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NOTES AND COMMENTS

ATTORNEY GENERAL v. X: A LOST OPPORTUNITY TO EXAMINE THE LIMITS OF EUROPEAN INTEGRATION

I. INTRODUCTION

In 1992 the Irish Supreme Court decided a case with the potential to alter the ways in which the Member States of the European Union (EU) relate to one another, and to the EU itself. The case, *Attorney General v. X*,¹ presented issues about the proper course of conduct for a Member State when the national constitution is seen as conflicting with EU law.² The Irish Supreme Court was faced with the prospect of declaring that Irish Constitutional law, specifically the ban on abortion enshrined in the eighth amendment to the Irish Constitution,³ was incompatible with, and therefore must bow to, the concepts of free movement of persons and the freedom to provide services which are enshrined in the EU's founding treaties.⁴

Instead of grappling with this difficult issue, the Irish Supreme Court, purporting to decide the case on the basis of national law,⁵ declared that the constitutional ban on abortion contains an exception to be used when the life of the mother is in danger.⁶ Had the Irish Supreme Court referred questions to

1. *Attorney General v. X*, [1992] 1 I.R. 1 (Ir. S.C.).

2. The conflict will usually stem, as it did in the X case, from a situation in which national law constricts the exercise of a right available under EU law.

3. Amend. VIII, Constitution of Ireland, 1937.

4. As will be shown, when a provision of Member State law conflicts with EU law, the EU law must be given effect. See discussion *infra* note 37.

5. If the case is decided on the basis of national law, the Irish court would not be required to look at how EU law would impact the dispute before the court. This process is similar to when a state court in the U.S. decides an issue on independent state law grounds obviating the need to reach the federal issue.

6. See *Attorney General*, [1992] 1 I.R. at 1. The Irish court stated that the Irish Constitution's ban on abortion contained an exception when the mother's life is in danger. Here, Ms. X stated that she would kill herself if she was not allowed to receive the abortion. Therefore the court lifted an injunction requested by the Attorney General and permitted her to travel to London.

the European Court of Justice (ECJ)⁷ on the proper interpretation of the Treaty provisions on free movement of persons⁸ and the freedom to provide services,⁹ we would undoubtedly now have a better understanding of the nature of EU power.¹⁰ An improved understanding of the outer limits of EU power would, in turn, give the Member States who wish to pass laws that restrict free movement under the Article 36 public morality exceptions¹¹ some confidence that those laws will withstand challenge. Finally, an awareness of the limits of European Law would allow Member States to further strengthen national protection for the fundamental rights guaranteed in their constitutions.

This potential for conflict between Community law and Member State law will be this Note's focus. More specifically, the Note will discuss the possibility of a Member State deciding to review Community action to ensure its correspondence with the rights and duties created by the Member State constitution.

The Note will begin by analyzing the referral system set out in the Treaty Establishing the European Community,¹² by

7. The referral system established by the EC Treaty is discussed *infra* Part III.C. The concepts of freedom of movement for persons and the freedom to provide services are codified in the EC Treaty at arts. 48-66. See Treaty Establishing the European Community, Feb. 7, 1992, 1 C.M.L.R. 573 (1992) [hereinafter EC Treaty].

8. EC Treaty, *supra* note 7, at art. 48(1).

9. *Id.* at art. 59.

10. A referral to the ECJ in the X case may have given guidance about the ways in which the EU was likely to act when new challenges to its power arose as in the Member States recent decision to sever bi-lateral relations with Austria, an EU member, when the Freedom Party, under Jorg Haider, was asked to join the national government.

11. EC Treaty, *supra* note 7, at art. 36. "The provisions of Articles 30-34 [free movement of goods] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy, or public security." *Id.* See also *id.* at arts. 30-34. A recent example of a nation exercising its article 36 right to restrict goods based on a concern for public health was the continued French ban on imports of British beef, even though the European Commission had declared that the beef was safe.

12. EC Treaty *supra* note 7. The EC Treaty was originally named the Treaty Establishing the European Economic Community. It was amended by the Single European Act in 1987, by the Treaty on European Union in 1992 (TEU), and by the Treaty of Amsterdam in 1998. The most recent attempt to amend the treaty, with the 2000 talks in Nice appears to have failed with German Chancellor Gerhard Schröder calling for a "redefinition" of the Franco-German alliance that has driven the Construction of Europe. See *Divorce after all these years? Not quite*,

which a national court which has difficulty in interpreting a Treaty provision, or is not sure how the Treaty impacts the case before it, shall refer a question or questions to the European Court of Justice for an opinion as to the proper interpretation of the Treaty.¹³ This discussion, and the binding nature of such opinions, will be informed by a systemic view of EU decision making.

Next, the ability of a Member State to review Community action will be analyzed through the prism of the German Federal Constitutional Court's (GFCC) Maastricht decision,¹⁴ paying particularly close attention to the German court's analysis of the democracy principle and the importance of legitimized decision making on a national and supra-national level.¹⁵ Finally, the Note will apply the principles of the Maastricht opinion to the Irish Supreme Court's decision in *Attorney General v. X*¹⁶ in an effort to understand how a Member State may

but. . . THE ECONOMIST, Jan. 27, 2001, at 49.

The TEU changed the name of the European Economic Community to the European Community (EC) in an effort to exemplify the increasingly social nature of European integration. The TEU instituted a pillar structure for the government of the Union. The EC, along with the European Coal and Steel Community and Euratom, the European Atomic Commission form one pillar through the article 212 merger of these groups into the European Community. The second pillar of the EU is the common foreign and security policy adopted by Title V of TEU. The third and final pillar is cooperation in the fields of justice and home affairs, established by Title VI of TEU. Since the TEU was subsumed within the EC Treaty, all citations to TEU treaty sections will be made to the EC Treaty.

13. See EC Treaty, *supra* note 7, at art. 177. Though the EC is just one part of the pillar structure established by TEU, it is the only one that concerns this note. The law making institutions of the EU, the Council of Ministers, the European Commission, and the European Parliament, may only act in a binding way on the Member States when that action is taken pursuant to a power contained within the EC Treaty. Community instructions on the common foreign and security policy and the cooperation of justice and home affairs for example, are advisory only.

14. Federal Constitutional Court Decision Concerning the Maastricht Treaty, 33 I.L.M. 388, 444 (BVerfG 1994).

15. With its decision in this case, the GFCC demonstrates the democratic illegitimacy of the EU while also pointing out the inherent problems of any action derived from either the implied powers doctrine or an EU commerce clause. See *id.* The GFCC also places itself between the Commission and the ECJ when it determines the compatibility of EU legislation with the democracy principle enshrined in the Basic Law. See *id.* Note that the requirement of democratic legitimacy becomes increasingly important in the context of the European Monetary Union, the completion of which will remove the last major barrier to the complete unification of Europe.

16. *Attorney General v. X*, [1992] 1 I.R. 1 (Ir. S.C.).

safeguard its own constitutional rights and obligations in the face of conflicting Community law.¹⁷

The Note will conclude that the GFCC and the Irish Supreme Court have established a method by which national courts, worried about the lack of fundamental rights protection in the EU, can decide that a national law, potentially in conflict with a provision of the Treaty, nonetheless applies.

II. HISTORY OF POST WORLD WAR II EUROPEAN INTEGRATION

In the wake of the social dislocation and economic devastation caused by the Second World War, the nations of Europe began looking at different ways through which they could secure a peaceful, prosperous future. Beginning with the creation of the Benelux Union,¹⁸ and the European Coal and Steel Community,¹⁹ the economic integration of Europe was seen as the best means of limiting the regional and national rivalries that engulfed the continent twice in the first half of the twentieth century.²⁰ In 1957, the Treaty Establishing the European Economic Community (EEC) was signed in Rome,²¹ its re-

17. The recent furor over the Freedom Party's ascension into power in Austria demonstrates that something as essential to a free and democratic society as the outcome of its own elections could potentially be a part of national sovereignty surrendered to the EU. Many Member States may object to such an intrusion leading to a new round of debate over the future of the European Union, a debate this author suggests is long overdue.

18. Treaty Instituting the Benelux Union, Feb. 3, 1958, 381 U.N.T.S. 260 (entered into force Nov. 1, 1960).

19. "An admirable example of co-operation and a practical application of the call for peace is the European Coal and Steel Community built on the premise that, if the basic raw materials for war (coal and steel) are removed from national control, wars between the traditional enemies, France and Germany, will become virtually impossible as long as both are prevented from developing a substantial war industry." D. LASOK & J.W. BRIDGE, *LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 4 (5th ed., 1991). See also Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

20. See LASOK & BRIDGE, *supra* note 19. See also *id.* at 5, stating that the presence of two competing super-powers acted as an impetus towards European integration which was seen as a means of restoring Europe's self-respect. It also seems to have worked. One superpower has fallen, and although another lurks ready to take its place, the EU is now the world's largest trade area with one of the strongest economies in the world.

21. Treaty Establishing the European Economic Community (EEC), Mar. 25, 1957, 298 U.N.T.S. 11. After Maastricht, the name of this treaty was changed to the Treaty Establishing the European Community in an effort to reflect the changing nature of the motivation behind the integration of Europe. See discussion *supra* note 12.

sounding success at achieving its objectives of "[promoting] . . . an increase in stability . . . and closer relations among those nations belonging to [the treaty]"²² was so complete that in the forty years the EEC has been in existence its membership has grown from six to fifteen and it has plans to expand to nearly twice that number in the coming years.²³

However, integration has not come without its price. There are many within the Community who feel that national identity is being sacrificed in the name of economic stability; and that this is a price they are unwilling to pay.²⁴ This conflict between a desire to retain a national identity and a concomitant desire to continue on the road to integration, is being played out every day in each of the nations that make up the Community.²⁵ This conflict is especially important in countries where the national identity is tied to the protection of rights which may conflict with the EU's goal of ever closer cooperation and integration among, and between, the Member States.

III. UNDERSTANDING THE EUROPEAN UNION

Originally created as a customs union, the European Community has grown into a political and legal community the likes of which the world has never seen.²⁶ In an early opinion that demonstrated an expansive view of Community power, the ECJ said that the Treaty Establishing the European Community created a "new legal order of international law."²⁷ This

22. EC Treaty, *supra* note 7.

23. The EEC was originally made up of the Benelux countries (Belgium, the Netherlands, and Luxembourg), France, Italy, and Germany. On Jan. 1, 1973, Denmark, Ireland, and the United Kingdom ascended into the EEC. In the 1980s, Greece, Spain, and Portugal joined, with the final three members; Austria, Norway, and Sweden who joined in the 1990's. Membership is expected to grow rapidly in the coming years as many of the former communist bloc nations of Eastern Europe are hoping to gain admission. See *Permanent Revolution for Europe's Union?*, THE ECONOMIST Feb. 3-9, 2001, at 49.

24. Evidence of public dissatisfaction with the EU has taken many forms. Among them are the British and Danish refusal to join the European Monetary Union and the European Currency Unit and the recent gathering of signatures for an Austrian referendum on whether that State should discontinue its membership. See, e.g., *World Briefing*, N.Y. TIMES, Dec. 6, 2000, at A8; *EU 14 Give Way to Austria*, THE ECONOMIST, Sept. 16, 2000, at 59.

25. See *Permanent Revolution*, *supra* note 23.

26. See discussion *supra* note 12.

27. Case 26/62, N.V. Algemene Transport-En Expeditie Onderneming van Gend

new order has been especially difficult for scholars to understand since both the structure of the EU and the power that it wields, are in a constant state of flux.²⁸ One scholar, David Gerber, has said that the reason that so many American, and some European, commentators have difficulty contending with the EU is that they are attempting to apply U.S. legal methods in the EU context and that this will, almost inherently, lead to inaccurate results.²⁹

Gerber states that these inaccurate results are bound to occur because commentators do not grasp that there are real and fundamental differences that underlie the decision making processes in the U.S. and the EU.³⁰ For example, decisions of the European Court of Justice are less important for their "holding" than for the value judgments that underlie the Court's reasoning.³¹ These value judgements, chief among them the need to foster economic and political integration, are then used as authoritative principles to guide judicial and administrative decision makers. What makes U.S. observance of the importance of these value judgments difficult is that they represent a "cultural" or community-based pattern of thought and action.³² However, there is "little historical expe-

en Loos v. Nederlandse Tariefcommissie, 1963 E.C.R. 1 (1967) [hereinafter van Gend en Loos].

28. For example the TEU changed the legislative procedures of the Community by increasing the use of qualified majority voting in the Council of Ministers and strengthening the co-decision role of the European Parliament. *See also* James Henry Bergeron, *An Ever Whiter Myth: The Colonization of Modernity in European Community Law*, in *EUROPE'S OTHER: EUROPEAN LAW BETWEEN MODERNITY AND POST-MODERNITY* 7 (Peter Fitzpatrick & James Henry Bergeron, eds., 1998). Professor Bergeron argues that the jurisprudence of the ECJ has created a theory of progression as a fundamental starting point for thinking about Community law, "the Treaties themselves do not establish a static legal order complete from the outset but a legislative process reflecting the nature of the Community as a gradually evolving legal system, the progressive realization of which entails the progressive surrender of rights by the states." *Id.* at 14-15.

29. *See* David J. Gerber, *Dimensions of European Law: A Symposium*, 1 COLUM J. EUR. L. 379 (1995).

30. *Id.* *See also* Bergeron, *supra* note 28, at 9-10. Bergeron argues that the goal of the ECJ, and therefore a principle that underlies all of its decisions is the creation of an individual of the treaties, whose rights are not limited by the bounds of national society. *Id.* at 10.

31. Gerber, *supra* note 29.

32. The community-based patterns of thought in this context are clearly the completion of the internal market and the increasingly close cooperation in non-economic spheres of government. EU competition policy is a clear example of the importance of the goals of the community overriding generally established (at least

rience associating community-based patterns of thought and action with supra-national groups."³³

Instead, Gerber argues that we should adopt a systemic view of the EU. Such a view would show the EU as a system of interaction among texts, institutions, communities of decision makers, and ways of thinking.³⁴ When analyzing an EU text, such as an ECJ opinion, under the systemic view, one must attempt to relate that text to other intellectual, political, and social influences by asking who interprets the text, for what purpose, and in what context. For example, in the *Cassis de Dijon*³⁵ case, the Court of Justice expanded the article 36 restrictions to cover consumer protection, largely as a result of local concerns and public pressures in the Member States during the early 1970's.³⁶

The current legal and political status of the European Union is not only troublesome for scholars, but also for those that created it. Conflict exists, even among the Member States of the European Community, as to whether this "new legal order" has progressed to become a federation of states or remains merely a supra-national organization geared toward the economic benefit of its members.³⁷ Thiuncertain status of the

in the United States) rules of law.

33. Gerber, *supra* note 27.

34. *Id.* See also, William J. Davey, *European Integration: Reflections on its Limits and Effects*, 1 IND. J. GLOBAL LEGAL STUD. 185, 186 (1993). Davey describes the European Union system of governance as a system of concentric circles.

35. *Rewe-Zentral AG v. Bundesmonopol-Verwaltung Fur Brantwein*, case 120/78, [1979] ECR 649 (*Cassis de Dijon*). The court held "obstacles to movement . . . resulting from disparities between the national laws . . . must be accepted . . . as being necessary (in) the defense of the consumer." *Id.* at para. 9.

36. GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY, ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 353 (1993).

37. Whatever appellation is given to the European Community, it is clear that the EC wields considerable power over the economies of Europe. Indeed the stated goal of the EC treaty was to create a "common market and an economic and monetary union" partially through "an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital." See EC Treaty *supra* note 7, at arts. 2, 3(c). In order to gain the economic benefits of Community membership the various Member States have chosen to refrain from exercising their sovereign rights by affirmatively granting the Community competency to make law in certain areas. See e.g., *Pigs Marketing Board*, Case C-83/78 (holding that once the community has pursuant to a Treaty provision legislated for the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it). What is also clear is that within these spheres of Union competence, Union law is supreme over any conflicting

EU was magnified in 200 when the member states sought to impose sanctions on Austria as punishment for the gains achieved in recent elections by the Freedom Party.³⁸ This move, particularly disingenuous if one looks at some of the past governments of certain EU states, especially France and Italy, perhaps tips the EU's hand that the Member States are taking the plunge toward federalism.

A. Authority for EU Decision Making

The EU must be classified as a sovereign entity. In its areas of competence it has complete authority to legislate, and its acts are binding on the Member States.³⁹ Additionally, Member State citizens are able to assert claims based on EU law against national governments.⁴⁰ Finally, the EU represents itself, and therefore the Member States at various international conferences.⁴¹

The EU, similar to the U.S. federal government, is a government of limited, enumerated powers, able to take only those actions over which the sovereign constituents have agreed to limit the exercise of their individual rights for the good of the whole.⁴² However, even though the actual treaty language

Member State law. Compare the German Federal Constitutional Court's Maastricht decision, *supra* note 14; Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany be the "Virginia of Europe?"* 43 AM. J. COMP. L. 177 (1995), with van Gend en Loos, *supra* note 27 (establishing the ECJ as the sole interpreter of EC law), and case 6/64 Flaminio Costa v. ENEL, 1964 E.C.R. 585.

38. Perhaps as a result of those sanctions the Freedom Party has lost most of the ground that it gained in 2000, garnering less than half the votes in previously received in the most recent elections. See *Dangerous in the Extreme: Recent Poor Election Results are Forcing Europe's Far Right Parties to Moderate their Rhetoric but the Threat to Democracy Still Remains*, THE GUARDIAN (LONDON), Oct. 18, 2000, at 21.

39. See van Gend en Loos, *supra* note 27, and *Pigs Marketing Board*, *supra* note 37.

40. See BERMANN, ET AL., *supra* note 36, at 181 (stating that when a Community law rule has direct effect—meaning that it creates rights for private parties and not merely obligations for Member States—private parties may bring an action against a Member State, or another private party, to enforce those rights).

41. See van Gend en Loos, *supra* note 76 (holding that EU law has direct effect within the Member States partially by the establishment of community institutions which are endowed with sovereign rights).

42. Who the sovereign constituents actually are is a matter of some debate. The Treaties themselves are signed by the member states, as states and not as representatives of their citizenry. But see BERGERON, *supra* note 28 (arguing that the ECJ has interpreted the Treaties so that the individuals that comprise the

may appear limiting,⁴³ it has been interpreted quite broadly by the European Commission⁴⁴ and the European Court of Justice⁴⁵ in an effort to expand the scope of Community authority.

Prior to the Treaty on European Union,⁴⁶ if the Community wished to legislate in an area that was not strictly concerned with the formation or strengthening of the economic community,⁴⁷ it was forced to attempt to link that legislation with the Member States' economic integration.⁴⁸ However, this limitation proved to be more theoretical than real since "it appears that virtually any measure likely to advance the common market, promote the convergence of Member State economic policies, or simply enhance economic performance within the Community would respond to a legitimate Community purpose."⁴⁹ It thus appears that the European Community was able to exercise power in much the same way as the United States Congress was allowed to legislate on matters of local concern through the use of the Commerce Clause,⁵⁰ before the

Member States are the true constituents of the EU).

43. The Treaties contain affirmative grants of power, any power not contained spelled out was presumably left to the Member States. The principle of subsidiarity, contained in TEU, art. 3b, is the latest attempt to limit expansive EU power. "The Community shall act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein . . ." EC Treaty, *supra* note 7, art. 3b.

44. The European Commission is commonly referred to as the EU's executive branch. The Commission is responsible for initiating all legislation and also ensures that the other institutions, the Member States, and EU business entities comply with the law. The Commission is appointed to a renewable four-year term by the Member States and its deliberations are secret. *See* BERMANN, ET AL., *supra* note 36, at 57.

45. *See* EC Treaty, *supra* note 7, arts. 164-188.

46. The Treaty on European Union was signed at Maastricht on February 7, 1992 and came into effect on November 1, 1993. *See* Treaty on European Union, O.J. C 224/1 (1992). There was considerable public discomfort with some of the Treaty's provisions, especially those that expanded the scope of Union competency through the establishment of economic and monetary union and the creation of a common currency. *See id.*, art. A.

47. The scope of community authority under arts. 2 and 3 of the EC Treaty.

48. *See* BERMANN, ET AL., *supra* note 36, at 29. *See also* Konstantinos D. Kerameus, *Political Integration and Procedural Convergence in the EU*, 45 AM. JUR. COMP. L. 919 (1997). Kerameus states that after the SEA both the required degree of connection between the subject matter of the laws to be approximated and the integrated market has been loosened. *Id.*

49. BERMANN, ET AL., *supra* note 36, at 30.

50. U.S. CONST. art. 1, §8, cl. 3.

landmark decision by the United States Supreme Court in *U.S. v. Lopez*.⁵¹ Contrary to what has happened recently in the U.S., the EC was aided by the Court of Justice in its exercise of "commerce power."

The Court of Justice, therefore, can be said to have accelerated the process of European integration through its expansive reading of the founding treaties⁵² and the Community's ability to legislate under them. For instance, the Court has declared that Union law is supreme over national law, even though the treaties themselves do not contain a supremacy clause.⁵³ The Court has also read the treaties so that they contain a doctrine of implied powers⁵⁴ similar to that found in the United States Constitution by Chief Justice John Marshall in *McCulloch v. Maryland*.⁵⁵ The doctrine of implied powers,

51. *U.S. v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Supreme Court, for the first time in more than fifty years found that an act of Congress was unconstitutional because it exceeded that body's authority under the Commerce Clause. *See id.* *See also* U.S. CONST. art. 1, §8, cl. 3.

52. The European Union was founded (as the EEC) by the Treaty of Rome in 1957. *See supra* note 14. That treaty has been amended by the Single European Act, The Maasrticht Treaty (the Treaty on European Union) and most recently by the Treaty of Amsterdam. Collectively these are known as the founding treaties.

53. *Pigs Marketing Board*, *supra* note 37. The supremacy of Community law stems from the idea of the common internal market. If the nations of the Community have chosen to come together to limit the exercise of their sovereignty, in order to gain the benefits of the common market, then the rules that govern the completion of that market must control over any other conflicting laws.

54. Article 235 of the EC Treaty contains an implied powers provision. It states:

"[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and th[e] Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

EC Treaty, *supra* note 7, art. 235. However, the cases that have upheld the Community's use of implied powers have not relied on this treaty provision. *See e.g.*, Case 8/55, *Federation Charbonniere de Belgique v. High Authority* (Federchar), 1954 ECR 245 (1954-56) (holding that the ECSC Treaty granted the High Authority certain independence necessary for the attainment of the objectives referred to in the Treaty. This independence did not stem from ECSC Treaty, art. 95 (the implied powers article) but rather from the substantive Community power at issue in the case). *See also* Cases 281, 283-85, 287/85, *Germany v. Commission* (Immigration of non-Community workers), 1987 ECR 2303 (1987) (holding that when an article of the Treaty Establishing the European Economic Community, here art. 118, confers on the Commission a specific task, it necessarily confers the powers which are indispensable in order to carry out that task).

55. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 408 (1819). Marshall,

along with the attempt to link Community action with economic integration, were the two key avenues for the consolidation of power during the early years of the Community.

One needs to view this increase in Community power in light of the political and social elements of the day. During the 1950's, post-war economic expansion provided a climate in which the Community's ambitions proved palatable to the Member State governments and, therefore, the ECJ's expansive reading of the Treaty and the Community's powers under it, especially the implied powers doctrine, received little attention.⁵⁶ The mid-1980's was another period of widespread political support for integration as evidenced by the 1985 White Paper on "Completing the Internal Market"⁵⁷ and the ratification of the 1987 Single European Act (SEA).⁵⁸

These documents, along with TEU and the formation of the European Monetary Union (EMU), shifted the EC's institutional balance away from inter-governmental cooperation and toward supra-nationalism by transferring new competencies to the Community.⁵⁹ The Treaty on European Union,⁶⁰ signed at Maastricht in 1992, granted the Community unprecedented control over the internal workings of the Member States thereby codifying and legitimizing the expansive view of Community power.

The TEU changed the name of the Community from the European Economic Community to the European Community⁶¹ demonstrating the increasingly social and cultural nature of the integration of Europe. The TEU also instituted citizen-

reading the constitution as a whole stated that "it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution." *Id.*

56. See Nicolai Ronnebek Hinrichsen, *The Constitutional Challenge to European Union Membership: A Challenge to the Danish Supreme Court*, 15 B.U. INT'L L.J. 571, 576 (1997).

57. See Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310.

58. Single European Act, 1987 O.L.J. (L 169).

59. See Hinrichsen, *supra* note 55, at 576.

60. See EC Treaty, *supra* note 6.

61. *Id.* at art. 1. TEU also increased the use of qualified majority voting in the Council of Ministers thereby eliminating the power of a Member State to have its own way by dragging its feet and preventing unanimity.

ship of the political Union,⁶² stating that "every person holding the nationality of a Member State shall be a citizen of the Union."⁶³ Additionally, the TEU continued the trend of granting new competencies to the Union, by including an explicit authorization to act in areas of education, public health, and vocational training.⁶⁴ Finally, the TEU seeks to give the Union the opportunity to "contribute to the flowering of the cultures of the Member States."⁶⁵

Therefore, during the above time periods, when we ask who interprets the law, for what purpose, and in what context, it becomes easier to understand why the Court of Justice and the other Community institutions have exercised such broad powers. The current status of Community power is slightly less certain.

B. Challenges to EU Authority

The large grants of power contained in TEU have caused ripples of discomfort to flow through some Member States.⁶⁶ There is a fear that nameless, faceless Eurocrats, who are not at all responsible to the citizens of the Member States,⁶⁷ are controlling too many aspects of daily life within each state.⁶⁸ This so-called "democracy deficit"⁶⁹ has led Member states

62. See EC Treaty, *supra* note 7, at arts. 8-8e.

63. *Id.*, art. 8.

64. Hinrichsen, *supra* note 56, at 576. See also TEU, *supra* note 46, at arts. J-K.

65. EC Treaty, *supra* note 7, at art. 128.

66. A poll reprinted in the Economist found that 57% of British voters were against UK membership in the EMU. This may prove disastrous as Prime Minister Tony Blair has said that British membership in the monetary union will be decided by a public referendum. See THE ECONOMIST, Nov. 6, 1999, at 12-13.

67. Recall that members of the European Commission are appointed by the Member State governments and meet in secret. The Council of Ministers, the EU legislative branch, consists of the representative from each Member State who works in whatever area the Council is debating. If the Council is discussing Community transportation policy, then the Ministers of Transportation of the various Member States will be the ones in attendance. The European Parliament, the only democratically elected part of the EU government has historically been the weakest. Only recently has the Parliament been given increased powers of co-decision. See EC Treaty, *supra* note 7, at arts. 145-54.

68. See *Europe's Mid-Life Crisis, a Survey of the European Union*, THE ECONOMIST, May 31, 1997, at 15-16 (stating that the gap between the "bureaucrat in Brussels" and the man on the street is widening, and suggesting that Europeans would react more favorably to the EU if its institutions were more democratic).

69. The democracy deficit expresses itself in situations where an unelected

and their citizens to challenge the legitimacy of Community action that relies on implied powers granted to the Community, not by the Member States, but by the Court of Justice.⁷⁰

This type of discomfort has expressed itself at numerous times throughout the EU's history. In the 1960's, President Charles DeGaulle of France, whose vision of Europe as a "Europe de Patries" suggests inter-governmental cooperation between sovereigns, rather than a supra-national structure, dominated the EC and successfully blocked British accession in both 1961 and 1967.⁷¹

Additionally, economic factors limited the enthusiasm of EC advocates through the 1970's and into the 1980's. The 1973 oil crisis crushed their early optimism, and the resulting inflation and unemployment made supra-national economic regulation an unwelcome idea to many.⁷² Finally, the late 1980's and early 90's have seen the principle of subsidiarity arise as an internal challenge to the increased integration envisioned by the TEU.⁷³

The subsidiarity principle, introduced in the SEA⁷⁴ and later included in TEU, states that "the community shall act within the limits of the powers conferred by [the] Treaty."⁷⁵

member of a national government binds that nation's citizens to a particular course of action through his vote in the Council of Ministers. This vote will create obligations, and grant rights, to national citizens without their express consent. A national citizen who disagrees with this decision, or who feels that he is harmed by it as little recourse.

70. As a result of this distrust of EU power grabbing opinion polls in Austria and Sweden suggest that a majority of voters in those countries would now vote against EU membership. See *Europe's Mid-Life Crisis*, *supra* note 68. Other examples of dissatisfaction with EU policy are; the Danish rejection of the Maastricht treaty, its narrow approval in the French referendum, and the two votes against EU membership by Norway. Presumably the use of implied powers based on Article 235 would be immune to such criticism since that provision requires unanimity in the Council. However, Article 235's requirement that Parliament only be consulted weakens the legitimacy of actions taken under it.

71. Hinrichsen, *supra* note 56, at 577.

72. Davey, *supra* note 34, at 89.

73. There is also some fear that the next Treaty, which some had hoped would be ready for signature as early as Dec. 2000, will increase the use of qualified majority voting in the Council and thus widen the democracy deficit. However, this may be offset by a reallocation of Commissioners through which the larger states, such as Germany, may gain votes and decrease the level of over representation of the smaller states, such as Luxembourg. See *THE ECONOMIST*, Nov. 13, 1999, at 51-52. But see *Divorce After All These Years?*, *supra* note 12.

74. Single European Act, *supra* note 9.

75. EC Treaty, *supra* note 7, at art. 3(b). The TEU also states "[t]his Treaty

The treaty goes on to say that unless the action is within an area of exclusive Community competency, the Community will act only if the results of the proposed action cannot be "sufficiently achieved" by the Member States.⁷⁶ While subsidiarity may thus seem an attempt on the part of the Member States to limit the Community's use of the implied powers doctrine,⁷⁷ an equally valid argument can be made that subsidiarity is supportive of integration in that it reinforces the supremacy of Community action in its seemingly ever increasing areas of competence.⁷⁸ Whether it is seen as supporting integration, or as reserving power in the Member States, subsidiarity is now a fundamental aspect of EU law-making as evidenced by all three of the law making institutions of the Community having created procedures to ensure compliance with the subsidiarity principle.⁷⁹

Ensuring compliance with subsidiarity is one way that Member States, through their representatives in the Council of Ministers, can ensure that the community does not attempt to exercise power outside the range of its competencies. Additionally, there have been situations where political will and public pressure have trumped doctrine in determining the result of a conflict.⁸⁰ However, a Member State may find itself outnumbered in the Council and unable to garner wide public support.

marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen." TEU, *supra* note 46, at art. A.

76. EC Treaty, *supra* note 7, at art 3b.

77. See generally, George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994). Berman argues that the aim of subsidiarity is not localism, but rather the pursuit of such values as self-determination and accountability and the preservation of identities. See *id.* at 340-41. See also, Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 668-69 (1999).

78. Subsidiarity may cause the institutions of the Community to rely more on Article 235, thus removing most claims that the Community's actions are ultra vires.

79. See Christian Timmermans, *Subsidiarity and Transparency*, 22 FORDHAM INT'L L. J. 106, 108 (1999). One area that may not see the effects of subsidiarity is the European Monetary Union. The way the EMU is set up, with complete independence from the other institutions of the EC, as well as independence for the Member State banks, leads one to believe that the goal is to have monetary decisions made as far as possible from the citizen, rather than as close as possible to him which is the goal of subsidiarity.

80. See *e.g.*, Cassis de Dijon *supra* note 35.

What can that nation do to ensure that a right it considers fundamental, although others may disagree as to its importance, is protected? One way that rights are traditionally protected in the U.S. is through the court system. In the EU context, the question becomes who does the reviewing, and of what law?

C. *Judicial Review of Community Action*

The Court of Justice has held that Member States may not review directives and regulations in order to determine their constitutionality under principles of national law.⁸¹ Instead, the national court shall refer the matter to the Court of Justice for a binding interpretation of the Treaty provision at issue.⁸² The referral system was included in the Treaty in order to increase the process of centralized decision making and to reinforce the notion that Community law is above and beyond national law.⁸³ The notion that EU law is in some way superior to national law stems from article 5 of the Treaty, which imposes a constitutional obligation on national courts to give full effect to Community law⁸⁴ and from ECJ decisions inter-

81. Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 ECR 4199 (1987). Article 189 of EC Treaty sets out the mechanisms through which the institutions of the EU make law. It states in pertinent part: "[i]n order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. EC Treaty, art. 189. From the point of view of harmonization, a regulation is the strongest weapon in the Community arsenal, it has general application and is directly and entirely applicable in each Member State. *Id.* A directive, on the other hand, is only binding as to the result achieved; the Member States are allowed to choose the form and methods of implementation. *Id.* Decisions are binding upon the parties to which they are issued, and recommendations and opinions are advisory only and have no binding force. *Id.*

82. Article 177 says that the court of justice shall have the authority to give preliminary rulings concerning the interpretation of the treaty. EC Treaty, *supra* note 7, at art. 177(a). *See also id.*, art. 173 which states that the ECJ shall review the legality of acts . . . intended to produce legal effects vis-a-vis third parties. *Id.* at art. 173.

83. The idea that community law is superior to national law has been given effect by the ECJ and has not been challenged by the Member States. *See e.g.*, *van Gend en Loos*, *supra* note 27; *Pigs Marketing Board*, *supra* note 37.

84. Article 5 of the EC treaty says "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of th[e] Treaty or resulting from actions taken by the institutions of the Community they shall facilitate the achievement of the Community's tasks."

preting the Treaty so that EU law is directly effective and superior to national law.⁸⁵

The Court of Justice has also held that when a Member State enacts legislation to implement a Community directive, that legislation also must be interpreted in the light of the founding treaties and the principles that underlie them.⁸⁶ The primacy of Union law thus applies to national law-making institutions such as administrative agencies, courts, and legislatures.⁸⁷ Indeed, in order to give full effect to EU law, an administrative agency may be forced to either ignore or go beyond national law, or abstain from action.⁸⁸

The system of government that has been set up by the founding treaties is necessarily a power sharing system,⁸⁹ since the Community lacks true coercive power over the Member States.⁹⁰ Therefore, the EU must rely on the Member

See EC Treaty, *supra* note 7, at art. 5. See also Case C-213/89, *The Queen v. Secretary of State for Transport ex parte Factorame Ltd.*, 1990 E.C.R. I-2433 [1990], at para. 19 (stating that pursuant to ECJ precedent, national courts are under an article 5 obligation to ensure the legal protection of persons that derive from the direct effect of certain provisions of Community law); Kurt Riechenberg, *Local Administration and the Binding Nature of Community Directives*, 22 FORDHAM INT'L. L. J. 696, 704 (1999). The Court of Justice has gone so far as to say that member states must pay damages for losses incurred as a result of a breach of community law. The member state must pay if the community provision; involves the grant of a right to individuals, if it identifies the contents of those rights, and there must be a causal link between the breach of the provision and the harm suffered. *Id.*

85. See *van Gend en Loos*, *supra* note 27 (applying a test to determine whether a particular community law is directly effective); *Pigs Marketing Board*, *supra* note 37 (holding that EU law is superior to conflicting national law).

86. The importance of fundamental principles in interpreting treaty provisions is an example of Gerber's systemic view of the EU. See Gerber, *supra* note 29. See also Riechenberg, *supra* note 84, at 715 (stating "if a national court is called upon to rule on the legality of such national implementing measures, then it must take into consideration Community law that forms the legal basis for such measures and determines the results to be achieved). *Id.*

87. Riechenberg, *supra* note 84, at 699.

88. *Id.*

89. "[T]he EC has become something more than the original international economic organization. A separate legal system intertwined with the legal systems of Member States has been developing through dynamic and synergistic relationships with courts in the Member States. EU law exists at the level of this interaction between domestic and supranational law." Sean C. Monaghan, *European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal Constitutional Court's Maastricht Decision*, 12 EMORY INT'L L. REV. 1443, 1465 (1998).

90. The EU does not have its own army or police force. Until recently if a Member State simply refused to follow Community law there was not much that

States to enforce Community law, both through statutory enactments⁹¹ and judicial decision making.⁹² Community law, once effective within the Member State, either directly, or after the passage of national implementing legislation, creates rights and obligations for national citizens, both individual and corporate.⁹³ Therefore, an individual who wishes to enforce either a right or duty under the Treaty usually will bring suit in his national court.⁹⁴ If the national court feels that an issue of Community law is essential to the resolution of the claim before it, and the court is unsure of the proper interpretation of that law, it may refer the question, or a list of questions, to the European Court of Justice for a binding interpretation of Community law.⁹⁵

the Community could do, either in retaliation, or as enforcement. However, with the introduction of sanctioning power in art of TEU, the EU now possesses some coercive power. The Austria case is illustrative. While the fourteen other member states refrained from bi-lateral contacts, Austria was included in EU decisions. Indeed since certain EU decisions require unanimous votes of the Member States Austria's potential veto power could have served as an impetus for the removal of sanctions three months before the Nice Conference. *But see* the French refusal to import British beef, discussed *supra* note 11. *See also* EC Treaty, *supra* note 7, at art. 85 (giving the Commission sanctioning power over an undertaking that is in violation of EC competition law).

91. Community directives require implementing legislation at the national level.

92. Since there are no EU trial courts, Union law must be enforced in suits brought in national courts. For example Irish law dictates that after the date upon which a regulation enters into force, it immediately penetrates the Irish legal order and is, thus, part of Irish law. Therefore, a Irish citizen is able to bring suit in an Irish national court to enforce an EU law obligation against another Irish citizen or against the Irish government. *See* Hugh O'Flaherty, *An Introduction to the Relationship Between European Community Law and National Law in Ireland*, 20 FORDHAM INT'L L.J. 1151, 1164-65 (1997).

93. In *van Gend en Loos*, *supra* note 27, the ECJ stated "to ascertain whether the provisions of an international treaty extend so far in their effects [so as to be directly effective] it is necessary to consider the spirit, the general scheme and the wording of the provisions." *Id.* at part B. Viewing the Treaty in a systemic way, reading the Treaty's stated objectives through the prism of the Preamble and the structure of the Community, the Court held that whether a treaty provision has direct effect turns on whether it is clear and unconditional or instead requires legislative intervention by the states. *Id.* The same test should hold for regulations issued pursuant to article 189 of the Treaty. *See also* O'Flaherty, *supra* note 92.

94. *See* EC Treaty, *supra* note 7, at art.173 (outlining the limited situations in which an EU citizen is able to bring a case directly before the ECJ).

95. *See* EC Treaty, *supra* note 7, at art. 177 (describing the referral procedures). When the ECJ answers a referral it is only deciding the proper interpretation it is not deciding the case for the national court. Instead the national court will use the ECJ's interpretation in order to resolve the dispute before it.

Article 177 of the Treaty, which gives the Court of Justice jurisdiction to give such preliminary rulings, provides that where the interpretation of Community law is necessary to resolve a dispute before a national court of last resort, that court "shall bring the matter before the Court of Justice."⁹⁶ In certain limited situations, described in article 173, an individual,⁹⁷ a Member State,⁹⁸ or a Community institution,⁹⁹ may bring an action directly before the Court of Justice in order to challenge the validity of a piece of secondary Community legislation either within two months of the publication of the measure, or of the date that the plaintiff became aware of the measure.¹⁰⁰

In sum, the founding treaties, as interpreted by the Court of Justice, do not provide for Member State review of a particular Community act, whether a treaty provision or a piece of secondary legislation. In both cases the Member State court is required to refer a question, or list of questions, to the Court of Justice for a determination of Community law. Thus, a Member State that feels that either a treaty provision, or a piece of secondary legislation, conflicts with some fundamental right or constitutional obligation enshrined in the national law has no recourse but to pursue their claim before the ECJ.

D. Fundamental Principles

Viewing the history of European integration with an eye toward "an ever closer union among the peoples of Europe" it is easy to understand the principles that underlie the referral system. In order to avoid different interpretations of the Treaty, it is essential to have one judicial body with complete, and

96. *Id.*

97. An individual may bring an action before the Court of Justice challenging the legality of Community action provided that action is of direct and individual concern to that individual. *See id.* at art. 173.

98. A Member state may bring an action challenging the legality of Community action before the Court of Justice on the grounds that; the Community lacks the competence to take such action, that the action infringes on an essential Community procedural requirement, that the action infringes upon the TEU itself, or that the action is violative of "any rule of law related to (the Treaty's) application, or misuse of powers." *Id.*

99. Both the Council of Ministers and the Commission are empowered to bring an action on the same grounds as a Member State. *See* EC Treaty, *supra* note 7, at art. 173.

100. *Id.*

enforceable, interpretive authority. Additionally, when the political will of the Member States was not strong enough to continue the push toward integration, the Court ensured that the rules providing for integration were enforced.¹⁰¹ Likewise, if it is true that "law is as much a part of the national culture as art or music"¹⁰² then a supra-national community, which is striving to create a supra-national culture, indeed a supra-national person, must have a supra-national system of law.

IV. THE GERMAN CHALLENGE TO COMMUNITY POWER

A. Introduction

It seems clear that Community action that is not grounded in a Treaty provision¹⁰³ is incapable of superceding national law, since it is in a sense, unconstitutional.¹⁰⁴ The more difficult question is: Who gets to implement this principle?¹⁰⁵ While national courts are not given the authority to declare that a community act is "unconstitutional,"¹⁰⁶ they do have a

101. See William J. Davey, *European Integration: Reflections on its Limits and Effects*, 1 IND. J. GLOBAL LEGAL STUD. 185, 200 (1993). Davey states that the ECJ has played a critical role in the integration process by establishing the right of individuals to invoke Community law in national courts, the supremacy of Community law over national rules, and striking down disguised barriers to trade. *Id.* See also Bergeron, *supra* note 27 (discussing the philosophy of the ECJ as geared towards increasing integration of the Member States); and discussion *supra*, notes 43-50 and accompanying text (noting the ECJ's use of the implied powers doctrine to justify a particular Community act as geared towards completion of the internal market).

102. David A. O. Edward, *What Kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration*, 5 COLUM. J. EUR. L. 1 (1998-99) (the author is a judge of the Court of Justice of the European Communities). See also Bergeron, *supra* note 28 (arguing that the creation of a Community individual, untrammelled by the boundaries of Member State citizenship was an early goal of the ECJ and essential for the progression of the Community to its present state).

103. Such an action would be ultra vires. An act that is ultra vires is one that is performed without any authority to act on the subject. BLACK'S LAW DICTIONARY 1522 (6th ed. 1990).

104. Recall that the EU, under the EC Treaty, is only capable of acting within the competencies granted it by the Member States. See EC Treaty, *supra* note 7, at arts. 1-8.

105. See Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 232 (1997).

106. See discussion *infra* Part III.C.

large role to play in the enforcement of Community law.¹⁰⁷ How far this role extends is an issue that has troubled the GFCC at least since the 1974 decision commonly referred to as *Solange I*.¹⁰⁸ In that case, as well as in *Solange II*,¹⁰⁹ and the *Maasticht*¹¹⁰ decision, the GFCC assumed that it had the authority to review Community legislation to ensure its compatibility with the Basic Law.¹¹¹

B. German Precedent

In *Solange I*, the GFCC hued to the widely held view that Community law forms an independent system of law that flows from an autonomous legal source.¹¹² The court examined Germany's membership in the Community as flowing from article 24¹¹³ of the Basic Law and declared that since the in-

107. See *id.* See also Riechenberg, *supra* note 84.

108. *Solange* means "as long as" and refers to the first word of the opinion. See *Internationale Handelsgesellschaft mbH v. Einfuhr-Und Vorratsstelle Fur Getreide Und Futtermittel*, [1974] 2 CMLR 540, May 29, 1974. The case grew out of a challenge by a German exporter who sought to prove that a 1967 Council regulation that made the grant of export licenses for certain agricultural products conditional on the prior payment of a deposit which was to be forfeited if the export was not made violated the principle of proportionality recognized in German law.

109. In re application of *Wunsche Handelsgesellschaft*, [1987] 3 CMLR 225, Oct. 22, 1986. In this case, a German importer challenged the denial of his permit application to import mushrooms from Taiwan arguing that the license requirement was no longer needed since there was in fact a shortage of mushrooms in the Community. The ECJ upheld the license requirement on referral from a German administrative law court and the importer then looked to the GFCC.

110. *Maasticht*, *supra* note 14. Several claims were pressed before the GFCC, however, the court held that only one of them, the guarantee of a right to vote and participate in the legitimation of the organs of government and to influence the implementation of state power, was admissible. It is this claim that is being discussed in this note.

111. The Basic Law is the German Constitution.

112. *Solange I*, *supra* note 107, at para. 2. The court stated "this court adheres to [the ECJ's] settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source." *Id.* However, the court went on to say that the system of Community law and the national law are "two legal spheres [that] stand independent of and side by side one another." *Id.* While stating that the ECJ could not rule with binding authority on whether a Community law is compatible with the Constitution, and that the GFCC could not determine whether secondary Community legislation coincided with the Treaties, the Court said "this does not lead to any difficulties as long as the two systems do not come into conflict with one another in their substance." *Id.*

113. Article 24 of the Basic Law deals with the transfer of sovereign rights

stitutions of the EC lacked democratic legitimacy, the GFCC must ensure that Community acts respect the fundamental rights protections of the Basic Law.¹¹⁴ The Court discussed the current state of European integration and decided that since the Community lacked democratic legitimacy,¹¹⁵ and sufficient human rights protection,¹¹⁶ it would allow suits based on a claim that Community law violates a fundamental rights principle guaranteed by German law.¹¹⁷ In the twelve years between *Solange I* and *Solange II*, the ECJ had read fundamental rights protection into the Treaty¹¹⁸ so that with its ruling in *Solange II* the GFCC was able to say that "there are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated."¹¹⁹ Therefore,

from the German federal government to supra-national institutions, such as the EU. All of the Member States of the EU amended their constitutions in this way as a means of incorporating community law into national law.

114. See *Solange I*, *supra* note 107, at paras. 3-4. More specifically, the court stated "article 24 of the constitution limits the possibility of the Community institutions to make law directly in Germany in that it nullifies any amendment of the Treaty which would destroy the identity of the valid constitution of the Federal Republic of Germany by encroaching on the structures which make it go up." *Id.*

115. "The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level." *Solange I*, *supra* note 108, at para. 4.

116. [The Community still] lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution. *Id.*

117. *Id.*

As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution, a reference by a court of the Federal Republic of Germany to the German Federal Constitutional Court following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Constitution.

Id. at para. 7.

118. The German court stated "[a]ll the main institutions of the Community have since acknowledged in a legally sufficient manner that in the exercise of their powers and in the pursuit of the objectives of the Community they will be guided as a legal duty by respect for fundamental rights, in particular as established by the constitutions of the Member States." *Solange II*, *supra* note 105, at para. d.

119. *Solange II*, *supra* note 109 at para. d. The court specifically referred to

the court concluded that "so long as" the institutions of the Community generally ensure an effective protection of fundamental rights, and in so far as they generally safeguard the content of fundamental rights, the GFCC will no longer exercise its jurisdiction to review Community legislation by the standard of the fundamental rights contained in the Basic Law.¹²⁰

C. *The Maastricht Decision*

With its decision in the Maastricht case, the GFCC resurrected the ability of a national court to determine the adequacy of Community law as it relates to the fundamental rights protection of national constitutional law. While stating that this case was not *Solange III*,¹²¹ the GFCC argued that the Community's lack of democratic legitimacy creates problems when the Community seeks to act on the fringes of its power.¹²² By requiring the EU to abide by its self-imposed limits on power and attempting to ensure democratic legitimacy in EU decision making, the GFCC has provided a model upon which other national courts may build in order to protect fundamental rights and national identity in the face of Europeanization.

In its Maastricht opinion, the GFCC held that Article 23(1) of the Basic Law, which empowers parliament to transfer the exercise of state responsibilities to a supra-national organization, is subject to the Basic Law principle of democracy, which prohibits dilution of the legitimacy of the exercise state power through elections.¹²³ The democratically elected members of the German parliament participate in maintaining Germany's rights as a member of the European institutions and in formu-

the joint declaration issued by the European Parliament, the Council and the Commission on April 5, 1977, which stated that these institutions will respect fundamental human rights and the European Human Rights Convention. *See also* Grimm, *supra* note 105, at 233-34.

120. *See Solange II*, *supra* note 109, at para. f.

121. *See Maastricht*, *supra* note 14, at 406.

122. *See Maastricht*, *supra* note 14, at 426.

123. Under German law all governmental decisions must be made or approved by officials democratically responsible to the German electorate. If the exercise of governmental power is shifted away from those who are democratically responsible to the electorate, than the principle of democracy has been violated and that exercise of power is unconstitutional. *Id* at 409. *See infra* discussion at note 125 for the process by which members of the EU legislative bodies are chosen.

lating Germany's EU policy.¹²⁴ Through this process, the German citizen retains a role in choosing the government that represents him and aids in formulating the policies that affect him.¹²⁵ When the institutions of the EU act in such a way as to either violate the principles established in the founding treaties,¹²⁶ or expand their reach in a way not anticipated by the Treaty,¹²⁷ the GFCC must exercise its power and declare that act unenforceable in Germany.

1. The German View of EU Power

The GFCC interpreted the TEU narrowly, concluding that it confers specific powers and responsibilities on the basis of limited, individual powers.¹²⁸ In an attack on the ECJ's use of an implied powers doctrine, the court stated that EU institutions may not "deduce the existence of a power based only on the existence of a function."¹²⁹ Likewise, the court read the subsidiarity principle as a blanket restraint on Community ac-

124. Maastricht, *supra* note 14.

125. "[A]ny German citizen with the right to vote is guaranteed the subjective right to participate in the election of the German Federal Parliament and thereby to co-operate in the legitimation of State power by the people at a federal level and to influence the implementation thereof." *Id.* The power to elect members of parliament legitimizes Community acts in Germany since the members of the European Commission, which is charged with proposing all legislation, are appointed by the national government from which they come. The Council of Ministers consists of members of national governments that are charged with making law in certain defined areas. For example the Minister of Transportation would be Germany's representative in the Council when that body is discussing issues of transportation policy. Finally the European Parliament ensures democratic legitimacy through the direct election of its members.

126. *E.g.*, if the Community attempted to legislate in a way that would hinder the functioning of the internal market or lead to decreased integration among the Member States.

127. By legislating the length of trucks to be used in transporting goods between the Member States, the length of the mud flaps that those trucks use, or mandating that trains used in Community transport be of a certain length or contain only a certain number of cars.

128. See Monaghan, *supra* note 87, at 1481-87. Note that the complainants in the Maastricht case also argued that the TEU was unconstitutional since it did not provide for ECJ review of Community acts pursuant to the common foreign and security policy and the cooperation in justice and home affairs. The court easily brushed this aside saying that those provisions of the Treaty do not allow the Community to implement law in the Member States which is directly applicable and which preempts other law. See also Maastricht, *supra* note 14, at 412-13.

129. Maastricht, *supra* note 14, at 426.

tion.¹³⁰ The court held that subsidiarity does not confer powers on the Community but rather places limitations on the implementation of powers that already have been conferred.¹³¹ Therefore, subsidiarity is a condition that must be met before a Community institution may act in an area in which it has a clearly granted competence.¹³²

Weighing in on the debate concerning the legal nature of the Community, the GFCC states that the term Union, as used in the TEU, refers to "the Member States acting in concert, not as an independent legal entity."¹³³ Instead, the German court believed that the EU is either an inter-governmental community of states, an alliance of states, or a community of states.¹³⁴ If the EU is a community of states, it receives democratic legitimacy for its actions from the national governments of the Member States.¹³⁵ If the community's exercise of sovereign powers is based upon the democratic process of forming political will and conveying that will to the community, those powers must be exercised by an institution responsible to the governments of the Member States; which are themselves subject to democratic control.¹³⁶ By deciding that Community law is legitimized in this way, the GFCC points out the inherent problems of any action derived from implied powers, or an EU commerce clause, and positions itself to determine the compatibility of EU legislation with the democracy principle as enshrined in the Basic Law.¹³⁷

130. See Monaghan, *supra* note 89, at 1482-83.

131. See *id.* See also Maastricht, *supra* note 14, at 441-42.

132. See Monaghan, *supra* note 87, at 1483.

133. *Id.* at 1487.

134. See *id.*

135. Since the Parliaments of the Member States are all democratically elected, their ultimate control over Community action provides the democratic legitimacy that is a fundamental aspect of governance in Europe.

136. See Maastricht, *supra* note 14, at 421-22. "The Maastricht treaty establishes an inter-governmental community for the creation of an ever closer union among the peoples of Europe, which peoples are organized on a state level rather than a state which is based upon the people of one state of Europe." *Id.*

137. While most of the Maastricht opinion is devoted to analyzing the role of the three law-making institutions of the EU vis-a-vis Germany the same limits will apply to ECJ decisions. While the GFCC has acknowledged the supremacy of EU law and the ECJ's role in interpreting that law the court stated that the ECJ does not have the authority to interpret the treaties in a way that would amount to their amendment. See Grimm, *supra* note 105, at 236-38. Grimm goes on to say that if the GFCC determines that the ECJ has amended the treaty through its interpretation of a particular provision, that decision will not be binding within

It seems that the GFCC would have the EU remain an inter-governmental organization such that a Member State simply could drop out if membership no longer suited its needs, became politically unpopular at home, or simply became too costly. However, this is not the version of the European Union that presently exists after the completion of the internal market and the formation of the European Monetary Union.¹³⁸ The presence of a monetary union suggests that political union will follow.¹³⁹ Therefore, for a country to choose to opt out or withdraw from the EU may prove increasingly difficult once EMU membership has been achieved.¹⁴⁰ In short, the nations of Europe simply have gone too far to turn back and have, for better or worse, tied their fates together with the principles of free trade and democratic cooperation.

V. PROTECTING FUNDAMENTAL RIGHTS: THE IRISH CASE

A. Background

Roman Catholicism has long been a part of Irish national identity. Accordingly, the 1937 Irish Constitution contained a formal allegiance with the Church.¹⁴¹ As part of this commingling of church and state, article 44.1.2 of the constitution recognized "the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens."¹⁴² In what may have been a foreshadowing of future changes in Irish society, this portion of the constitution was repealed in 1972, just one year before Ireland joined the European Community.

In 1983, just ten years after entering the Community, and perhaps as a result of fear of the long term effects of the other

Germany. *Id.*

138. See EC Treaty, *supra* note 7, at art. 2.

139. See Permanent Revolution, *supra* note 23.

140. For example, it would most likely be much more difficult for New York State to opt out of a Mid-Atlantic regional trade agreement, than for it to secede from the U.S.

141. The Irish Constitution was largely the work of one man, Eamon deValera. DeValera had a vision of Ireland as a nation of rural, Catholic, farmers and sought to imprint this belief on the basic structure of his newly independent nation. See generally, Christine P. James, *Cead Mile Failte? Ireland Welcomes Divorce: The 1995 Divorce Referendum and the Family (Divorce) Act of 1996* 8 DUKE J. COMP. & INT'L L. 175, 175-88 (1997).

142. Art. 41.1.2, Constitution of Ireland, 1937 (repealed 1972).

Member States' more liberal abortion policies, article 40.3.3 (hereinafter the eighth amendment) which reads "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right,"¹⁴³ was added to the constitution. The Irish courts have interpreted that provision to mean that abortions are not available in Ireland under any circumstances. The courts also have said that the eighth amendment does not allow Irish citizens, in Ireland, to be counseled about abortion,¹⁴⁴ the availability of abortion in other nations¹⁴⁵ (notably England), or to travel to receive an abortion.¹⁴⁶

While in some respects the vision of Ireland as a nation of rural Catholic farmers has survived,¹⁴⁷ in many other ways this image has failed to keep pace with modern realities. One way in which it has failed is the changing nature of the Irish economy. In 1937, the Republic of Ireland was overwhelmingly supported by an agrarian economy supplemented by small industrial concerns.¹⁴⁸ By 1995, Ireland had Europe's fastest growing economy and its third best performing market.¹⁴⁹ Although the Irish government began to shift the country's economy away from agriculture and toward industry, particularly high-tech industry as early as the 1960's,¹⁵⁰ it was Ireland's

143. Art. 40.3.3, Constitution of Ireland, 1937.

144. See *SPUC v. Grogan* [1989] I.R. 753 (Ir. H.Ct.) *aff'd* in part, *rev'd* in part [1989] I.R. 760 (Ir. S.C.).

145. See *id.*

146. See *Attorney General v. X*, *supra* note 1.

147. The Catholic Church still plays a large role in society, as evidenced by the narrow margin that passed the divorce act in 1996 and the continued vitality of the eighth amendment's ban on abortion.

148. See generally, James, *supra* note 141; Jessica J. Poyner, *Investing in Ireland: The Enticement of the U.S. High-Tech Industry to the Emerald Isle*, 10 *TRANSNAT'L LAW* 195, 196-97 (1997).

149. See Poyner, *supra* note 148, at 199-97.

150. The Irish Development Agency ("IDA"), which became an independent government agency in 1969, is largely responsible for attracting foreign business into Ireland. The IDA gave US\$120 million in corporate tax breaks and spends US\$100 million annually in order to attract foreign firms (with one-half of that amount going to US firms alone). Additionally, Ireland has relatively low-wages and a well educated work-force (and one that receives an emphasis on technology in the universities). The strength of the Irish Tiger appears unabated. Recently Dell Computers and Intel have announced that they are expanding their presence in Ireland with the construction of new assembly plants.

accession into the European Community in 1973 that truly led to the creation of the "Irish Tiger."¹⁵¹

Another way in which the early view of Ireland has failed to withstand Europeanization is in the area of social policy. While the imposition of EU law on Ireland's economy has created a great success story, the attempted imposition of EU law on Ireland's social policy has created unrest and dissatisfaction.¹⁵²

Regardless of the merits of the abortion debate, and the rights of people to divorce, it should seem clear that the overlay of EU law, especially the free movement principles, have altered the language and tenor of the debate. This note is not attempting to take a position on the merits of the debate, but rather argues that any changes in national law on such an important issue should be made by national citizens and not imposed on them from above by an organization that is not democratically responsible to them.

B. ATTORNEY GENERAL v. X

In December 1991, Ms. X was raped and became pregnant.¹⁵³ She was distraught over her plight and, together with her parents, made the decision to travel to England to receive an abortion.¹⁵⁴ During the course of the criminal investigation of the rape, Ms. X related to the police that she would be traveling to England to end her pregnancy.¹⁵⁵ As required by Irish law, this fact was reported and eventually came to the attention of the Attorney General who sued for an injunction in the Irish High Court in an effort to restrain Ms. X from traveling abroad.¹⁵⁶ Upon hearing of the issuance of the injunction, Ms. X and her family returned to Ireland to argue before the High Court which ruled against her.¹⁵⁷

On appeal, the Irish Supreme Court reversed, holding that

151. See Poyner, *supra* note 148.

152. See David O'Connor, *Limiting Public Morality Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union*, 22 BROOK. J. INT'L. L. 695, 695-711 (1997).

153. Attorney General v. X, [1992] 1 I.R. 1 (Ir. S.C.) (opinion of C.J. Finlay).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

"the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy, that such termination is permissible having regard to the true intention of article 40.3.3 of the Constitution."¹⁵⁸ In this case, Ms. X had told her mother on several occasions that as a result of becoming pregnant she wanted to kill herself and this, along with psychiatric testimony that corroborated her intention, was found to be sufficient to meet the Supreme Court's new test.¹⁵⁹

Ms. X's attorneys had also raised issues of European Law in their defense; namely that the mother's right to travel, including travel outside of Irish jurisdiction, was absolute and could not be restricted by reference to the right to life of the unborn child.¹⁶⁰ The Supreme Court chose to avoid those issues by deciding the case on the basis of national law.¹⁶¹ However, since the European law issues were briefed and argued before the Court, Chief Justice Finlay addressed them in clearly identified obiter dicta.¹⁶²

C.J. Finlay argued that when there is a conflict between

158. *Id.*

159. Specifically X told her mother that upon learning that she was pregnant she wanted to throw herself down a flight of stairs. On the return journey from London X told her mother that while in London she had wanted to throw herself in front of a train. X later told her parents that she was causing them so much trouble that she would rather be dead than to continue as she was. As a result of all this X's mother took her to a clinical psychiatrist who felt that X was capable of suicide because she had concluded that it was the best solution to the situation she was in. *Attorney General v. X*, [1992] 1 I.R. 1, at paras. 6-7. (Ir. S.C.) (opinion of C.J. Finlay).

160. X also raised alternative defenses that if her right to travel could be restricted it could only be done by act of Parliament and not simply by court order. An additional claim was made that travel to receive an abortion could not be restricted since that service was legal in other countries. *See id.*

161. "The conclusions which I have reached and which are shared by a majority of my colleagues on this court as to the true test to be applied to the reconciliation of the right to life of the unborn and the right to life of the mother identified and guaranteed under article 40.3.3 of the constitution and on the facts which have been established by the appellants to satisfy that test, make it unnecessary for the purpose of deciding this appeal to reach any conclusion on these further issues which were raised." *See id.* (opinion of Chief Justice Finlay).

162. "These issues having been fully argued and being matters of considerable public interest, it seems to me that I should express my views upon them, even though those views may fall, as a matter of law, within the category of being obiter dicta." *Id.* (opinion of C.J. Finlay).

rights that are fundamental, it becomes necessary to apply a priority of rights, and that in this case the right to life would trump the right to travel.¹⁶³ Addressing article 59 of the TEU, and its guarantees of free movement, C.J. Finlay noted that Member States are allowed to derogate from that principle on the basis of public policy, public security, or public health.¹⁶⁴ At this point the court noted that since neither they, nor the High Court below, had been asked to refer to the ECJ, and since European law was unnecessary to resolve the dispute before them, their opinion was final.¹⁶⁵

While the ratification of the Maastricht treaty, and public referenda that accompanied it, have ensured that these same facts no longer will present a problem to Europeanization,¹⁶⁶ the Irish Supreme Court's decision still may be instructive in attempting to determine the outer limits of European power.

In their attempt to avoid issues of European Law,¹⁶⁷ and ensure that national law controls national decision-making, the Irish Supreme court and the German Federal Constitutional Court have together provided a model for other EU Member States that seek to protect themselves from European encroachment on social policy and democratic control.

163. *Id.* C.J. Finlay also rejected X's alternative argument that travel should only be restricted by act of Parliament by looking to the historical power of the Court to protect and defend human life.

164. *See Id.* *See also* EC Treaty, *supra* note 7, at art. 59.

165. "It is consistent with the jurisprudence of the Court that there being a ground on which the case can be decided without reference to European law, but under Irish law only, that method should be employed." Attorney General v. X, [1992] 1 I.R. 1 (Ir. S.C.) (opinion of C.J. Finlay).

166. In a referendum held on November 25, 1992, Irish voters passed the Thirteenth and Fourteenth Amendments to the Irish Constitution. The Thirteenth Amendment, which was passed by 62.3% of voters, grants Irish citizens the right to travel to another EU Member State to receive an abortion. The Fourteenth Amendment, which passed by 60%, allows Irish citizens to receive and furnish information about abortion services available in other Member States, thereby overruling the Irish Supreme Court's decision in *Society for the Protection of Unborn Children v. Grogan*, [1989] IR 753, [1991] 3 CMLR 849. *See* Abigail-Mary E.W. Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385, 398-99 (1997). *See also* RAYMOND BYRNE & WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 1992 206-7 (1994).

167. The Irish Courts were aided in this by the litigants failure to even ask for a referral to the ECJ on the issues of European law that were presented. However, since the process of asking for, and being granted, an article 177 referral is a matter of national law the Irish courts could still have refused and decided the case on the basis of national law.

C. An Alternative Approach for National Courts that Wish to Protect National Identity and Fundamental Rights

While the European Court of Justice has held explicitly that national courts may not review community law to ensure its correspondence with national constitutional law,¹⁶⁸ the German Constitutional court has done so¹⁶⁹ and the Irish Supreme Court has hinted that it might.¹⁷⁰ Since the decision whether to refer questions to the ECJ is a matter of national law, it is for the national courts alone to decide when EU law is instrumental to the resolution of a case before that court. Therefore, a national court could ensure that fundamental rights are protected by seeking to resolve cases on the basis of national law and, thereby, consistent with the principle of subsidiarity, that decisions are to be made as close to the people as possible, enforce limits on European power.

Since the EU is a government of limited enumerated powers, national courts have a large role to play in enforcing those limits. Limiting the reach of EU law, through a process of fundamental rights protection in national courts, may serve as a vehicle to create a different kind of European Union, one that is more responsive to individual Europeans and less aggressive in its strive toward integration. Whether the nations of Europe actually want a kinder, gentler EU is a decision that would then be made due to the express political will of Europeans rather than being imposed on them without their knowledge or consent.

VI. CONCLUSION

This Note has attempted to argue that any changes in national law, as related to the fundamental rights of national citizens should be made by an institution that is democratically responsible to them and not imposed from above by a supra-national organization such as the European Union. Through a discussion of the EU's organizational structure, and the method by which disputes as to the meaning of European law are resolved, this Note has shown that the EU's law making insti-

168. See van Gend en Loos, *supra* note 27.

169. See Solange I, *supra* note 108; and Maastricht, *supra* note 14.

170. See SPUC v. Grogan, *supra* note 143; Attorney General v. X, [1992] 1 I.R. 1 (Ir. S.C.) (opinion of C.J. Finlay).

tutions are too far removed from the average citizen to alter, consonant with democratic and subsidiarity principles, the way that Europeans relate to one another.

While there are several avenues by which the EU can become more responsible to the citizens of the Member States, this Note has focused on the mechanism of national court challenges to EU law. In both the German and Irish cases, the national courts expressed a willingness to examine EU law within a framework of fundamental rights and guarantees established by the national constitution. This willingness to re-examine EU law in a national constitutional context could, if exported, lead to a more disciplined and democratically driven understanding of EU law.

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