JUDICIAL ENFORCEMENT OF FEDERALISM PRINCIPLES

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The United States Supreme Court is a constitutional court in many different respects. It enforces, and in so doing helps define, the legal relationship between federal and state law. It enforces, and in so doing helps define, the relationship between the branches of the federal government itself. It enforces, and, in so doing helps define, the scope of individual rights vis a vis the actions of government at all levels. And it enforces, and in so doing helps define, the parameters within which legislative acts of Congress may be declared incompatible with the Constitution.

It is the first among these "constitutional" aspects of the U.S. Supreme Court that I wish to address in this colloquium, and this for two reasons. First, judicial enforcement of federalism is a matter over which the U.S. Supreme Court has in recent years shown a greater degree of concern than at any time since the founding of the United States. Second, judicial enforcement of federalism is a matter on which U.S. experience cannot help but be instructive for the European Court of Justice and its role in the European Union, however distinctive from one

another the political environments in Europe and the United States may be. Time does not permit a full exploration of the reasons for the recent resurgence in the Supreme Court of interest in the principles of federalism and in the judicial role in their enforcement. However, the very fact of this resurgence tends to confirm both the importance of the subject of this colloquium and the usefulness of considering what the recent American judicial experience in this arena has been.

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In these remarks, I shall deal first, though very briefly, with the elements of the U.S. constitutional text that pertain to the relationship between federal and state exercises of legislative power and to the federal judiciary's role in enforcing constitutional principles that would preserve that relationship. I then examine more thoroughly and systematically the specific techniques with which the Supreme Court has experimented over these past 25 years in making federalism principles meaningful and their judicial enforcement effective. I do not mean to suggest that the Court was not attentive to questions of federalism during the long period between the country's founding and the 1970's; that is far from the case. But the federalism jurisprudence of the Supreme Court over the last 25 years has been particularly rich in exploring the various strategies available to courts seeking to enforce principles of federalism, and in demonstrating what it is that makes each and every one of those strategies at least somewhat problematic.

A. The Constitutional Design

Like any constitutional court venturing into problems of federalism, the Supreme Court

must show respect for the terms of the Constitution, such as they are, that bear on those problems. In fact, the text of the U.S. Constitution is fairly limited in respect both to the governing principles of legislative federalism and to the federal judicial role in enforcing those principles.

First, the Constitution adopts the familiar approach of enumerating the subject matters on which Congress, as repository of the federal legislative power, is permitted to legislate.[1] Admittedly, certain of the enumerated powers are phrased in very broad terms; regulation of interstate and foreign commerce comes to mind as the foremost example.[2] Moreover, the Constitution contains a "necessary and proper clause,"[3] giving Congress what might be considered "implied powers" ancillary to those expressly granted. Still, the federal legislative powers are nevertheless enumerated.

Second, the powers of Congress, though subject to the principle of enumeration, were fortified from the outset by the Supremacy Clause, a constitutional provision rendering federal law superior in rank and force to state law in the event of conflict between them.[4] That clause has been understood as admonishing the states, including the state courts, to enforce federal law

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1 U.S. Constitution, art. 1., sec. 8.

2 U.S. Constitution, art. 1, sec. 8, cl. 3.

3 U.S. Constitution, art. 1, sec. 8, cl. 18.

4 U.S. Constitution, art. 6, cl. 2. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

in preference to state law in such situations.[5]

Third, the Constitution, as amended by the Bill of Rights, confirms what had probably been assumed from the start, namely that the enumeration of federal legislative powers implies that all powers not expressly granted to Congress by the Constitution are reserved to the States and the people. This is the force of the Tenth Amendment.[6]

Only two subsequent constitutional amendments affect federalism principles directly. These are the Eleventh Amendment, which shields the States from suit in federal court without their consent,[7] and the Fourteenth Amendment, which expressly gives Congress the power to enact legislation to "enforce" the guarantees of due process and equal protection of the laws that this amendment gave persons against States and their political subdivisions.[8]

No less significant than the Constitution's express provisions on federalism are its

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[5] See, e.g., McDermott v. Wisconsin, 228 U.S. 115, 132 (1913).

[6] The 10th Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[7] The 11th Amendment reads: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[8] The 14th Amendment, in pertinent part, reads:

> Sec. 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> ...
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> Sec. 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

silences on the subject. Thus, the constitutional text says nothing about whether and to what extent Congress may use its legislative power to preempt state law on matters of shared competence (that is to say, to "occupy" the field so as even to bar state law measures that are not in themselves inconsistent with federal law). Nor does it address the question of whether and to what extent Congress should refrain from exercising its legislative powers, even when it has the apparent constitutional authority to exercise it. In other words, the constitutional text does not appear to subject the exercise of federal power to some overriding constitutional requirement of necessity.[9]

Neither is the constitutional text particularly informative about the power and role of the federal courts in reviewing the constitutionality of federal legislation, whether in general or with specific reference to such principles of federalism as supremacy, the enumeration of federal powers, or the reservation of non-conferred powers to the States. In other words, the Constitution is, if anything, less explicit about the role of the federal judiciary in policing principles of legislative federalism than about the content of those principles themselves.[10]

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[9] The comparable Community law notion is, of course, the principle of subsidiarity, discussed at *infra* note 28, and accompanying text.

[10] Article III of the Constitution, governing the judicial power, provides:

> Sec. 1. 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 ....
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> Sec. 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;... to 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; between Citizens of the same State claiming lands under the Grants of

Even with this quite limited textual support, there never was very much doubt that the Supreme Court would enforce certain principles of the Constitution, including the separation of powers and the protection of constitutionally protected individual rights. Prominent among the principles that the Court was prepared to enforce was the principle of supremacy of federal over state law.[11] The Court went further in fact, by enforcing the notion that, even in the absence of a specific federal statute, the States were barred from using their legislative powers in such a way as unduly to interfere with interstate or foreign commerce.[12] Thus was established what has come to be known as the Court's "dormant" commerce clause jurisprudence, a jurisprudence that has been reasonably, though not perfectly, stable and consistent over the years[13].

B. Techniques for the Judicial Enforcement of Federalism Principles

But what about enforcement of the federalism limitations *on the federal government itself,* rather than on the states? The Supreme court has been much less sure of itself, and

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different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Sec. 3. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the supreme Court shall have original jurisdiction. In all other cases before mentioned, 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.

[11] See note 4 *supra*.

[12] See, e.g., Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557 (1886).

[13] See D. Regan, How to Think about the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*, 94 Mich. L. Rev. 554 (1995); D. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986).

accordingly much less stable and consistent in its jurisprudence. Of this there is no better illustration than the past 25 years of Supreme Court case law to which this article is chiefly addressed.

With the benefit of hindsight, we can establish a simple typology of the techniques that the Court has experimented with in recent years in seeking to enforce the Constitution's federalism principles. This is not to suggest that the Court has ever advanced any typology as such, for it has not. As one might have expected, the Court has proceeded in an empirical fashion; the typology presented in this article is merely an academic account of the Court's efforts.

1. A first and quite logical technique for the judicial enforcement of federalism principles consists of taking the federal legislative powers as enumerated in the Constitution and essentially defining them, in the sense of restrictively delineating their scope. There are few who would deny that the Supreme Court has the institutional right to define the meaning of the federal government's enumerated legislative powers, such as "the regulation of interstate commerce" -- which does not of course mean that there will not be disagreement over whether in any particular instance the Court has given too broad or too narrow an interpretation to the constitutional language in question. This function can readily be justified by the interest in ensuring that Congress and other federal authorities do not overstep the bounds of the constitutional grant of authority under which they act.

A notable instance of this technique is the Court's recent opinion in *United States v. Lopez*,[14] to the effect that in order to justify the enactment of federal legislation under the

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[14] 514 U.S. 549 (1995).

interstate commerce clause, Congress must conclude, and be able plausibly to conclude, that the needs of interstate commerce necessitate the legislation in question. Debate over this decision revolved precisely around the question whether the Court's criteria for determining the genuineness of the involvement of interstate commerce was an appropriate one, and whether the Court showed sufficient deference to Congress in determining whether those criteria were met.

A less well-known example of judicial "definition" of federal legislative competences is the Court's more recent decision in the case of *City of Boerne v. Flores*.[15] In this case, the constitutional language being interpreted was not the interstate commerce clause, as in *Lopez*, but rather the language of the 14th Amendment to the effect that Congress may enact such legislation as is necessary to "enforce" the amendment's guarantees of due process and equal protection of laws against the states.[16] The statute under challenge was the Religious Freedom Restoration Act (RFRA) of 1993, which was enacted in effect to overrule a previous Supreme Court ruling that permitted a state to criminalize the use of a drug, and to deny unemployment benefits to a person who became jobless on account of using that drug as a matter of religious observance. The RFRA, which Congress enacted pursuant to the 14th Amendment's enforcement clause, specifically prohibited the unnecessary burdening of the freedom of religion by requiring states to prove a compelling state interest in such burdening as well as an absence of any less drastic means of achieving its objectives. When the Archbishop of San Antonio invoked the RFRA to challenge the denial of a building permit to a church on historic preservation grounds, the Supreme Court took the occasion to declare that Congress in enacting the RFRA had exceeded

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15 521 U.S. 507 (1997).

16 See note 8 *supra*.

the bounds of the 14th Amendment's enforcement clause. According to the Court, a federal statute fails to "enforce" the 14th Amendment when it seeks to legislate rather than effectuate the meaning of the Amendment. According to the Court, in order properly to enforce the 14th Amendment, a statute must seek either to remedy past violations or to prevent future violations. Indeed, even if a statute is meant to remedy past violations or prevent future ones, it must do so in a "proportionate" manner; otherwise it again must be regarded as prescriptive rather than remedial.

It is too early to tell whether these two cases indicate a general trend on the part of the Court toward narrowly defining the meaning of the legislative powers conferred on Congress by the Constitution. In any event, the cases themselves represent a narrowing of two of the most significant bases of federal legislative authority to be found in the Constitution: the interstate commerce clause and the enforcement provision of the 14th Amendment.

2. A second judicial technique for enforcing basic federalism principles in favor of the states consists of carving out certain privileged domains in which Congress is not permitted to legislate even when exercising one or more of its enumerated legislative powers. This is a technique that the Court first employed in the well-known case of *National Leagues of Cities v. Usery*.[17] The Court took this challenge to the application of federal minimum wage standards to state and local public officials as an opportunity to rule that certain matters "traditionally" subject to state governance-- such as the one at hand -- lay beyond the proper scope of Congressional regulation under the 10th Amendment because subjecting them to federal regulation would hamper the states either in their very existence or in their performance of "essential" functions.

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[17] 426 U.S. 833 (1976).

This 5-4 ruling invited lower courts in effect to identify those areas in which the states and their subdivisions were constitutionally sheltered, in the interest of a viable federal system, from the application of otherwise valid Congressional enactments.

The *National League of Cities* jurisprudence was not to be long-lasting. In an equally divided opinion in the case of *Garcia v. San Antonio Housing Authority*,[18] the Court subsequently overruled *National League of Cities* as an improper and ultimately impractical attempt to turn the federal judiciary into a protector of state and local governments prerogatives that it was the responsibility of the states themselves to protect through their participation in the federal legislative process. In all likelihood, the Court despaired of its being able to identify with certainty or conviction the "traditional" or "essential" functions of state government with which the 10th Amendment could be said to forbid Congress to interfere.

Although it is not unimaginable that a new majority of the Court might eventually re-embrace the notion that, under the American system of "dual sovereignty," certain state and local activities are immune from regulation at the federal level, there is reason to suppose that the Court would prefer to develop some new approach to safeguarding state prerogatives rather than resurrect the ill-defined tests of state sovereignty associated with *National League of Cities*.

3. If there is one technique to which the Supreme Court has shown very little attraction in this period of experimentation, it is one that would entail reviewing the "necessity" of the specific federal legislative intervention under challenge for purposes of achieving Congress' otherwise legitimate objectives. Under such an approach, even when Congress is merely exercising one or more of its enumerated powers, the federal courts might review whether

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[18] 469 U.S. 528 (1985).

federal intervention was necessary at all in order to achieve a legitimate federal objective; they might also review whether the intensity of the specific form of federal intervention was justified under the circumstances.

These avenues of inquiry -- plainly associated with the "subsidiarity"[19] and "proportionality" [20]doctrines of European Community law -- are not ones the Supreme Court is particularly eager to travel or to have the lower federal courts travel. For example, there is little to suggest that the federal judiciary will review a Congressional determination to "preempt" state law, in the narrow sense I have used that term earlier. Similarly, the Court has not even purported to require that Congress demonstrate the ineffectiveness of state and local action to achieve certain objectives before enacting federal legislation in pursuit of those objectives, as the doctrine of subsidiarity would appear to require.

Limiting Congress' right to exercise its legislative powers preemptively or its right to determine that action at the federal level is more efficient than action at the state or local level is considered as necessarily entailing a "second-guessing" of the need for federal legislation or of a specific piece of federal legislation in particular. These are widely regarded as policy judgments that the courts lack the political legitimacy to decide, and that are best left to the federal legislative process and to the political participation in that process enjoyed by those who represent the states and their political subdivisions.

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[19] EC Treaty, art. 3b, clause 2: "In areas which do not fall within its exclusive competence, the Community shall take action ... only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

[20] EC Treaty, art. 3b, clause 3: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

4. Each of the three techniques that I have surveyed above has a certain logic. It is reasonable to suppose that the federal courts might choose to limit congressional authority by giving a narrow interpretation to specific grants of federal legislative power, or by carving "exceptions" to the broad scope of federal legislative authority for certain activities essential to the vitality of the states and their political subdivisions, or by examining (according to one or another standard of review) whether federal intervention of any kind, or of the specific kind in question, was truly necessary under the circumstances. Yet, the technique that appears to have won greatest favor in the current Court is none of these. Instead, the Court has explored the possibility of placing certain limitations on the kind of relationship in which the federal government will be allowed to place the states, irrespective of the subject matter of the federal intervention. Such rules may be described as limiting not the substance of federal legislative norms, but rather the "situation" by which, or the "relationship" with which, those norms come to be implemented or enforced.

The Constitution itself provides a good illustration of such a "situational" or "relational" constraint. The 11th Amendment, as noted above,[21] provides that the states are not to be sued in federal court without their consent in federal court. Congress presumably cannot authorize such suits even when enacting legislation that, from a substantive point of view, lies clearly within its enumerated powers. Because the 11th Amendment prohibition is inscribed in the Constitution itself, as amended, the Supreme Court has not hesitated to define and enforce it. In fact, the Court has recently been very active in strengthening the 11th Amendment immunity of the states. For example, it effectively ruled in one recent case that Congress has no authority to "abrogate"

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[21] See note 7 *supra*, and accompanying text.

the 11th Amendment by passing legislation under the interstate commerce clause that expressly subjects states to litigation in the federal courts.[22] The only possibility for abrogation that this decision leaves open is by means of statutes enacted pursuant to a constitutional amendment that postdates the 11th Amendment itself (and of which the 14th Amendment would be the most likely example). The Court ruled in a still more recent decision that the only situation in which 11th Amendment immunity can be avoided through a suit against state officials in their individual capacity is when a suit is brought, not for damages or other remedial relief for past injury, but rather for purely prospective relief in contemplation of future violations.[23]

Since federal court litigation against the states describes a very narrow situation, the 11th Amendment brings a very narrow limitation to the federal legislative power. However, the Supreme Court has by recent case law produced a much broader "situational" or "relational" limitation on the federal legislative power. First in the case of *New York v. United States*,[24] and later in the case of *Printz v. United States*,[25] the Court placed major restrictions on the situation in which Congress could constitutionally cast the states. In *New York*, the Court in effect held that Congress may not compel the states to enact legislation to carry out a federally prescribed statutory regime; in that case the federal statute require the states to enact legislation either providing for disposal of all waste by a certain date or assuming all liability for that waste as its owner. According to the Supreme Court, when Congress goes beyond inducing the states to

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22 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

23 Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).

24 505 U.S. 144 (1992).

25 521 U.S. 98 (1997).

legislate in a certain way (for example, by offering federal financial incentives for them to do so), and actually compels them to legislate in that fashion, it impermissibly "commandeers" the legislative apparatus of the states in violation of the 10th Amendment and the principle of state autonomy that the Amendment embraces. This, according to the Court, is not meant to undermine the supremacy of federal law. It means only that, if the states do not choose voluntarily to enact legislation in furtherance of federal policy (or cannot be induced to do so through federal financial incentives), then the federal government must implement that policy through its own means (be they personnel, materiel, or funds), bearing not only the costs entailed in doing so, but also the underlying political responsibility to the national electorate. Fortunately, the federal revenue-raising power is such as to make this possible, provided the federal policy in question has sufficient political support.

In the *Printz* case, the Court extended its prohibition to the commandeering of the states' administrative functions. It held that Congress could not compel the states to employ state officials in the implementation of federal policy (in the case at hand, the conduct by local sheriffs of background checks on purchasers of handguns); according to the Court, doing so amounted to a forbidden "conscription" of state officials. Once again, where states are unwilling, and cannot be induced, to lend their administrative resources to the enforcement of federal policy, this jurisprudence would require the federal government to assure the necessary enforcement.

The theory behind the "anti-commandeering" principle, according to the court, is that when the states are required to devote their legislative and administrative resources to the effectuation of federally prescribed policies, they lose the opportunity to devote those resources to the effectuation of policies of their own making -- policies that may more accurately reflect the

political preferences of the state electorates to whom they are democratically accountable. Under this view, federal commandeering is inimical to the principle of democracy, since U.S. democracy requires a measure of policymaking freedom not only at the federal level, but at the state and local level as well.

The federalism principle laid down in *New York v. United States* and *Printz v. United States* presents a certain non-theoretical advantage as well. Whether or not it is correct as a historical or a policy matter, the principle announced in these cases calls upon the courts to make a reasonably objective assessment of the "relationship" between federal law and the states. It is undeniably easier for federal courts to recognize "commandeering" or "conscription," when they see it, than to determine whether a piece of federal legislation "truly" implicates interstate commerce, or whether an activity represents a sufficiently "traditional" or "essential" state function to immunize it from federal regulation, or whether the federal intervention is "necessary" and "proportionate." It is also a less overtly political exercise.

C. Enforcing Federalism Principles in the European Union

What bearing, if any, does this survey of the Supreme Court's enforcement of federalism principles have for the European Court of Justice and the European Union? It is interesting, and possibly even useful, to consider the suitability of each of these enforcement techniques in the European context.

Let us begin with the technique of restrictively defining Community competences. The Court of Justice has unquestioned authority to pursue such an approach and, some might even argue, a constitutional obligation to do so. Saying what the constitution means is undoubtedly a

proper judicial function of a constitutional court; it is especially proper in a "constitution" such as the EC Treaty which abides by the principle of enumerated powers and expresses those powers through elaborate verbal formulations.

But though the Court of Justice would be entirely justified in closely interpreting the terms of the EC Treaty so as to limit the institutions' sphere of activity, it simply has not done so. On the contrary, the Court has never to my knowledge taken the opportunity to give a restrictive definition to the treaty provisions that authorize Community action or to insist that the Community measures actually taken fit squarely within such a definition. Even as the Court moves into a generally less activist era, there is very little evidence of an inclination on its part to deploy this judicial strategy. It seems to me doubtful that the Court will change course in this respect, nor would I encourage it to do so.

As for the Court carving out certain "core" subjects on which the Community institutions may not legislate, even when acting pursuant to an enumerated legislative power, the prospects are dimmer still. It is not simply that the exercise would be arbitrary and uncertain, as the U.S. Supreme Court now seems to believe.[26] It is also that the EC Treaty, unlike the U.S. Constitution, goes a long way by its very own terms in telling us what those "core" aspects of state sovereignty are. Among the things the intergovernmental conferences that produced the Treaty and its amendments clearly do is to refrain from extending Community competence to certain matters or, alternatively, to confer competence on the Community over a matter, but subject its exercise to procedural rules, like unanimous voting in the Council, which help ensure that the matter remains a "core" aspect of state sovereignty.

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[26] See note 18 *supra*, and accompanying text.

In other words, a judicial carving out of state sovereignty exceptions to the Community's legislative power under the Treaty is especially misplaced when the Treaty by its very nature expressly addresses and embodies state sovereignty concerns. The very rich "legal basis" case law of the Court of Justice[27] rests on the premise that when Member States consider state sovereignty concerns important enough, they include appropriate voting formula language in the relevant treaty articles. The Court accordingly shows appropriate respect for state sovereignty concerns simply by enforcing the requirement that for each Community law measure the correct legal basis in the Treaty must be used and that the procedures and voting formulas associated with that legal basis must be observed.

Of the various judicial techniques for enforcing federalism principles in the Community, it is the notion of subsidiarity[28] that appears to hold the greatest promise. Through this principle, the Court might review whether enactment of a legislative measure at the Community level is necessary in light of the Member States' capacity to act, and could strike down a measure on the ground that, while the institutions were merely exercising their enumerated powers, they violated the principle of subsidiarity in the course of doing so.

If we analogize subsidiarity to the principle of proportionality, we might well conclude that the Court of Justice will conduct judicial review of this nature, since the Court has in fact used a general principle of proportionality as a basis for striking down Community legislation.[29]

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[27] See G. Bermann, R. Goebel. W. Davey & E. Fox, Cases and Materials on European Community Law 85-89 (West Pub. 1993, and 1998 supp.), and cases cited therein.

[28] See note 9, 19 *supra*.

[29] See G. Bermann, R. Goebel. W. Davey & E. Fox, Cases and Materials on European Community Law 129-33 (West Pub. 1993, and 1998 supp.), and cases cited therein.

But there is reason to doubt that the Court will enforce subsidiarity as energetically as it has enforced proportionality. The Council, which after all is composed of representatives of the Member States themselves, should be in an excellent position to determine whether action at the Member State level would adequately achieve the Community's objectives. It is difficult to see why, if the Member States themselves act on the belief that Community legislation is necessary, the Court should interfere with that judgment on the ground that it believes otherwise.

Early indications from the Court suggest that it will not in fact be eager to review the necessity of action at the Community level rather than the Member State level. In neither of the two relevant judgments rendered thus far -- *United Kingdom v. Council*[30] and *Germany v. Parliament and Council*[31] -- did the Court require more than a statement of belief by the Council (or, as the case may be, the Council and Parliament) that Community-level action was required. Moreover, when it came to that question, the Court appeared ready to accept as a sufficient statement of reasons for the view that the requirement of subsidiarity was satisfied a conclusory statement that Community-level action was needed. It is questionable whether the Court is requiring enough by way of statement of reasons on the question of subsidiarity, but it is also unrealistic to suppose that it will ever be prepared to go very deeply into the merits of the subsidiarity question.

This brings me to the question whether there is any prospect that the Court of Justice will develop techniques of the "situational" or "relational" kind I described above in connection with

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30 Case C-84/94 (Working time directive), [1996] ECR I-5793.

31 Case C-233/94 (Deposit guarantee schemes), [1997] ECR I-2405.

the Supreme Court's 11th Amendment and "anti-commandeering" jurisprudence.[32] I believe we can say with some confidence that these two particular "relational" principles, as such, stand very little chance of acceptance by the Court of Justice. As for the 11th Amendment, the EC Treaty -- far from prohibiting actions Member States in the Community courts -- specifically authorizes them.[33] Indeed, the Court has taken the perhaps even more far-reaching step of requiring that the Member States courts open up their own doors to private liability actions against the States for their Community law infractions.[34] As for "commandeering" of the Member States, that is an apt description of the very way in which the Community works, and is supposed to work on a daily basis.[35] The Court's own Article 169 case law clearly establishes that neither local political opposition to Community policy within a Member State nor the alleged inadequacy of the State's resources (financial, administrative or otherwise) constitutes an adequate excuse for non-compliance with Community law obligations.[36] In a sense, commandeering is a Community law way of life.

This does not mean that there are no other "situational" or "relational" prohibitions that

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[32] See notes 21-25 *supra*, and accompanying text.

[33] EC Treaty, arts. 169, 170.

[34] Francovich v. Italy, Cases C-6, 9/90, [1991] ECR 5357; Brasserie du Pecheur SA v. Germany, and The Queen v. Secretary of State for Transport ex parte Factortame Ltd., Joined Cases C-46, 48, [1996] ECR I-1029.

[35] As to the form of Community law known as the "directive," the Treaty provides that a directive "shall be binding, as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." EC Treaty, art. 189.

[36] See G. Bermann, R. Goebel. W. Davey & E. Fox, Cases and Materials on European Community Law 296-309 (West Pub. 1993, and 1998 supp.), and cases cited therein.

the Court of Justice could possibly devise to help ensure that the Member States retain their vitality and a certain degree of political freedom. But it is not at all obvious what those prohibitions might be. Ultimately, I doubt that the Court of Justice will venture very far down the road to devising prohibitions of this sort. The Supreme Court has been harshly criticized for its "anti-commandeering" jurisprudence, precisely because it is accused of having "invented" it.[37] Every indication we have suggests that the Member States will be expected to protect themselves rather than allowed to expect that the Court will protect them. This the Member States can do by a combination of careful negotiation and drafting at the intergovernmental conferences, on the one hand, and carefully crafted legislation on the basis of the Treaty, on the other. Obviously, the first of these is easier to achieve -- both by virtue of the way intergovernmental conferences are conducted and the unanimity rule to which Treaty amendments are subjected. But with the rise of qualified majority voting in the Community legislative process, there is a real risk that that process will not result in protecting the "core" of state sovereignty within the Community, whatever that core may consist of. This, however, is just another part of the political price of supranational regional integration.

Ultimately, we should expect the Court of Justice to look to the political process as the Member States' best hope. If that is so, then we can anticipate little by way of "situational" or "relational" prohibitions of the Court's own making, just as we can expect very little carving of exceptions to the Community's enumerated competences in the interest of Member State sovereignty. By the same token, neither is a narrow judicial defining of those competences to be

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[37] See e.g. S. Prakash, Field Office Federalism, 79 Va. L. Rev. 1957 (1993); R. Levy, New York v. United States: An Essay on the Uses and Misuses of Precedent, History and Policy in Determining the Scope of Federal Power, 41 Kan. L. Rev. 493 (1993).

expected. There remains, then, mostly the hope that the Court will take the requirement of a subsidiarity statement of reasons more seriously than it has thus far done, and above all show a continuing commitment to the principle that the institutions must use the correct legal basis when they go about legislating at the Community level. If that is so, it will be all the more important that the Treaty continue to be drafted in terms that the Member States are willing to live by, and that the institutions and Member States themselves take those terms seriously.