However Parliament’s powers have been continuously increasing, clearly showing an evolutionary process to a more integrated Europe. The elected members sit in political groups not national ones during sessions of Parliament. In fact, Article 138a of the EC Treaty states that political parties are an important factor in the process of integration within the union and that they contribute to the

development of a “European consciousness” while expressing the political will of the citizens of the union.

Council

It is hard to view the council as a single institution because its membership varies with the issues being discussed and voted on. Article 146 requires that the council be made up of a representative that serves at the ministerial level of the government of the state he/she is representing and who shall have the necessary authority to bind the member state in the issue at hand. It therefore follows that the number of Council members is equal to the number of member states in the union which is at present 15. The fact that the Council is made up of different members allows several different Council meetings to take place simultaneously. A meeting can be taking place with the “Agricultural” Council while a meeting of “Environmental” Council is taking place. The member states send their national ministers to represent the state in the specific area of their competence. Thus it is difficult to think of the Council as a single permanent institution. There is what is considered a general Council which is attended to by the foreign ministers of the member states. It is also for this reason that the Treaty does not demarcate the length of a member’s term on the Council as this is dependant upon the government of the member state.

The Presidency of the Council is held by each state for a period of six months on a rotating basis (Article 146). The President chairs the Council meetings. The Council meets when the President convenes it on his own initiative or at the request of a Council member or the Commission (Article 147).

Since it is the Council that has the power to enact legislation for the Communities within the union it is not surprising to see it under total control of the states.

COREPER

The Council is assisted in its work by a Committee of Permanent Representatives (COREPER). The existence of COREPER was recognized in the Merger Treaty’s Art. 4. The committee consists of permanent representatives of the member states who help prepare the work that the Council is going to undertake. The delegate whose member state holds the Presidency of the Council chairs the committee. The representatives act in some degree like ambassadors of the member state to the union. They present their state’s views to the other states while keeping their government informed about the position of other government’s views on different issues concerning the Communities. “The Permanent Representations are the eyes and ears of the national Governments in Brussels.”⁴

The European Council

Although not formally an institution within the Communities it is most certainly a union institution and entirely distinct from the Council. The European Council consists of the heads of government or heads of state of the member states. Its creation can be found in Article 2 of the SEA which states:

The European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission of the European

⁴ Weatherhill and Beaumont, *EC Law*, p. 85.

Communities. They shall be assisted by the Ministers of Foreign Affairs and by a Member of the Commission. The European Council shall meet at least twice a year.

Although the Treaties assign no power to the European Council, the fact that it is made up of the heads of government means that it certainly fulfills the requirements of Article 146 and theoretically could enact legislation for the communities. Article D of the TEU sees the function of the European Council as providing “the Union with the necessary impetus for its development and shall define the general political guidelines thereof.” The same Article also states that the Presidency of the European Council rotates in accordance with the Presidency of the Council and that the European Council will present a report after each of its meetings and an annual progress report on the Union to the European Parliament. Article L of the TEU removes the provisions of Art. D on the European Council from the scope of the European Court of Justice’s power of review.

Commission

The Commission is the subject of the 5th part, §3 of the EC Treaty. It fulfills neither a purely executive or legislative function. Its role is part legislature, part executive and part law enforcer or guardian of the Treaty.

Article 157 states that the Commission shall consist of twenty Commissioners. The process of appointed is found in Article 158 (2); Commissioners are appointed by the common accord of the governments of the member states for a term of five years (Article 158 (1)). The length of this term is subjected only to the provisions of Article 144 and Article 160. A motion of censure against the whole Commission is contemplated in Article 144 and achieved through a two-thirds of Parliament vote if they constitute a majority of all the votes in it. While in Article 160 the dismissal of a single Commissioner can be accomplished by the Court of Justice at the request of the Council or Commission if the Commissioner no longer fulfills the requirements of office or is guilty of serious misconduct in carrying out his/her duties. Article 157 (1) guarantees that every Commissioner will be the national of a member state and that each member state will have at least one national on the Commission as well as limiting the maximum number from any one state to two. In practice it has been the five larger states that have been able to select two of their nationals as members of the Commission. The members of the Commission are to carry out the tasks with complete independence from the member states. “In the performance of these duties, they shall neither seek nor take instructions from any Government or from any other body...[e]ach Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks” - Article 157(2). In other words they are to serve the Community and not the member states that appoint them.

A President of the Commission is to be agreed upon by the governments of the member states. This is done after they have consulted with the Parliament. The candidate is then requested to appear before Parliament and make a statement. After which the Parliament will hold a debate and then vote to approve or reject the candidate.⁵ In the event of rejection the Parliament will request that the governments appoint a new nominee. This approval or rejection is not legally binding upon the governments of the member states but it is highly unlikely that they would appoint a President in the face of Parliamentary opposition. Weatherhill and Beaumont infer that Parliament probably has a *de facto* veto in this part

⁵ See Rule 32 of the European Parliament’s Rules of Procedure.

of the Presidential selection process.⁶ The nominee for President then will be consulted by the governments of the member states in regard to the nomination of the other Commissioners. The nominated President of the Commission and the other nominees are then approved by a majority vote of the Parliament.⁷ The Parliament only has the power to approve or disapprove all the nominees and may not vote on them individually. If the body of nominees is approved by the Parliament they will be appointed by the common accord of the member state governments. It is highly unlikely that the Parliament would block the approval of the body of nominees after having approved the Presidential candidate. The *de facto* veto power over the nomination of the President would therefore appear to be of greater significance than Parliament's *de jure* power of veto over the nominated Commission.⁸

European Court of Justice (ECJ)

Article 164 charges the Court, in the interpretation and application of the Treaty, with ensuring that the law is observed. When the ECJ is discussed as an institution of the union, one is really referring to both the Court of Justice itself as well as the Court of First Instance. These two courts along with the national courts share and carry out the judicial functions of the union. The Court of Justice will be discussed first while the Court of First Instance will be discussed separately.

The composition of the Court is found in Article 165. It consists of 15 judges and 9 advocates-general⁹ who sit for renewable six year terms and are appointed by common accord of the governments of the member states - Articles 165-167. It is further stipulated in Article 167 that appointment to one of these offices requires that the appointee's independence be beyond doubt and that he/she possess the requirements necessary for appointment to the highest judicial office in their respective countries or are jurisconsults of recognized competence. There is no Treaty stipulation that requires that appointees be of any particular nationality or even union citizens. No state is guaranteed any particular number of these positions. It is, however, the practice of the member states to appoint nationals of their state to these positions. Each member state appoints a judge while the positions of advocates-general go one each to the larger countries (France, Germany, Italy, Spain and the United Kingdom) with the remaining positions being appointed by the smaller states on a rotating basis. Articles 165 and 166 provide for the Council acting on a unanimous decision on a request from the Court to increase the number of judges or advocates-general of the Court.

There is a President of the Court who the judges elected from among themselves for a three year renewable term - Article 167. The President's function is to direct the judicial business of the court and carry out the administration functions. The Court's Rules of Procedure, Articles 8 and 25 provide for the President presiding at hearings and Court deliberations and fixing dates and times for the convening of the Court. There is no legal provision in regard to nationality of the President of the Court.

The judges and advocates-general of the Court may only be removed from their positions during their six year term by an unanimous vote of the other judges and advocates-general if

⁶ Weatherhill and Beaumont, *EC Law*, p. 46.

⁷ See Rule 33(5) of the European Parliament's Rules of Procedure

⁸ Weatherhill and Beaumont, *EC Law*, p. 47.

⁹ The number of will be reduced to eight after October 6, 2000 with the retirement of the position held by Mr. La Pergola who had been one of two judges from Italy but with the change in composition on the Court due to the entry of Austria, Finland and Sweden into the union was made an advocates-general.

the person in question no longer fulfills the requirements of office.¹⁰ As of yet this procedure has not been used.

Since the judges are appointed to renewable terms the judges could be subjected to political pressure from the state that appointed them. This danger is diminished by the fact the Court functions in a collegial fashion. The decisions that are handed down by the Court are both unanimous and anonymous. That is to say that the voting of the Court can not be ascertained and that dissenting opinions are not allowed; the signature of all the judges appears on the final form. However, the fact that the judicial appointments are renewable gives the states some degree of continuing control over the Court. If the judge's political tendencies are not in line with the government in control of the state at the time of reappointment, the state does not have to make the reappointment. Brown and Kennedy state that "[i]n practice such decisions are no doubt rarely based on political ground, but appearances are also of importance on so sensitive a matter."¹¹

Court of First Instance

The Court of First Instance was formed in 1988 by Council acting on the power it received in SEA to relieve the Court of Justice of some of its swelling caseload. It consists of fifteen judges and no advocates-general although one of the judges may be called upon to fulfill that function.¹² They are appointed just like the judges of the Court of Justice for six year renewable terms. The qualifications for appointees are somewhat less stringent than for appointment to the Court of Justice. It is only required that their independence be beyond doubt and that they possess the ability required for appointment to judicial office - Article 168a(3). The judges of the CFI also choose a President from among them by secret ballot (simple majority) for a renewable term of 3 years. The functions of this position are identical to the ones of the President of the Court of Justice.

Judges on the Court of First Instance are subject to the same removal procedure during their term of office as the judges on the Court of Justice.¹³

¹⁰ Statute of the Court of Justice, Article 6.

¹¹ Brown and Kennedy, *The Court of Justice of the European Communities*, p. 48.

¹² Council Dec. 88/591, Art. 2(3) and Court of First Instance's Rules of Procedure, Art. 2.

¹³ Statute of the Court of Justice, Article 44.

USA

Since the USA is, as we have already determined, a union of people acting through states one would expect the people to assert great control over the government formed by the Constitution. The structure of the USA government will bear out this fact.

The structure of the federal government of the USA is a major concern of the Constitution. The first three Articles of that document outline the three branches of the federal government and define the power assigned to each of them. There is a clear demarcation of the three branches of government, the legislative, the executive and the judiciary in the Constitution. This “separation of powers” is generally ascribable to the French author Montesquieu. Although Montesquieu ideas are not said to be the blueprint for the US government they were well known to the Founding Fathers. In “The Federalist No. 9”, Hamilton at length discusses the meaning of Montesquieu’s views on government from *The Spirit of the Laws*. He answers criticism from opponents of the Constitution based on Montesquieuian thought with his own views on Montesquieu’s ideas about separation of powers and popular government.

Although the US federal system can be said to be based on Montesquieuian thought with its ideas of separation of powers, the US Constitution outlines a system of “checks and balances” that are unique to the USA. Each branch of the government has its distinct and separate function under the Constitution. The separate branches are free to work together to attain goals or one branch of the government can use its power under the Constitution to “check” the excesses of the other branches in their exercise of power. The ultimate check, however, rests with the people. Governmental excess on the part of the legislative and executive branches can be controlled by the people simply electing new political leaders or over the judicial branch by amending the Constitution. This balance of power is exactly what the Founding Fathers intended.

Congress

Article I, Sec. 1 of the Constitution states that: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives”, in other words a bicameral legislature. The two houses of Congress are each given their own specific powers that they exercise exclusively; other powers of Congress must be exercised by both houses. The reason for the two houses was to provide representation of the people and the states. As will be seen the intention was to give the states greater representation in Senate while the House was to be controlled by the people and act as their direct representatives in the federal government. The two houses help to also offset the differences that exist between the states in regard to their relative sizes: larger states having more representatives in the House while equal representation is achieved in the Senate.¹⁴

The House of Representatives

“The House of Representatives shall be composed of members chosen every second year by the people of the several States.” - Article I, § 2, cl. 1. The people are clearly in direct control of this house of Congress. Election periods are short in order to insure that no usurpation at the expense of the people will occur.¹⁵ In Article I, § 2, cl. 5 this house is given “the sole power of impeachment”. The rationale again being that the people should be able to exercise

¹⁴ See “The Federalist No. 62”

¹⁵ For discussions on the length of House terms see “The Federalist No.52 & 53”.

control over the officers of the government and therefore this power is vested in the branch that is under their control. Since the people of the union are the ones who ultimately bear its expenses, the House is given the initiation right of all revenue measures. “All bills for raising revenue shall originate in the House of Representatives” - Article I, § 7, cl. 1.¹⁶

The Senate

In Article I, §3, cl. 1 the Senate is created. “The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature* thereof for six years.” (The italicized words were changed by Amendment XVII, § 1 and now read: *elected by the people thereof*.) This was the house that was envisaged by the Founding Fathers that would be the representatives of the states as such in the federal government. It was given the duties of “state” - areas of concern that were less important to the people but of greater concern to the states in which greater discretion and stability are needed.¹⁷ These matter include: ratification of treaties made by the President, appointment of ambassadors, public ministers and consuls, Supreme Court justices and the other officers of the USA - Article II, § 2, cl. 2. The Senate also has “the sole power to try all impeachments.” This is to moderate the people’s ability to remove public officers for light or transient reasons, a check on “mobocracy”.¹⁸ As the union evolved and the people wanted an even greater control over the federal government, the aforementioned change was made in how Senators were elected in 1913.

The President

Article II places the executive power in a President of the United States of America who is elected to the office for a term of four years.¹⁹ The election of the President is carried out by the people acting through their states. Each state is assigned a number of electors (being “equal to the whole number of Senators and Representatives to which the State may be entitled to in the Congress - Article II, § 1, cl. 2). For all practical purposes today the candidate who receives a majority of the popular votes cast in the state receives all the electoral votes of the state in the Presidential election. “The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed” (supra, cl. 3). This system of election protects the states’ representation in the federal government in electing a President by distributing votes in a proportionate relation to the relative size of the individual states based on their population. In practice, this system of respecting the states’ representation in the union has proved to be no different than if Presidents were to be elected on a straight popular election basis. The candidates who have received the majority of the electoral votes have normally also received the greatest number of popular votes.²⁰

¹⁶ For discussion of apportionment’s importance to taxation (as related to representation) see “The Federalist No. 54”.

¹⁷ See “The Federalist No. 64”.

¹⁸ For discussion of balance between the House’s power to impeach and the Senate’s power to try impeachments see “The Federalist No. 66”.

¹⁹ The President and Vice President as well as all other civil officers of the US are subject to removal from office by impeachment “on the conviction of, treason, bribery, or other high crimes and misdemeanors.” - Article II, § 4. This means that all federal executive officers and members of the judiciary are subject to impeachment but not members of Congress or personal of the armed services.

²⁰ Exceptions being the Presidential election of 1876 (which was decided by a Federal Election Commission awarding disputed electoral votes to Hayes who had received less popular votes than Tilden) and 1888.

The process of electing the President has evolved over time. Originally the electors who voted for the President were selected by the state legislatures. Now the procedure is that electors are slated by party and are then voted for by the people of the state. (However less than half the states legally bind the electors to vote for the presidential candidate that carried that state but it is rare that they do not vote for the candidates of the party that slated them.)

It is also interesting to note the procedure for the election of the President in the case of no candidate receiving a majority of the electoral votes. The process as amended in 1804 is as follows: “if no person have such a majority [of electoral votes], then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote.” The states in this voting procedure are all treated equally regardless of size and clearly a shortcoming of the presidential election process. A minority candidate building on a majority of the smaller states could carry the Presidency while having conceivably come third in the popular and electoral voting. But since no election since 1800 (which precipitated the aforementioned amendment) has been decided by the House of Representatives this becomes a highly speculative and theoretical matter.

Another provision which limits states’ rights in regard to the election of the President is found both in the original and amended version of clause 3. It states that the “electors shall meet in their respective States, and vote by ballot *for two persons, of whom one*²¹ at least shall not be an inhabitant of the same State with themselves.” The intention here is plain, the President and Vice President shall not be from the same state.

The Vice President

It was originally the intent of the Constitution that “after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President.” This provision was superseded by Amendment XII in 1804. The Vice President is now elected in the same manner as the President but on a separate ballot specifically for the Vice Presidency. In the case of no person receiving a majority of the electoral votes for that office, the election of the Vice President is made by the Senate who may chose from the two persons receiving the highest number of votes. The Vice President is the presiding officer of the Senate “but shall have no vote, unless they be equally divided.” - Article I, § 3, cl. 4.

The Supreme Court (USSC)

“The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The Judges shall hold their offices during good behavior.” - Article III, § 1, cl. 1. The Judiciary Act passed by the first Congress in 1789 laid the foundation for a federal court system. It also provided for a Chief Justice and five Associate Justices for the Supreme Court - the current number of Justices is nine. Appointment is made by the President with the Senate’s consent and for a tenure of life subject only to impeachment.²² The position of Chief Justice is filled by separate appointment and is responsible for the Court’s administration.

²¹ As amended: *for President and Vice President, one of whom,*

²² No Supreme Court Justice has ever been impeached. Although an attempt was made in 1804 when the House voted to impeach Justice Chase but the Senate failed to convict him.

The appointment of Supreme Court Justices to life terms is to insulate them from political pressure. Since they cannot be removed from the bench other than through impeachment they are insulated from pressure being exerted upon them from either the federal government, the states or the people. This insulation is in keeping with the idea of separation of powers among the three branches of the union as well as the separation of state and federal power.

Legislative Process

In examining the legislative processes of the two unions, both the process of Treaty and constitutional amendment will be examined as well as the creation of laws of the union. It is through these legislative processes and those who hold this legislative power that determine if the union is truly one of states or one of people. The ultimate legislative power is the power to amend or change provisions of the Treaties or Constitution. This procedure determines the true source of sovereignty and who holds it in the unions. It is the constituting documents of the unions that authorize the institutions to enact and enforce the legislation it creates. It is through this process that one can see if the legislation passed creates legally binding obligations on the states or if the union is one of purely expressed ideals and aspirations that the people and states seek to achieve but are not legal bound in fulfilling.

EU

The EU is, as has already been mentioned, a union of states. It would be expected in such a union that the states would be in control of the legislative process. Within the three pillar structure of the EU, only the pillar consisting of the three Community Treaties creates its own law. The two other pillars function under the rules that govern international law and bind the states in that manner. When law is discussed in terms of the EU it is generally referring to Community or EC Law, that is the law of the European Communities which is binding upon the member states regardless of their approval of that legislation. It is the legislative process of this EC law that will be the focus of this study. The member states are bound by the law that emanates from the Communities by way of international law and the obligations imposed upon them by the Treaties. They are bound to “take all appropriate measures, whether general or particular, to ensure fulfillment” of these obligations (Article 5 EC Treaty). Community law is in general referred to as falling into one of two categories: primary legislation or secondary legislation. Another source of community law is also international agreements that “are entered into by the Community institutions pursuant to their powers” under the treaties.²³ Since the law created under the EC Treaty is of the greatest scope of the Community Treaty the following analysis of secondary legislation will be made in accordance with its provisions.

Primary Legislation

The treaties with their protocols and amendments made to them through the Merger Treaty, Budgetary Treaties, Single European Act, Treaty on European Union and the Acts of Accession of the individual member states are what constitute the primary legislation of the union. These agreements, being treaties made under international law, are amended by the ratification of new treaties that supersede the old ones. Indeed the Merger Treaty, Single European Act and the Treaty on European Union can all be viewed as amendments to the previous Treaties. In the creation of this primary legislation it is the states that wield absolute power in determining how that legislation will be formed and if they will be bound by it. The opting out of the monetary union by Denmark and the United Kingdom as well as the UK’s opting out of the social policy are examples of this.

Secondary Legislation

Article 189 defines the types of EC legislation that the Community institutions can use to accomplish their tasks and explains the legal significance of each form of legislation. There are two primary forms of legislation created in the Community; the form chosen is dependent upon its aim and function. Regulations, which are of general application, are binding in their entirety and directly applicable in all the member states are the first form of legislation. The other form is directives, which are binding upon the member states as to the results that are to be achieved by it but leave it up to the member states to decide the manner in which the directive will be executed within the state. In short, a directive must be implemented but the state to whom it is directed can choose the method of implementation. These two primary forms of legislation should be distinguished from decisions (which have binding effect only upon those to whom they are directed), as well as recommendations and opinions (which are not binding and have only persuasive force). These types of Community acts are rarely legislative actions as such instead they often emanate from secondary legislation which empowers the Community institution to make the decision or issue a recommendation. The

²³ Steiner, *Textbook on EC Law*, p.23.

Court will make the determination as to which category an act will fall into regardless of its label by looking at its contents and determining if it is intended to produce “legal effects”.²⁴

The legislation process in the union under the Community Treaties is not uniform and rather intricate as well as dependent on what subject matter is being legislated. The following analysis will concentrate on the role of the institutions in the process rather than the process itself. This approach is used since it is more appropriate to this study of states’ rights in a union. The principal forms of secondary legislation are basically produced in one of two different manners. Articles 189b and 189c cover these procedures. These two forms of legislative procedure foresee different powers being exerted by the different institutions in the process. The procedure outlined in Article 189c is often referred to as the “cooperation” procedure while the outlined procedure in Article 189b is often referred as the “co-decision” procedure. This latter procedure was inserted into the Treaty by the TEU. The primary distinction of the procedures is the role and powers that Parliament has in the legislative process. The use of these procedures is dependent upon the Treaty provision that covers the subject matter being enacted. Since legislation can be challenged before the Court on “the correctness of the legal basis and thus the procedures for the adoption of a particular measure”²⁵ it is of utmost importance that the method chosen for adopting the measure be the correct procedure if the law is going to be able to withstand review by the Court.

One can say that the legislative process is still highly intergovernmental in nature giving the states a lot of power to the exclusion of the union’s citizens; hence the idea of a democratic deficit. Although in keeping with idea of integration the powers of Parliament are constantly increasing.

Commission

Regardless of the subject matter or procedure being used it is the Commission that has the initiative right to all legislation. This means that it alone can draft Community legislation. Article 152, however, allows the Council to “request the Commission to undertake any studies which the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals”. (The Commission’s failure to do so could lead to the Council to bring proceedings before the Court under Article 175 - discussed infra under “Judicial Process”.) The initiation right encompasses any matter directly arising under the Treaty and even the general power to take necessary action granted to the Community by Article 235.

The Commission may throughout the legislative process introduce amendments to the proposed legislation.

The Commission may even, if the power has been delegated to it through the legislative process, create law in a manner much akin to that of an administrative agency in a national state. An example of this is the group or block exemptions that the Commission has issued in regard to the field of competition law. In general this power is exercised in outlining administrative rules and does not extend to creating new Community policy.

²⁴ See *ERTA*, Case 22/70.

²⁵ See *Commission v. Council(Re Erasmus)* Case 242/87.

Council

The legislative power of the Community can be said to reside in the Council. This is not surprising, for as has already been described the Council is made up of the representatives of the governments of the member states. This power is by no means absolute. The Council lacks the power to initiate legislation (see discussion *supra* concerning Article 152). In either the cooperation or co-decision procedure it is ultimately the Council that has the power to pass or reject any legislative proposal. Simply stated if the Council will not approve it, it cannot become law.

Voting in the Council is normally to be made on a simple majority basis unless the Treaty otherwise specifies a different majority. This is provided for in Article 148 (1). However, since the Treaty rules almost always call for a different voting method, either a qualified majority or unanimity, it can be said that “[t]he exceptions...become the rule”.²⁶ The voting procedure is determined by the subject matter and Treaty provisions that are relevant to that topic. The Council and the member states tend to want to adopt legislation under Articles which require an unanimous basis for decision. This allows them to better protect their national sovereignty. As a practical matter, if an unanimous decision must be reached this gives each member state a *de facto* veto right over the proposed legislation. An example of how discussions can arise as to the proper voting procedure can be found in the case *United Kingdom v. Council*, Case 68/86 in which it was determined that Article 43, which provides for a qualified majority vote, was ruled valid for enacting a beef hormone directive and Article 100 requiring a unanimous vote was not required. If legislation is going to be enacted under Article 235 an unanimous vote of the Council is obligatory. This procedure also limits the role of Parliament to a merely consultative one but may only be used, however, if there is no other provision in the Treaty under which to enact the specific legislation.

Although the Council is limited to one voting member per state this does not mean that there is equal representation in the Council when it comes to voting. There are a total of 87 votes in the Council that are distributed among the states in a proportion that is related to the relative population of the state.²⁷ When voting, the members cast all their votes one way or the other, no division of the votes is allowed. This division obviously has no bearing on a voting procedure requiring unanimity. This apportionment blocks the ability of the big states from enacting legislation against the wishes of the smaller ones. If the smaller nations stick together they can block any proposal that is being voted on although they too, would not combined have enough votes to enact the legislation without the support of some of the larger states.

As the Community grows the apportionment is of the utmost importance to the states. If a balance is not maintained it would become fairly easy for the larger states to control the whole of the Community legislative process. Conversely, this apportionment gain could be used upon the entry of more states to the Community to diminish the strength of the larger states. However, as the process of integration continues and more states are admitted to the union and the democratic deficit is diminished it would not be surprising to see the Council lose much of its legislative power even to the point of it having only a veto power that could be

²⁶ Note 24, p. 41.

²⁷ Currently the distribution is as follows: France 10, Germany 10, Italy 10, United Kingdom 10, Spain 8, Belgium 5, Greece 5, the Netherlands 5, Portugal 5, Austria 4, Sweden 4, Denmark 3, Finland 3, Ireland 3, Luxembourg 2.

overridden by the Parliament. That day may lie in the future if the union takes on a more federal character.

Parliament

It is the Parliament's role in the legislative process that is altered the most by use of either the cooperation or co-decision method of legislating. In fact these methods derive their names from the part played by the Parliament in the process. Parliament's power has been increasing in the legislative process but is not near the power of a national parliament.

Originally the Parliament's function was purely consultative. In other words before any legislation could be enacted it was necessary for the Council to consult with the Parliament and receive its opinion before taking any action. [See *Roquette Frères v. Council*, Case 138/79 or *Maizena GmbH v. Council*, Case 139/79 in both cases the Court held that the Council had breached an essential Treaty procedural requirement by enacting a measure before the Parliament had sent its opinion to the Council.] The Parliament's opinion is not binding on the Council, however, and therefore may be ignored if the Council so decides.

The cooperation procedure was introduced by the SEA. In this procedure the Parliament is given a second chance after the Council has received its opinion to review the Council's position. It may then accept, take no position on the proposal, reject or attempt to amend the proposal that it has received back from the Council. The significance of the first two Parliamentary actions (or inaction in the case of taking no position) allows the Council to adopt the proposal by qualified majority. In the case of the Parliament rejecting the proposal, the Council may still adopt it but must do so by an unanimous vote (Art. 189c (c)(2)). If it proposes amendments, the proposal is sent to the Commission, who may accept or reject the amendments. If the reconsidered measure is to be passed by the Council it must be by a qualified majority. The amendments, if they are accepted by the Commission can also be passed by a qualified majority, however, if the Commission, rejects the amendments the Council may adopt them but only by an unanimous vote (Art. 189c (d)(2), (e)). In this procedure the Parliament has no power to stop a position adopted by the Council from becoming law but can make the Council's task more difficult by forcing the Council to be united thus making all the states equal in the legislative process.

With the adoption of the TEU the Parliament's legislative power was strengthened further by the introduction of the co-decision process. As mentioned above this procedure is found in Article 189b of the EC Treaty. This procedure is somewhat similar to the cooperation procedure, the distinction being that in the use of this procedure Parliament, through the use of an absolute majority, can exercise a veto over the proposal which the Council is powerless to override. This procedure is more complex than the cooperation procedure and this complexity is in reality an attempt to have the Parliament and Council reach a consensus on the proposed measure. Despite this it is the first attempt at granting the Parliament any real legislative power. It can be said that this is the first real encroachment into the hitherto absolute power of the states within the Community to legislate.

USA

As has already been pointed out American federalism is based on a system of “checks and balances” and separation of powers. That is the federal government’s institutions “checking” the powers of one another and the distinction between state and federal power. Both of these doctrines will be seen in practice in the legislative processes of the union.

The Laws of the United States

Laws are made in the USA by a bill being passed by both Houses of Congress - Article 1, § 7, cl. 2. This federal legislation along with treaties made by the US are the only forms of law that the Constitution recognizes. Although federal agencies can make law, this is done by the power devolving on them through Congressional authorization. In essence there is only one method for a bill to become a law but there is two variations on this method.

Presidential Signature

A bill that passed in both Houses of Congress “shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it” (Article 1, § 7, cl. 2). This is the most common and simple method of passing legislation in the USA. It requires only a simple majority of both Houses.

Presidential Veto

If the President refuses to sign it “he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law” (Article 1, § 7, cl. 2). In this case the President’s refusal to sign the bill into law determines the voting majority needed in Congress to pass legislation. It is not in any way an absolute veto that the President wields. This procedure shows that the legislative power is solely in the hands of Congress. The President can attempt to thwart legislative intentions but a determined Congress has no need of Presidential authorization.

A bill will also become law without the signature of the President if “any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him” (Article 1, § 7, cl. 2).

As has been seen earlier through the examination of the structure of the Congress and Presidency this process show a balances between the people and the federal government as well as the states and the federal government. This balance is the basis of the “checks and balances” in the federal government. The institutions of the government are not free to act on their own to the detriment of the people or states of the union. This balance is designed to protect both the interests of the people and the states, each being giving a voice in the legislative process. Although as the United States have “integrated” into a nation the people have taken over control of the legislative process.

Constitutional Amendment

The provisions on amending the US Constitution are found in Article V. That article provides for two methods of amendment. One is that Congress propose amendments to the states, the other is that the legislatures of the states call a convention for the purpose of proposing

amendments. Both the interests of the states and people are protect through this amendment process. In either case the article provides that two-thirds of both Houses of Congress or two-thirds of states “shall deem it necessary” in order for the process to be put into action. In order for the proposed amendment to “be valid to all intents and purposes” it is required that three-fourths of the state legislatures or conventions approve the proposed amendment. The last sentence of the Article also provides an unequivocal prohibition on passing an amendment altering the equal suffrage of a state in the Senate without that state’s consent. It can be said that the states hold the power of amending the Constitution and the provision is carefully designed to protect their rights in the union.

The amendment process has proven to be difficult in practice. The changes that have been made to the Constitution have been the corrections of obvious flaws that became apparent as the government and nation developed. In all there have been twenty-seven amendments made to the Constitution but none have made any fundamental changes in the form of the US government or the legislative process. The vast majority of them have been enacted to protect and further the rights of the citizens of the USA. Of the twenty-seven amendments that the states have ratified, eleven of them were submitted to the states by the First Congress. The first ten of these are commonly referred to as the Bill of Rights whose passing was necessitated by opposition the Constitution faced during the ratification process on the grounds that it did not specify the rights of the people in it and can almost be viewed as part of the ratification process of the Constitution itself.²⁸ The preamble to those amendments when they were proposed reads: “The conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the government will best insure the beneficent ends of its institutions, be it resolved.”

States have not passed amendments for “light and transient causes”. Indeed it needs a great amount of public support within the states for the legislature to accept an amendment. The elected representatives in the states may be subjected to tremendous political pressure from their constituencies when fundamental issues arise.

It should also be noted that the only process of amending the Constitution that has hitherto been used is the one of Congress proposing the amendments to the states. Although there have been some calls for another constitutional convention none have ever been held. It is probably the fear that the next call for a constitutional convention will result in what happened the last time a constitutional convention was held and that is that the convention will write an entirely new constitution for the United States. Indeed it is probably only through this method that the government of the United States could be peacefully changed.

²⁸ The eleventh (now Amendment XXVII) being passed as late as 1992!

Foundations of the Unions

The United States and the European Community brought together states that had previously had a great deal of autonomy in regard to all aspects of internal policies. The entering of the states into the unions changed their situation by the distribution of a large degree of this power to a “general” authority.

The EC Treaty is thought of in terms of a framework treaty (*traité cadre*); it provides for the establishment of a “common market”.²⁹ A common market has both internal and external aspects. Internally it means that there are to be no obstacles to trade and externally that it has common policies to all non-member states. In other words, a common market means that trading “conditions similar to those of a domestic market”³⁰ are to be achieved. The Treaty is one of *compétence d’attribution* meaning that Community authority must be derived from the Treaty. The Treaty does not confer a general law making power upon the Community. Its legislative competence can only be derived from Treaty provisions.

The US Constitution establishes a federal government based on the principle of separation of state and federal power. The general legislative power being held by the states unless it is granted to the federal government. This is the principle of enumerated powers. The federal government’s authority according to this principle is limited but when acting within its sphere of competence it is supreme. These grants of power affect both the internal and external policies of the states. The Constitution also places direct prohibitions on the states in regard to the exercise of their legislative authority.

It is these documents which grant authority and provide for the exercise of legislative power that greatly impact state sovereignty and limit the states’ power to act as they wish.

²⁹ See Article 7.

³⁰ *Metro v. Commission*, Case 26/76 & *Polydor v. Harlequin*, Case 270/80.

A Common Market - the EC

Article 2 makes it clear that the chief concern of the Community is the economic integration of its states. In this regard, it becomes the establishment of a common market that is the most important aspect of Treaty. As mentioned above a common market as two component aspects: the creation of an internal market and a customs union. It is the effects that the creation of this internal market has on states' rights that is the focus of this study.

The Treaty envisages its attainment through the establishing of four freedoms and harmonization. Article 7a.2 states that the internal market is to be "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." The law of the four freedoms and related provisions of the Treaty provide for a substantive law enumerated in the Treaty. These provisions place primarily negative restrictions on the states. However, these restrictions on state action would not be completely effective if the states were totally free to carry on policies totally independent of one another. The Treaty therefore provides for a number of "positive" measures to be enacted in the form of harmonization policies which are to be determined by the Community.

Four Freedoms and Harmonization

It is in this area that one finds the substantive provisions of the Treaty. These are found in Part Three of the Treaty which accounts for over half of its total length.

The ultimate goal of economic integration is to replace national protectionism with the power of a competitive economy based on the strength of 340 million consumers. By opening the market up to these enormous competitive forces found in a market that size the economies of the states will all be streamlined and maximumly effective. Means and resources of production will find the most cost-effective location in the Community with the breaking down of national boundaries. It will ultimately benefit consumers by basing production on a economy of scale demanded by a market that size.

It is with this end in mind that the Treaty has provided for the four freedoms of the common market. They are the component parts of economic activity. By insuring that there are no state restrictions on their movement, an integrated market can be achieved. These are the means of achieving the internal market.

Free movement of goods

Probably the "freedom" that has had the greatest impact on the states is the free movement of goods. This area commands more attention than the other freedoms as it has produced the greatest amount of litigation. This is not surprising as it is through the regulation of goods that states have been best able to pursue the objectives of economic protectionism.

Article 9 envisages a customs union "which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and

of all charges having equivalent effect (CEE).” This is the foundation of free movement of goods.³¹

The Treaty first takes aim at eliminating fiscal restraints on trade. Article 12 prohibits the imposition of custom duties or charges having equivalent effect from being placed on the goods from other states; Article 13 provides for the setting in motion of a process of removing preexisting duties charged on out of state goods. The first step towards an internal market is the removal of state power to apply any duties to out of state goods. When an evaluation of a charge is made the Court will look at the effect of the charge and not its purpose. In *Commission v. Italy*, Case 7/68, Italy argued that an export tax was charged to protect art treasures and therefore not prohibited by Article 12. Their argument was based on the fact that these items were of artistic and cultural value not commercial value and the purpose was to retain significant national treasures within the state. The Court did not except either reasoning and construed Article 12 to mean that any time a charge is assessed based on a good crossing a boundary it deters its free movement and is caught by this provision. In a later case the Court defined a CEE as: “Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense.”³² It does not matter whether the CEE is “not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.”³³ This does not prevent the state from imposing a fee that is remuneration for a service rendered by the state to a trader. However, this exception to the CEE rule is very narrowly construed. A charge for quality control imposed by the state was rejected³⁴ as well as a fee related to costs of custom clearance.³⁵ The trader must receive a specific and identifiable benefit for the amount paid which must be proportionate to the benefit of the service provided. As of yet no state imposed fee has passed this scrutiny. To be upheld the fee is going to have to be part of a bargain that is struck for specific services and not unilaterally imposed by the state. The state may also charge proportional fees if there is an obligation upon them that arises under Community or international law. These are fees that are mandated by Community legislation or the states are obliged to assess in fulfilling an obligation arising under international law.³⁶

States are still free to set up their own policies on taxation in regard to goods. However, they are prevented from discriminating either “directly or indirectly” on out of state goods. The provisions of Article 95 which contain this prohibition are found in the part of the Treaty entitled “Tax Provisions” but are best construed in the context of free movement of goods. The Court has distinguished between a CEE and a tax in that it considers a tax to be systematically applied to a specific category of goods which does not take into account the origin of the goods.³⁷ These taxes could be used as trade barriers if different rates of taxation

³¹ The following is a general outline of how the free movement of goods is suppose to work in the Community. The exact way that the CEE, internal taxation and MEQR doctrines are applied can become quite technical and product related. There is an extensive case law concerning this topic that simply cannot be covered in its entirety here.

³² *Commission v. Italy*, Case 24/68. See also *Sociaal Fonds voor de Diamantarbeiders*, Case 2&3/69 and *Commission v. Belgium*, Case 132/82.

³³ *Ibid.*

³⁴ See *Cadsky v. ICE*, Case 63/74

³⁵ See *Ford España v. Spain*, Case 170/88

³⁶ See *IFG v. Freistaat Bayern*, Case 1/83 and *Commission v. Netherlands*, Case 89/76.

³⁷ See *Commission v. France*, Case 90/79.

could be imposed on goods that are in competition with each other. This article basically prevents indirect methods of protectionism. If a tax is imposed on imported goods at a rate that is higher than the rate charged for competitive in state goods, that tax will run afoul of this article. The question here is what products are similar enough to fall within the different categories so that taxation is not discriminatory? The Court interprets “similar” in this case broadly. A British tax scheme that assessed lower rates on beer (in-state product) than wine (import product) was held to breach Article 95.³⁸ It is the competitive relationship between products that will decide if they are similar or not. Products that “have similar characteristics and meet the same needs from the point of view of consumers” will be held to be similar.³⁹ This concept runs parallel to product substitution in competition law.

The provision of Article 95.2 also prohibits the states from “imposing on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.” The scope of this paragraph is greater than the preceding paragraph. Under this provision even if the imported and domestic goods are not “similar” they may still be in competition in some manner. While different taxes rates are allowed, they will be found incompatible with this provision if they have a protectionistic effect. In *Humblot v. Directeur des Services Fiscaux*, Case 112/84 a French tax, on vehicles over 16-CV (horsepower) that was much higher than the ones assessed on cars under 16-CV, was found to be protectionistic in effect since France produced no cars over 16-CV. Although on its face this tax discriminated on the basis of horsepower it in effect discriminated against import cars since this tax placed a disproportionate burden on cars not produced in France.⁴⁰

Besides the prohibition on fiscal restraints of trade, the Treaty also aims at removing non-fiscal barriers. These barriers on imports (Article 30) and on exports (Article 34) are called “quantitative restrictions and measures having equivalent effect (MEQR)”. These provisions takes aim at any non-fiscal measure the state could impose that would effect interstate trade. These measures include imposing quotas, product standards, prohibitions and other restrictions that would reduce the amount of products coming into the state through interstate traffic. The state can implement the restriction if it falls under one of the exemptions found in Article 36. This article allows restrictions on imports and exports if they can be “justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.” These exemptions cannot be used by the states as “a means of arbitrary discrimination or disguised restriction” on interstate trade and have been narrowly construed by the Court. They should be seen as exceptions to the rule and not as any residual state power. Justification for their enactment will be based on a test of proportionality (necessary and no more than necessary). These provisions apply to measures adopted by the states in the widest sense of the word. Measures taken by any body which derives its power from a legislative act will fall within the scope of the articles. Actions taken by professional associations and government sponsored groups can fall within the scope of these provisions and need not be binding.⁴¹

³⁸ *Commission v. UK*, Case 170/78.

³⁹ *Commission v. Denmark*, Case 106/84.

⁴⁰ Compare *Commission v. Greece*, Case 132/88 where the Court allowed a Greek tax that burdened cars with 1800cc engines heavier than ones with 1600cc engines (the only ones produced in Greece) when it found that the tax did not have a protectionist effect.

⁴¹ See *R v. Royal Pharmaceutical Society of Great Britain*, Case 266, 267/87 and *Commission v. Ireland*, Case 249/81.

The Court held in *Riseria Luigi Geddo v. Ente Nazionale Risi*, Case 2/73 that quantitative restrictions are “measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.” This encompasses any ban,⁴² quota system⁴³ or requirement of import license⁴⁴. MEQRs have been given a very broad interpretation by the Court. The Commission provided guidelines for these measures in Directive 70/50 which divided them into two categories:

- (a) “measures, *other than those applicable equally to domestic or imported products*”, i.e., “distinctly applicable” measures, “which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production” (Article 2 (1)), and
- (b) measures “*which are equally applicable to domestic and imported products*”, i.e., “indistinctly applicable” measures (Article 3). These measures are only contrary to Article 30 “where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules”, that is where “the restrictive effects on the free movement of goods are out of proportion to their purpose”, or where “the same objective cannot be attained by other measures which are less of a hindrance to trade” (Article 3). Thus, indistinctly applicable rules appear to be acceptable provided that they comply with the principle of proportionality.⁴⁵

In regard to the definition of MEQRs the most important case is without doubt *Procureur du Roi v. Dassonville*, Case 8/74. In which the Court stated: “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.” This means that it is not necessary for the rules to actually effect interstate trade it is enough that they are capable of affecting it. Any effect, regardless of its significance, is capable of breaching Article 30 as the Court does not apply a *de minimis* rule in these cases.⁴⁶

Under the “Dassonville formula” the Court has disallowed a number of measures: a “buy Irish” campaign in which all souvenirs not made in Ireland were required to be marked “foreign”⁴⁷, states fixing maximum pricing might cut into profit margins discouraging the import of more expensive imports⁴⁸ and minimum pricing requirements forcing the price of cheaper imports upwards⁴⁹. Measures aimed at production, for example the regulation of baker’s hours⁵⁰, and not trade can be construed not to violate Article 30 as they are a disadvantage to domestic production and therefore do not discriminate. Measures that limit the level of alcohol in beverages sold for on premise consumption will not run afoul of Article 30 as they do not discriminate as to origin of product.⁵¹

⁴² See *Commission v. Italy*, Case 7/61.

⁴³ See *Salgoil SpA v. Italian Minister of Foreign Trade*, Case 13/68.

⁴⁴ See *Commission v. UK*, Case 124/81.

⁴⁵ Taken from Steiner, *Textbook on EC Law*, p. 95.

⁴⁶ See *Van De Haar*, Case 177/82.

⁴⁷ *Commission v. Ireland*, Case 113/80.

⁴⁸ *Tasca*, Case 65/75.

⁴⁹ *Openbaar Ministerie v. Van Tiggele*, Case 82/77.

⁵⁰ See *Oebel*, Case 155/80.

⁵¹ See *Blesgen v. Belgium*, Case 75/81.

In developing the “Cassis de Dijon principle”⁵² the Court attempted to ascertain the scope of the “Dassonville formula” in regard to indistinctly applicable measures. For the free movement of goods, *Cassis* means two things: 1. it provides for “mutual recognition” of goods, that is goods legally produced in one state may not be denied entry into another, 2. that the only exception to this rule is based on “mandatory requirements” (these include matters of public policy which among other things include public health, fiscal supervision, fairness of commercial transactions and consumer protection). This non-exhaustive list of exceptions was extended to include environmental protection⁵³ and culture⁵⁴. The rules that are exempted must still be proportionate, that is necessary to achieve the end sought and no greater in scope than needed. In *Walter Rau Lebensmittelwerke v. De Smedt PVBA*, Case 261/81, the Court held that a Belgian law requiring margarine packaging to be cube shaped to allow consumers to distinguish it from butter where disproportionate since the same result could be achieved through labeling requirements. Any state claim that a rule is justified under *Cassis* will be under close scrutiny by the Court. States bear the burden of proving that standards in other states are inadequate. Germany tried to ban the import of all beer that was not brewed according to their *Reinheitsgebot* (purity law), however there was no evidence to support its claim that additives in beer present any health risks to consumers and since this law served to shield German beer producers from out of state competition it was blocking the import of beers from other states.⁵⁵

The scope of the “Dassonville formula” in conjunction with the “Cassis de Dijon principle” allowed a trader to virtually challenge any state measure and needed demarcation to prevent over application in regard to non-discriminatory state rules. In essence interstate traders were being allowed to challenge any state rule that limited their commercial freedom and affected the volume of their sales in interstate products. In *Keck and Mithouard*, Cases C-267 & C-268/91 the Court demarcated the limits of Article 30’s MEQRs by stating that:

“the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, provided that those provisions apply to all affected traders operation within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”

Under this ruling if the volume of interstate commerce is affected in the same manner as intrastate commerce, the state rule restricting the volume of sales will not be deemed to be a measure that runs contrary to Article 30.

Generally, the principles surrounding imports in Article 30 will be applied in the case of exports under Article 34. It was held in *Bouhelier*, Case 53/76 that the French requirement of attaining an export license for watches breached Article 34 since there were no such requirements placed on watches for domestic sale. However, in the case of export restrictions, measures that are indistinctly applicable will not be subject to the “Dassonville Formula”.

⁵² See *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwien*, Case 120/78.

⁵³ See *Commission v. Denmark*, Case 302/86 (deposit system for beverage containers).

⁵⁴ See both *Cinéthèque v. Fédération Nationale de Cinemas Francasies*, Case 60, 61/84 (promoting the production of films) and *Torfaen BC v. B & Q plc*, Case 145/88 (Sunday trading laws).

⁵⁵ *Commission v. Germany*, Case 178/84.

The measures in this case must be specifically aimed at distorting the relationship between intrastate trade and exports. A prohibition on meat product producers from having horse meat on the premises, to insure that it would not end up in their products and be exported to states having a ban on the sale of horse meat was upheld.⁵⁶ These measures can only be saved by the application of Article 36 as the Court is more lenient when it comes to states discriminating against themselves as those measures are not protectionistic in nature.

A final aspect of the free movement of goods is the state as a market participant. Article 37 allows for state monopolies in the market but they may neither discriminate in purchasing or sales conditions or distort competition in the Community market. State subsidies are the subject of Articles 92. It provides for a prohibition on a grant that “distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods”. However, it specifically mentions that welfare and disaster relief are legitimate social and economic ends in which the granting of aid is allowed. It also provides for the granting of aid in certain cases when it is used for the support of depressed areas, remedy a serious economic problem or promote culture among other things.

Free movement of persons

The free movement of persons has basically two component parts. The first is the right for workers to move to other states in search of and taking employment and the other is a general right of residence. The right of workers allows more freedom in relation to relocating in another member state.

Article 48 provides for the right of workers to move freely within the Community. It encompasses the right of workers to accept offers of employment, to seek employment through out the Community, to stay in another state and remain in a state after having been employed there - p. 3,(a), (b), (c), (d)⁵⁷. The scope of this right is detailed in secondary legislation.⁵⁸ All EU citizens enjoy equal rights in seeking employment within the Union and a state or employer may not discriminate on the basis of nationality.⁵⁹ These rights extend to family members (spouses and dependents)⁶⁰ of the worker but are dependent on the worker’s rights. The concept of worker has been construed broadly and is a Community definition not dependent on what the states consider to be a worker (the test being that the activity be “effective and genuine” in an attempt to improve living conditions of the person engaged in them).⁶¹ Part time employment also falls within the scope of this Article. A German giving music lessons part time in the Netherlands was considered a worker.⁶² Trainees can be considered workers but students are not.⁶³

⁵⁶ *Groenveld v. Produktschap voor Vee en Vlees*, Case 15/79.

⁵⁷ p. 4 of this Article removes work in the public sector (defense, tax inspection, judiciary, police, etc.) from the scope of the article.

⁵⁸ See Dir. 68/360 & 64/221, Reg. 1612/68 & 1251/70.

⁵⁹ See *Commission v. France*, Case 167/73 were a scheme that provided for quotas that favored French seaman was held invalid not withstanding the fact that competent authorities were instructed not to apply the quotas against Union citizens.

⁶⁰ See Reg. 1612/68, Articles 10-12.

⁶¹ See *Levin v. Staatssecretaris van Justitie*, Case 53/81.

⁶² See *Kempf v. Staatssecretaris van Justitie*, Case 139/85.

⁶³ See *Lawrie-Blum v. Land Baden-Württemberg*, Case 66/85 and *Raulin v. Netherlands Ministry of Education and Science*, Case 357/89 respectively.

A worker's rights will vary depending on the law of the state of employment. Equality of treatment is the basic premise of this freedom. Community law provides for no minimum guarantees to benefits and treatment other than non-discrimination. The states are generally free to enact regulations to suit their needs as long as they do not violate other provisions of the Treaty (such as Article 119 which bars sexual discrimination in regard to salary) or any harmonization regulations the Community enacts within this field (harmonization is discussed infra).

The state may not deprive the non-national worker of any of his/her rights that are a part of Community law. These encompass fundamental rights that are recognized by the states including the *European Convention on Human Rights*.

Admission to another state requires that the worker prove his privileged status. Dir. 68/360, Article 3 states that a worker be admitted "simply on production of a valid identity card or passport" while Article 4 requires the worker show proof of employment. The state may not require a residency permit or other administrative measure.⁶⁴ However, the state may require that the worker report his/her presence in the state - failure to do so or comply with other immigration formalities allows the state to impose proportionate fines for non-compliance but it may not deport the worker on these grounds.⁶⁵

The right of general residence is more restricted. It was provided for by Directives 90/364, 90/365 and 90/366. This right is contingent on the person being able to show adequate means of support without being employed. This encompasses retirees and students. They also may not rely on the state supported medical insurance schemes but must be insured independently of the state. In short this right of residence is granted as long as the person exercising it can show that he/she will not be a financial burden on the state. If the right is attained, it provisions encompass family members as well.

States may limited a non-national's right to residence based on the provisions of Article 48 (3) which encompass "limitations justified on grounds of public policy, public security or public health." These provisions are interpreted narrowly and allow the state to exclude the person but do not authorize discrimination. Directive 64/221 fills out these provisions. The grounds of public security and public health need not be elaborated upon while public policy is a vague concept. Each state may have different opinions on what this ground is and have room to develop it within the limits of the Treaty. The court has held that this ground can only be invoked if there is a "genuine and sufficiently serious threat to public policy"⁶⁶ and that it affects "one of the fundamental interests of society."⁶⁷ The conduct complained of must be personal in nature. It need not necessarily be illegal, it is enough that the conduct is socially undesirable. Thus the UK could deny the admittance of a scientologist.⁶⁸ Belgium, however, could not deny residence permits to two French prostitutes since their craft was not illegal in Belgium and their nationals who practiced it were not subjected to repressive measures.⁶⁹

⁶⁴ See *R v. Pieck*, Case 157/79.

⁶⁵ See *Messner*, Case C-265/88 and *Procureur du Roi v. Royer*, Case 48/75.

⁶⁶ *Rutili v. Ministre de l'Interieur*, Case 36/75.

⁶⁷ *R v. Bouchereau*, Case 30/77.

⁶⁸ *Van Duyn v. Home Office*, Case 41/74.

⁶⁹ *Rezguia Adoui and Dominique Cornuaille v. Belgium*, Cases 115, 116/81.

Free movement of services

Movement of services pertains to the right of companies to offer their services and participate in commercial activities across state borders. The provision in regard to this freedom is found in Article 59. The right of establishment (Article 52) will also be covered under this heading. The difference between the two primarily being that establishment implies a more permanent presence in another state. The basic premise in both of these articles is that in offering or providing their services to others that are not located in the same state as the company or person offering the service (or if it decides to establish itself in another state), it will be treated in the same manner as a national of that state - a non discrimination provision. “[A]ny discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member state other than that in which the service is to be provided” is abolished by these provisions.⁷⁰

The meaning of this is understood easily by the following examples. A Portuguese firm having once procured a building contract in France is free to use its own work force in the fulfilling of the contract - although a state is still free to apply its local labor laws on the workers.⁷¹ A Dutch man, with a doctorate in Belgium law cannot be denied admission to the Belgium bar based on his nationality.⁷² An English based company providing patent renewal services cannot be required to obtain a license to do business in Germany since such rules protect the German market from competition.⁷³

The states may limit this freedom on the grounds of “public policy, public security or public health” (Articles 56 & 66) and if the activities concern the “exercise of official authority” (Articles 55 & 66).

Free movement of capital

As of yet this freedom has played a minimal role in the development of Community law. The provisions governing this freedom are found in Articles 67-73 (the current law in this field being covered by Articles 73b-g). The importance of these provisions and the focus on them has increased and will continue to since plans for a monetary union were added to the Treaty. The provisions of the article basically let states discriminate in their applications of tax schemes of capital based on residency but the states through political initiative have agreed not to do so in a non-binding resolution. Article 73d (a)(b) allows states to “take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.” These measures may not be “means of arbitrary discrimination or disguised restriction”. These provision are along the lines of Article 36 and interpretation will follow those lines of reasoning if the states want to exercise their rights under these provisions. As the monetary union takes shape and economic policy becomes more centralized these provisions are going to have great impact on the states ability to set economic policies.

⁷⁰ *Van Binsbergen v. Bestuur van de Bedrijfsvereniging*, Case 33/74.

⁷¹ *Rush Portuguesa Lds v. Office National d'Immigration*, Case 113/89.

⁷² *Reyners v. Belgian State*, Case 2/74.

⁷³ *Säger v. Dennemeyer*, Case 76/90.

Harmonization

The states, as can be ascertained from the above discussion, retain a great deal of freedom to determine their own policies as long as they do not interfere with any of the four fundamental freedoms or are justified on one of the grounds provided for in one of the exemptions. In other words there remains many lawful measures that the states are entitled to enact that serve to infringe upon the freedoms provided for in the Treaty. It is the dismantling of these barriers that the process of harmonization is concerned with. Harmonization is the legislative activity within the Community that establishes a Community policy supplanting the numerous different regulations that each state would otherwise be allowed to have. Many of these lawful measures divide and distort the market unity through competitive advantages or disadvantages for different states. Harmonization is the ultimate goal of all Community legislation, be it in the unifying of state standards or elaboration of Treaty provisions. As has been shown in the section entitled *Legislative Process*, each state exercises a great deal of authority in forming this policy and may even exercise a veto right depending on the voting process.

Harmonization occurs on two levels in the Community: 1. when demanded by the Treaty, 2. when the Treaty authorizes it as a step to attain the common market. The Treaty charges the states, through the Community, with the task of establishing certain common policies. These include a common agriculture policy (Article 38), a transport policy (Article 74) and a commercial policy (Article 110).⁷⁴ In other areas the Treaty envisions the states harmonizing conflicting state law by providing aspirational provisions of what is to be achieved in certain fields. These areas include among others environmental protection (Article 130r), consumer protection (Article 129a), working conditions (Article 117) and taxation (Article 99). The Community's power in harmonization is extended by the provisions in Articles 100 & 100a which give it fairly broad authority in this field. They authorize the Community to adopt harmonization legislation when it aids the establishment and functioning of the common market. These articles, alone or in correlation with other Treaty provisions, allow the Community to implement both internal and external measures in a diverse range of fields pertaining to its aims. The Community's power granted by the Treaty in Article 235 should not be forgotten in this regard either. It enables the Community to act if the action "should prove necessary" allowing it to act where there is no expressed authorization. This power is used when matters fall into the broader aims of the Community such as the development of its social policy.

Through the exercise of these powers the Community has been able to enact harmonization legislation in a number of fields not specifically enumerated in the Treaty. Some examples of these areas include among others product safety standards, product liability, broadcasting and company law.

Constitutional Principles

Community law is neither international law nor national law it "constitutes a new legal order...for the benefit of which the states have limited their sovereign rights".⁷⁵ It is *sui generis*. To understand EC law and its implications for the states it must be studied according to its own principles which are, as is to be expected, unique. The Community is a creation of

⁷⁴ Competition is another area that the Treaty mandates a common policy and provides many of the substantive provisions of that policy. The common policies can also be found in Article 3.

⁷⁵ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62.

the states that formed it, however, the benefits of the common market are for the people of Europe. It is their rights that are ultimately affected by the Treaty. The Community imposes obligations directly upon them while at the same time conferring them specific rights. The legal protection of these rights is a high priority of the Community. If these rights conferred upon individuals by the Treaty, without any implementing legislation, can be exercised by individuals before their national state courts they are considered to be directly applicable and effective. This idea of direct applicability and direct effects are a fundamental tenant of Community law.

Direct effect and the idea of supremacy of Community law have played a very important role in the development of the Community. The determination of whether or not a provision has direct effect often demarcates the obligation made upon the state.

Direct Effect

The *Van Gend en Loos* case was the first time that the Court found that Treaty provisions had direct effect. It held that:

“Art. 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation...[which] is not qualified by any reservation on the part of the States which would make its implementation conditional upon a positive measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between the Member States and their subjects.”

The court has applied a test which includes finding that the provision must be “unconditional and sufficiently precise” in order to be construed to have direct effect. In short the provision must be justiciable. When these rights are justiciable by an individual against the state they are said to have “vertical direct effect”.

Treaty provisions may also provide rights that can be exercised directly against other individuals in a state court. Article 119 (no salary discrimination on account of sex) provides a sufficiently clear provision which can be relied upon by an individual against his/her employer.⁷⁶ If articles of the Treaty may be used in this “horizontal” relationship, they are said to have “horizontal direct effect”.

Since regulations are of “general application” they may also have direct effect as long as the provision is not conditional or imprecise. The Court has also found that directives although not of “general application”, are not precluded from producing direct effects in regard to “the obligation which it imposes” upon the state as long as the period for implementation has expired.⁷⁷ However, since directives are only binding upon the states, a directive “may not of itself impose obligations on an individual” and therefore lacks “horizontal direct effect”.⁷⁸

The Court furthered the scope of the binding effects of Community law upon the states in its ruling in *Von Colson and Kamann v. Land Nordrhein Westfalen*, Case 14/83. Instead of finding either “horizontal” or “vertical” direct effect, it found that Community law was

⁷⁶ See *Defrenne v. SABENA*, Case 43/75.

⁷⁷ See *Van Duyn v. Home Office*, Case 41/74 (vertical direct effects of directives) and *Pubblico Ministero v. Ratti*, Case 148/78 (no direct effect in regard to directives until after time-limit has expired).

⁷⁸ See *Marshall v. Southampton & South West Hampshire Area Health Authority*, Case 152/84.

capable of “indirect effect”. Through the obligation that Article 5 places upon the states to insure that Community law is effectively applied “national courts are required to interpret their national law in the light of the wording and purpose” of a directive to achieve the result it seeks to achieve.

The Court’s decision finding that a state can be held liable for damages if it is negligent in implementing a directive, has probably had the greatest impact on the states in regard to Community law. This liability is provided for regardless of the directives direct effect. This was the holding of *Francovich v. Italian State*, Case 6 & 9/90. If a directive’s provisions identify rights that are attributable to individuals and there is casual link between the obligation of the state and the losses suffered, the state can be liable for these damages. Individuals must be afforded remedy if the state breaches Community law and thus deprives them of their rights.

Supremacy

There is no article in the Treaty that explains what happens when the provisions of state law come into conflict with Community law. The lack of a declaration of supremacy in the Treaty made it incumbent upon the Court to decide this question which it did in *Costa v. ENEL*, Case 6/64. It stated that:

“The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.” Concluding that provisions of Community law “would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.”

Since the Court found that the idea of supremacy, if not explicitly in a Treaty provision, was at least inherent in its provisions, the states were unequivocally bound to the economic union it purports. They no longer have legislative powers in areas where the Community provisions prevail.

The Court formulated its doctrine of preemption in a later case.⁷⁹ Here it stated that conflicting provisions of national law are “automatically inapplicable...[and] also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions” since “[t]he rules of Community law must be fully and uniformly applied in all the Member States.”

⁷⁹ *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77.

Enumerated Powers - Federalism

As already noted the US Constitution vests legislative power in Congress. Legislative power is simply the power to make laws. But what kinds of laws can Congress make? The laws that Congress enacts will ultimately delineate states' rights in the union. If the Constitution did not limit the legislative prerogatives of Congress there would really be no point in discussing states' rights at all. This demarcation of Congress' legislative authority is the subject of the doctrine of enumerated powers.

The US Constitution is undoubtedly one of enumerated powers. That is to say that the federal government has only those powers that are granted to it by the Constitution. In the "Federalist No. 84", Hamilton replied to the objection that the proposed Constitution contained no bill of rights by arguing that it would "contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?" According to him the inclusion of an exception to powers not granted would "serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers". And in 1819, Marshall unequivocally stated in his opinion in *McCulloch v. Maryland* that: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was pending before the people, found it necessary to urge; that principle is now universally admitted."

The US government is granted by the Constitution legislative authority over certain matters that are to be of federal concern in Article 1, § 8. Among the different powers enumerated in that section are the ones contained in the first eight of its eighteen clauses which read as follows (numbers added to aid identification):

1. To lay and collect taxes, duties, imposts and excises, to pay the debts of and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
2. To borrow money on the credit of the United States;
3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;
4. To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States;
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
6. To provide for the punishment of counterfeiting the securities and current coin of the United States;
7. To establish post-offices and post-roads;
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

These are among the powers explicitly granted to the general government. They are the objects of legitimate concern of the central government. Other powers that are enumerated in this section include provisions for the establishment of the military, inferior tribunals to the Supreme Court and jurisdiction over the national capital. Section 8, however, is not a

complete listing of all the legislative powers. Others legislative powers are found in other areas of the Constitution. The provisions of § 8 give an indication of the scope that the federal government is to have.

Since the Constitution is based on enumerated powers, Congress has no general power to make law. It only can pass legislation which falls within these provisions of enumerated powers. The consequence of which is that in the USA the general police powers of the government rests with the states. That is the power to regulate the health and safety of the citizenry. Any attempt by the federal government to pass general legislation would be an usurpation of power on its part and such legislation would be void on the grounds that Congress exceeded its constitutional authority.

It is clear from the foregoing paragraph that of all the possible concerns and ends of government, the federal government is only given competence in a certain number of specifically defined areas. But as Chief Justice Marshall observed in his *McCulloch* opinion it is not this question that is of any real concern but rather it is the question regarding the “extent of the powers actually granted” that cause reflection and “is perpetually arising, and will probably continue to arise so long as our system [of federal government] shall exist”. It is obvious, for example, that whatever is meant by “taxation”, “interstate and foreign commerce”, “naturalization”, “bankruptcies” and “coining money” are all matters of federal concern. This, however, does not mean that Congress is powerless to regulate other areas not directly enumerated. This is due to the last clause (18) of § 8, the necessary and proper clause (discussed *infra*), which is unquestionably the most important clause of the Constitution in regard to legislative authority.

In any area where a power is enumerated there are no limitations placed upon Congress as to what kind of legislation may be passed except limitations that may be found within the Constitution itself. (Some of the most notable prohibitions being the provisions of Article I, § 9, the Bill of Rights, equal treatment and due process.) The Congress is free to regulate in any manner that it sees fit. This, however, does not mean that Congress necessarily has an exclusive right to regulate these areas. The states may have a concurrent right to legislate in these same areas depending upon the nature of the power granted, the language of the provision or any other constitutional limitation barring state legislation. For example, Article I, §10, cl. 2 mentions some of the general constitutional prohibitions that are placed on the states’ legislative power one of which is the coining of money making this an exclusive federal power. The borrowing money on the credit of the US bars states from doing so by the nature of the provision. The states are excluded from legislating for the nation’s capital by the wording of Article I, § 8, cl. 17 which grants Congress “exclusive” legislative rights over the District of Columbia. If the power to regulate is a concurrent power shared by the state and federal government, this still does not mean that a state is free to do so as the supremacy and preemption doctrines (discussed *infra*) may encroach upon this right.

The tenth amendment is sometimes referred to as a states’ rights amendment but this is not true. The tenth amendment states that: “The powers not delegated to the United States by the Constitution, nor prohibited to it by the State, are reserved to the States respectively, or to the people.” This amendment really states nothing but the obvious. It lies in the nature of the idea of sovereignty residing with the “people”. As already noted under the discussion of the preamble of the US Constitution, Chief Justice Marshall declared that it was the people acting through their respective states that created the union and bound their states to it. The

significance of this fact is that sovereignty in the USA ultimately rests with the people; the state and federal governments are thus creations of the people and each has been delegated certain powers by them. It is from the people that both the state and federal governments are empowered. This view was confirmed in *Texas v. White*, 74 U.S. 700 (1868). The implication clearly being that the people (the sovereign) can freely divide power between the state and federal governments in any manner that they see fit. Under the doctrine of enumerated powers this means that any power not so delegated to the national government was “reserved to the States” meaning in other words quite simply not delegated to the federal government. From which it follows that every action taken by the federal government must somehow be positively affirmed by the US Constitution. It is obvious to see how this amendment really just begs the question of states’ rights by stating the obvious. In affirming the position that what is not delegated by the people is reserved to them or the states simply does not shed any light on what rights the states have.

Broadly speaking the powers that have the greatest effect on the states’ rights on internal matters are Congress’ power to regulate commerce and its taxing and spending powers. The exercise of these powers can have a direct impact on the states and a definite effect on the policies of the states.

Congress’ power to regulate interstate commerce is concurrent with the states’ power to regulate transactions in the state. The federal government’s power in this area is very broad and can almost be thought of as a general “police” in that the Congress has the power to prohibit any goods, persons or activities that cross state lines if it finds that they impair the health, safety, welfare or morals of the citizenry. This regulating authority even extends to commerce after it is no longer in interstate commerce. (A federal statute requiring labeling of bottles in interstate commerce applied after the bottles were no longer in interstate commerce. This requirement made inspection easier since it could be ascertained that the bottles were properly labeled while in interstate commerce was upheld in *McDermott v. Wisconsin*, 228 U.S. 115 (1913).) However, the scope of this should be distinguished as to probably only applying to the condition of the goods after they have left state commerce and not to their use. Nor may persons be regulated after their interstate travel has come to an end. Although Congress still may have the power to regulate them at that time if an effect on interstate commerce can be found.

Power to regulate under the commerce clause extends to all commerce or activities that affect more than one state. In *Gibbons v. Ogden*, 22 U.S. 1 (1824), Chief Justice Marshall concluded in his opinion that Congress had the authority to regulate commerce that had any interstate impact. This means that any activity which has effects in more than one state is brought within the scope of the commerce clause. This effect on interstate commerce is to be judged in the aggregate, so an activity which on its face appears to be strictly a *intrastate* matter may be viewed as affecting other states. A farmer in Ohio who grew wheat on his own land to feed his livestock and to be ground for flour for home consumption, found himself engaged in interstate commerce when the Supreme Court looked at his activities. The Court deemed that his activities in and of themselves had no bearing on interstate commerce but if all farmers engaged in such activity it would affect the demand and supply of wheat in interstate commerce which was the subject of federal regulation.⁸⁰ A restaurant which practices racial discrimination may be barred from this practice by the commerce clause since this practice

⁸⁰ *Wickard v. Filburn*, 317 U.S. 111 (1942).

may affect the number of restaurants that are established and thus in fact may effect other states.⁸¹ The Court in this case made the observation that racial unrest tends to have a negative impact on business. A local business whose sales are diminished on these grounds will have effects on out of state suppliers who deal with the local business and therefore bring them within the scope of interstate commerce. It is because of the scope of this power and the fact that it is the *effect on* interstate commerce that gives power to regulate these activities that make it such a broad power in Congress' hands. Usually the Court will find that the activity being regulated has an effect on interstate commerce and uphold the federal regulation enacted under this clause.

The taxing and spending powers of the federal government are also very broad powers and gives it power to control the states in ways it otherwise could not. These powers are provided for in Article 1, § 8, cl. 1 (noted *supra*), Art. I, § 9, cl. 7 and are thought of as being independent powers.⁸² That is to say that the powers need not be exercised in any relationship to any of the other enumerated powers of the federal government. Congress can in principle spend federal moneys in any manner that it sees fit with relatively few limitations. To effectuate a policy in an area that Congress cannot legislate, due to the subject falling outside of its legitimate area of concern under one of its enumerated powers, it can offer funds to a state that complies with the regulations and stated policy. The Court considered this to be “tempting” rather than “coercing” and upheld this type of spending scheme in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). These spending schemes must be enacted, however, for the promotion of the “general welfare” as distinguished from “some mere local purpose” to be constitutional.⁸³ In exercising its taxing powers, Congress can also tax in a manner that is regulatory. It is fully within the scope of Congress' taxing power to levy taxes that are punitive and would thus serve the purpose of basically regulating the subject of the tax.⁸⁴ For example, recently the imposition of a tax on cigarettes has been contemplated to discourage their use and punish the tobacco industry for aiming its advertising at teenagers. The amount of this tax under Congress' taxing power is basically unlimited and constitutional as long as it can be construed as raising revenue. The purpose or intent behind the taxing and spending is not a subject for judicial scrutiny since virtually all taxation and spending has a regulatory effect which either promotes or discourages the activity which is the subject of these actions. It is easy to see how state policy can be overridden by the exercise of these powers.

The states' powers over taxation of interstate commerce is governed by the commerce clause which places certain limits on the power of the state in this regard. This is also a power that is held concurrently with the federal government. The primary premise in this regard is that the imposed state taxes may not discriminate against interstate commerce unless authorized by Congress.⁸⁵ If the tax is nondiscriminatory the Court will impose a balancing test that weighs the state's revenue needs against the burden the tax imposes on interstate commerce to obtain if it is valid or not. Validity is also dependent upon the object of taxation having a substantial

⁸¹ *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁸² See *United States v. Butler*, 297 U.S. 1 (1936).

⁸³ See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

⁸⁴ See *McCray v. United States*, 195 U.S. 27 (1904) - the judiciary will not inquire into the motive or purpose of Congress in adopting a statute levying an excise tax, *United States v. Doremus*, 249 U.S. 86 (1919) - tax on narcotics, *Sonzinsky v. United States*, 300 U.S. 506 (1937) - firearm deals taxed, and *United States v. Kahrigier*, 345 U.S. 22 (1953) - bookmaking taxed.

⁸⁵ *Boston Stock Exchange v. State Tax Commission*, 420 U.S. 656 (1977).

“nexus” to the taxing state, the tax being “fairly apportioned” and compensatory or “fairly related to services provided.”⁸⁶ Since the subjects of taxation are great and varied, the application of these premises vary according to the object or activity that is being taxed. For example, if the subject of the tax in an “instrument of commerce” (planes, railroad cars, trucks, etc.) a valid tax must establish a “nexus” to the state imposing the tax and be proportionate to the contacts it has with the state as it moves between the states during the year. (Nexus is defined as “benefit” or “protection”⁸⁷ and if nexus is found in more than one state the value of the tax can be apportioned by the miles traveled in the taxing state⁸⁸ or on the physical presence of the number of these instruments on any given day in the state and averaging that number out for the whole year.⁸⁹ Licensing, franchise or net income taxes work along the lines of the instrumentality taxes and also must be “fairly relate to services provided” and measured by either a flat annual fee or proportionate rate based on revenue generated within the state.⁹⁰ This approach to validating state taxes on interstate commerce basically applies to all types of license, franchise, net income, sales and users taxes that states may wish to impose. Highway use taxes fulfilling the above requirements are valid if imposed to compensate the state for the maintenance and administration of its roads.⁹¹ The rules governing state taxation basically seek to avoid economic protectionism and “multiple” or “double” taxation of the same object by different states.

Implied Powers

The doctrine of implied powers stems from the necessary and proper clause found in Article I, § 8, cl. 18. It reads:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

This doctrine although being thought of as one of implied powers is really just another enumerate power. The power of enacting legislation under this clause is enumerated under this clause, there really is nothing implied about it. It is better to think of this power as an enumerated power but a power that is on a contingent basis. As the wording of the clause itself implies Congress has the power “for carrying into execution” the other previously enumerate powers. It therefore follows that any legislation that is enacted under this clause is within constitutional limits as long as it bears a relationship to one of the other “foregoing powers”. Although this may at first glance appear to be a simple concept it has not proven so in practice. The USSC itself has struggle with this concept and not always understood if Congress has exercised an “enumerated” power or one that was “necessary and proper”.

This clause greatly broadens Congress’ power to legislate. It means that in areas that are not properly placed under congressional authority by the Constitution, the federal government is not excluded from acting in these areas that would otherwise be exclusively in the sphere of the states’ powers. However, whenever the federal government does exercise this power over matters that are not legitimate concerns of the federal government there must be a relationship

⁸⁶ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

⁸⁷ See *Braniff Airways v. Nebraska Board of Equalization*, 347 U.S. 590 (1954).

⁸⁸ See *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

⁸⁹ See *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158 (1933).

⁹⁰ See *Complete Auto Transit, Inc. v. Brady*, supra.

⁹¹ See *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

to a valid federal concern to make it “necessary and proper” thus validating this exercise of power. In others words, the Congress can legislate in areas that are rationally related to some legitimated federal interest.

To fully understand how the necessary and proper clause works and what its significance is, one always has to look at the other enumerated powers and try to distinguish between what powers are within the federal governments sphere of legitimate concern and what are not. This concept was one question that was brought up in *McCulloch v. Maryland*. In that case, Congress had incorporated a national bank although there are no provisions which authorize Congress to “incorporate” or establish a national bank. Therefore it is quite simply out of the federal governments sphere of legitimate interests under the Constitution to establish such a bank. There is no provision, on the other hand, in the Constitution that expressly prohibits Congress from incorporating a national bank. It is however clearly within the authority of Congress to “lay and collect taxes”, “pay the debts... of the US”, “borrow money”, “coin money” and “regulate commerce”. This is were the contingent power enumerated in the necessary and proper clause governs. The question now becomes one of not if Congress has authority to incorporate a national bank, which it does not, but rather one of if the incorporation of a national bank is “necessary and proper” (rationally related) to one of the above mentioned powers. Can any relationship be established between these enumerate powers that could make the incorporation of the bank “necessary and proper”? The incorporation of a national bank could certainly help effectuate any of the above mentioned legitimate powers. Therefore the Supreme Court found in this case that the incorporating of a bank was not contrary to the Constitution through Congress’ enumerate power under the necessary and proper clause. Writing for the Court, Marshall summed it up in this manner: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,...are Constitutional.” To validate legislation under this clause there must be a relationship established between what is necessary (the means) and some other enumerate power (the end to be achieved). The regulation must promote some legitimate concern of the federal government.

The question then becomes one of who is to determine if the means are “appropriate”. The Supreme Court has fairly consistently held that this determination is to be made by Congress and not the Court itself. This is based on the division of powers embodied between the three branches of government in the Constitution. The legislative prerogatives are, as mentioned, solely vested in the Congress, it is therefore inherent that the determination of what means are necessary to effectuate the legislative policies of the legislative branch are best left up to that branch. Marshall again in *McCulloch* stated that “to undertake here to inquire into the de[g]ree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.” The Supreme Court in 1937 reaffirmed this position in its ruling in *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937); the decision of whether the means are supported by the end “is primarily for Congress to consider and decide”.

The deference to congressional determination was also the subject of a more recent case. In *United States v. Lopez*, No. 93-1260 (1995) the Court found that a federal statute prohibiting the possession of a firearm in a school zone exceeded “the authority of Congress ‘[t]o regulate Commerce...among the several states...’” The Court found in this case that the congressional findings and legislative history were insufficient to establish a connection between the legislation and interstate commerce. If Congress fails to make the necessary determination

that legislation is necessitated by one of the provisions of its enumerated powers, the Court then can make this determination itself. Which it did and found that: “The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.” In studying this case the real question today becomes, if Congress had made a definite determination as to the fact that handguns in school zones do have a substantial effect on interstate commerce would the ruling in *Lopez* have been different? Should this case be read as the Court starting to “to tread on legislative ground” or was it merely the fact that Congress had not established the required nexus between one of its enumerated powers and the legislation it passed?

It is only through these enumerated powers and the use of the necessary and proper clause that Congress can enact valid legislation under the Constitution.

Lastly it should be pointed out that Congress cannot force states to enact legislation. This is the holding of *New York v. United States*, 505 U.S. 144 (1992).⁹² “Congress may not simply commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” Congress must respect the sovereignty of the states and not force states to accept federal regulatory programs.

This however is not as big of an obstacle to Congress implementing its policies as at first might be thought. There are at least three ways that Congress can get around this. The first being that Congress can regulate this area itself by direct federal regulation. In this case low level radioactive waste may cross state lines and even if it does not it may still affect interstate commerce and therefore be caught by Congress’ power under the commerce clause making this an area of legitimate federal concern which can be directly regulated by federal legislation. Another option open to Congress would be to conditionally “pre-empt” state legislation (preemption is discussed *infra*). This means that Congress passes legislation that regulates the subject matter but makes its validity conditional on the basis that the state fails to enact legislation that meets the federal standard. Lastly, Congress can rely on its spending power to implement its will. In other words it offers the states an incentive if they meet the federal requirements but nothing if it does not comply. Simply, Congress bribes the states. It is in acting within any of the above manners that the federal government can affect and dictate the policies of the states.

Individual Rights

The exercise of either federal or state power is limited by specific guarantees of rights enumerated within the Constitution. The prohibitions are found in Article I, § 9, § 10, the Bill of Rights and the due process and equal protection provisions of the fourteenth amendment and are always applicable. In other words if a federal or state act, no matter how constitutional in regard to its respective power, is found to violate one of these provisions, it will always be unconstitutional. These provisions are always lurking in the background in regard to any state or federal action and must always be kept in mind although a discussion of their implications is outside of the scope of this work.

In Article IV, § 2, cl. 1 and 2 in part read: “Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State...The citizens of each

⁹² The case concerned Congress demanding that the states implement regulation in regard to low level nuclear waste disposal.

State shall be entitled to all privileges and immunities of citizens in the several States.” This clause generally protects individuals against discrimination on the part of states that they are not citizens of by guaranteeing them the same rights as residents of the state. This provision is closely related to the limitations that are placed on the states by the commerce clause. These provisions guarantee, among other things, that people married or divorced in one state will have this situation recognized by all states and that driver’s licenses issued by one state will be recognized as valid by the others. State statutes that differentiated on the basis of state residence were held invalid under this clause when related to: priority of creditors in receivership proceedings⁹³, hiring preferences⁹⁴ and the right of pursuing an occupation in another state⁹⁵.

Supremacy

Article VI, § 2, cl. 2 reads: “ This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land”. The effect of which means that whenever Congress has exercised its legislative authority in an area in which a state holds concurrent legislative power, any state law that is “inconsistent” with federal law is prohibited. The key to this clause is the “inconsistency” of state law. A state law will only be held void if under the supremacy clause it would in any way interfere, thwart, hamper or otherwise stand as an obstacle to fully achieving the objectives and purposes of the federal law as Congress enacted it. This question was the second question resolved in the *McCulloch* decision where a state law of Maryland which taxed the newly created national bank was struck down since “the power to tax involves the power to destroy” and “[t]hat a power to create implies a power to preserve [and] a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve;...That, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.”⁹⁶ This is true regardless of the fact that a state law may have been enacted to further a legitimate state concern and not intended to impede the purpose of the federal law. This was the holding in *Perez v. Campbell*, 402 U.S. 637 (1971), in which a state law whose purpose was to keep irresponsible drivers off the road by suspending their driver’s licenses if they failed to fully pay a judgment arising out of an accident was struck down. The rationale for this was that the state law frustrates the purpose of the federal bankruptcy laws which give debtors a fresh start by discharging their debts.

Preemption

Preemption has its roots in the supremacy clause discussed above and is really just the other side of the supremacy “coin”. When the coin is flipped it works like this: heads federal powers win, tails state powers lose. Although this doctrine can be applied in any area of enumerated federal power it most often pertains to cases arising under the necessary and proper or commerce clause. It basically means that when Congress has acted in a certain field that field is “occupied” by the federal legislation and the states are prevented by that legislation from acting within the field that congressional legislation occupies.

⁹³ See *Blake v. McClung*, 172, U.S. 239 (1898).

⁹⁴ *Hicklin v. Orbeck*, 437 U.S. 518 (1978) - Alaska could not require that residents be hired in preference to nonresidents to reduce unemployment within the state.

⁹⁵ See *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) - where Virginia’s residency requirement for admission to the State’s bar violated the privileges and immunities clause.

⁹⁶ *McCulloch v. Maryland*, subra.

In two cases *Maryland v. Louisiana*, 451 U.S. 725 (1981) and *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) a simplified outline of this doctrine was presented:

- I. State law is preempted if Congress so intends.
 - A. There is a presumption against preemptive intent, but;
 - B. Preemptive intent may be expressly stated, and
 - C. Preemptive intent may be inferred whenever:
 1. A preemptive design is “implicitly contained in [the federal act’s] structure and purpose;” or
 2. “The scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;” or
 3. “[T]he Act of Congress...touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,” or
 4. “[T]he object sought to be obtained by the federal law and the character of obligation imposed by it...reveal” purpose to displace state law; or
 5. “[T]he state policy...produc[es] a result inconsistent with the objective of the federal statute.”
- II. In addition, state law is nullified to the extent that it actually conflicts with federal law. Such conflict arises:
 - A. When “compliance with both federal and state regulations is a physical impossibility;” or
 - B. When state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁹⁷

Although as Engdahl points out this “impression of check-list methodology given by this nice formulation, however, is misleading.”⁹⁸ In a case in which the question will arise it will only be one or two of these points that will be applicable and different case law will control different subject matters.

Another aspect of the preemptive effect of the commerce clause is the so called negative or dormant commerce clause (self-executing commerce clause) which basically has a preemptive effect on state regulation. This concept can be seen as preventing state interference with federal regulatory power. Normally, since the commerce clause is an enumerated source of congressional power it comes into play when Congress exercises its authority under it; the negative or dormant commerce clause has effect in just the opposite case, taking affect when congress does not act. The question in this case is: does the unexercised power of Congress place any limits on the states to regulate these areas? We know from the above discussion of legislative powers that generally speaking the state and federal governments hold concurrent legislative powers and from the discussion on supremacy that any inconsistent state law is invalid. Under the “negative” commerce clause, however, certain matters of legitimate federal

⁹⁷ Outline taken from Engdahl, *Constitutional Federalism*, p. 342-3.

⁹⁸ *Ibid*, p. 343.

concern are “preempted” by their very nature. That is to say that even in the absence of federal regulation certain kinds of state regulation of commerce are preempted. This is done by the Courts making an assumption that the activities that the states are engaging in would be so adverse to the wishes of Congress that it is preempted even by the unexercised power of Congress. The idea here goes back to the formation of the union and the framers’ fears of “economic warfare” breaking out between the states and the combating of economic protectionism.

The action on the part of the states that activates the “dormant” commerce clause and preempts all activity under that heading is state discrimination against other states as well as unduly burdensome laws.⁹⁹ But the practice of state discrimination does have some exceptions and can broadly speaking be placed into one of two categories, each of which will be discussed after covering unconstitutional methods of discrimination.

State discrimination on the part of one state against the commerce of another is preempted by the “dormant” commerce clause. That is to say, the treating of in-state interests and out of state interests differently is prohibited under this doctrine. Examples of this kind of discrimination include prohibiting the entry of certain products into the state to protect industries within that state¹⁰⁰, placing a premium on out of state goods¹⁰¹ and the restriction of the movement of goods out of a state¹⁰². All of these kinds of activities would be unconstitutional. The states are free to enact regulations that cover *interstate* activities so long as the regulations apply equally to in-state and out of state commerce alike. The Court feels that when in-state and outside interest are treated equally and proportionately, political forces within the state will serve to protect the out of state interests in like manner with the in-state interests.¹⁰³

One exception to this rule is in the event that there are no reasonable and adequate alternatives available to the states in order to protect the health or welfare of its people, the state may be allowed to discriminate against out of state interests. The Court has, however, rarely found this to be the case. One of these rare exceptions was in *Maine v. Taylor*, 477 U.S. 131 (1986). A Maine statute was upheld that prohibited the importation of live bait from out of state as the Court found that it served a “legitimate local purpose” (the protection of unique and delicate fisheries) and no other nondiscriminatory means were available to the state (there were no available means of detecting harmful parasites at the time).

⁹⁹ The following is a systematic simplification over the way this doctrine works. There have been countless cases that have arisen under the “negative commerce” clause and the whole could certainly be the scope of a much lengthier work in its own right. These are some of the “highlights” that provide a basis for how this doctrine is generally applied but by no means encompasses the whole of the doctrine. It would not be possible to have all the cases fit into a neat systematic outline. In fact, Chief Justice Burger called this “the cloudy waters of this Court’s ‘dormant Commerce Clause’ doctrine.” [*Wardair Canada, Inc. v. Florida Dept. of Rev.*, 477 U.S. 1 (1986)]

¹⁰⁰ See both *Edwards v. California*, 314 U.S. 160 (1941) - state could not prohibit persons from bringing into the state non-resident destitute people, and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) - state landfill space cannot be reserved for in-state wastes.

¹⁰¹ *Welton v. Missouri*, 91 U.S. 275 (1876) - special tax applied to sellers of out of state products invalid.

¹⁰² *H.P. Hood & Sons v. Dumond*, 336 U.S. 525 (1949) - New York prevented undertaking from opening a shipping dock for milk destined to leave the state. The Court stated “A State may not promote its own local economic advantages by curtailing the volume of interstate commerce.”

¹⁰³ See *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938) - were South Carolina limited size and weight of trucks that used state highways regardless if they were in interstate commerce or not.

The second area that is an exception to this rule is subsidies. This can be done either by directly allocating money to or favoring in-state interests when the state acts as a market participant. In other words states can give money directly to its residents without running afoul of the “dormant” commerce clause. Welfare and educational grants can be given by the states to their in-state residents only without any problem. When the state acts through the market in the buying and selling of goods it is really acting in a private capacity and therefore not regulating. It is important in this regard to distinguish the state as a market participant or a market regulator. This distinction is what makes the state’s action constitutional.¹⁰⁴ The state as a market participant is free to favor whomever it wishes with reduced prices or through removing competition for a product by selling only to in-state purchasers. In both cases this kind of action is allowed because it is the residents of the state who are ultimately the ones who are paying for the transaction through their taxes and they can spend their money how they like.

Lastly, any state law whether it discriminates or not may be struck down if it is found to be “unduly burdensome”. Justice Douglas wrote in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) that: “This is one of those cases - few in number - where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce.” In this case the State of Illinois had passed a statute requiring that all trucks use a contoured mudguard as distinguished from the normal flat mudguard that is used in other states (it was even noted that these contoured mudguards were even outlawed in another state). Illinois claimed that the use of these mudguards would increase safety on the state highways. The Court agreed that there indeed could be a benefit to road safety but that this benefit was outweighed by the cost and bother placed on the trucks entering Illinois that were forced to change mudguards. The statute placed an undue burden on interstate commerce and was therefore struck down. This decision was reached through a balancing test. Do the benefits of the legislation outweigh the costs or burdens of compliance? If these benefits are outweighed by these costs the act may be struck down.

Another exception to this general “dormant” commerce clause doctrine is found in the twenty-first amendment. Since this is an amendment provision it should be remembered that it is not a Court made doctrine in the sense of the “dormant” commerce clause but is rather a judicial interpretation of that amendment. The amendment besides repealing prohibition states in § 2 that: “The transportation or importation into any State...for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The purpose of this amendment is to give the states greater regulatory control over liquor and in effect negate the “negative” commerce clause. This was the holding in *Hostetter v. Idlewood Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) when the Court construed the amendment to mean that states are “unconfined by traditional Commerce Clause limitations” in regulating interstate commerce pertaining to liquor. Although this state power is considered to be broad it is not unlimited. In the same case the Court ruled that this regulatory power did not extend to overseas or out of state sales. It also does not allow the state to discriminate against out of state liquors.¹⁰⁵ Nor does it displace the limitation on the states in regard to imports duties

¹⁰⁴ *Hughes v. Alexandria*, 426 U.S. 794 (1976) - Maryland’s scarp processing program that paid bounties for junked cars upheld; *Reeves, Inc. v. Stake*, 477 U.S. 429 (1980) - State-owned cement plant could, in times of supply shortages, give preference to local customers over out of state ones.

¹⁰⁵ *Bacchus Imports, Ltd. v. Dias.*, 468 U.S. 263 (1984) - Hawaii’s exempting of locally produced okolehao from state wholesale excise tax struck down as it discriminated in favor of the local product.

from abroad found in Article I, § 10, cl. 2.¹⁰⁶ In *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573 (1986) the Court held that it must “reconcile the interests protected by the two constitutional provisions” (the “dormant” commerce clause and the amendment provision) on a case by case basis. In that case it found that: “The Commerce Clause operates with full force whenever one State attempts to regulate the sale of alcoholic beverages in another State.”

One final point that should be made in regard to the “negative” commerce clause. Since the commerce clause is an enumerate source of federal power, Congress can through its use authorize the states to regulate interstate commerce themselves. If this is done nothing the states do will violate the “negative” commerce clause.¹⁰⁷ This being due to the fact that the “negative” commerce clause is only applicable, in the absence of congressional use of its powers under the commerce clause as mentioned above.

¹⁰⁶ See *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

¹⁰⁷ See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

Judicial Process

It is through the judicial process that the states can protect and defend their prerogatives against encroachment by the central powers of the union as well as have their rights limited. It is also important to understand that the states themselves play a part in this process. In both the case of the EU and USA the state courts form part of the “union’s” judicial system as they are neither displaced or excluded from the judicial process. Union membership in both cases has had effects on their jurisdiction and the manner in which they can apply state law but they are the final authority on the interpretation of their law. It is important to understand the role of the state courts and how they are to function within the unions’ judicial system to understand how states’ rights are affected. The EU and USA have chosen two entirely different structures and procedures for their judicial systems. The outline of how each of these structures work and what their jurisdictional areas are as follows.¹⁰⁸

¹⁰⁸ The focus of the ECJ will pertain only to its powers in the EC.

State Court Cooperation - the EC

There are two basic forms of procedure in the EC: direct case and indirect cases. The ideas of direct and indirect should be kept distinct from the normal idea of courts having original or appellate jurisdiction; this is due to the system of cooperation that is envisaged by the Treaty between the ECJ and state courts. Direct cases have their origin in the ECJ and strictly concern points of EC law. Indirect cases are referred to the Court by the state courts on points of EC law and the compatibility of state law with EC law. As mentioned under the heading *The Court of Justice*, the ECJ as a community institution is divided into the ECJ as a court and the attached CFI. The roles that each plays in the community legal order are very distinct and are related to their separate areas of jurisdiction. The ECJ is primarily a constitutional court which through the use of judicial review exercises judicial control of the legal acts of the Community institutions and indirectly the states. The CFI fulfills the role of a trial or administrative court ascertaining the facts that are relevant to the case and reviewing the legality of decisions made by the Community institutions.

The ECJ is charged with the task of ensuring “that in the interpretation and application of this Treaty the law is observed”- Article 164. This function assigned to the Court provides for its legal competence. This Article and the provision found in Article 219 which prohibits the states from submitting disputes concerning this “application or interpretation” to any alternative forums guarantees the autonomy of the Community order and makes the ECJ supreme in its interpretation of EC law. This fact in conjunction with the obligation placed on the states in Article 5 binds the state courts to the ECJ’s exposition of the Treaty.

Jurisdiction

The jurisdiction of the court is provided for explicitly in the Treaty. The only method open to change it would be by Treaty amendment. The Treaty also makes provision for which cases can be handled by the CFI. According to Article 168a the CFI’s jurisdiction is determined by the ECJ requesting that the Council, through an unanimous decision (after having consulted the European Parliament and Commission) provide for CFI jurisdiction over certain types of cases. The Article contains no provision or positive demarcation of which cases can or must be moved to the CFI’s sphere of competence but rather contains a prohibition in regard to any of the ECJ’s powers concerning preliminary rulings under Art. 177 from being moved into the CFI’s realm of competence. The other important provision of Article 168a is its providing for a right of appeal to the ECJ on points of law only of any CFI ruling. Presently its jurisdiction extends to all of the cases that the Treaty allows with the exception of direct actions brought by the states or Community institutions.

Infringement Proceedings

Infringement proceedings are actions that are brought against states for failure to comply with the provisions of the Treaty. These are direct actions and are either brought before the Court by the Commission in accordance with the provisions in Art. 169 or by another member state as provided for in Art. 170. Through this method the Commission and states provide for the surveillance of EC law. Since the Art. 170 procedure is rarely used¹⁰⁹ the focus of the following discussion will concern Art. 169.

¹⁰⁹ In fact there have only been three suits filed under this procedure to date and only one was settled by a judgment of the Court. In *France v. United Kingdom*, Case 141/78 the UK was found to have infringed Community law through the size of mesh it allowed for fishing. There may be a number of reasons for the states

The provision of Art. 169 envisages the Commission as “policing” the states to insure that they fulfill the obligations that the Treaty places upon them. It follows naturally that only the Commission and states can be parties to these proceedings. Examples of this type of action may be the failure of a state to implement a directive or the failure to provide punishment for breaches of Community law within their legal system¹¹⁰ and thus breaching Art. 5. As the purpose of the Article is to insure compliance with the Treaty, a settlement is possible at any stage of the proceeding if the state amends the breach. The Article provides for a two stage process. The first is an informal stage in which the Commission will act upon a complaint it has received from an individual or company and start an inquiry into the alleged violation; it may even identify a breach through its own investigations. It will then send a letter informing the state of the alleged breach and ask it to comment upon the matter. The state either will change its law to bring it into compliance with Community law or try to convince the Commission that no breach exists. If the matter is still unresolved the formal stage of the procedure will be initiated by the Commission submitting its observations on the alleged breach in a letter of formal notice to the state. This letter is of legal significance as it defines the scope of the Commission’s case.¹¹¹ If compliance is still not achieved that Commission will issue a reasoned opinion which basically provides the grounds for the Commission’s case against the state.¹¹² This is basically an ultimatum, mandating that the state rectify the breach within a prescribed time limit, normally between two weeks and two months depending on the nature of the breach, or face having the matter referred to the ECJ. The Commission’s power under this article is discretionary at every stage of this process and it can decide not to pursue a matter any further if it so wishes. That is to say the fact that a reasoned opinion is sent to a state does not obligate the Commission to refer the matter to the ECJ¹¹³ but as a practical matter it undoubtedly will if the state fails to rectify the breach.

Expeditious infringement proceedings which require no reasoned opinion and can be referred to the ECJ without delay are provided for in Art. 93 (2) 2 which concerns state aids to industry, in Art. 100a (4) involving the improper use by a state of the “opting” out procedure of a harmonization measure and in Art. 225 regarding improper use of exemptions related to security interests.

Annulment Proceedings

The annulment proceedings are nothing more than the Court exercising the power of judicial review over EC acts. This power is provided for in Art. 173. There are three important aspects of this power of the Court. One is the types of acts that are subject to review, another is the standing (*locus standi*) of the applicants bringing the suit and finally the grounds for the actions. The Article provides for the review of “the legality of acts of the Council and the Commission other than recommendations or opinions” (Art. 173.1). The Court has construed this to mean that any measure adopted that is intended to produce legal effects is subject to

not using this procedure but unless some infringement is very compelling to their interests the states have preferred to let the Commission handle the matter with the Art. 169 procedure.

¹¹⁰ See *Commission v. Greece*, Case 68/88.

¹¹¹ In *Commission v. Italy*, Case 51/83, the ECJ prevented the Commission from extending the breadth of the allegations against Italy to include ones not included in this letter of formal notice.

¹¹² The Commission is always bound to these grounds through out the rest of the process. As the Court stated in *Commission v. Netherlands*, Case 290/87, “The Court has consistently held that an application must be founded on the same grounds and submissions as the reasoned opinion.”

¹¹³ See *Star Fruit Company v. Commission*, Case 247/87.

review.¹¹⁴ *Locus standi* is divided into two classes: privileged and non-privileged applicants. Privileged applicants being the community institutions (with the limitation on Parliament that it may only protect its prerogatives) and the states. Non-privileged applicants are private parties who may “institute proceedings against a decision addressed to that person or against a decision which, although...addressed to another person, is of direct and individual concern to the former” (Art. 173.2). Individual concern is to be determined by the *Plaumann* test which provides that persons are “individually concerned if that decision affects them by reason of certain attributes which are peculiar to them” distinguishing them from all other persons.¹¹⁵ The grounds for judicial review include “lack of competence, infringement of an essential procedural requirement, infringement of th[e] Treaty or of any rule of law relating to its application, or misuse of power.” The reference to “any rule of law” is very broad in scope covering the “general principles of law” that the Court has developed which include: fundamental human rights, legitimate expectations, proportionality, equal treatment and legal certainty among others.

Effect of Annulment

In the case of the Court finding that the action is well grounded it will void the act (Article 173). It may declare the act void in whole or in part.¹¹⁶ The Court will also make the determination as to nullification’s retroactive effect. On the grounds of legal certainty it may provide for nullification to be applied only to the applicant while retaining effect in regard to everyone else.¹¹⁷

Actions for Failure to Act

Art. 175 provides for a cause of action in the event that a Community institution should “fail to act”. This article is really the flip-side of Art. 173. It insures that the institutions of the Community act when it is within their power. The states as well as the privileged and non-privileged applicants have standing under this article. Non-privileged applicants can use it to force a Community institution to act on their behalf or at least define its position in the matter. The process is set in motion by the applicant calling upon the institution to act. This forces the institution “within two months of being so called upon”, to define its position in the matter and if it fails to do so the applicant may bring an action before the Court. If the defined position should reveal a Treaty breach, proceedings may be allowed under Art. 173. Art. 175 is seldom used.

Actions for Damages

The reading of Art. 178 in conjunction with Art. 215 provides for the tortious liability of the Community institutions and its servants. Community law lacks any of its own rules pertaining to how liability is to be determined but the article provides for the use of the “general principles common” to the states. In a number of cases the Court has identified three requisite components that a litigant must establish if the action is to be successful: 1. the institution or official in question must have acted wrongly, 2. the applicant must be able to establish actual

¹¹⁴ The Court has interpreted this provision very broadly and read into much more than is on the face of the provision. In *Commission v. Council (ERTA)*, Case 22/70 the Court decided that recommendations and opinions could be encompassed by the scope of this provision since a restrictive interpretation would not “ensure, as required by Article 164, observance of the law”. And in *Les Verts v. European Parliament*, Case 294/83 it ruled that it even encompassed acts of the Parliament.

¹¹⁵ See *Plaumann v. Commission*, Case 25/62.

¹¹⁶ See *Consten & Grundig v. Commission*, Cases 56, 58/64.

¹¹⁷ See *Simmenthal v. Commission*, Case 92/78.

damage suffered, 3. there must be a tangible link between the act and the damage for which relief is sought. If the act was of general application, the applicant is also going to need to show that the behavior was a “sufficiently flagrant violation of a superior rule of law for the protection of the individual.”¹¹⁸ Damage must be concrete and not speculative.¹¹⁹ A rule of contributory or comparative negligence will apply.¹²⁰ If the action is brought against an employee of a Community institution who is discharging the duties of his or her office, the institution will have vicarious liability for the actions of its employee.

Actions for Opinions

Art. 228 provides for the ECJ ruling on the compatibility of agreements reached by the Community institutions, other states and international organizations within the provisions of the Treaty. As these opinions concern external relations they fall outside of the scope of this work.¹²¹

The Application of Community Law in State Courts

The ECJ as has been shown has a “monopoly” on the interpretation of EC law but it is the state courts that are entrusted with its application. This is done through actions that are brought before the national courts in which they are bound by the obligation in Article 5 to apply EC law. If the ECJ did not have a “monopoly” on the interpretation of the law, it would be easy for the law to be interpreted in different ways, in different states. The fact that each member state has its own legal system and traditions would increase the difficulties encountered in trying to achieve a uniform interpretation if this matter was left entirely up to the states. In order to achieve uniformity through out all the member states and insure the ECJ’s role as the “supreme” interpreter of EC law, Article 177 has provided a system of “referral” in which the national courts can request rulings on points of EC law in order to help them apply the law in cases arising before them. These cases are what are called “indirect cases”. As the ECJ’s ruling in these cases is authoritative they can generally be placed under the heading of “Preliminary Rulings”. This has in practice proved to be one of the most important areas of the ECJ’s jurisdiction; it has accounted for roughly sixty percent of the Court’s rulings¹²² and has allowed the Court to make some of its most important rulings (including the *Van Gend en Loos*, *Costa* and *Francovich* rulings).

Preliminary Rulings

Under Article 177 when a state court is faced with a question of Community law that it must answer in order to rule on the case before it, the question can be referred to the ECJ. In this process the ECJ does not decide the case, it only answers the state court’s question and leaves the final ruling in the hands of the state court. This process emphasizes the cooperative relationship between ECJ and the state courts. The most important aspects of ECJ’s jurisdiction under this article covers: Treaty interpretation and ruling on the validity and interpretation of Community institutions acts (points (a) and (b)). Although the ECJ has no explicit authority to rule on state law as such¹²³ it can in practice do this by providing “the national court with all such criteria for the interpretation of Community law which may enable

¹¹⁸ See *Schöppenstedt v. Council*, Case 5/71.

¹¹⁹ See *Kampffmeyer v. Commission*, Case 5, 7, 13-24/66.

¹²⁰ See *Adams v. Commission*, Case 145/83.

¹²¹ They are only mentioned to contrast the position in regard to advisory opinions in the US.

¹²² Commission’s *XXIVth General Report on the Activities of the Communities 1990*.

¹²³ See *Adlerblum v. Caisse Nationale d’Assurance Vieillesse des Travailleurs Salariés*, Case 93/75.

it to answer that question.”¹²⁴ It should also be pointed out that a national court can never declare an EC act void.¹²⁵

The ECJ stated the purpose of Article 177 in its ruling in *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, Case 166/73: “Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring in all circumstances the law is the same in all States of the Community.”

The national courts generally have a discretion to refer to the ECJ for a preliminary ruling although if they are courts of last resort they are under an obligation to refer. The litigants are powerless to force a state court to refer; if the court “considers that a decision on the question is necessary to enable it to give judgment” it may request that the ECJ give such a ruling (Art. 177.2). The ECJ is then generally under an obligation to answer the state court. However, if the Court finds that the matter being referred to it is the subject of “friendly” litigation it may decline judgment.¹²⁶ “[T]he duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States.”¹²⁷ If the state court is one “against whose decisions there is no judicial remedy under national law” that court “shall bring the matter before the Court of Justice” (Art. 177.3). The Court has, however, limited the scope of this imperative. In its doctrine of *acte éclairé* as developed in *Da Costa en Schaake NV v. Nederlandse Belastingadministratie*, Case 28-30/62, a court of last instance is relieved of its obligation to refer substantive questions which the ECJ has already answered. Basically, if the case has already been decided there is no obligation to refer. A state court of last resort is also relieved of the obligation to refer a question in which the answer is obvious and on which all the courts of the member states and ECJ would agree. This is the doctrine of *acte clair*.¹²⁸ Referral is not required if the matter is part of interlocutory proceedings that are subject to review in the main proceedings.¹²⁹

Interim Measures

The Court has the authority to grant interim measures which is necessitated by the lack of suspensory effect that actions have before the ECJ. The effect of proceedings before the ECJ and its power to grant interim measures are provided for in Articles 185 and 186. These articles allow the Court to suspend the effect of a contested Community act or provide other necessary relief. The Court will only do so on the application of the affected party who must show a *prima facie* case, urgency of the necessity of the measures and “serious and irreparable damage”.¹³⁰ Financial damage alone is not considered adequate for the granting of interim measures unless deemed unrecoverable in the main action.¹³¹ Generally interim measures concern direct actions but they can also apply in Article 177 proceedings.¹³²

¹²⁴ *Melkunie*, Case 97/83.

¹²⁵ *Firma Photo-Frost*, Case 314/85.

¹²⁶ See the two cases of *Foglia v. Novello*, Cases 104/79 and 244/80.

¹²⁷ *Foglia v. Novello*, Case 244/80.

¹²⁸ See *CILFIT*, Case 283/81.

¹²⁹ See *Hoffman-La Roche v. Centrafarm*, Case 107/76.

¹³⁰ See *Vichy v. Commission*, Case T-19/91R.

¹³¹ See *NTN Toyo Bearing v. Commission*, Case 113/77R.

¹³² See *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe*, Cases C 143/88 & 92/89 and *R v. Secretary of State for Transport, ex parte Factortame*, Case 213/89.

Federal Courts - the USA

As was already covered under the heading of *The Supreme Court*, in the USA judicial power is vested in a Supreme Court and the lower courts that Congress established under the Judiciary Act. The creation of these lower courts (district and circuit) established what is known as the federal court system. In this structure the state courts are not replaced or taken over in any way but function parallel with the federal courts. What distinguishes the functions of the state and federal courts is the matters that fall under the jurisdiction of each. It should be pointed out that this federal court system is not a specific requirement of the Constitution. Article III, § 1 only states that “Congress may from time to time ordain and establish” inferior courts. This is a legislative prerogative on the part of Congress; it is fully within its power to create or not create inferior courts purely on its own volition. It was totally within the power of Congress to let the state courts fulfill the role that is played by the federal courts in the USA’s judicial system. There is no requirement that a federal system be established in the Constitution. It is important to fully grasp the significance of this point because it has ramifications on the power of Congress over the jurisdiction of the courts it creates.

Beside the courts formed under Article III there are a number of special courts that Congress has established under the powers granted it in Article I. These courts are often referred to as adjunct courts and include the military courts (courts-martial), bankruptcy courts, claim courts and the local courts of the District of Columbia among others. Administrative agencies are also considered adjunct courts. The judges that serve on these courts do not have guaranteed pay and life tenure like the federal judges of Article III courts. These courts have generally been upheld by the Supreme Court. The test of validity in the case of Article I courts is found in *Northern Pipeline Construction Co v. Marathon Pipe Line Co*, 458 U.S. 50 (1982). A court will be deemed valid as an Article I court if it adjudicates “public rights” matters. That is disputes in which the government is a party to the litigation. Another aspect of validity of these courts is that their decisions be the subject of review by an Article III court.

Jurisdiction

Section 2 of Article III provides for the constitutional scope of federal judicial power. Judicial power of the federal courts is to cover “all cases, in law and equity, arising under this Constitution” as well as “controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States,...and between citizens of a State, or the citizens thereof, and foreign states, citizens or subjects.” It is important to remember that these provisions authorize federal judicial power but it is Congress that confers it upon the federal courts. The jurisdiction of the federal courts has never in the history of the USA been equal to the scope of the authorization provided for by the Constitution.

Basically the jurisdiction of the federal courts are federal question cases and diversity jurisdiction cases. The jurisdiction in “diversity” cases is provided for in 23 USC § 1332 which basically provides for the federal trial courts original jurisdiction in those cases where citizens of different states are litigating against each other, against another state or against a foreign state if the amount in controversy exceeds \$50,000 excluding costs and interest. This statute has been construed to mean that diversity in these cases must be complete¹³³; that is to say that the citizenship of all plaintiffs must be different from that of all defendants. There

¹³³ See *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

can be no overlapping of citizenship between plaintiff and defendants if diversity is to be maintained. If diversity is not maintained the federal courts have no jurisdiction over the case. Statute 23 USC § 1331 provides federal question jurisdiction. It states that: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” The determination as to whether the case involves a federal question is made by the “well-pleaded complaint” rule which requires that the federal question appear on the face of the complaint.¹³⁴ This basically means that the plaintiff’s claim must be based on federal law. If the defendant pleads a federal defense, that does not confirm subject matter jurisdiction under this statute. Both of these jurisdictional rules can become quite technical and are a little more complicated than can be presented here (see 23 USC § 1367 covering such matters as supplemental jurisdiction¹³⁵ and 23 USC § 1441 concerning removal jurisdiction¹³⁶), the above outline, however, will suffice for the purpose of this study.

The Supreme Court is established by the Constitution and therefore beyond congressional control. That is to say that Congress cannot by legislative act abolish it. Congress, as it exercises control over the lower federal courts by controlling their very existence and what cases they handle, also exercises control over the Supreme Court’s jurisdiction. Article III, § 2, cl. 3 states, after providing for the original jurisdiction of the Supreme Court, that “the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as *the Congress* shall make” (emphasis added). This means that it is within the power of Congress to take certain kinds of cases away from the Supreme Court’s jurisdiction. It is a matter of theoretical speculation as to how far this power over the court extends. It does not, however, allow Congress to determine how the Supreme Court will rule in a certain case but it may well allow it to take a whole category of cases out of the jurisdiction of the Court. The question is really how far can Congress go by using its power over the jurisdiction of the Court to effectively disable the Court in its judicial role. A traditional reading of Article III would seem to allow the Congress to go extremely long in this attempt in an effort to restrain it in keeping with the idea of checks and balances. It has also been argued that the Congress cannot destroy “the essential role of the Supreme Court in the constitutional plan”¹³⁷ by limiting its jurisdiction to achieve unconstitutional purposes, for example, to censure a certain political point of view or deny equal protection. However, this dispute over the limitations of congressional power over the Supreme Court is unresolved.

This question really revolves around two different readings of Chief Justice Marshall’s opinion in *Marbury v. Madison*. That decision can be read in different ways which carry implications for the whole authority of the Supreme Court and its function in exercising judicial review. Through the traditional, narrow reading of *Marbury*, the case is of fundamental importance. The power of judicial review under this reading is incidental to the case and the Supreme Court only being able to exercise it if the case is properly before it. This means that if there is no case to hear there is no chance to exercise judicial review. Under this view congressional power over the federal courts jurisdiction is basically unlimited. However, if *Marbury* is read in a broader sense it implies that the Supreme Court

¹³⁴ Reaffirmed in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

¹³⁵ Additional claims brought by parties to the suit that cannot be heard under the other basic jurisdictional statutes.

¹³⁶ Allowing a defendant to “remove” a case from a state to a federal court.

¹³⁷ Hart & Wechsler’s *The Federal Courts and the Federal System*, p. 330

is “the ultimate interpreter of the Constitution”¹³⁸ and that it is “supreme in the exposition of the law of the Constitution”.¹³⁹ This means that the Supreme Court’s role in the constitutional scheme is not merely one of deciding cases but of construing the meaning of the Constitution. Here the case becomes secondary in importance and judicial review of primary importance. Under this reading of *Marbury*, Congress is limited in its power to take away jurisdiction if in doing so it would destroy this essential function of the Supreme Court.¹⁴⁰

The Supreme Court has original jurisdiction as provided for in Article III, § 2, cl. 2 “[i]n all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party”. The most important of this jurisdiction being in the disputes between states. However, these are very rare. In all, the Court may decide 2 or 3 cases a year under its original jurisdiction. The Court is very reluctant to exercise its original jurisdiction and will often refuse jurisdiction if another forum is available. This clause as noted above also provides for the fact that the rest of the Court’s jurisdiction is appellate. Basically all of the Court’s appellate jurisdiction today is at its own discretion deciding which cases it will hear by writ of certiorari based on its “rule of four” (the writ being granted by the vote of four of the Court’s Justices). Under 28 USC §1254 the Court can hear virtually any case in which the lower federal courts have jurisdiction . It is granted appellate jurisdiction over state court decisions by 28 USC §1257 but is restricted to reviewing “final judgments or decrees” only. Cases from the federal courts of appeals provide the bulk of its caseload by a ratio of about four to one over cases arising from the state courts.

The Supreme Court can exercise judicial review in its appellate jurisdiction both over state statutes¹⁴¹ and state court decisions as far as they concern questions of federal law¹⁴². This means that the USSC will only rule on the compatibility of state law with the Constitution. “Judges in every state” are bound by the “supreme law of the land” notwithstanding “anything in the constitutions or laws” of their state and the Supreme Court has the power to insure that they faithfully comply. State courts’ decisions in regard to their own state law, however, are final and binding.¹⁴³ What this means is that the Supreme Court will only rule on if the state law as construed by the state courts is unconstitutional. This has been turned into a jurisdiction rule which is called the adequate and independent state ground (AISG) doctrine. This rule simply stated means that in exercising its power of judicial review the Supreme Court will only review the case if it was decided on federal grounds. It will not review a case if it can find a AISG.¹⁴⁴ That is to say if a state rule is adequate to support the judgment and not dependent upon federal law there is AISG and the USSC will not review the case. In other words if the federal claim is irrelevant to the outcome of the case there is an AISG. This can happen by the federal claimant either winning or losing the case. If he wins there is no need to review the federal claim or if he lost under states procedural rules in any manner¹⁴⁵ the federal claim is lost. If it is unclear if the case turned on a federal or state ground the Court will make its own decision in the matter.

¹³⁸ See *Powell v. McCormick*, 395 U.S. 486 (1969).

¹³⁹ See *Cooper v. Arron*, 358 U.S. 1 (1958).

¹⁴⁰ The main idea in this paragraph is taken from John C. Jeffries, Jr.’s lecture in *Federal Courts*, Tape 2, “Federal Jurisdiction”.

¹⁴¹ See *Fletcher v. Peck*, 10 U.S. 87 (1810).

¹⁴² See *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

¹⁴³ See *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

¹⁴⁴ See *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

¹⁴⁵ See *Michel v. Louisiana*, 350 U.S. 91 (1951).

Case and Controversy

The federal courts are restricted by the constitutional provisions of Article III, § 2 to “cases” and “controversies”. This is only to say that the matter must be justiciable. A matter must be “appropriate for judicial determination”, it must be “definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character.”¹⁴⁶ What is “justiciable” or what constitutes a “case” or “controversy” is not a matter that is covered by any simple doctrine. A number of different doctrines have evolved that are overlapping and not clear cut. What follows briefly touches upon the basic requirements needed for a case to be considered justiciable. These can roughly be placed into three categories as follows:

Advisory Opinions

Federal courts are barred from issuing advisory opinions under the “case and controversy” doctrine. This also holds true for feigned cases as the litigants are not partaking in adversary proceedings and in essence are actually seeking the opinion of the court. The courts will not answer questions posed to them by the other branches of government. Thomas Jefferson, while serving as Secretary of State, requested by letter the opinion of the Supreme Court in regard to the legal consequences of US neutrality in the Napoleonic Wars. The Supreme Court refused to answer his question. The Court’s role in the legal system in the USA is one of a court of last resort and has only judicial power as provided for by Article III. To provide an answer would have meant that the Court would have made a decision to which it would be bound and if the same issue were to be litigated before the Court it would have prejudiced itself and could not act in an independent manner. Furthermore as these questions were not part of litigation it is not certain that the Court would reach the same conclusion if the matter was argued in all its particular before it. Congress in *Muskrat v. United States*, 219 U.S. 346 (1911), authorized by statute the litigants in an action and made provision for covering their attorney’s fees in order to receive a declaratory judgment from the Court. On the grounds that a judgment would be nothing more than “an expression of opinion upon the validity of the acts in question” the Court refused to hear the case. Litigation that is fictitious or friendly will not be heard in federal court.¹⁴⁷ Parties to suits must be in a real situation where their legal situation is in jeopardy. The legal rights and obligation of the parties must be at stake. In summary a person or state that wishes to challenge the constitutionality of a state or federal law in federal court must violate the statute or seek injunctive relief.

Standing and Ripeness

Standing, ripeness and mootness are doctrines that are all related and aimed at making the litigation meaningful. Standing is probably the most important of these three concepts. In order to have standing the litigant must have a personal stake in the outcome. It is not enough for a party to be a well meaning concerned citizen “policing” constitutional rights. A direct and personal injury must be shown on the part of the plaintiff.¹⁴⁸ Any injury even a small one will suffice to grant standing. However, it is not enough to be a taxpayer challenging an unconstitutional expenditure since then the interest is too “remote, fluctuating, and uncertain”.¹⁴⁹ The only exception to this rule is in challenges brought against violations of the

¹⁴⁶ *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937).

¹⁴⁷ See *Chicago & Grand Trunk Railway v. Wellman*, 143 U.S. 339 (1892).

¹⁴⁸ See *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Sierra Club was denied standing in their suit to protect environmental beauty since no member could show that they were individually affected. Standing would have been found if one member of the Club had just walked through the park the Club wanted to protect.

¹⁴⁹ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

establishment of religion clause as there would otherwise be no one who would have a determinable and concrete injury in which to file suit under.¹⁵⁰ Ripeness means that the dispute must have reached a stage where the litigants are at odds about the constitutional questions involved in their dispute. This means that the legal position must no longer be hypothetical but concrete and affecting the legal situation of one of the litigants. In other words it is not enough that a person be thinking about participating in an activity at some future date that might be affected by a current statute which would impair his legal rights.¹⁵¹ The standing and ripeness doctrines were summarized in *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933) by Justice Stone when he referred to them as “valuable legal rights asserted by the complainant [standing] and threatened with imminent invasion by appellees [ripeness].” Mootness is merely the fact the nothing in the circumstances of the case has changed to affect the legal relationship of the litigants or that the case is not brought too late as to prevent the court from providing judicial relief. An important exception to the mootness doctrine is in the case of an issue being “capable of repetition, yet evading review”. This occurs when the violation may be repeated but the controversy at hand is of such short duration that it is moot before judicial proceeding can be brought. Examples of these kinds of cases are ones which involve challenges to election statutes¹⁵² or a woman seeking an abortion.¹⁵³

Political Question

The federal courts will not adjudicate a case that involves a political question. In this case they defer judgment to the proper branch of government that handles political questions, that being either the executive or legislative branch. These questions are considered beyond the sphere of judicial competence and as such are non-justiciable. These cases are to be decided on a case by case basis [*Baker v. Carr*, 369 U.S. 186 (1962) - which also outlines the general provisions of the political question doctrine as some of the political questions may involve political rights on which the Court will pass judgment]. Examples of such questions on which the Court refused to hear the case on its merits include issues concerning the recognition of foreign governments¹⁵⁴, election results of members of Congress which are left up to each House to determine (Art. I, § 5), decisions concerning the organization of the military¹⁵⁵ and provisions relating to the amendment process¹⁵⁶.

Federal Abstention

Since state courts and federal courts can have concurrent jurisdiction over cases in which they determine questions of the other’s law, conflicts can arise. To minimize the problems that can arise because of this fact, the federal courts have developed a number of abstention doctrines. In certain cases within their jurisdiction, the federal courts will refuse to hear them in deference to the state courts. These cases normally concern issues of state law which the federal courts feel are better decided by the state courts. Since the state supreme courts are the final interpreters of state law and no review of state law occurs in the federal judicial system, the federal courts will “abstain” from deciding these questions of state law. There a number

¹⁵⁰ See *Flast v. Cohen*, 392 U.S. 83 (1968).

¹⁵¹ See *United Public Workers v. Mitchell*, 330 U.S. 75.

¹⁵² See *Moore v. Ogilvie*, 394 U.S. 814 (1969).

¹⁵³ See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵⁴ See *Martin v. Mott*, 25 U.S. 19 (1827) & *United States v. Curtiss-Wright Export Corp.*, 209 U.S. 304 (1936).

¹⁵⁵ See *Gilligan v. Morgan*, 413 U.S. 1 (1973).

¹⁵⁶ See *Coleman v. Miller*, 307 U.S. 433 (1939) - the effect of a state ratifying a proposed amendment and then withdrawing its approval is to be determined by Congress.

of different abstention doctrines that allow the federal courts to: avoid a constitutional question by letting the state court to construe its law in a manner consistent with the Constitution¹⁵⁷, not disrupt matters of important state policy¹⁵⁸, allow a state to settle a question of its law in an area of local concern¹⁵⁹ or avoid duplicate litigation¹⁶⁰. In *Younger v. Harris*, Justice Black wrote that: “Our Federalism...is a system in which there is sensitivity to the legitimate interests of both state and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and interest, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” This case prevents state defendants from becoming federal plaintiffs in matters before state courts.¹⁶¹

The Eleventh Amendment

The eleventh amendment, precipitated by the *Chisholm v. Georgia*, 2 U.S. 419 (1793) ruling (in which the USSC decided that a citizen of South Carolina was allowed to sue Georgia on a contract brought under the state-citizen diversity clause), bars suits from being brought by individuals against the states for money damages in federal court. It restored state sovereign immunity in federal court.¹⁶² The protection this amendment would appear to offer the states is not as broad as would first appear. There are exceptions to this rule. State sovereign immunity also does not bar the USSC from reviewing state courts’ decisions.¹⁶³

The court ruled in *Ex parte Young*, 209 U.S. 123 (1908) that this amendment did not bar federal courts from providing injunctive or prospective relief. In this case the Court held that a state’s Attorney General could be enjoined to prevent him from enforcing an unconstitutional railroad rate setting order. Thus creating the legal fiction that a suit against an officer of the state is not a suit against the state itself. The rationale being that an officer who acts illegally is not acting on the state’s behalf. Since the states must always act through some officer or another, the eleventh amendment protection is severely limited by this rule. There is one very important condition in *Ex parte Young* and that is it only applies if federal law is violated.

States can also waive their immunity by voluntary appearance or statute. It is even possible, under certain provisions of the Constitution (commerce clause, fourteenth amendment), for Congress to abrogate state sovereign immunity. It could also be waived if a state accepts the administration of a federal program that provides for allowing the state to be sued. This must be done in a “clear statement” in the statute, such as “persons include states”; any ambiguity will be resolved in favor of the states.¹⁶⁴

¹⁵⁷ Pullman Abstention, see *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

¹⁵⁸ Burford Abstention, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

¹⁵⁹ Thibodaux Abstention, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

¹⁶⁰ See *Colorado River Water Conservation v. U.S.*, 424 U.S. 800 (1976).

¹⁶¹ Equitable Abstention.

¹⁶² See *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹⁶³ See *Cohens v. Virginia*, 19 U.S. 264 (1821).

¹⁶⁴ See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), no consent found.

Conclusion

The individual states that form the EU and the USA have joined together to accomplish different ends and objectives. The autonomy of the states in these unions is in large measure affected by the union, its structure as well as the goals that the unions set out to achieve. It is this effect on state sovereignty and autonomy that has been the focus of this thesis.

The unions themselves are very different. In the section on *The Unions*, some of the historical forces that contributed to the creation of the two unions were covered as well as the purposes that the unions set out to achieve. Under this heading the structures of the two unions was also covered. It was seen here that while the unions have some similar characteristics they remain very distinct. The Constitution of the USA forms without a doubt a federal government with enumerated powers. On the other hand the same is not true of the EU. The EU is more of a league or loose confederation than a state. The states of which have retained their sovereignty and independence while deliberating on common concerns and recommending measures to promote their general welfare. However, within the EU, the EC forms a closer association in which a “legislature” enacts binding law. The functions of government within the EC are still carried out by the states in keeping with a confederal idea of unity. The federal government that is created by the US Constitution is granted its powers directly from the people acting through their states while the EU is an entity that is formed and controlled by the states. These distinctions play a very important in regard to states’ rights.

In examining the legislative process of the two unions the distinction between a union of states and a union of people became apparent. It was seen in the legislative process of the EU that the states retain an almost absolute power over the legislative process. It is this exclusion of its citizens from the legislative process that produces the “democratic deficit” in the EU. On the other hand, in keeping with the principles of democratic government, the people of the USA exert a much more direct influence over the legislative process of their federal government through both the legislative and executive branches of the government. In the federal system of checks and balances, the American people also make sure that one part of the government will not encroach the prerogatives of another. The role of the states in the legislative process in the USA is secondary to its citizens who act through their respective states at a federal level. The states are reduced to political non-entities in the legislative process itself while still remaining and constituting a very integral part of the overall system of government. This is contrasted by the role the people of the EU play in that legislative process where it is the states that act on behalf of the people.

Both the USA and EU brought together states that were independent and sovereign before the formation of the unions. The joining together of the states in the unions meant that the autonomy they had previously exercised was affected. What had previously been the exclusive province of the states, now was shared to some extent with a “general” authority. It is this authority, that is the granting “general” power to a central entity, that demarcates states’ rights. Sometimes this grant of power is exclusive leaving the states with no power to act within that sphere and sometimes its is shared between the states and central authority. It is the question of what powers the states retain and what are granted to the general authority that form the heart of states’ rights issues.

The EU and the USA have taking entirely different approaches to these grants of power. Within the structure of the EU it is only within the pillar of the EC that this question of “federalism” is apparent and appropriate. The EC Treaty is a framework treaty which establishes the outer boundary of interstate cooperation. Legislative competence can only be derived from the treaty; it is a treaty of *compétence d’attribution*, limiting legislative authority to “filling in” the framework the treaty creates. On the other hand the US Constitution authorizes the federal government to exercise general legislative authority albeit in limited areas which are enumerated in its provisions. It is upon this principle of enumerated powers that the federal government is empowered. Since the residual power in the USA resides with the states and people, the Constitution also prohibits the states from enacting certain kinds of legislation.

In certain areas, the legislative authority of the union can come into conflict with the legislative authority of the states. It is this aspect of states’ rights that bring into focus the question of supremacy and preemption. The Constitution makes an unequivocal statement in its supremacy clause that the Constitution and laws made pursuant to it are the supreme law of the land “any thing in the Constitution or laws of any state to the contrary notwithstanding.” Since the Treaty makes no such claim it was incumbent upon the ECJ to formulated a supremacy doctrine which it did in its *Costa v. ENEL* ruling. It is through these ideas of supremacy that preemption gets its force. Preemption precludes the states from acting within areas that would limited the effectiveness of the central authority to act in these areas. It is in the areas where the union is supreme that state sovereignty is affected most.

The provisions relating to what powers are within the central sphere of authority are the substantive provisions of Treaty and the enumerated powers of the Constitution. Under the Treaty provisions a common market is formed with internal and external aspects. The common market is based on four freedoms and harmonization. It is the aim of the common market that one “domestic” market will be achieved by the free movement of goods, persons, services and capital. The provisions in regard to the four freedoms are primarily negative restrictions on the states’ power to act in these areas. In order to reap the full benefits of this market and remove other barriers to its attainment, the Treaty makes provision for the harmonization of national legislation to achieve a common market. The federal government of the USA is given a broader range of powers under the Constitution than the Treaty grants the EC. As well as covering interstate commerce, which is comparable to the four freedoms found in the Treaty, its powers also include coining money, laying and collecting taxes, the establishment of post offices, and foreign relations of the states among other things. Pursuant to these enumerated powers, the federal government is also given the power to enact “all laws which shall be necessary and proper” in carrying out the other powers. This makes the scope of federal power in the USA much greater than it otherwise would be. It is however probably the dormant commerce clause that has the greatest impact on the states in the USA. Under this doctrine all state action that is prejudicial to Congress’ power to regulate interstate commerce is preempted. Whether the method is four freedoms and harmonization as in the EC or enumeration of the power to regulate interstate commerce on a federal level as in the USA, the goal is to prevent economic “warfare” or protectionism from being implemented by the states of the unions.

The last section of this thesis covered the judicial process of both union, for it is the judiciary that has the final word on states’ rights and how they are ultimately defined. In both unions the state courts play an important role in the judicial systems of the unions. In keeping with

the confederal idea behind the EU, state court cooperation is the method followed. The state courts are supreme within their jurisdictions, making authoritative rulings on their state law, while the ECJ is the authoritative voice in interpreting the Treaty. This ensures that EC law will be interpreted uniformly through out the Community. It however falls upon the state courts to apply EC law. And just as the ECJ cannot displace state law, the state courts may not invalidate any Community act. The USA has, as has been seen, a parallel system of state and federal courts with overlapping jurisdiction. At the top of the federal court system, the USSC is the ultimate interpreter of the Constitution for both the state and federal courts. Although it will not make authoritative rulings on state law it does have the power to displace any federal or state act that is contrary to the Constitution. It is through this exercise of judicial review that the USSC has been able to ensure the equal application of the law through out the union.

States' rights in a union will be affected in different ways depending on the purpose and structure of the union. As has been shown in this thesis, the EU is a union of states in which state sovereignty is preserved to a larger extent than in the USA. Lacking a government of its own, the EU acts primary through its member states to implement its policy. On the other hand, the USA is a federal government in which the people have distributed sovereignty between the states and the central government in which both are supreme in the areas of their respective concerns. These distinctions are not surprising as each union has a different purpose. The EU seeks to create an ever closer union of the peoples of Europe in which the horrors of war and the ineffectiveness of economic protectionism will become vague memories of a distant past. The USA was created "to form a more perfect union" between the people and states of America to promote "the general welfare and secure the blessings of liberty" in a perpetual union. States' rights will be an ongoing discussion in both unions, just as they have been in the past, as both the states and people of these union try to decide if these goals are best attained at a central or state level.

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