

Peter Bußjäger
Anna Gamper
(editors)

**The Homogeneity of Democracy,
Rights and the Rule of Law in
Federal or Confederal Systems**



Institut für Föderalismus

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The Homogeneity of Democracy, Rights and the Rule of Law in Federal or Confederal Systems

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Introduction

This volume contains most of the papers presented at the annual meeting of the International Association of Centres for Federal Studies (IACFS) and of the International Political Science Association (IPSA) which took place from 13 to 16 November 2002 at Innsbruck University.

The Institut für Föderalismus hosted this joint conference which was co-organised by Prof. Dr. Peter Pernthaler on behalf of the Institut für öffentliches Recht, Finanzrecht und Politikwissenschaft, University of Innsbruck.

The organisers were fortunate in attracting a very distinguished group of about fifty participants from five continents to discuss the theme "The Homogeneity of Democracy, Rights, and the Rule of Law in Federal and Confederal Systems". Papers and discussions included modernization and nationalism, homogeneity by bottom-up federalism, the theory of autonomy, subnational constitutional "space", the rule of law and secession, theory and practice in federalism, compounded federal democracy, homogeneity and democracy, federating nation states, and national identity and cultural diversity. Each paper presentation was met with considerable interest and lively debate.

This publication reflects the academic excellence of a fruitful conference. It is also intended as a contribution to comparative research on federalism by making the papers available on a broader basis.

We are grateful to our contributors who met the very tight deadlines we set and to the staff at both institutes who helped us with the organisation of the conference and the preparation of this book. We are particularly indebted to Dr. Anna Gamper who, apart from the paper presentation she gave, was mainly responsible for coordinating the conference and for editing this book.

Finally, we would like to thank the Centre International de Formation Européenne (CIFE, Nice) for its generous financial assistance.

Peter Bußjäger

John Kincaid

Peter Pernthaler

Innsbruck, June 2003

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Smashing the Twin Relics of Barbarism - Slavery and Polygamy: Rejecting Territorial Multiculturalism in American Federalism

We are all now, it is often said, multiculturalists, by which, presumably, we mean that humanity must respect and accommodate the world's diverse cultures. One factor fostering federalism since World War II is federalism's ostensibly benign ability to achieve unity while accommodating diversity, principally territorially based cultural diversity rooted in nationality, race, language, and/or religion. Yet, this association of federalism with multiculturalism is paradoxical because modern federalism, as it originated in the United States of America in the 1780s, did not aim to preserve territorial multiculturalism. On the contrary, American federalism has waged war on such multiculturalism in the name of individualism for two centuries. The association of federalism with multiculturalism is paradoxical, as well, because most Western leaders and many non-Western leaders had long assumed that modernization, urbanization, and industrialization would displace traditional cultures with more secular, individualistic societies. Yet, quite often, reactions against modernization have rejuvenated or resurrected traditional cultures. Furthermore, certain practices of many traditional cultures deeply offend modern norms of human rights; yet, federalism is often held up as the mode of governance that accommodates diversity encapsulated in communal autonomy.

Consequently, many federal polities are struggling to reconcile modern federalism with pre-modern diversity, and some of these federations contain powerful elements of anti-modernism that resist federal intervention. Such resistance to intervention has been, moreover, substantially legitimized and virtually elevated to a human right by certain ideologies of multiculturalism, by critiques of cultural imperialism – especially of the Western universalist form that underlay the invention of modern federalism – by the internationally recognized right of self-determination of peoples, and by the very constitutional principles of federal polities that promise self-governing self-determination.

What, then, is a federal government to do if such self-determination preserves or gives rise to anti-democratic, rights-repressing left-wing, right-wing, or no-wing cultural regimes in one of more of its constituent

polities? When, and on what moral or constitutional grounds, is ameliorative federal intervention legitimate, and what military, political, judicial, administrative, economic, and social processes are likely to be both the most benign and most effective means of intervention?

These questions have certainly been confronted by the United States, most critically in the 1860s when cultural conflict produced a civil war that nearly destroyed the union. Americans confronted these questions forcefully again a century later during the civil rights revolution of the 1960s, which provoked massive federal interventions into the historically self-governing affairs of the constituent states and transformed the federal system. The United States, therefore, has not been immune from the diversity conflicts characteristic of most federations; however, what distinguishes the United States is the extent to which the federal Constitution is premised on liberal individualism and is thus hostile to institutionalizations of territorial multiculturalism.

This hostility was reflected in the founding of the United States, in the mid-nineteenth-century struggle against what the Republican Party Platform of 1856 called “those twin relics of barbarism – Polygamy, and Slavery,” and in the mid-twentieth-century struggle against both *de jure* and *de facto* governmental legitimation of racial segregation. These latter struggles were often termed irrepressible, partly because they were virtually foreordained at the founding.

The U.S. Constitution as a Force for Individualistic Modernization

No where in the U.S. Constitution is there a hint of any intent to accommodate multiculturalism along territorial lines. On the contrary, the federal Constitution is hostile to such diversity. The Constitution was, from the outset, a force for modernization premised on liberal individualism and voluntary communitarianism, and was dedicated to protecting individual liberty, enhancing commercial prosperity, and ensuring national security. Thus, the federal Constitution became over time an instrument to legitimize federal intervention into the affairs of states and territories that established, or were about to establish, regimes deemed to be pre-modern or anti-modern. Such regimes have no constitutional peg on which to hang legitimacy – a reality that became ever more apparent to southerners during the decades preceding the Civil War (1861-65) and that required southerners, such as John C. Calhoun, to articulate the doctrine of the concurrent majority, redefine the Constitution as a compact among the states, deny the existence of an

American people, and ultimately assert secession as a matter of rightful self-determination and relief from oppression.

The southern slavocracy was the monstrous territorial expression of multiculturalism at the time of the founding, and this expression – commonly known as the southern way of life – was politically powerful enough to compel constitutional accommodation as the price of union. The southern states would not have joined the union without slavery, and the northern states were not in a military or political position to bring the southern states into the union without slavery. Furthermore, key leaders of the Revolution and of Federalism were southern slaveholders, such as George Washington, Thomas Jefferson, and James Madison. However, very importantly for the framing of the U.S. Constitution, these southern champions of federal union acknowledged that slavery was a “peculiar institution” that contradicted the principles of the Declaration of Independence and the intended modernity of the American polity.

Consequently, the framers of the U.S. Constitution declined to legitimize slavery and the southern way of life. Instead, in the absence of an ability to abolish slavery, the framers oriented the federal Constitution toward slavery’s extinction and refused to use the words “slave” or “slavery” in the document. As Madison argued at the Constitutional Convention in 1787, it would be “wrong to admit in the Constitution the idea that there could be property in men.”² The key extinction provision was the importation clause (Art. I, Sec. 9). Although the clause prohibited the federal Congress from outlawing the slave trade until 1808 (a necessary concession to the South), it was widely believed that slavery was fated for extinction by the forces of modern commerce, especially those to be set in motion by the new Constitution, and that a ban on slave trading would speed up that extinction. Therefore, the framers specifically voted not to legalize the slave trade between 1787 and 1808, and the Constitution permitted Congress to levy a tax or duty “not exceeding ten dollars for each Person” imported as a slave.

This compromise was far from desirable to slavery’s opponents, but as Madison suggested in *Federalist* 38, the new Constitution, like that of Solon, gave to the people not “the government best suited to their happiness, but most tolerable to their prejudices,”³ something true of every constitution. The new Constitution at least permitted Congress to ban the slave trade within 21 years; the old Articles of Confederation permitted slave trading forever. “It were doubtless to be wished,” wrote Madison in *Federalist* 42, “that the power of prohibiting the importation of slaves, had not been postponed until the year 1808.”⁴ However:

It ought to be considered as a great point in favor of humanity, that a period of twenty years may terminate for ever within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal Government...⁵

Indeed, a federal law forbidding the slave trade went into effect on January 1, 1808, making the United States the first slave-trading nation to prohibit that trade.

This constitutional extinction plan was thwarted, however, by the invention of the cotton gin in 1793, just five years after the establishment of the new federal government. Eli Whitney's technological innovation rejuvenated cotton and slavery as economic assets for the South and its western frontier. The ban on slave trading encouraged the smuggling and breeding of slaves. Opponents of slavery became increasingly anguished about the vitality of slavery and sought numerous ways to end it, including a proposal by Madison that the federal government use revenues from western land sales to purchase the manumission of slaves and permit them to return home to Africa. Congress did not adopt the proposal, probably wisely so, because the plan would likely have increased the slave population by providing financial incentives for entrepreneurs to breed slaves solely for freedom sales to the federal government. As a result, northern states increasingly refused to comply with the Constitution's fugitive-slave clause (Art. IV, Sec. 2), and the abolitionist movement gained considerable strength, until the federal victory in the Civil War finally brought an end to slavery, though not to the southern way of life.

That life was not brought to an end until the 1960s. The grounds for the federal assault on the southern way of life in the 1960s lay originally in the pregnant words "person" and "persons" used in every reference to slavery in the Constitution. These words were not cosmetic or euphemistic; they signaled the Constitution's rejection of slavery and expectation of its extinction. Even the Constitution's now infamous reference to slaves as three-fifths persons (Art. I, Sec. 2) for purposes of federal taxation and state representation in the U.S. House of Representatives was, from the perspective of 1787, a remarkable concession by southerners, who regarded slaves as mere property. This three-fifths compromise, moreover, was solely confined to these two purposes; every other reference to slaves in the Constitution deems them to be full persons.

Consequently, the nation was quickly plunged into civil war after the U.S. Supreme Court in its most disastrous decision, *Dred Scott v. Sandford* (1857), opined that the federal Constitution pointed not forward to the extinction of slavery but backward to the perpetuation of slavery by states and territories exercising constitutionally guaranteed rights of self-government. Equally outrageous to opponents of slavery was Chief Justice Roger Taney's opinion "that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted" the Declaration of Independence. Taney was seen as perverting the Declaration, which abolitionists, the new Republican party, Abraham Lincoln, and even many southerners had recently elevated to the status of a sacred document that defined the intentions of the founders and the purposes of the federal union. Where many new democracies today incorporate international human-rights covenants into their constitution, progressive forces for modernization in mid-nineteenth-century America accomplished the *de facto* incorporation of the Declaration as the higher law of the federal Constitution.

The post-Civil War Fourteenth Amendment to the U.S. Constitution, ratified in 1868, therefore, pointedly begins with the words "All persons born or naturalized in the United States" and ends with the words "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." Proponents of the Fourteenth Amendment referred to it as "the new covenant," which implicitly incorporated the Declaration into the federal Constitution and completed the work that could not be completed by the founders in 1787. In turn, the 12-year period following the Civil War was, and still is, called Reconstruction. Moreover, all three Reconstruction amendments – XIII (abolishing slavery), XIV, and XV (prohibiting denial of the suffrage "on account of race, color, or previous condition of servitude") – authorize Congress to enforce these amendments against the states.

Otherwise, the federal Constitution does not concern itself with multiculturalism in any form, for several reasons. For one, American federalism did not emerge from a pre-modern society or in revolt against feudalism, nor was it imposed on territorially entrenched pre-modern societies. Even the southern way of life was not thoroughly pre-modern; it was principally anti-modern in its adherence to slavery, but that adherence was ambivalent until the invention of the cotton gin and the rise of abolitionism drove southerners ever deeper into cultural justifications of slavery, racism, and their way of life. Second, American federalism is a product of early modernity. The founders reinvented federalism for modernity in the context of a religious belief system molded

by Reformed Protestantism which, with its covenant or federal theology, helped usher in modernity, and in the context of a secular political thought system based on often productive tensions between Lockean liberal individualism and Machiavellian civic republicanism. Third, the singular innovation in federalism wrought by the new Constitution was, as Alexander Hamilton argued in *Federalist* 15, the authority of the federal government to legislate for individuals and, thus, to regulate interstate and foreign commerce, levy taxes, and conscript men into the military – all three of which became the most powerful tools of modernization and centralization in the hands of the federal government. As such, the new Constitution overthrew what Hamilton, Madison, and other founders regarded as the preeminently pre-modern and multicultural form of federalism, namely, confederation, which Hamilton termed “an ‘assemblage of societies’” (*Federalist* 9)⁶ that invariably seems “to cherish with blind devotion the political monster of an *imperium in imperio*” (*Federalist* 15).⁷ The *Federalist* founders would have none of this, and Madison even sought to invest the federal Congress with constitutional authority to veto objectionable laws enacted by state legislatures.

The U.S. Constitution, therefore, did not envision a federation of cultural communities vested with territorial rights or sovereignty but, instead, a strong and perpetual union of sovereign constituent polities constituted and reconstituted by free and mobile individuals on culturally neutral territories for purposes of self-government to address local needs, satisfy local majoritarian preferences, and hold the potential tyranny of a strong federal government at bay. Even the Bill of Rights, added to the Constitution at the insistence of the Anti-Federalists, fails to address the Anti-Federalists’ key concern for states’ rights. The Bill of Rights addresses “the personal rights of individuals,” not “the rights reserved to the States in their political capacity” (*Federalist* 38).⁸ While the U.S. Constitution virtually guarantees the inviolability of states’ boundaries, it does not do so for cultural reasons. Furthermore, it guards against retrogressions into pre-modernity by requiring the federal government to “guarantee to every State in [the] Union a Republican Form of Government” (Art. IV, Sec. 4) and by prohibiting both the federal government and the states from granting titles of nobility. The U.S. Constitution’s antipathy toward territorial multiculturalism is reflected in various other discrete provisions as well, such as the exclusive authority of the federal Congress “to establish a uniform rule of Naturalization” (Art. I, Sec 8) and the prohibition of state impairments of “the Obligation of Contracts” (Art. I, Sec. 10).

Yet, the federal Constitution also is entirely open to non-territorial multiculturalism in the private sector, as reflected in the Constitution's fundamental orientation toward individuals and individualism, in the Bill of Rights, in the rights of naturalized immigrants to serve in all federal offices except the presidency, in the president's oath of office which obligates him to defend the Constitution, not the American people, nation, or fatherland, in the prohibition of any "religious Test" as a qualification for federal office (Art. VI), in the full faith and credit and the privileges and immunities clauses in Article IV, and in the Constitution's refusal to mandate an official language or otherwise extend constitutional legitimacy to any culture, language, race, nationality, or religion. Additionally, by not defining boundaries for the United States and by providing for the admission of new states, the U.S. Constitution is, in principle, open to boundless expansion and inclusion. Today, therefore, the population of the United States includes individuals who represent every language, race, nationality, culture, and religion present in the world.

The Mormon Question

Because the Civil War made slavery the dominant theme of mid-nineteenth-century federalism, most observers of this history overlook the equally tempestuous and transformative controversy over the Mormon Question, namely, whether Mormon emigrants had constitutional authority to legalize polygamy in their Utah territory, just as proponents of slavery and the U.S. Supreme Court in *Dred Scott* held that white emigrants had constitutional authority to legalize slavery in the territories. Likewise, while every student of American federalism recognizes the Morrill Act of 1862, which authorized federal land grants for the states to establish agricultural colleges, few are aware of the other Morrill Act of 1862, the Morrill Anti-Bigamy Act that outlawed polygamy in the territories.

Mormonism – the Church of Jesus Christ of Latter-day Saints – is a home-grown American religion, a theological mutation of Puritanism and Reformed Protestantism, founded by Joseph Smith in 1830 in upstate New York in the wake of the religious revival known as the Great Awakening. In this environment, Mormonism quickly gained adherents. In fact, if current worldwide rates of conversion are sustained through this century, by 2100 the Mormon Church will be the second largest Christian denomination (after the Roman Catholic Church) and the first major world faith established since Mohammed founded Islam 1,400 years ago.

In 1830, Smith published the *Book of Mormon*, the church's holy scripture, which Smith claimed he had transcribed from golden plates buried in rural New York, which were revealed to him by an angel, Moroni. In 1831, he moved his flock of several hundred Saints to Kirkland, Ohio, and then to Missouri, but violence by non-Mormons against the Saints escalated during the ensuing years as rumors of Mormon polygamy spread throughout the region. Missouri's governor sent 3,000 state militiamen into the Mormon region and issued an "extermination order" in 1838 declaring that "the Mormons ... must be exterminated or driven from the state if necessary for the public peace."⁹ The Saints fled to Illinois where they established the city of Nauvoo, which quickly grew to a population of some 20,000. However, Joseph Smith and his brother were murdered by a lynch mob in an Illinois jail in 1844. During these travails, Mormons repeatedly appealed to the federal government for protection against the states, only to be told that the federal government lacked authority to intervene in the states' self-governing domestic affairs. As a result of this and of the Illinois legislature's revocation of Nauvoo's city charter in 1845, the church's new leader, Brigham Young, organized a heroic and arduous exodus in 1847 of thousands of Mormons out of Illinois westward into the harsh terrain of Utah's Salt Lake Valley where they felt safe to establish their new Zion outside the reach of vicious states and within the protective cocoon of the federal Constitution's apparent guarantees of self-determination and local autonomy to govern themselves and organize their domestic affairs, including marriage, as they sought fit without external interference.

Indeed, the Mormons petitioned Congress in 1849 for admission to the union as the state of Deseret. The petition was ignored, but Utah was brought into the federation as a territory under the Compromise of 1850 between the free states and the slave states over the lands acquired by the United States in the Mexican War (1846-48). However, the proposed geographic size of Utah was reduced considerably, and Congress declined to name it Deseret. Otherwise, the Mormons were left largely unmolested until 1852 when the church suddenly revealed Joseph Smith's 1843 "Revelation on Celestial Marriage," which declared polygamy to be a sacred principle of the faith.

This revelation, more than the *Book of Mormon's* prophesy that the overthrow of "gentile [non-Mormon] governments of the American continent" was imminent, sparked a political firestorm across the United States. Opponents of polygamy were quick to label it female slavery and equally quick to urge the federal government to extinguish the "barbaric" practice. The anti-slavery and anti-polygamy movements became closely intertwined. For example, Harriet Beecher Stowe, whose 1852 novel

Uncle Tom's Cabin was a phenomenal boost for the anti-slavery movement, became an ardent anti-polygamist as well. Women, especially, wrote torrid novels to inflame anti-polygamy sentiment, such as Maria Ward's highly successful *Female Life among the Mormons*, which was published in successive editions from 1855 until 1913.¹⁰ Non-Mormons were unwilling to accept what they regarded as "polygamic theocracy" in Utah as a legitimate application of the ideas of self-government and of the states as laboratories of democracy and policy innovation.

Southerners, too, were appalled by polygamy but were less vociferous in their opposition because of the difficulty of reconciling their support for self-determination in the territories on slavery with opposition to self-determination in the territories on polygamy. Southerners refused to legitimize federal legal intervention into the Mormon way of life even though Utah was only a territory, and they voted against anti-polygamy bills in Congress because such legislation would open the door to federal intervention into their own way of life. Marriage belonged to the domestic powers over persons and property reserved to the states by the Tenth Amendment. Federal regulation of marriage in Utah would legitimize federal regulation of slavery and other matters of persons and property essential to the southern way of life. Although territories were governed directly by the federal government through governors appointed by the president, territorial residents elected their own legislatures and staffed the territorial courts, and it was widely accepted that because territories were expected to become states, they enjoyed virtually all of the constitutional autonomy accorded the states.

The federal government intervened initially with a small contingent of troops sent to Utah in 1854 to investigate both the murder of nine U.S. soldiers by Indians and the refusal of the Mormon courts to imprison the Indians. Federal officials and anti-polygamists were increasingly alarmed by Brigham Young's statements that Mormons were "above the law" and by the Mormons' conception of Indians "as 'Lamanites,' a people to be converted to the one true faith so as to wreak vengeance on gentiles, avenging the murder of the Mormon prophets and hastening the arrival of the Kingdom of God, in which every righteous Mormon male would be rewarded with his own kingdom on his own planet, to be peopled with his plural wives and children, sealed to him for eternity."¹¹

Federal alarm escalated when, on September 11, 1857, more than 120 men, women, and children on a westward wagon-train were murdered by Mormons and Indian allies in southwestern Utah. The church denied involvement and blamed the Indians. The Mormons, who

cultivated Indian hostility toward the United States, appeared ready to cut off key routes of western migration, and Young appeared to be preparing his militia and Indian allies to make war on the United States just as the storm clouds of the Civil War were on the horizon. President James Buchanan, who was sympathetic to territorial self-determination, dispatched one-sixth of all U.S. troops to Utah, but most of them could not get over the mountains during the winter of 1857, and Congress refused to fund the expedition even though many southern Democrats supported military intervention on the ground that Mormons were in a state of rebellion. Southerners reasoned that crushing polygamy militarily rather than legislatively or judicially would not legitimize federal intervention against slavery.

However, no military confrontation occurred; instead, polygamy was attacked with political, legislative, judicial, administrative, and economic tools. Military intervention would have been bloody and futile. Furthermore, the onset of the Civil War shifted federal concern to securing Utah against the Southern Confederacy. Mormons, moreover, strongly supported the federal Constitution because they believed that it was inspired by God to prepare the way for the return of Jesus and the establishment of the Kingdom of God. The Republican Congress did pass the Morrill Anti-Bigamy Act during the war, but it was utterly ineffective. Mormons kept no written records of marriages, Mormon juries refused to convict polygamists, and, much to the shock of anti-polygamists, Mormon women refused to testify against their husbands. The federal government also encouraged non-Mormon migration into Utah, which was one reason for building the transcontinental railroad. The railroad was completed at Promontory, Utah, in 1869. In 1870, Utah became the second U.S. jurisdiction to grant women the right to vote – an effort by the church to maintain Mormon majority control of Utah.

As post-war Reconstruction ended in the mid-1870s, anti-polygamy pressure intensified again in the Congress and among the general non-Mormon public. The Mormons, moreover, had been placed on the defensive by this time. The church had supported Democrat Samuel Tilden in the 1876 presidential election, an election that was not decided in favor of Republican Rutherford B. Hayes until March 1877 because neither candidate had won a majority of the electoral college votes. Anti-polygamists also resurrected the specter of the 1857 massacre, known as the Mountain Meadows Massacre, thereby intensifying popular fears that Mormonism was a cult of blood atonements, mysterious violence, and sexual deviance. Under persistent pressure from the federal government and public opinion, Brigham Young excommunicated three ringleaders of the massacre in the early 1870s and then executed a key

ringleader in 1877. Young himself was held up to public ridicule at this time because one of his wives sued him for divorce in 1873 and undertook "one of the most spectacularly successful lecture tours of the nineteenth century."¹² Billed as "The Rebel of the Harem," she regaled audiences, including President Ulysses S. Grant and his wife, with tales of violence, jealousy, deception, and torture in Mormon households.

In an effort to bolster the Morrill Act, the Republican Congress passed the Poland Act of 1874, which reduced the powers of probate judges in Utah, required juries to be selected by the U.S. marshal and his territorial counterpart, and allowed polygamy cases to be appealed to the U.S. Supreme Court.¹³ In response, Mormons mounted a test case in an effort to obtain judicial support for polygamy under the free-exercise-of-religion clause of the First Amendment to the U.S. Constitution. The church selected George Reynolds, a "mild and obedient" 32-year-old man who was "bookkeeper and private secretary to a succession of Mormon Church presidents."¹⁴ Convicted of polygamy, Reynolds appealed to the U.S. Supreme Court. The case, decided in 1879, was a national sensation.

In *Reynolds v. United States*,¹⁵ the Court held that polygamy was not protected by the First Amendment. The Court essentially followed the federal government's line of argument that if polygamy were to be protected by the First Amendment, then "Hindu widows [would] hurl themselves on the funeral pyres of their husbands, East Islanders ... expose their new-born babes, Thugs ... commit gruesome murders," and Mormons commit more atrocities like the Mountain Meadows Massacre, "all in the 'name of religion.'"¹⁶ In short, Mormons were free to believe in polygamy but not to practice polygamy. The decision was a stunning victory for anti-polygamists as well as a stunning expansion of federal power into local autonomy. For the first time, the Court legitimized the authority of the federal government to intervene in matters of local self-government in order to protect what it deemed to be the human rights of persons against abuses by autonomous places, in this case, a territorial jurisdiction. Essentially, moreover, the Court held that rights abuses could be determined by standards found in prevailing practices and customary norms. In this case, all of the states had outlawed polygamy, even back into the colonial era, and there was deemed to be a national consensus that polygamy violated customary norms of human decency and individual freedom. The ruling thus repudiated a key element of the 1857 *Dred Scott* decision and wrought a fundamental change in American federalism.

As a result, increasingly coercive anti-polygamy legislation poured out of Congress in the 1880s with strong support from Republicans as well as many Democrats (even some southern Democrats), and the federal government flooded Utah with litigation. The Edmunds Act of 1882 defined a new federal crime, "unlawful cohabitation," excluded people who believed in polygamy from juries, and deprived Mormons of the right to vote. Between 1882 and 1896, federal prosecutors brought more than 1,400 indictments against Mormons for unlawful cohabitation. This prosecutorial effort was unprecedented in U.S. history.

As one scholar concludes, anti-polygamists were driven by a "logic of coercion" in the name of individual freedom,¹⁷ and their preferred instrument of coercion was the federal government. Consequently, the next act, the Edmunds-Tucker Act of 1887, went even farther in using what one anti-polygamist called "'the dynamite of the law' to blow up polygamy."¹⁸ The statute established federal crimes of adultery, incest, and fornication for men and women while protecting first wives from adultery charges; held that only a first wife could not be compelled to testify against her husband without his consent; required registration of all marriages; created a right for the first wife to claim a portion of her husband's estate upon his death; deprived women of the right to vote; revoked the corporate charter of the Mormon Church; limited church ownership of real property to \$50,000; escheated church property to the federal government for use to fund public schools to teach children anti-polygamy values; and abolished the church's Perpetual Emigrating Fund, a revolving pool that financed the migration of Mormon converts from Europe to Utah. Under the new federal law, nearly 200 women in Utah were indicted for fornication between 1887 and 1890.¹⁹ The United States also requested European governments to prevent the emigration of "law-defying Mormons," a request rejected by those governments.

The Edmunds-Tucker Act produced another U.S. Supreme Court case, the *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*,²⁰ in which the church sought to recover its charter and property. In 6-3 decision issued in May 1890, the Court ruled against the Mormons on both matters. Justice Joseph Bradley, in his majority opinion, held that the church's legal charter and property rights constituted government support of a corporate monopoly that engaged in "barbarous" and "nefarious" practices "repugnant to our laws and to the principles of our civilization." As in *Reynolds*, Bradley made reference to the practice of Suttee by Hindu widows. Bradley also placed the revocation of the church's corporate charter in the context of growing cries for federal anti-monopoly legislation since John D. Rockefeller had established the Standard Oil Trust in 1879. Anti-polygamists had come to

characterize the Mormon church as a corporate monopoly which, like every monopoly, wielded political power, oppressed people, and subverted democracy. Thus, in *Late Corporation*, the Court executed another stunning expansion of federal power, thoroughly repudiated *Dred Scott* by allowing the federal government to override local autonomy in the federal system on matters of property as well as persons, signaled advance legitimation of the Sherman Anti-Trust Act, which was passed by Congress in July 1890 (and was the legal basis of the recently concluded anti-monopoly prosecution of Microsoft), and, in effect, declared the U.S. Constitution to be a Protestant document and that Protestant Christian humanism was the standard against which governments were to be judged on human-rights.

In September 1890, Wilford Woodruff, the last of the Mormon presidents who had trekked west with Young, received a communication from God who told him that the church should abandon its legal claim to polygamy in order to survive. By this time, indeed, the church was buried in litigation, polygamy had gone underground, and Mormonism was riven by internal dissent. The church issued a "Manifesto" announcing that it would no longer advise the Saints to defy the laws of men. The anti-polygamy movement evaporated immediately, although fear, suspicion, and fascination with Mormons continued for decades.²¹ In the spirit of Abraham Lincoln's "charity toward all and malice toward none" after the Civil War, all of the Mormon Church's personal and real property that had been confiscated in 1887 was returned by 1896, and Democratic President Grover Cleveland issued pardons for all convicted polygamists who promised to obey the law. Thus, the legitimacy of territorial multiculturalism came to an end in the United States, never to rear its head again.

The Legacy in the Civil Rights Movement of the 1960s

The crushing of this last relic of barbarism cast a pall of monocultural Puritanesque Protestantism across the country. The standard-bearer of this monoculture was the Republican party, which had come into existence during the 1850s to slay slavery and polygamy and which remained the dominant party in the federal government and most northern states from 1860 to 1932. Although progressive Republicans from Abraham Lincoln to Theodore Roosevelt effected many beneficial reforms, along with expansion of the power of the federal government, the Republican party abandoned blacks to oppression under the resurgence of white supremacy in the South after Reconstruction,

became increasingly tied to the interests of corporate wealth, and turned against the tide of immigration, especially of Roman Catholics and Jews, that was pouring into the United States.

By 1924, Republicans succeeded in enacting legislation that reduced immigration drastically from 1929 to 1965. An attempt was made to amend the federal Constitution to provide for a strict separation of church and state that would preclude any religious group, especially Catholics, from imitating the Mormon experiment in territorial self-government. The amendment failed, but most states adopted such amendments. Consequently, Catholics and Jews established parallel societies with schools, social agencies, and other institutions located in the private sector. This Puritanesque Protestant culture reached its constitutional apogee in 1919 with the Eighteenth Amendment to the federal Constitution, which outlawed the manufacture and sale of alcoholic beverages nationwide. However, the glaring failure of Prohibition revealed all of the holes in this monocultural pall, and Prohibition was repealed in December 1933 (by the Twenty-First Amendment) after Franklin D. Roosevelt's Democratic New Deal coalition had come into power in 1932. The Democrats were the polyglot party of the new, non-territorial multiculturalism that would bloom during the 1960s. As prominent Republican James G. Blaine had put it in the 1880s, Democrats were the party of "Rum, Romanism, and Rebellion."

The new multiculturalism did not bloom until the 1960s because Roosevelt's Democratic coalition needed the support of the solidly conservative and Democratic South in order to stay in power. Consequently, southern white supremacy was left undisturbed. Furthermore, many northern white ethnics (e.g., Irish, Italian, and Polish) who supported the Democrats were culturally traditionalistic and supportive of many elements of the Protestant monoculture. The emphasis on assimilation and Americanization that had emerged during the 1880s, moreover, contributed to substantial socialization of immigrant groups into this Protestant culture. As a result, in the aftermath of World War II and 20 years of Democratic dominance, the 1950s, under Republican President Dwight D. Eisenhower (1952-60), became that last hurrah of this monoculture. A cultural détente was achieved among Protestants, Catholics, and Jews in which Catholics and Jews were embraced as equal partners in America's "civil religion," and they united with Protestants against the new barbarism of communism just as they had united with Protestants against Nazism.

The new multiculturalism bloomed during the 1960s because black Americans had completed the transfer of their allegiance from the Republican party to the Democratic party by the late 1950s and because they finally revolted in the mid-1950s against the last vestige of the old territorial multiculturalism, namely, the southern way of life that maintained *de facto* enslavement via *de jure* segregation and oppression.

Many factors contributed to the demise of the Old South, almost all of which had precedents in the nineteenth-century battles against slavery and polygamy. Although Roosevelt did little to relieve black oppression directly, economic development and rural electrification spurred by the New Deal and intensified by war-time industrialization transformed the agricultural South. Construction of the interstate highway system under the 1956 federal-aid highway program, coupled with air conditioning, had much the same impact on the South as the transcontinental railroad had had on Mormon Utah. Northerners moved into many southern states, such that states with large numbers of northern migrants abandoned the old southern way of life more quickly and less violently than did such hard-core southern states as Mississippi and Alabama. Additionally, the emergence of numerous federal social-welfare programs, from the New Deal of the 1930s to the Great Society of the 1960s, that were administered by state and local bureaucrats under federal rules of entitlement, substantially displaced local political administration of social welfare and thereby reduced the leverage of southern white politicians over both blacks and poor whites. After World War II, moreover, President Harry S. Truman took the first step toward desegregation by ordering the desegregation of the U.S. armed forces.

Like the Mormons before them, blacks initially filed test cases intended to reach the U.S. Supreme Court as their primary strategy for dismantling segregation. Most cases failed, but blacks began to achieve small successes during the 1940s, especially as the U.S. Supreme Court, following on the precedents of *Reynolds* and *Late Corporation*, increasingly allowed the federal government to intervene in state and local affairs in order to protect individual rights against jurisdictional abuses – a process known as the nationalization or incorporation of the U.S. Bill of Rights through the Fourteenth Amendment of 1868. This litigation strategy culminated in the Court's unanimous *Brown v. Board of Education* rulings in 1954 and 1955, which ordered southern states to dismantle their segregated school systems "with all deliberate speed." As a result, the South, much like Mormon Utah, was soon awash in federal litigation. The *Brown* rulings also provided black Americans with a crucial constitutional foundation on which to build a massive social movement to

counter the massive resistance of southern whites to desegregation and to carry their plea for equal rights throughout the nation and the world.

The Reverend Dr. Martin Luther King, Jr., emerged in the mid-1950s as the principal leader of the black Civil Rights Movement. King's success lay not only in his courage and oratory but also in his attunement with the Protestant monoculture. Most black Americans are Protestant, King was a Baptist preacher, and in constructing and deploying the non-violent Civil Rights Movement, he made adroit use of the nation's three sacred documents – the Protestant Bible, the Declaration of Independence, and the U.S. Constitution – to appeal both to his followers and to the white majority. The movement was a revolt against the southern perversion of the dominant culture, not a revolt against the dominant culture per se. Indeed, the movement sought integration and inclusion on an equal footing with all other Americans. A black nationalist movement emerged in the late 1960s advocating a territorial base for black self-government, but it drew little sympathy from blacks and even less from whites, although it did contribute to construction of a black subculture within civil society, later termed African-American culture.

Like the abolitionist and anti-polygamy movements, the Civil Rights Movement called for massive and coercive federal intervention into state and local self-governance in order to protect the safety and rights of blacks. Although federal troops were dispatched into southern states on several occasions, and U.S. marshals and FBI agents were sent very frequently, these were last-resort federal tactics in a strategy that otherwise emphasized the carrots of federal aid and intergovernmental negotiation coupled with the sticks of federal court orders. Governor George Wallace, for instance, was permitted to stand in the doorway of the University of Alabama in order to give a speech symbolically blocking the entrance of the school's first black student so long as Wallace then stepped aside without incident to allow the student to enter the school. The Civil Rights Movement repeatedly called for more frequent and aggressive federal intervention, but to no avail.

However, the movement wrested major legislation from Congress, especially the Civil Rights Act of 1964 and Voting Rights Act of 1965, but in signing these bills, Democratic President Lyndon B. Johnson predicted that they were the death knell of the Democratic party. Indeed, the election of Richard M. Nixon to the presidency in 1968 started the resurgence of the Republican party, which aggressively recruited southern whites and other disaffected Democrats and raised the flag of Puritanesque Protestantism once again, though under new names such as "the silent majority" and "traditional values."

Nevertheless, the Civil Rights Movement substantially achieved its objective of "equal protection of the laws," a principle upheld by the Republican party too, although blacks still have not achieved equal inclusion into white society. Equally important, the black rights-movement spun off rights movements for women, Hispanics, Indians, persons with disabilities, gays and lesbians, other groups, and alternative lifestyles more generally – all of which enjoy substantial constitutional and statutory protections, even though all do not enjoy the same levels of social and economic inclusion. The Civil Rights Movement also helped to generate the protest movement against the Vietnam War as white participants, especially young people, became socialized into non-violent protest and then became more radicalized by the assassinations of King and Robert F. Kennedy, the escalating war in Vietnam, black urban riots in northern cities, and public recognition of environmental degradation.

Consequently, by the end of the 1960s, a vastly more powerful federal government was engaged in a massive fiscal, political, legislative, judicial, and administrative campaign to liberate persons from the tyranny of places, namely, the country's constituent polities, which had been the historic repositories of most of the domestic powers of government that affect the daily lives of citizens. State and local governments waving the flag of states' rights came to be seen as the oppressors, while the federal government was seen as the liberator of individual freedom, even though the federal government was not inherently more benign than the states. The federal government had simply lacked the constitutional authority to exercise the domestic powers reserved to the states, as well as the political legitimacy and will to intrude upon the states' sovereign self-governing autonomy. The federal government had acquired considerable constitutional authority and political legitimacy to do so during the battles against slavery and polygamy, but the political will to exercise that authority and legitimacy did not flower until the 1960s. As a result, a new but non-territorial multiculturalism based on individualism and voluntary associations in the private sector bloomed during the 1960s under the sun of the federal Constitution as the federal government chopped away the thicket of state and local weeds that had blocked the federal sunlight.

One irony of this history is that by the 1960s as well, the Mormons came to be what George Will called "the most American of religions" and what Leo Tolstoy had called "the American religion." The end of polygamy proved to be a boon for the church, allowing it to grow unmolested, assimilate into American society, and carry the old Puritanesque Protestant culture into this century and around the world. Mormons are among the most highly educated, prosperous, and longest living Americans. They are strong advocates of "family values," namely,

the virtues of the monogamous nuclear family and the evils of adultery, fornication, abortion, and homosexuality. They do not drink alcohol, coffee, tea, or soft drinks containing caffeine, and they do not smoke, gamble, or use addictive drugs. They are law-abiding, capitalistic, and patriotic, and they have a high level of voter turnout for elections in which they vote mostly Republican. They also run one of the world's largest private welfare systems. Mormons are called upon to forego two meals a month and to donate the cost of the food (known as a "fast offering") to a congregational fund for the poor. It is estimated that two-thirds of Mormons comply with their church's injunction to tithe, that is, give 10 percent of their annual income to the church. Mormons are also expected to devote 40 hours per week to church-run activities, and young Mormons are expected to serve as missionaries for two years. The church operates farms, canneries, supermarkets, and other businesses through which it provides jobs to unemployed and otherwise unemployable people and uses the profits for both welfare and church operations.²²

At the same time, some 20,000 to 60,000 people still practice polygamy,²³ especially in southern Utah, and many do so openly as a result of the new climate of multiculturalism created during the 1960s, even though in 1946 the U.S. Supreme Court had ruled that Mormon polygamists could be prosecuted under the Mann Act of 1910 (the "White Slavery Act") that prohibits the taking of women across state lines for illicit sexual purposes.²⁴ Indeed, Justice William O. Douglas, who wrote the majority opinion in the 1946 case, opined in dissent in *Wisconsin v. Yoder*,²⁵ which upheld the right of Old Amish Order parents to withdraw their children from public high schools before reaching the mandatory state school-completion age, that *Yoder* implicitly overruled *Reynolds* and opened the door to the resurrection of legal polygamy.

Lessons?

Questions of federal intervention into the affairs of constituent polities are salient because federal systems are more culturally heterogeneous than other political systems and because democracy has more difficulty taking root in large heterogeneous polities (see Table 1).²⁶ The mean population of the world's 25 federal polities is 96.6 million, compared to 61.5 million for the world's decentralized unitary polities and only 12.3 million for the remaining 131 unitary systems.

Table 1
Cultural Diversity and Freedom

	Cultural Diversity (Mean Percent of Most Numerous Cultural Community in Total National Population)		
	Free	Partly Free	Not Free
Federal (N = 25)	75,0	54,8	N.A.
Decentralized Unitary (N = 35)	80,0	70,9	76,8
Other Unitary (N = 131)	78,4	68,8	68,3

Source: Computed from Adrian Karatnycky, et al., eds., *Freedom in the World: The Annual Survey of Political Rights & Civil Liberties, 2000-2001* (New York: Freedom House and Transaction, 2001).

Note: N.A. is Pakistan and United Arab Emirates for which diversity data were not available.

Lessons that can be learned from the American federal experience are probably limited, however, because the United States has never had the kind of deeply entrenched and anciently rooted territorial multiculturalism characteristic of most federal polities. Nevertheless, some potential lessons might be drawn from this case.

For one, the mid-nineteenth-century elevation of the Declaration of Independence to sacred status as the higher law basis of the federal Constitution is akin to the post-World War II elevation of international human-rights covenants and conventions as a higher law basis for many new national democratic constitutions, federal and non-federal. This analogy is apt as well, because like the so-called global community today, the United States of the nineteenth century did not have a common, shared culture rooted in antiquity that defined the boundaries between individual rights and government power. Indeed, Americans had only just become a people since the Declaration of Independence had been proclaimed in 1776. Consequently, the abolitionists elevated the Declaration as the key focal point for consensus-building on expansions of human rights, just as international rights covenants today are focal points for global consensus-building, as well as for international human-rights interventions into the affairs of nation-states.

The design of a federal constitution and especially its fundamental purposes, or teleology, may also be important, as in the temporary accommodation of slavery in the U.S. Constitution with the underlying intent to extinguish it. If the constitution looks toward long-term objectives that cannot be achieved at the founding but should be achieved in the future, then a basis might be available for intervention into certain affairs of the federation's constituent polities. However, this basis must be credible. If that basis is grounded in human rights or constitutional fidelity, then it might be more politically and legally acceptable than interventions grounded in political or cultural considerations or administrative convenience. At the same time, too explicit and easy a constitutional authorization for intervention, the more likely it might be that the federal government will abuse that power (e.g., President's Rule in India). Some federal governments are eager to intervene in the affairs of their constituent polities for political, fiscal, or cultural advantages. Consequently, the constituent polities need some constitutional tools of defense against federal tyranny.

Another question is whether authority to intervene in the affairs of constituent polities should lie in the legislative, executive, or judicial branch of the federation. Judicial intervention might be the most tolerable so long as the federal court is viewed as politically neutral and constitution-conforming. However, intervention by the legislative or executive branch might be more acceptable if they are seen as the instruments of a general national consensus rather than as instruments of a partisan or subcultural agenda. If all branches of the federal government act in unison on the same constitutional grounds, then intervention might be all the more acceptable and effective. Regardless of constitutional provisions, though, the legitimacy of the federal government as compared to the legitimacy of the constituent governments would seem to be crucial. Intervention by a corrupt, inefficient, dishonest federal government is not likely to be viewed favorably.

Another question is whether federal intervention should be unilateral, and under what criteria, or whether federal intervention should require some type of invitation from constituent polities, or whether the federal government should be required to exhaust some type of process before intervening substantially in the affairs of constituent polities. At least in the political arena, face-saving opportunities should be created for the political leaders of constituent polities threatened with federal intervention.

Federal intervention in matters of fundamental cultural importance or significant political value to certain constituent polities is probably best undertaken incrementally with a variety of gradually increasing coercive measures as necessary. As a last resort, federal military intervention is surely best undertaken sparingly, judiciously, and with as little violence as possible.

- 1 Kirk H. Porter and Donald Bruce Johnson, comps., *National Party Platforms, 1840-1960* (Urbana: University of Illinois Press, 1958), p. 27.
- 2 Charles T. Tansill, comp., *Documents Illustrative of the Formation of the Union of the American States* (Washington, DC: House Document No. 398, U.S. Government Printing Office, 1927), p. 618.
- 3 Jacob E. Cooke, ed., *The Federalist* (Middletown, CT: Wesleyan University Press, 1961), p. 241.
- 4 *Ibid.*, p. 281.
- 5 *Ibid.*, pp. 281-282.
- 6 *Ibid.*, p. 55.
- 7 *Ibid.*, p. 93.
- 8 *Ibid.*, p. 244. The last provision of the Bill of Rights, the Tenth Amendment, reserves "powers" not "rights" to the states or to the people.
- 9 J. Kingston Pierce, "The Death of Joseph," *American History* 36:5 (December 2001): 58.
- 10 Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002), p. 32.
- 11 Caroline Fraser, "The Mormon Murder Case," *New York Review of Books* XLIX:18 (November 21, 2002): 18.
- 12 Gordon, *The Mormon Question*, p. 112.
- 13 *Ibid.*, pp. 112-113.
- 14 *Ibid.*, p. 114.
- 15 98 U.S. 145.
- 16 Gordon, *The Mormon Question*, p. 126.
- 17 *Ibid.*, p. 232.
- 18 *Ibid.*, p. 180.
- 19 *Ibid.*, p. 181.
- 20 136 U.S. 12 (1890).
- 21 See, for example, Wallace Stegner, *Mormon Country* (New York: Duell, Sloan and Pearce, 1942).
- 22 See, for background, Richard N. Ostling and Joan K. Ostling, *Mormon America: The Power and the Promise* (San Francisco: HarperSanFrancisco, 1999) and Terry L. Givens, *By the Hand of Mormon: The American Scripture that Launched a New World Religion* (New York: Oxford University Press, 2002).
- 23 "The Mormons: The church of the West," *The Economist* 362 (February 9, 2002): 26.
- 24 *Cleveland v. United States*, 329 U.S. 14 (1946).
- 25 405 U.S. 205 (1972).
- 26 Robert A. Dahl and Edward Tufte, *Size and Democracy* (Stanford, CA: Stanford University Press, 1973).

Crisis of Democracy – Is Federalism a Solution?

In the light of civil and ethnic conflicts, the "war against terrorism" and its potential expansion, hunger and misery in large parts of the world, economic globalisation, growing pollution, etc, are our democratic institutions still capable of finding suitable solutions or should we acknowledge that the most important decisions are being taken by business leaders, while politicians, parliaments and other public institutions tend to fall behind? In almost all democracies the number of active voters is decreasing in particular among young people. According to public opinions polls in France and Germany, the majority of citizens indicate that politicians are not taking care of their real problems and – even more alarming – that they do not tell the truth.

Our present reflection should not, of course, be interpreted as a suggestion to replace democracy by another form of government. Churchill was right when he called democracy "the worst political system with the exception of all the others". Western democracy is naturally preferable to totalitarian or authoritarian systems, but a critical analysis of the present crisis will lead to some suggestions, in particular to the conclusion that a greater volume and quality of federalism could be the answer.

The Crisis of Democratic Institutions

The image given by political leaders and parties as well as by schools and civic instruction programmes does not stand up to serious scientific analysis. It is simply a myth. "A government of people" is assumed to be chosen "by the people and for the people" through free elections. The "sovereign" citizens select their best representatives, parties and programmes, the elected members of parliament choose and control the executive power and thus fulfil the preferences expressed by the voters through legislation.

Free elections, the pluralism of political parties as well as the separation of legislative, executive and jurisdictional powers seem to assure a positive functioning of democracy. Democracy exists as soon as there

are free elections and pluralist competition between different political parties.

Those principles are acceptable but any serious analysis of democratic reality indicates a growing crisis:

Free Elections

Even in Western countries with developed economies, voters are not very well informed. Hence their decision is often irrational and sentimental. The lack of knowledge and degree of irrationality grow in relation to the distance between voters and institutions. The voters' understanding of local government issues is much greater than their perception of national and transnational problems. Most European citizens know very little about the EU institutions and appear to believe that the European Parliament has no or little power. Hence the turnout at European elections is usually very low - in some member states even less than 50%. Voters also seem usually to be more motivated by domestic and less by foreign policy issues. The last German general elections in 2002 were certainly an exception, when Schröder's promise to renounce any German participation in a potential war against Iraq seems to have made the difference.

Free elections can only fulfil their role as one of the major instruments of democracy if the following conditions are fulfilled:

- Voters should be well informed and made aware of the basic differences between the candidates, the parties and their programmes;
- Once elected, politicians should undertake the wishes of their voters. At least those in government should implement their electoral promises and announced programme;
- The voters' motivation and final choice should be as rational as possible and based on reflection rather than on irrational feelings.

Empirical research, and in particular public opinion polls, indicate unfortunately that voters are usually not well informed, even in the most developed Western societies.

Elections are lost or won with floating voters, the majority of whom are even much more ignorant than traditional voters. While those who always tend to vote for the same candidate or party usually read only those newspapers which generally confirm their opinion, well-informed intellectuals who may change their political options only represent a small

minority of the floating voters. A large majority of these floating voters is not interested in politics at all. They probably do not even read the political pages of their newspapers. This explains the low level of election campaigns as well as the trend towards similar speeches and promises from all parties and candidates as well as the growing loss of politicians' credibility. In most European countries public opinion polls show alarming results. As indicated in the introduction, the majority of French voters believes that politicians do not tell the truth and do not care about their voters' real problems¹. In Germany, like in most other European countries, politicians rank among the least appreciated professions. The highest percentage of abstentions from voting at the 2002 general elections in France and Germany appeared among young voters. While many old people still consider voting to be a civic duty, over 58% of young French voters seem to consider elections as a loss of time and pretend not to care about the result².

In some cases, such as the Presidential elections in France and in the US, which are usually considered to be democratically progressive in relation to the previous manners of appointing a head of state, a rational decision becomes very difficult even for well-informed voters. What underlies the choice of an exceptionally well-informed American or French voter who has read all the programmes and listened to the most important speeches of the two major candidates, if he or she tends to support foreign and security policy of candidate A, economic and social policy of candidate B, cultural options of candidate A and education policy proposed by candidate B?

In the light of this dilemma, even a highly educated and informed citizen will be motivated rather by his or her ideological belief or personal situation. Voters whose economic situation is satisfactory tend to vote for those in government, whilst those with economic and professional difficulties often prefer the opposition. Cultural criteria may also play a role. For parents with schoolchildren it may be educational policy, while those who suffer from pollution would be influenced by environmental policies. In all those cases they would not care whether the foreign policy of the other candidates was more attractive.

The above-mentioned examples concern well-informed citizens who are, as we have said, a small minority. The large majority of voters are naturally conditioned by their social environment, education, traditions, sex or their mood, often following fashionable trends. In many cases voters allow themselves to be influenced by the polls and wish to be on the winning side. In even more cases, voters make their choice rather "against" and not so much "in favour" of a candidate or a party.

This also concerns the apparently very democratic method of the referendum. It may indeed be preferable if the local governments ask the people to vote for or against a certain project, as long as the different options are generally understandable. This is however certainly not the case at referendums in favour or against a complicated international treaty. A very large majority of French and Danish voters could not understand the Treaty of Maastricht when they received the full text before going to vote in the referendum. Even experts could only understand the Treaty of Maastricht if they had the three EC treaties on their desk. Many French and Danish voters voted against the Maastricht Treaty simply because they did not understand it. Others were motivated by their respective criticisms of the French President or the Danish government.

Knowing the decisive role of floating voters, candidates tend to forget their own ideological positions during election campaigns and present themselves with slogans coming rather from the opposite side. In 1974, Valéry Giscard d'Estaing, who had occupied several important positions in de Gaulle's and Pompidou's conservative governments, presented himself as the candidate of "changement". In their first election campaigns to become head of government, both Tony Blair and Gerhard Schröder did not make typically socialist speeches. "New Labour" and "New Centre"³ liked the traditional slogans of the left.

In general, we may observe that electoral speeches and promises both from conservative and progressive candidates tend to show increasing similarity. Both sides promise what public opinion polls indicate as important to the voters. No wonder that the latter are more and more coming to the conclusion that it does not really matter who is going to win.

If free elections are considered as the only criterion of democracy, the result is often unjust in multicultural societies. In those cases the victory of candidates or parties representing ethnic or religious minorities often tends to legitimate their unconditional rule and policy of assimilation. This is sometimes leading to the discrimination of minorities. For that reason, ethnic or religious majorities often tend to be opposed to the recognition of a different identity through what they consider as an exaggerated autonomy of the region where the minority lives. On the other hand, ethnic or religious minorities who know that they never will be given the right of self-government, tend to become separatists.

Political parties

On the European continent (less in the UK and the USA) political parties tend to be extremely centralised with a low degree of democracy. Officially, political leaders are elected by the members or delegates of their parties who also adopt their programmes and major political options, but apart from exceptions (the Greens) party congresses usually tend to show almost unanimous support for their leaders and their ideas. Internal conflicts are then preferred to be hidden in front of journalists and TV cameras. European journalists often do not understand how a Republican president can govern and even achieve legislation when the Democrats have the majority in Congress, or the other way round. In fact, the differentiation between Democrats and Republicans basically appears at the local level and during presidential elections. There is no discipline of voting in Congress, where the President needs to obtain a majority for each particular item of legislation.

In the UK the two major political parties used to represent different social classes. In particular the Labour Party represented the working class and was to a large extent a party of unions, up to the point where trade union members were also automatically members of the party. On the other hand the Tories represented the upper and middle classes. One could expect that in most cases the political party represented the interests of a coherent social class, but once in power the winning party had to choose between continuing to defend a certain social interest and thereby to neglect the interest of the other side or to neglect the social interest of their traditional voters in favour of the "general interest". New Labour as well as the role of the Liberal Party and finally also the evolution of society have changed the British system, which is still characterised by one major difference *vis-à-vis* the continental parties. The British candidates for national and European elections are selected by members in the constituencies and not by the party leaders. The British system of candidate selection is closer to the American method than to the one used in most continental European countries. Indeed, American candidates for federal elections are nominated in their states, either by local party committees or by the voters. In some US states primary elections are not only used to choose a candidate for the presidential election, but to select any candidate for any political position. An interesting example is shown by the state of Indiana, where candidates to become mayors, sheriffs or local party leaders are chosen by the voters of their own parties through primary elections.

In most countries on the European continent political parties have a highly centralised structure with strong hierarchy and bureaucracy. Young

citizens who intend to start a political career usually have to join a party and adopt an extremely conformist behaviour. For years and even decades they are supposed to praise the leaders and their policies and to abstain from any criticism if they want to make a career and be nominated one day as a candidate for elections.

Parliament, Technocracy, Media and Money

In Europe, parliaments have largely lost their legislative power, not *de jure* but *de facto*. Legislation prepared by the executive power is greatly influenced by technocratic bureaucracy and the lobbying of interest groups. They usually have more knowledge and expertise than most members of parliament. From the legal point of view the parliament still has legislative power, but the code of conduct for MPs is very simple: in parliament, members of the parties in government vote in favour of, while members of the opposition parties vote against the proposed bills. In most cases they have even not read the text, which has been discussed in the committees; but everybody there also knows in advance the results of the legislation.

Again in this respect the American system is very different: as mentioned before, there is not the same party discipline as in most European countries.

The crisis of democratic institutions is constantly growing as a result of the increasing role played by the state in society. Compared to the 18th and even the first part of the 19th centuries, the number of ministries and civil servants has almost been multiplied permanently. The state now assumes many responsibilities which previously had been the task of private communities, groups or associations. The responsibility for children's education has been largely transferred from families to kindergartens and schools, most of which are run by the state in Europe. Even in the most liberal⁴ countries like the USA public spending plays an increasing role in the economy. The American federal administration and the states are the number one employers and consumers. The central governments have constantly increased their powers, even to a certain extent in the federal systems. At the same time they are losing power in the globalisation process.

The crisis of democracy is increased by the media. Quite often television imposes certain policies or even the choice of candidates. The increasing competition between different TV programmes leads to the emphasis on bad news. Bad news attracts the public more than good news. Since this does not only concern natural catastrophes, tragedies,

accidents and crises all over the world, but also corruption, dysfunctions, conflicts and the crisis of political leaders and institutions, viewers obtain the impression that the political systems do not work well. This in particular concerns international society and the EU for the Europeans. TV correspondents and other journalists in Brussels know perfectly well that they will not be given a minute in the evening news or the front page of the newspapers if they report on positive results. On the contrary, they obtain three to five minutes or the headlines as soon as there is a crisis or a conflict. The result is growing euro-scepticism. The average EU citizen tends to believe that the European Community institutions do not fulfil their tasks.

Another problem for democracy is the increasing role of international financial power. Heads of state or governments often make a "pilgrimage" to Davos where leading managers of banks or industrial or commercial corporations have no difficulties in obtaining an appointment with the Chancellor, President or Prime Minister or any other minister he or she wants to see within a period of a few days or even hours, while an ordinary citizen does not have the slightest chance to be received by a leading politician.

Money also plays a very important role in the US political system. No citizen has the slightest chance to be elected if he or she is not either rich or receiving substantial support from several very rich people. In many cases the latter want to receive some kind of personal or political compensation.

Equal rights for citizens has become an illusion since a long time. Globalisation continues to increase the power of big business and to weaken the sovereignty of nation states and their political leaders.

A Melting Pot of Ideological Sources

Behind the empirical analysis of the institutions a more profound reason for the crisis of democracy is based on the confusion of different ideological sources.

Two initially opposed concepts have merged:

- Rousseau's theory of democracy as the expression of a unique *volonté générale*.
- The concept of pluralism, in particular developed in Britain and the United States

Giovanni Sartori called Rousseau's theory the "rational way" and pluralism the "empirical way"⁵ J.R. Talmon opposed "totalitarian democracy" (Rousseau) to "liberal democracy" (pluralism)⁶.

Rousseau's Concepts

Jean-Jacques Rousseau believed in the existence of the *volonté générale*, a general interest independent of the particular interests of citizens. The ideal democracy could be achieved if the citizens renounced to their own interests in favour of *volonté générale*.

Rousseau's model was not Athens but Sparta, a perfect military dictatorship whose legislator Lycurg "educated the citizens to the point that they abandoned themselves due to patriotic enthusiasm"⁷. Rousseau believed that the "legislator" should rule by discovering and representing the general interest. There should be no power level between the citizens and the legislator.

Of course, Rousseau developed his theory for centralised government as a citizen of the Republic of Geneva. He probably did not dream of introducing his concept into France, but the *Jacobins*, his disciples, implemented Rousseau's concepts during the French revolution. Some of the *Girondins* wanted to use the local and regional revolutionary councils for the construction of a federal France. But Danton, one of the *Jacobin* leaders, initiated legislation against those who wanted to transform France into a federation. They were simply condemned to death.

Rousseau should be seen as one of the theoretical founding fathers of totalitarian systems including both Marxism-Leninism and Hitler's Nazi ideology. A long time before Karl Marx, Rousseau attacked private property as a source of individualistic egotism opposed to *volonté générale*. Carl Schmitt, a leading philosopher of law in the German Weimar Republic, prepared the Nazi system through his theory of a "total" state and by attacking the pluralism of ideologies, political parties and economic interests as a source of paralysing the nation, while he called for a "charismatic leader" who should be the "incarnation" of *volonté générale*. Carl Schmitt quoted Rousseau. When he later saw the results of the Nazi regime, he said that he had not wanted that kind of political system. Hitler himself, without directly quoting Rousseau, announced a similar idea in his election campaigns before coming to power. Germany has many political parties, he said, all representing particular interests such as Catholics, farmers, the working class, or business, but he represented himself as the only one who represented

Germany. Of course, we also find elements of Rousseau's thinking in many democracies:

- The concept of "*la République une et indivisible*" in France, promoting the nation state as the unique level of sovereignty, is a theory both opposed to regional autonomy and to European integration. Jean-Pierre Chevènement, Max Gallo, but also Le Pen represent this concept.
- Members of national parliaments are supposed to represent not only their constituencies or political parties but the whole nation. This concept does not exist in France or other European countries. Preparing his presidential campaign, John F. Kennedy wrote and frequently said that, as a senator, he was not only representing the state of Massachusetts but the whole nation.

At the end of his life, Rousseau recognised the utopian character of his theory. In his letter of July 26, 1767 to Mirabeau he admitted that his concept would inevitably lead to despotism. He kept only one hope: "I would like God to be the dictator".

Pluralism

In his *Reflections on the Revolution in France*, the liberal British thinker Edmund Burke criticised Rousseau severely. He did not believe in the existence of *volonté générale* and considered parliament as a forum where various particular interests expressed themselves and usually reached a compromise.

Harold Laski went even further, denying the right of the state to be sovereign⁸. Private organisations such as corporations or unions could reach a similar degree of sovereignty. After the economic crisis of 1929, Laski changed his mind and became a socialist.

In the 20th century Robert Dahl admitted that a general interest could be found in the "pre-political" area such as the constitution and human rights, where he sees "consensus omnium" while he accepted Burke's idea of a pluralist confrontation of interests in daily political decisions taken by the governmental administrations and parliament.

Other pluralist thinkers of the 20th century are Ernst Fraenkel in Germany and Carl Popper. The latter made an absolute method of relativism, believing that each theory would sooner or later be "falsified".

Is Federalism the Answer?

In the 1960's, the Italian political scientist, Sabino S. Acquaviva, described free elections in a centralised system as an illusion⁹. He arrived at the conclusion that a society needs decentralisation of power in order to allow citizens to participate in democratic decisions. "A society will attain more democracy by developing a federalist structure, based on small and subordinated groups¹⁰".

Robert Dahl and Edward R. Tufte came to the same conclusion when they examined the ideal size for democracy.¹¹ While small countries such as Luxembourg allow citizens better participation through direct contacts to the candidates and deeper understanding of the political system, most decisions for security and economic policy and welfare are taken on the transnational level. On the other hand, in large democracies such as the USA or Canada the national administration may take far more decisions, while their contacts to citizens will always be indirect and through the media. Citizens often do not understand the system and many of them do not participate in elections.

Dahl and Tufte came to the conclusion that small countries require integration into a transnational order such as a European community or NATO, while large countries needed more devolution. They suggested that medium-size countries such as France, Germany, Italy or the UK should do both. At the end of their study, Dahl and Tufte came to the question of whether federalism would not be the right answer. They agreed to this model "not as a perfect solution" but "as an orientation"¹².

This conclusion was certainly remarkable since Robert Dahl represented originally an American school of liberal pluralism and did not show much interest in institutions. Before publication of his and Edward R. Tufte's study on "Size and Democracy", Daniel Elazar regretted Robert Dahl's lack of interest for federalism.

One of the achievements of federalism is to bring a large part of decision making power closer to the people, wherever local or regional government has reached a large degree of **autonomy**. This is not only a legal question but also a financial one. While the US federation has been centralised, since today three quarters of public spending is undertaken by the federal administration, 60% of public spending in Switzerland is local. Swiss municipalities have available budgets which are ten times higher than the budgets of comparable French municipalities.

Additionally, the principle of **subsidiarity** or adequate distribution of power between a federation and member states allows for more adequate solutions to problems and makes the political system more transparent and understandable for citizens.

The solutions to conflicts between different political levels and entities in a federation on the basis of law and mutual agreements (co-operative federalism) is certainly a more democratic method than the centralist decision monopoly or the rule of the strongest, which we still find in the globalised international society. Checks and balances are a democratic principle.

Finally, not only citizens but also member states or member organisations participate in federal decision making, where we find certainly more democracy than in centralised structures.

The crisis of democracy analysed above also exists, of course, in political federations, but would not the situation be much worse if they were also centralised nation states? And is the answer a reform to introduce a better application of federalist principles into existing federations?

Federalism should not only be seen as a constitutional model for federal states, transnational integration or regional devolution. Federalism is also a model of society. Many private associations, unions, transnational or other complex business corporations try to combine unity and diversity. If they are too centralised, members or employees show a lack of motivation. On the other hand, if diversity becomes too strong, anarchy will lead to separatism. Federalism does introduce a certain degree of democratic stability.

Last but not least, our reflection should lead to the question whether the principles of federalism – autonomy, co-operation and solutions to conflicts on the basis of law and mutual agreements, checks and balances, subsidiarity or adequate distribution of power and federalist participation – should not be proposed for our globalised economy and society. An increasing number of banks, multinational companies and other business corporations choose federalism as their organisational structure and show an increasing interest in teaching federalism.

Comparing poor and good governance, McKenzey came to very similar conclusions, without using the term of federalism:

***Selected practices used by the investment community
to evaluate governance¹³***

Poor governance	Good governance
■ Minority of outside directors	■ Majority of outside directors
■ Outside directors have financial ties with management	■ Outside directors are truly independent ; no ties with management
■ Directors own little or no stock	■ Directors have significant shareholdings
■ Directors compensated only in cash	■ Material proportion of director's pay is stock-related
■ No formal director evaluation process	■ Formal director evaluation in place
■ Very unresponsive to investor requests for information on governance issues	■ Very responsive to investor requests for information on governance issues

Democracy will, of course, never be perfect but it certainly might recover from the present crisis through more federalism.

- 1 See Pierre Bréchon, Comprendre les logiques de l'abstention, *Revue Politique et Parlementaire*, n°1020-1021, Sept.-Dec. 2002, p. 86-87.
- 2 Ibidem.
- 3 Neue Mitte.
- 4 In the European sense of the term.
- 5 Giovanni Sartori, *Democrazia e definizione*.
- 6 J.L. Talmon, *Les origines de la démocratie totalitaire*, Paris 1966.
- 7 Plutarque, *Vitae*, translated into French by Amyot, frequently read and quoted by Rousseau. This quoting is taken from the book written by the German political analyst, Ernst Fraenkel, *Deutschland und die westlichen Demokratien*, Stuttgart, Kohlhammer, 1968.
- 8 Harold Laski, *The Foundations of Sovereignty and Other Essays*, New York, 1921, and *Studies in Law and Politics*, London, 1932.
- 9 Sabino S Acquaviva, *La Scelta illusoria*, Rome, 1965.
- 10 Op. cit. p. 134. (Translated from Italian by F. Kinsky).
- 11 Robert Dahl and Edward R. Tufte, *Size and Democracy*, Stanford, 1973.
- 12 Op. cit. p. 139.
- 13 Source: McKinsey Global Investor Opinion Survey on Corporate Governance, 2002.

Homogeneity from the Bottom up – the Shaping of National Policy by Provinces: A South African Case Study

1. Introduction

The focus is usually on enforcing homogeneity onto units within a federation, based often on the implicit premise that the center is "right", enlightened or modern, and that one or more of the constituent units are "wrong". Subnational units are perceived as pandering to local interests which may be either backward, out of step with the national normative framework, or not in the national interests. The question is then the extent of the units' right to be "wrong" or out of line. Questions of democracy, autonomy and the overall normative framework are thus pertinent. The centre would have a number of devices that it can use to effect homogeneity from the top down. The uniforming set of norms, enshrined in a bill of rights, can be used. A bill of right with a focus on individual rights holders, is not concerned with the functional division of power.¹ Other devices would be financial incentives through a variety of conditionals grants. There may be also overriding supervisory powers in hybrid-federal countries.

In South Africa, for example, the national government can override provincial legislation on a list of grounds, including the need to get a uniform economic policy.² A commitment to the principle of cooperative government and a dominant national government may also ensure that national policy reaches the provinces through intergovernmental relations structures. Where intergovernmental relations are played out in the shadow of strong political party discipline, as is the case in South Africa,³ homogeneity is the likely outcome.

The issue could also be turned around. What if the center is "wrong" and one or more of the units are "right"? How can the units influence the centre to change a particular policy that is perceived to be wrong-headed. Can homogeneity be effected from the bottom up? This is an important question because one of the arguments for decentralization of power is the value of innovation through experimentation that constituent units may produce. Moreover, if the national policy is perceived to be wrong, and it applies to constituent units to their detriment, they have every incentive to change it.

The issue that this paper seeks to address is how constituent units influence and shape national policy. What are the strategies and mechanisms open to provinces in South Africa? There are a number of strategies that can be employed. Political persuasion through the established intergovernmental relations structures is the very purpose of these structures, and outcomes are often determined by the political and financial position of the unit that is out of line.

Recent events in South Africa suggest that provinces played two significant roles in shaping national policy. First, it will be argued, that because a system of decentralization provides a number of sites of political representation, the scope for political competition is increased.⁴ This very fact makes national policy vulnerable to political influences from below. Provincial policy shows up the weakness of national policy and, in the end, may change the national policy through political competition. Second, provinces played a significant role in shaping a national policy when that policy was determined by the courts in terms of the overarching normative structure of the Bill of Rights.

This mix of politics and law played it self out in the area of government policy on combating the HIV/AIDS pandemic in South Africa.

2. The National HIV/AIDS Policy

"Health services" is a concurrent competence of both the provinces and the national government.⁵ Health services, along with social welfare and education, constitute the bulk of provincial expenditure. All hospitals fall under provincial control and the role of the national Department of Health is mainly concerned with policy. Formally national policy is developed in consultation with the provinces through regular meetings of the national Minister of Health and the provincial Members of the Executive Committee (MECs) responsible for health, in an informal intergovernmental relations structure called a MinMEC. Not unlike health policy in federal countries,⁶ national policy dominates.

One such policy has been the national government's policy on the combating of HIV/AIDS. HIV/AIDS is taking on pandemic proportions in South Africa. It is calculated that South Africa has the highest number of people in the world living with HIV/AIDS, the estimations range from between 4.2 million to 6 million out of a population of 40 million. Studies show that 24% of pregnant women are HIV positive. Consequently around 70 000 to 100 000 babies are being born HIV positive each year. With an infection rate of over 10%, HIV/AIDS is the main cause of death

in South Africa, with life expectancy predicted to drop in 2010 to 45 years from the present 70 years. The Constitutional Court has described this pandemic as the "the greatest threat to public health in our country."⁷

HIV/AIDS and its treatment have been contested policy terrain. Part of the debate has been generated by the so-called "dissident" scientists who believe that there is no link between the HIV virus and AIDS and hence that the treatment of AIDS with anti-retroviral drugs is simply the administering of poison. President Mbeki's initial flirtation with the "dissident" scientists and their ideas made international news headlines until he eventually withdrew from the debate.

While "dissident" views on HIV/AIDS were not necessarily held by the national Department of Health, skepticism about the usefulness of anti-retroviral drugs and caution about their safety pervaded the national health policy in 2001. With "health services" a concurrent competence, the application of the national HIV/AIDS policy was voluntarily. It was applied in all ANC-controlled provinces as well as KwaZulu-Natal. This province is governed by an IFP-ANC coalition with an ANC member responsible for health. The only province that did not apply the national policy was the Western Cape, then governed by the Democratic Alliance (DA).⁸

The substance of the national policy was that anti-retroviral drugs were not to be provided at state hospitals. Two policies attracted particular attention. The first was that the drug AZT – the best known anti-retroviral drug – could not be provided even to rape victims although this therapy was available and widely used in private hospitals and even in state hospitals for medical workers coming in contact with HIV-infected blood through needle stick injuries. The horror of this policy came to fore when, in a case where a Northern Cape hospital administered the drug to a nine month old rape victim, the responsible doctor was reprimanded by the provincial MEC for health for the breach of the policy.⁹ In Mpumalanga the MEC of health refused to allow an NGO to provide anti-retroviral drugs to rape victims and fired the hospital superintendent for allowing it.¹⁰

The second policy related to the anti-retroviral drug called Nevirapine, which if provided to HIV-positive pregnant women and their new born babies, reduced the mother-to-child transmission of the virus by 50%. While Nevirapine was the drug of choice, the national government and the nine provinces endorsed in 2001 at a MinMEC meeting the national policy in terms of which two research sites would be established in each of the nine provinces for a period of two years.¹¹

The aim of the policy was that, on the basis of the test results, a decision would be made whether to make the drug available in all provincial hospitals. The national Department of Health had concerns about the safety and efficacy of the drug – the side effects of the drug were not known. The management of the programme, including counseling and the provision of formula milk, would also be studied. The result was that doctors at hospitals other than the pilot sites could not prescribe the drug even though it had been offered for free by the pharmaceutical companies. The pilot sites, when operating, could reach only 10% of the population.¹² While the Western Cape agreed to the conduct of the research, it would not limit the provision of the drug to two sites.

This policy flew in the face of medical evidence that Nevirapine was one of the best and cheapest methods of preventing the transmission of the virus. Both the South African Medicines Control Council and the World Health Organization approved its use. The drug was indeed available and used in private hospitals.

3. The Right to Health Care Services and Active Civil Society

South Africa boasts of perhaps the most progressive Bill of Rights in the world, having included a string of socio-economic rights. They include the right of everyone to have access to adequate housing,¹³ sufficient food and water, social security and, importantly, "health care services, including reproductive health care".¹⁴ These rights are heavily qualified – the state need only "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights".¹⁵ Despite these qualifications the Constitutional Court has been willing to give effect to them. In a significant decision the Court held that the national, provincial and local government failed to give effect to the right to housing by not having an emergency policy in place to take care of homeless people in desperate circumstances.¹⁶ In practice it meant that while a claimant was not entitled to a house, he or she had a right to a reasonable government policy. And it was the reasonableness of the policy that the Court would review.

There are pockets of well-organized civil society in South Africa. The Treatment Action Campaign (TAC) is a consortium of AIDS activists that campaigned against the two policies of the government – refusal to provide AZT for rape victims and the provision of Nevirapine for all HIV-positive women and their new born babies. The Treatment Action Campaign was not alone in its campaign; the major unions movement,

Cosatu, and even the SA Communist Party voiced concern about the government policy.

The TAC instituted proceedings in the Pretoria High Court in August 2001 seeking a court order against the national department of Health and the nine provincial health departments compelling them -

- (a) to provide Nevirapine where the provincial hospitals had the capacity to do so, and
- (b) to plan a comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV.

The national government and all the provinces apart from the Western Cape contested the case. At the time of the court decision in December 2001 the Western Cape had a policy of providing Nevirapine to HIV-positive mothers and their newborn babies. The policy had already commenced in January 2001 and by February 2002 was reaching 70% of women in the province.¹⁷ The new government, formed by the NNP and the ANC in December 2001, with the premiership allocated to the NNP, did not result in a change of policy.

4. The First Legal Skirmish

The applicants based their claim on the right to health care services. They had to prove, among other things, that the government's failure to provide Nevirapine was not saved by the three qualifications to this socio-economic right. They had to show that -

- a. the government was not taking "reasonable legislative and other measures";
- b. there was no "progressive realization" of the right, and
- c. it was "within available resources" of the provinces to do so.

A key part of the applicants' argument was that the Court could assess these elusive criteria by comparing the conduct of the eight provinces with that of the Western Cape. This province extended the provision of Nevirapine beyond the two test sites and it was rolling out a comprehensive plan which would cover all the women in the province by April 2003. Furthermore, this policy was within the Western Cape's "available resources". With all provinces receiving 96% of their revenue from intergovernmental transfers, it was not a case of rich versus poor provinces.

The High Court gave a judgment on 14 December 2001 fully endorsing this argument. The claim that there was no capacity in the public health sector to give effect to the right was dismissed with reference to the Western Cape's practice.¹⁸ The same answer was given regarding the fear that allowing doctors to prescribe Nevirapine would throw the system in disarray and would cause budgetary distortions.¹⁹ The objections that a roll-out was not affordable was countered by the actual budget of the Western Cape.

The applicants succeeded in obtaining their requested relief. The Court ordered the government to make Nevirapine available to HIV-positive pregnant women and their babies in public hospitals with the necessary facilities and capacity. In devising a court order, the practice of the Western Cape was also influential. Nevirapine could be prescribed by doctors after consultation with the medical superintendant in charge of the health facility.²⁰ On the second relief sought – getting a comprehensive and co-ordinated plan together for a roll-out of the programme – the Western Cape practice was again the telling case. If the Western Cape could put together all the elements of a co-ordinated and programmatic plan, so could the others.²¹

The national government and the eight provinces appealed against the decision to the Constitutional Court, the effect of which was to suspend the operation of the court order. While no immediate relief was forthcoming, the success of the court case fuelled the public debate about the untenable national policy. The appeal itself was depicted as further evidence of heartlessness on the part of the government. Public sentiment eventually ruptured the united front of the eight provinces.

5. Provincial Dissent

In provinces widespread disquiet about the pilot site policy was reported. The IFP publicly instructed its KwaZulu-Natal premier, Lionel Mtshali, to distribute Nevirapine to all HIV-positive pregnant women in the province.²² In provinces doctors were, in defiance of national policy, providing the Nevirapine to HIV-positive pregnant women, often purchased from their own pockets.²³ The talks was about a "spontaneous uprising" against the government's HIV/AIDS policy, with "the greatest success of the revolt" the Gauteng government's decision to roll out its Nevirapine programme.

5.1 Gauteng

The most significant crack in otherwise uniform ANC-governed provinces came when Gauteng broke ranks. That there was some disquiet in the ANC ranks was well known. Already, former President Nelson Mandela was critical of the government's approach towards HIV/AIDS, only to be hauled in by the ANC leadership.²⁴

Gauteng premier Mbhazima Shilowa, past Cosatu general secretary and referred to as the most "senior ANC premier", announced at the opening of the provincial legislature in February 2002 that Nevirapine would be made available to HIV-positive pregnant women at all public hospitals in Gauteng and large community centers within the next financial year. The programme would be launched at seven hospitals within the next 100 days and the rest would be provided for by the end of the financial year.

Whether Shilowa set out to defy national policy is not clear. There are some suggestions that he and his MEC for health were under the impression that, if the province had the capacity, it could go ahead and extend the provision of Nevirapine.²⁵ The reaction of the national ministry of Health suggests otherwise. Shilowa was accused of breaching of resolutions adopted by the MECs at MinMECs that the roll-out of the Nevirapine programme would only commence after research results at the pilot sites became available. A spokesperson for the Ministry reportedly stated: "What is happening at Gauteng is against policy as stated in MinMEC. MinMEC now has to decide what, if any action should be taken. Decisions made at MinMEC have been violated. But at this stage I do not know how the matter is going to be taken forward."²⁶

As MinMEC is merely a consultative forum between the national government and the provinces, seeking to align policies and programmes, there was nothing that this structure could do to get the Western Cape in tow or sanction provinces that broke agreements. The sanction lay within the political sphere. Instead of being asked to account to the MinMEC, Shilowa was lambasted by the ANC headquarters, being accused of political opportunism.²⁷

Shilowa's stance had wide support. This was evident from the positive reaction by Cosatu and the SA Communist Party, which, with the ANC, formed the tripartite alliance. Cosatu came out in full support of the premier, and lambasted the national minister's stance.²⁸ The SA Communist Party, more coyly, called for a meeting of the three partners for a full discussion on whether the present national policy was adequate.²⁹

The national Health Department clearly lost the war. In response to the public spat the national government took out a full-page advertisement stating that it was not against expanding the provision of anti-retroviral drugs to prevent mother-to-child transmission, but will not make it immediately available. Moreover, the appeal against the TAC High Court decision was not against the provision of Nevirapine, but "to gain clarity on whether the courts or elected government decides on the detail of providing health services. This is a critical question about the division of powers in our democracy."³⁰

A political compromise was also struck with Shilowa; while there could not be talk of the "roll-out" of the programme to all hospitals, Nevirapine could nevertheless be provided at additional sites. A national government statement read: "The new services are an expansion of the research programme and must be done in accordance with national guidelines and protocols."³¹ The crux of the national policy, the research sites, was not to be abandoned, but merely extended. Whatever the words, they did not hide the fact that Gauteng effectively changed the national "test site" policy.

5.2 KwaZulu-Natal

Less than a week after the Gauteng furore, the KwaZulu-Natal (KZN) premier, the IFP Lionel Mtshali, announced that the province would provide Nevirapine to all pregnant mothers in the province; prior testing was not necessary as in rural areas where there were no testing facilities the incidence of HIV infection was the highest.³² Coupled with this announcement was the withdrawal of the KZN government as an appellant against the High Court decision and the joining of the TAC application for the immediate enforcement of the decision. The problem was, however, that the provincial MEC responsible for health, was a member of the ANC, and loyally opposed to the TAC case.

As a footnote to the saga, a rather strange legal wrangle ensued which reveals much about coalition politics in South Africa. The KZN Premier as head of the provincial government applied to the High Court to remove the province from the list of nine appellants and to join the TAC side. The provincial minister for Health would have none of this, claiming that he still supported the national government's position. Thus, in the High Court two different senior counsel appeared, each claiming to represent the government of KZN. The High Court, correctly, ruled that the Premier must prevail. The provincial MEC did not take that order lying down and appealed the ruling to the Constitutional Court.³³

The Constitutional Court, correctly, depicted the issue as follows:

"The real dispute is between the Premier and the MEC as to what stance should be adopted by the government of KZN in the TAC matter. Clearly this is a purely political dispute which could and should have been resolved at a political level. If the Premier was of the view that the MEC was not implementing the province's policy regarding the issues in the TAC case, he should have dealt with that at a political level."³⁴

Dealing with the matter at a political level means, in the Westminster system, the sacking of the MEC, a prospect that was politically not feasible in KZN. The coalition government in that province is not based on an agreement on policy but is a marriage of convenience where political parties place their own imprimatur on the departments they control. Facing this reality, the Court turned the application down on the erroneous ground that the two parties, both being organs of state, should have applied the principles of cooperative government and attempted to avoid litigation.³⁵ By failing to comply with this duty, the Court thus refused the MEC's application for leave to appeal.

6. A Change of National Policy

On noting an appeal against the 14 December 2001 judgment, the legal effect was to automatically suspend the implementation of the court order. When applying for leave to appeal on 1 March 2002, the TAC counter claimed for the immediate implementation of the court order. The High Court agreed to this. On 11 March 2002 it ordered that, pending the appeal to the Constitutional Court, Nevirapine should be given to HIV-positive pregnant women whenever possible. Against this order the Government appealed to the Constitutional Court as well.

Having been recalled from court recess, the Constitutional Court dismissed on 4 April 2002 the appeal against the execution order.³⁶ The effect was that the implementation order stood until the final outcome of the appeal on the merits.³⁷ In compliance of the court ruling, pending the appeal on the main case, state hospitals that have the testing and counseling facilities had to provide Nevirapine to patients who made an informed choice to use the drug.

The Constitutional Court's ruling must have sent a clear signal to the Government that the Court saw merit in the main case. On 17 April the Government announced a major reversal of policy which entailed the embrace of anti-retroviral drugs as a valid form of therapy in the two

areas of contention. First, victims of rape and sexual assault were to be given the option of anti-retroviral drugs. Second, the government was preparing the universal roll-out of Nevirapine for HIV-positive mothers from the end of 2002,³⁸ that is, when the 12 months results from the pilot sites would be available.³⁹ This change of face, a newspaper editorial commented "was an admission of wrongness whose candour was rare even among the world's most established democracies."⁴⁰ The change in policy was attributed to pressures from a number of quarters. Once commentator argued that "helping this [pressure] reach a critical mass is said to be the increasingly vocal unhappiness within the African National Congress and the government about the state's stance on HIV/AIDS."⁴¹

Despite this about turn, the Government still pursued the court challenge on the question of principle – should courts decide policy?

7. Constitutional Court – Finding National Policy Wanting

After hearing argument in the beginning of May, the Constitutional Court handed down its judgment in July 2002. Noting that "[i]n our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention",⁴² the Court sought to conduct a dispassionate and objective review of the government's arguments and played down the different provincial policies and practices. Unlike the High Court, few direct references were made to provincial practices in considering the merits of the case, but when it came to devising a court order, the "dissident" provinces were, however, much in evidence.

On the first order – that Nevirapine be provided by all hospitals that have the capacity and facilities – the Court had to review the rationality of the government's policy on Nevirapine. The government advanced four basic reasons for its policy. First, there were concerns about the efficacy of the drug if not accompanied by a host of other measures such as counseling, formula milk and so forth. Second, the administration of the drug may lead to the development of resistance to the efficacy of the drug in later years. Third, there were safety concerns about the after effects of the drug. Fourth, there was the question of whether the public health system had the capacity to provide the package of measures. This includes the costs of the drug, counseling and the provision of formula milk. In sum, the argument ran, without knowing the full extent of the costs and efficacy of the treatment, it would be unwise for government to commit itself to a wide-ranging programme

All these reasons the Court found unsubstantiated. The heart of the government's policy, according to the Court, lay in the fact that it was not practically or financially feasible to provide the programme in each provincial hospital. This reason the Court dismissed because it disallowed the administration of the programme in those hospitals (and provinces, implicitly) where there is the capacity to do so.⁴³ While there is no reference to the Western Cape, Gauteng or KZN the Court implicitly recognized that health services South Africa are not monolithic; there would have to be an asymmetrical application of the programme. It noted that the level of asymmetry in health services provision was profound. On the number of fixed clinics offering HIV testing, provinces vary between 100% (Western Cape, Northern Cape, Gauteng) to 14,6% in Limpopo with three provinces between 40% and 53% (KZN 40%, Eastern Cape 44% and North West 53%). On the number of fixed clinics offering HIV counseling the differences are less – from 60,7% in Mpumalanga to 96,7% in Western Cape.⁴⁴

The Court found that where counseling and testing facilities were available, it was well within the available resources of the state; "the provision of a single dose of Nevirapine to mother and child where medically indicated is a simple, cheap and potentially lifesaving medical intervention."⁴⁵ The Court thus held that the inflexible policy of only providing the drug at the 18 pilot sites was in violation of the right to health care services because it was not reasonable.⁴⁶ Consequently, hospitals and clinics that have testing and counseling facilities should be able to prescribe Nevirapine where it is medically indicated.

On the second order – the roll out of a comprehensive plan – the issue was what role the Court should play when dealing with government policy. Having rejected the argument that judicial meddling with policy would be an infringement of the doctrine of the separation of powers, the Court reaffirmed its right to issue an injunction (or mandamus) and to exercise supervisory jurisdiction.⁴⁷ However, having asserted the right to give an injunction, the Court still faced the question of how to compel a government with limited resources and capacity constraints – personnel and finances – to execute a policy. The question is thus whether budgetary constraints provided a legitimate reason for not implementing a comprehensive policy for the use of Nevirapine including testing and counseling.⁴⁸

In answering this question the Court made direct reference to provincial policy changes. It noted that when the application was launched in 2001, the policy was rigid. By the time of the argument on appeal in May 2002, flexibility in policy has emerged. The Court referred

to the Gauteng policy of extending the programme to six hospitals and three community health care centers and, during the course of 2002, throughout the province.⁴⁹ The Court also mentioned "change in policy" in KwaZulu-Natal.⁵⁰ In the Court's view "[t]hese developments clearly demonstrate that, provided the requisite political will is present, the supply of Nevirapine at public institutions can be rapidly expanded to reach many more than the 10% of the population intended to be catered for in terms of the test site policy."⁵¹

The Court's view was, in effect, that where there is a will there is a way and this axiom was amply illustrated by the conduct of some provinces. With such proof in hand, the Court could thus enter the terrain of policy with budgetary implications without much trepidation. The task at hand was thus to nudge the centre to follow the "dissident" provinces. With reference to the fact that three provinces had adopted a programme of extending the supply of Nevirapine throughout their territory, the Court depicted its role as that of facilitating the formation of the national political will. It said:

"Government policy is now evolving. Additional sites where Nevirapine is provided with a 'full package' to combat mother-to-child transmission of HIV are being added. What now remains is for the other provinces to follow suit. The order that we make will facilitate this."⁵²

This passage reveals the Court's conception of the role and functioning of the decentralized polity. First, the reference to "government policy" sees national and provincial governments as a collective – "the government". From a Bill of Rights perspective that is inevitable. The constitutional obligations imposed on the government cut across the national and provincial divide and provincial borders.

Second, the reference to the government policy that is "evolving" sees the political differences that gave rise to different policies in the first place as part and parcel of an evolutionary process that produces eventually a national policy. The result is that the national policy, enunciated by the Court, had its roots in the policies of the "dissident" provinces.

Third, the Court saw competitive politics as a part of evolutionary process. It conveniently, and correctly, did not mention the political drama that constituted the evolution. There is no mention of the scuffle between the ANC and IFP politicians jostling to represent the province of KZN before it.

Fourth, the reasonableness of government policy is judged in the light of its constituent parts. Dissident provinces can show that the national policy is untenable and their own feasible. Diversity of the policy and practice meant that the Court was able to deal with the extremely difficult issues of budgetary and policy implications of enforcing socio-economic rights. Spelt out much clearer in the High Court judgment, provincial differences became evidence of what content could be given to the requirement of "progressive realization" of socio-economic rights. Likewise, existing provincial budgets gave an indication of what is "within the available resources" of the state.

8. The Aftermath

The aftermath of the saga has been varied. Two events stand out. First, the positive outcome of the Constitutional Court case provided provinces with the scope for innovative programmes and some seized the opportunity. The KwaZulu-Natal government applied to an international fund, the Global Fund to Fight HIV-AIDS, Tuberculosis and Malaria, for a R600 million grant that would fund the roll out of a comprehensive HIV/AIDS programme in the province. The national Ministry blocked the grant because all links with that international agency should procedurally have flowed through the national Department of Health. The dominant role of the national government in the field of international relations, highlighted the quasi-ness of our quasi-federal system.

Second, courts may guide the direction of political will but they do not necessarily create political will by court order. Implementation of the court order has been slow. Evidence emerged two months after the court judgment that some provinces were very slow in giving effect to the national policy, leading to charges of stonewalling the court judgment.⁵³ Where a provincial MEC is allegedly an adherent of the "dissident" scientific view on HIV/AIDS,⁵⁴ the other side of the debate may well come into play; how can new "dissident" provinces be brought into the national line? The processes mentioned above – financial incentives, political pressure, and if need be, national intervention, may follow. With national policy now part of a court order, contempt proceedings were mooted by the Treatment Action Campaign.

9. Discussion

This case study, perhaps an isolated one, is evidence that the formation of homogeneity in national policy is possible from the bottom up. The combination of the Constitutional Court judgment and the change in government policy has resulted that all provinces have received national guidelines for the implementation of the prevention of mother-to-child transmission. Training for a universal roll-out plan has commenced in all provinces.⁵⁵ The good policy, initiated by "dissident" provinces prevailed.

Homogeneity from the bottom up occurred through two related process. First was the political process. The provinces provided a number of sites for political representation and contestation. This very fact makes national policy vulnerable to political influences from below. Provincial policy shows up the weakness of national policy and breaks the monolith and, in the end, changes the national policy in the face of political competition. Equally important, provincial points of representation are themselves more vulnerable to civil society interventions, which may, then, have a knock-on effect on the national sphere.

Second, provinces played a crucial role in shaping the court decisions that affected the national policy. Provincial policy and practice, which showed up national policy, contributed significantly to the TAC judgments by showing the realms of the possible. The policy laden and imprecise criteria such as the "reasonableness" of policy, the time scales for "progressive realization" of socio-economic rights, and the extent of "available resources" – criteria which courts usually want to steer clear of – are made both comprehensible and manageable.

The presence of socio-economic rights in the South African bill of rights may well be a unique feature in constitutions. However, the method of legal reasoning that draws on comparative practice and policy is well established where courts have to consider the impact that policy review may have on the use of scarce resources. The Canadian Supreme Court has, for example, judged the compatibility of criminal courts with the constitutional demand for speedy trials, the outcome of which would require the allocation of considerable state resources, at the hand of comparative studies across provinces.⁵⁶

To sum up, the moral of the saga appears to be that through the dispersal of state power in a decentralized arrangement, subnational units may on occasion become important actors in shaping national policy. Thus, rather than the national government being the primary enforcer of homogeneity, decentralization allows an organic process by which homogeneity could be developed from the bottom up.

- 1 Tran 2000, 183 eff.
2 See Steytler 2001.
3 See Steytler 1999.
4 See Banting & Corbett 2002, 5.
5 Schedule 4A Constitution 1996.
6 Banting & Corbett 2002, 16.
7 *Minister of Health and others v Treatment Action Campaign and others* (1) 2002 (10) 1033 (CC) par 93 (referred to as the TAC Constitutional Court case).
8 With the disintegration of the Democratic Alliance (DA) towards the end of 2001, one of the partners, the New National Party (NNP), formed an alliance with the ANC in a deal that gave the NNP the premiership of the province and the ANC the mayorship of the city of Cape Town. The provincial HIV/AIDS policy did not change with the change in government.
9 "State fury over AZT for raped baby" 11 to 17 January 2002 *Mail & Guardian* p 3.
10 "Provinces stonewall action" 20 to 26 September 2002 *Mail & Guardian* p 2.
11 Protocol for providing a comprehensive package of care for the prevention of mother to child transmission of HIV in South Africa, April 2001, quoted in TAC-judgment par 16.
12 *Treatment Action Campaign v Minister of Health and others* 2002 (4) BCLR 356 (T) 360 (referred to the TAC High Court case).
13 S 26 Constitution 1996.
14 S 27 Constitution 1996.
15 S 27(2) Constitution 1996. See generally Liebenberg 2000; De Waal et al 2000, 397 eff.
16 *Government of Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
17 "All the president's provinces" 22 to 28 February 2002 *Mail & Guardian* p 7.
18 At 383F.
19 At 383J.
20 At 384C.
21 At 385G.
22 Chief Buthelezi speech to Parliament, 14 February 2002, reported in "Buthelezi draws a line" 15 to 21 February 2002 *Mail & Guardian* p 4.
23 "Reality of Aids spurs widening revolt against government policies" 21 February 2002 *Cape Times* p 9.
24 "Health minister slams Shilowa's Aids plan" 17 February 2001 *The Star*.
25 "ANC closes ranks" 22 to 28 February 2002 *Mail & Guardian* p 6-7;
26 "Health minister slams Shilowa's Aids plan" 17 February 2001 *The Star*.
27 "State in new bid to quell AIDS furore" 22 February 2002 *Business Day* p 1.
28 "'You're an embarrassment' " 20 February 2002 *Cape Times* p 1.
29 "SACP calls for alliance dialogue on nevirapine" 21 February 2002 *Cape Times* p 6;
30 "Uneasy peace over HIV/AIDS policy shattered" 20 February 2002 *Business Day* p 1.
31 "State in new bid to quell AIDS furore" 22 February 2002 *Business Day* p 1.
32 "'Not limits' on Gauteng nevirapine programme" 22 February 2002 *Cape Times* p 3.
33 "KZN jumps state Aids ship" 1 to 7 March 2002 *Mail & Guardian* p 8. See also "Four KwaZulu hospitals to roll out nevirapine" 28 March 2002 *Business Day*.
34 *MEC for Health, KZN v Premier of KZN: in re Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1028 (CC).
35 At par 7.
36 Steytler 2001a.
37 "Government is backed into corner after ruling" 5 April 2002 *Business Day*.
Minister of Health and others v Treatment Action Campaign and others (2) 2002 (10) BCLR 1075 (CC).

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- 38 "Government stages a dramatic about-turn on its AIDS policy" 18 April 2002 *Business Day*;
"Yes to Aids drugs for rape victim" 18 April 2002 *Cape Times* p 1.
- 39 Belinda Beresford "What bent Mbeki" 19 to 25 April 2002 *Mail & Guardian* p 3.
- 40 "Let down by the 'hand of hope' " 21 July 2002 *Sunday Times* p 18.
- 41 Belinda Beresford "What bent Mbeki" 19 to 25 April 2002 *Mail & Guardian* p 2.
- 42 *Minister of Health and other v Treatment Action Campaign (1)* 2002 (10) 1033 (CC) par 20.
- 43 Par 64.
- 44 Par 90.
- 45 Par 73.
- 46 Par 80.
- 47 Par 106.
- 48 Par 116.
- 49 Par 118.
- 50 Par 118.
- 51 Par 119.
- 52 Par 132.
- 53 "Provinces stonewall action" 20 to 26 September 2002 *Mail & Guardian* p 2; "TAC: We want
to help" 20 to 26 September 2002 *Mail & Guardian* p 3.
- 54 "TAC: We want to help" 20 to 26 September 2002 *Mail & Guardian* p 3.
- 55 "State considers Aids drugs for public hospitals" 10 October 2002 *Cape Times* p 4.
- 56 Stuart 1991, 235.

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The Emerging Theory of Federal Autonomy and its Challenges¹

The concept of autonomy, which undergirds the shared rule aspect of federation and federalism, faces challenges with temporal governing forces. The federal model is, as Elazar (1987) maintains, contractually noncentralized. The very first modern federation, the U.S., sought to balance those "federal" (i.e. confederal) and "national" concerns that would preserve the powers and interests of the constituent states yet create a general government that possessed those powers needed to address those general concerns regarding all of the people. That is what the U.S. "framers" meant by federal (Diamond 1963). The federal arrangements that were created built upon the already developed obligation by rulers to respect own-source governing by national groups, communities, and towns regarding certain communal, social, economic, and political matters. By the time this first contemporary federation was contracted, autonomy had come to mean both individual rights and liberties, along with the right to choose representatives and communal rights, defined by territory, language, culture or religion to a self-government that protects and promotes their distinctive features (Loughlin 2000).

This paper attempts to define the meaning of federal autonomy as a distinct form and examine it in the light of two of its most essential contemporary challenges: intergovernmentalization and use of governance networks.² Initially the theory and history of autonomy is explored. Then federal autonomy is distinguished from communal and territorial autonomy. Next, generally accepted principles of federal autonomy are reviewed. This is followed by an introduction to current federal complexity. That is, how various federal arrangements have compounded the notion of federalism and federation. Then the two universal challenges to autonomy are identified and discussed. The final substantive section discusses the conditions – traditional and emergent – when general government intervention with regard to federal autonomy appear to hold regardless of federalism's temporal challenges.

Autonomy – History and Theory

In order to understand federal autonomy it is necessary to explore its antecedents, which will aid in understanding of its place in federal theory. While most scholars have a general sense of its meaning, it has many applications. As will be demonstrated, it requires some contextual understanding. Ethnonational scholar Walker Connor (1994: 83) asserts that autonomy is not just an alternative to independence:

Although often treated by scholars, state authorities, and ethnonational elites as alternatives, independence and autonomy are hardly that. Autonomy is an amorphous concept, capable of covering a multitude of visions extending from very limited local options to complete control over everything other than foreign policy. It can therefore incorporate all situations between total subordination to the center and total independence. Both autonomy and independence are therefore terms that tend to obscure important shadings in the attitudes that members of a group can be expected to hold concerning goals.

Autonomy has normally been associated with dual levels or dual governance with each level to some degree able to decide on certain affairs independently of the other. Clearly most ancient empires and monarchies did not control everything centrally, but ceded and/or recognized some control over political interests, tribal groups, towns and other internal political forces. Authority relations were bilateral, involving “exchanges” between ruler and ruled (Bendix 1978: 60). For example, Roman Britain and Gaul were officially administered by governors, but in practice were run by local authorities. Each municipality ruled itself as well as its surrounding territory. While some districts were “set asides” as imperial domains, the larger portion of the country was divided among a dozen or so tribes, each grouped around a town where the tribal council met to conduct district business. In thirteenth and fourteenth century Brandenburg and Northern German towns were often guaranteed their local autonomy, free of baronial control, as was the case in other parts of Germany, e.g. Rheinisher, Stätebund, Schwäbisher-statbund, and so on. To protect this autonomy the territorial leaders allied themselves with the confederated Hanseatic League. At the same time, these towns and mercantile associations supported the extant version of the Holy Roman Empire in the hope of protection against territorial princes (Bendix 147:177).

In medieval England parallel central and local tracks led to the pre-modern concept of autonomy. English kinship, going back to Saxon days, was always based on invading and settling war bands that had to live with existing populations and potential hostility. In spite of numerous internal conflicts and foreign entanglements monarchy and local governments grew at the same time. On the one hand royal adjudication and administration steadily developed, whereas local government provided the machinery of operation. "At both levels, legal and administrative affairs were indistinguishable because the safeguarding of rights was tantamount to the collection of payments (fees, fines, dues) as the material equivalents of those rights. Royal as well as aristocratic governance depended essentially on these rights and that collection" (Bendix 1978: 197). Those conditions led to forms of balance between central and local power.

This dual condition obviously had a great influence on the establishment of colonial America. By the seventeenth century English settlers possessed feelings of autonomy, based on town and shire government, of a self-rule nature. The working relationship that evolved between the English Crown and the colonies were based on loose ties, at least in the case of most colonies. Nor were these relations rationalized or formalized. As a result, "A system of divided power inevitably evolved under the circumstances, and its practice for a period of over one hundred and fifty years set it too deeply in the habits of the people to be overturned upon independence" (Leach 1970: 2).

This form of territorial autonomy has come to be associated with the granting of authority as a result of the evolving connections between subnational units and the center in the emerging nation-state. Autonomy of this type can be nonlegal or legal but in the case of the later it flows downward and is not "compacted." This proved to be the basis of local government laws and powers in England from the twelfth century on; they were promulgated by crown and parliament. Current examples would include the parliament and governance of Scotland under the U.K. Scotland Act of 1998, Greenland's self-rule under Denmark's Home Rule Act of 1979, and Crimea's distinctive self-governing under Ukraine's Constitution of 1996. In each case, a unitary state legally grants limited, self-governing powers to a constituent unit. While these transactions are usually based on protracted political negotiations, it is a non-contractual legal subordination of power that recognizes limited (as opposed to separate spheres) rule of matters of local importance (Agranoff 2001a). Territorial autonomy is also granted by division, that is legal decentralization of the central government into provinces/territories/districts/regions and by charters granted or recognized for municipal

corporations. In this type of autonomy, even when constitutions identify the existence of such units, their powers are granted (and removed) by central parliaments. As such, territorially autonomous units are not independent spheres that come together in a compating mode. They are integrally and legally subordinate to "higher" level governments.

Autonomy is not always associated with territorial authority. There is a long history of forms of communal autonomy without particular reference to local or regional government over a territory. One familiar situation is where ethnic populations are widely scattered and experience a type of "functional" or personal control over certain affairs. This type of autonomy implies selective self-management in educational, cultural, religious and sometimes juridical activities (Safran 2000: 12). An example of functional autonomy was Jewish communal authority in the Russian and Ottoman empires. For over two decades in the late eighteenth century in Russia the "Kahal" or corporate Jewish community not only dealt with religious issues but acted as imperial agents in collecting the Russian head tax among Jews. The Khals also maintained authority to control Jewish travel and mobility. Jewish courts had jurisdiction over civil and religious affairs. These bodies followed an earlier tradition of communal self-government under the Polish-Lithuanian commonwealth before 1764 (Fishman 1995: 9-10).

This type of communal autonomy persists in contemporary life, as persons of the same ethnic or religious group live in proximity in larger urban settings. For example, the influx of ethnic groups into cities has led to ethnically specific housing projects, specialty shops, voluntary societies and other institutions in selected neighborhoods, leading to functional self containment. If they are externally enforced they amount to segregation. If self-regulating: "These activities add up to 'autonomy' if they are voluntary and the state does not interfere" (Safran 2000: 12).

Federal Autonomy

In addition to functional and territorial autonomy a third variation exists that is unique to federation and related federal arrangements, e.g. confederation, federacy, federation and all of the others. As Elazar (1987: 33) maintains, federalism is a form of diffused political power that "rests on the principle that political and social institutions and relationships are best established through covenants, compacts, and other contractual arrangements, rather than, or in addition to simply growing organically; in other words, that humans are able to make constitutional choices" (see also Burgess 1993; King 1982). In ancient Israel the consent-based body

politic – **ital** – maintained strong constituent element identity and eventually territorial bases, in which separate institutions of communal government were maintained on the basis of agreements or covenants. In a sense the **ital** amounted to a tribal confederacy, "the constituent members of which could often pursue their individual interests without apparent regard for the common good" (Elazar and Cohen 1985: 62). In ancient Greece, "a few shadowy leagues and confederations" existed to meet such cross-polity-needs as common defense and trade protection, but the "intense feelings of community and individuality made it virtually impossible for Greeks to transcend the city-state." And while they never long transcended the passion for local autonomy (a Greek word), they looked outwardly through collective agreement (Roberts 1997: 174, 173). In some pre-modern feudal societies, contracted guarantees were quite common, such as the **fueros** or charters of rights in Spain, but these pre-modern societies were not aware of the problem of sovereignty, the hallmark of the modern nation-state. As a result they had less problems with divided authority, an issue that contemporary federalism addresses.

The era of European empire also brought forward federal type arrangements. For example, Moreno (2001: 41) describes a more or less typical Hapsburg arrangement, in this case regarding quasi-unified Spain:

The monarchs of the House of Habsburg favoured the formula of both political unity and territorial autonomy, and in general they maintained this attitude throughout their entire dynasty. The precedents for these were the political pacts of the Catalan-Aragonese confederation, adopted also by the Austrian branch of the same dynasty. The universalistic imperial aspirations that Spain and the House of Habsburg represented rested entirely on local autonomy and inclined towards federative combinations.

Indeed, early-Modern Spain constituted a series of autonomous arrangements that respected the self-rule of Castile, Aragon, Navarre, and their respective components.

As confederation transitioned into modern federalism, following the example of the United States in 1789, autonomy has become associated with two distinct spheres of rule including general designated government powers but nevertheless contractual. Riker (1964: 11) associates autonomy under modern federal government along these lines: "A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area in which it is autonomous, and (3) there is some guarantee (even through merely a

statement in a constitution) of the autonomy of each government in its own sphere.”

Federal autonomy was clearly recognized as a primary component in Alexis de Tocqueville’s (1988) nineteenth century study of American democracy. Building on the divided authority tradition of the colonial experience, towns and colonies had their charters, but legally they were tied to the monarchy (44). After the federal system was established the U.S. was said to have a complex constitution, with guarantees of two completely separate and “almost independent governments” (61). While much has changed from the days of Tocqueville, he concluded that at the local level, while local governments, e.g. towns may be legally subordinate “they have not received their powers; on the contrary it would seem that they have surrendered a portion of their powers for the benefit of the state.” In regard to New England townships, he observed that “In all that concerns themselves alone the townships remain independent bodies, and I do not think one could find a single inhabitant of New England who would recognize the right of the government of the state to control matters of purely municipal interest” (67) (see also Lutz 1988). Tocqueville clearly recognized that federal constitutional government rested on more than social traditions and legal regulation. It also was based in a series of negotiated but guaranteed powers, contractually arranged.

Thus, in addition to territorial and functional autonomy it can be argued that a distinct third or federal form of autonomy exists. It appears to be more than a variant of territorial autonomy. Its contracted guarantee of independent decision power, i.e. shared rule, makes it a matter of separate inquiry.

Operationalizing Federal Autonomy

Federal autonomy is put to the test virtually every time that the contractual relationship is exercised. In this process, federal systems have met many emergent challenges, e.g. universal suffrage, civil war, industrialization, the emergence of welfare states, and most recently globalization. While no two federal systems are identical, each goes through the exercise of defining what the contractual autonomy relationship means with every major action or policy. In the United States, a great deal of constitutional history involves limiting and testing – courts, Congress, state actions – the ability of states to function independently alongside those general government actions that can alter, threaten or even destroy that independence. Questions relating to the meaning of the

federal bargain particularly by maintenance of state authority are recurring (e.g. Walker 2000). In Germany, on the other hand, the institutional framework has significantly limited the autonomy of both the federal and the Länder governments. While it has permitted considerable decentralization, the German brand of "cooperative federalism" has led to a "unitary legal order while accounting for regional variations" (Benz 2000: 136-137). So the quest for some underlying tenets of federal autonomy is limited by the variety in federal arrangements and practices (Watts 1996).

One of the most clear and far reaching definitions of federal autonomy was offered by Spain's Constitutional Court in 1983 with regard to the well-known law that attempted to curtail the establishment of federal arrangements through its growing autonomous communities (AC). The statute, **Ley Orgánica de Armonización de Proceso Autonómico** (LOAPA), reduced some of the powers previously granted to the ACs and required AC parliaments to seek central government approval for their laws.³ The Court, based on six different challenges (five from ACs, one from national deputies) declared major portions to be unconstitutional, particularly provisions that involved the central government's newly added power to overturn AC laws, along with other AC normative actions. Basing its decision on Section 2 and Article 137 of the 1978 Constitution, the Court determined that "autonomy" means the possibility of making the final decision in relation to an assigned competency (they are also stated in the Constitution). The LOAPA decision not only set aside certain central government actions regarding "control" over the regions, but has served as the major legal standard that subsequently "measured" autonomy constitutionally in the building of Spain's evolving federalism (Agranoff 1996b; Agranoff and Ramos 1997; Vallés and Cuchillo Foix 1988).

Dimensions of Federal Autonomy

One overarching federal autonomy principle would be that of mutual respect or what the Germans call federal comity or **bundesfreundliches Verhalten**. Developed by the Constitutional Court, it means that each side, even in the exercise of its undisputed powers, is obliged to avoid undue interference with the constitutional prerogatives of the other level of government (Scharpf 1996: 369). In most federations and systems with federal features this involves the fundamental notion that a general government respects the existence and decision space of its subnational governments. At the same time constituent units substantially accept the processes and policies of the general government as legitimate and

binding. It means that even though a center may have the political or fiscal (and even legal – as defined by constitutional courts) power to erode or destroy a subnational government or governments it does not do so because it is a “general government” with specified powers. By the same token, constituent units must recognize, pay heed to and live by majority general government decisions, even when they don’t agree with them. Respect for elected governments and policy processes must thus be maintained (Leonardy 1996: 87).

Federal comity is a practice that seems to be constantly operable in Canada, where, “Is it a federal or provincial responsibility?” is constantly asked and the general government is generally restrained by provinces. In Germany, federalism has become more unitary in nature, and comity is regularly put to the test in political warfare (Gress and James 2001: 274). Nevertheless, comity is preserved by the Länder being an integral part of its second parliamentary chamber. In the U.S. it relies on the political power of state governments plus Congressional restraint along with those decisions of the Supreme Court that strengthen states. Subnational elections are virtually always recognized and respected. In contrast federal comity has historically been set aside in Mexico. For over seventy years, the ruling PRI party controlled state elections, governments and policies in Mexico (Rodríguez 1997). It is only in the past two decades that this principle of running over the states has changed, with rotation of other parties into local, state, and finally the presidency of the general government. Also, in India, where the center has used a clause in its constitution to move against its states by removing its elected governments or pushing aside policy decisions around one hundred times (Arora and Verney 1995). Without federal comity the contract is violated. A country is thus hardly federally autonomous, because constituent units lack the independence of shared rule and self-rule is set aside. They do not have the right to make important final decisions regarding government and over matters of assigned competencies.

Beyond the overarching principle of respect for the contractual arrangement through federal comity there would appear to be a set of principles that have come to be associated with federal operation that meet the test of time. A framework identified by Rufus Davis (1956) nearly a half century ago is highly instructive. The first principle, similar to the federal respect idea, says that general governments must operate in a way that they do not destroy the electoral or decision powers of subnational governments. Davis (1956) refers to the ability of the members of a federal state to, within their ambit of power, and in terms of the federal bargain, be able to pursue their own ends, in the manner they

choose, providing they do not destroy, limit or encroach on the other's sphere.

A second Davis principle is that powers or competencies should be legally identified and divided, so that subnational governments possess sufficient authority over their own spheres of activity. In other words, it is not enough to divide functions and respect them, but in reasonable numbers some should be primarily if not exclusively subnational. A third principle is that there exists an impartial judicial remedy for settling disputes between levels, or that weighs such disputes against federal constitutional provisions. Most federal countries implement this idea through their constitutional courts.

The fourth principle has to do with taxation powers, in that subnational units should possess sufficient revenue powers along with independent normative power over raising such taxes. These powers should be independent of general government tax powers, again, with final decision at the subnational level. The fifth and final principle has to do with expenditure powers. The subnational units must also possess decision power over spending the tax monies that they levy. Although these are not the only principles of federalism advanced by Davis, they are the ones that would uphold autonomy. Along similar lines as those identified with the Spanish Court, he concludes that within federal systems the "irrevocable freedom of each unit to initiate those measures and pursue those ends it believes within its ambit of power" (235) is essential.

It could additionally be argued that federal autonomy would have to contain the feature of some role for subnational units in the general governments' policy making and basic governing processes. Different countries handle this differently, but generally it is by direct constituent unit representation in parliamentary bodies, often in second chambers. Canada and Australia also use "executive federalism" extensively, where first ministers and other cabinet members at both levels sort out problems of federal significance (Watts 1996). In the United States and Brazil, governors are also important political forces in the federal scheme, even though they hold no direct or official representative positions. They can be and often are politically important representational forces (Haider 1974; Mainwaring 1997).

Some federal scholars would also argue that ability to change the overall federal system is needed. Constituent units should possess sufficient legal (and political) power to intervene in order to change the basic general government framework (King 1982). This power would appear to be directly and regularly put to the test when the German Bundesrat meets to make major policy decisions, that is – framework

laws that affect the entire federal system. On the other hand, it exists only indirectly in the U.S., in that the states can (but have not) call a constitutional convention.

Evolving Federation and Federal Arrangements

Daniel Elazar (1984) once maintained that the federal matrix in countries like the U.S. has always been a “matrix of matrices,” with changing power loadings in which general and subnational concerns are necessarily addressed. In essence, he maintained that the U.S. was neither centralized nor decentralized, but noncentralized in character. Federalism world-wide has displayed similar resilience to vast challenges and changes. There are many adaptations to forms of noncentralization. In just over two centuries of existence in its modern form, federation has displayed remarkable resilience, as witnessed by federal arrangements in such different forms as federacies, union and condominium arrangements, associated states, and the like (Elazar 1994).

In regard to government structure, perhaps no two of the twenty-three or so federations are completely alike. Traditionally Mexico, India, Austria and Malaysia are considered to be part of the federal family but are highly “centralized” in nature. Power is loaded in their national governments’ favor, so to speak, at the expense of subnational autonomy. By contrast, traditionally “decentralized” federations would include Brazil, Canada, Switzerland and perhaps recently Belgium. Somewhere in the middle, where general and subnational balances are the normal order, would be Germany, Australia, and the United States. Of course there are also what many would consider to be nominal federations, such as Russia, Pakistan, Argentina and Venezuela. These are, of course, general tendencies but perhaps they demonstrate the “rules” for federal existence are rather limited and flexible beyond the constitutional division of governing in which the people grant power to two levels simultaneously (Burgess 1993; King 1982).

In addition to these formal federations stand a handful of what can be identified as developing federations, or federal-like systems. These countries – Belgium, Ethiopia, Spain, South Africa – are constitutionally entrenching second-level autonomy and over a period of time are using their federal arrangements to move closer to federation. Each is in a different state of development and the four “proto-federations” vary in the degree of decentralized autonomy and even democracy that is manifested (Hooghe 1993; Agranoff 1996; Moreno 2001; Breitake 1995; Simeon and Murray 2001).

Belgium's center, community, plus capital region negotiated arrangements have moved it the closest to federation over the past three decades. Since 1972 the center has been hollowed out in favor of overlapping communities that are responsible for education, culture and related affairs and regions that are responsible for economic development, infrastructure and related matters. Functions (e.g. agriculture in 2000) are increasingly transferred downward. The regions even have those treaty/foreign affairs powers that relate to their other functions. The last big piece of the picture, devolved financing, is being worked out in 2001-2002. The general government retains pensions and social security, health, defense and those foreign affairs that do not impact community interests. The case of Belgium is clearly not one of an aggrandizing center, but rather the opposite; a polity that is compacting by devolutionary reforms (Fitzmaurice 1996).

The case of Spain's post-Franco state of autonomous communities also comes close to federation. Again, a federal pact was not forged, but a set of basic agreements were made to accommodate historic ethnoterritorial claims (Moreno 1997; 2001) that have led to federal-like arrangements for its seventeen self-governing constituent units. It has been a process that was constitutionally established, but growth and development by multi-party agreement (Agranoff 1996) and through extensive intergovernmental relations (Agranoff and Ramos 1997). One of the latest pieces of the puzzle was put in place in late 2001, when the government changed the financing arrangement from sets of subventions to a set of extensive tax sharing formulas, in some cases the transfer of normative powers over small taxes. The new system places one third of revenues from the income tax, 35 percent of other taxes (tobacco, electricity, transportation) in the hands of the ACs. In return, certain functions, particularly health care, were completely transferred to the regions (Ruíz-Huerta, Herrero, y Vizán 2002).

Federal countries must be similarly resilient because of the many social, economic and political shifts they face. In the case of the United States, it has occurred over a period of two and one-quarter centuries. The federal country began as a limited suffrage small republic that was primarily agricultural-rural and commercial, and comparatively insular. In its existence it has faced similar challenges to those of western countries. Along came universal suffrage, industrialization, urbanization and later greater international concerns. Political parties emerged somewhere along the line and in the twentieth century three changes profoundly changed its polity: the welfare state, taxes on incomes and the end of international isolation. In many ways these changes are related. The international order and the welfare state became financially dependent on

the income tax to fuel them. The welfare state was a cross-nation phenomenon, and income tax expansion through came as post-war prosperity set in (Shannon 1990).

These forces definitely changed the role of the U.S. federal government, as they did in most other federal countries. Some would say that theses forces tipped the balance in many federal countries toward general governments. It has been suggested that in the twentieth century the pillars of a national electorate, manufacturing and commerce, international relations/defense, the welfare state and income taxes altered the government balance of federal countries to make them similar to those of unitary countries (e.g. Zimmerman 1992). But that conclusion may be premature. While it will be demonstrated that centralization is a concern, subnational governments, including constituent units in federal countries, are also growing and developing their own powers, and therefore reinforcing their autonomy (Agranoff 2001b; Anton 1984; Rhodes 1997).

The Universal Challenge of Intergovernmentalization

The previously mentioned developments, particularly growing welfare states and the income tax advantages of central governments, have led to an accelerated amount of intergovernmental relations within all federations. Richard Rose (1984) explained this phenomenon in his **Understanding Big Government**. The chief day-to-day task of every nation's government has become the routine nationwide organization and delivery of welfare state services. Country-wide operation involves the power to organize and distribute on a widespread basis, involving subnational units and local delivery agents. Central governments initially finance and set the conditions and parameters of services but it does not administer them. Multiple institutional involvement suggests interdependence (as well as dependence). Therefore government involves both territorial authority and functional responsibilities. It is therefore useful to think of government activity as programs, with the essential links those of coordination. "*Policy unites what constitutions divide*" (Rose 1985: 21). While the welfare state was fueled by the income tax and somewhat by growing defense concerns, it profoundly changed the nature of all polities. For federal countries, intergovernmentalization accelerated as was a natural adaptation of systems where functions were historically connected (Elazar 1962).

Intergovernmentalization presents tremendous challenges to federal autonomy. First, national programming has increased. In the attempt to seek nation-wide standards and equity across all populations – to have national programs – constitute admirable goals but they can come at the expense of constituent unit decision making power. The most obvious case for nationalization of this type would come in regard to health and social policy. While competencies and powers tend to reside in subnational governments, the desire for minimum standards and equity across regions intergovernmentalizes these programs. Constituent units appear to be in regular struggles to maintain “the final say” over these competencies. In most federations, there have been attempts to operate programs on a shared central-subnational basis, within some parameters of subnational program design, either at the “front end” by prior bargaining as in Germany through the **Bundestag** or during the administrative phase, as is usually the case in the U.S. Canada seems to do both, through its executive federalism mechanisms as well as by provincial administration. Despite any administrative control over programs, the **policy** development venue, particularly in social welfare, has definitely shifted upward over the past half-century.

Second, of greater threat to federal autonomy is the tendency toward central preemption of constituent unit regulatory programs. Granted that some programs, for example air traffic control, naturally lend themselves to capture by the center. “The changing times and technology will always generate some instances of competency capture.” But in vast areas of welfare state regulatory policy, for example health and safety, telecommunication, and aspects of environmental policy, the center has made the constituent units vacate areas that were traditionally in their portfolio of programs (Zimmerman 1993). In Europe, many of these functions are negotiated between central/general governments and the European Community, with only regional powers of consultation. Thus, national accretion of programs and program regulations presents considerable threats to federal autonomy (Kincaid 1998).

Third, increasing fiscal flows from center to constituent units can be threatening to the revenue/expenditure dimension of federal autonomy. In the U.S., for example, by 1978 federal aid accounted for 22 percent (up from 5 percent in 1954) of state and local revenue, largely because of increased social welfare expenditures. This growth, according to Bahl (1984: 22) had the effect of reducing the role of state governments in overall public financing and increased the dependence on the federal government. These spending ratios have somewhat receded over the past two decades. The general trend, however remains.

How is autonomy maintained within a system of creeping inter-governmentalization? Each country develops its own mechanisms of intergovernmental relations to maintain contacts between the levels. Federal parliamentary systems like Australia and Canada tend to find means by which the executives of each level meet with one another (Galligan 1995; Watts 1996). Federal presidential systems like U.S. and Brazil tend to depend on a combination of state representation and direct contacts between governors and the national administration. Germany and South Africa rely on their second chambers, where there is direct representation, to address matters of autonomy. Most federations rely on the judicial process, usually with a constitutional court to protect and uphold the autonomous rights of subnational units. Also, each country develops working means of administrator – to – administrator working interaction, formal and informal, to work through programs (Agranoff 1996a). Finally, a sometimes forgotten element of program implementation in the intergovernmental era is the power and control that subnational units hold because they possess the day – to – day or operational mechanisms of programs. To have such control over a shared program means maintenance of large measures of autonomy (Pressman 1972) as well as the ability to play various games of collaboration (Agranoff 2001b; Agranoff and McGuire 2003). As Anton (1984) once observed with regard to the U.S., one cannot confuse federal program (and funding) growth with federal power. Rather than U.S. federal government expansion at the expense of the states, perhaps the scenario is federal and state growth. Intergovernmental relations are designed to cope with simultaneously expanding governments.

The essential questions relate to the degree to which political efforts and policy competencies traditionally thought of as subnational remain as essentially or substantially within that sphere. Recognizing that exclusiveness no longer is (or perhaps ever was) possible the question is a matter of “substantial” balance. In some arenas, there is no doubt that the decision balance has become more central or national, e.g. arenas of managing the economy, environment, health financing, health and safety, and in many federal countries education. Nevertheless in most federal countries (Germany and India may be exceptions) not only does implementation control remain in the hands of subnational governments (and their governance partners) but some arenas remain substantially subnational. In the United States, for example, economic development, transportation, regional planning, mental disability services, police and corrections, and education remain essentially state/local functions (for example see Edner and McDowell 2002). In short, measures of subnational policy and program autonomy are far from lost. While

intergovernmentalization has led to measures of shared decision, there remains ample opportunity for decision, including the final say, in many program arenas (Agranoff 2001b).

The Emerging Challenge of Governance

In the past few decades there has also been recognition that a new overlay of governance exists alongside intergovernmentalization. While government refers to the formal institutions or bodies that establish the constitutional order, defend the territory, raise and distribute revenue, establish the laws and regulate the territorial organization of the state, governance represents governments' attempt to guide, steer, control or manage the wide range of new nongovernmental actors in civil society, and in the economy, to jointly formulate and implement policies and programs (Hirst 2000). Rhodes (1997: 7) refers to the British polity as "differentiated," characterized by functional and institutional specialization and the fragmentation of policies and politics. Increasingly, policies are effected by non-elected officials, inside and outside of government. Fredrickson (1999) refers to the increasing disarticulation of the state, where there is an increasing gap between jurisdiction and program management. As will be demonstrated, the governance phenomena occurs through networks of actors. In regard to federal countries, it means that the governmental levels are not supplanted, but that nongovernmental organizations involved in the work of government represent lateral concerns at most levels (Agranoff and McGuire 1998). Governance becomes another adaptation challenge to autonomy.

Governance challenges over the past half century are identified by John Loughlin (2000: 14-15) in his examination of European regional autonomy. He traces changes in economics, society, culture and values and state features through three eras: the "expansive" welfare state, the "contracting" neoliberal state and the current "communitarian" social state. In regard to state features he traces the aforementioned income-tax based welfare state with its centralism and bureaucratization – managerialism features succeed by the "hollow state" with less government intervention, tax reductions, privatization, decentralization and the "marketization of public services." The current era emphasizes equality of opportunity and social justice but through competition. He calls it the enabling state, with no return to the old welfare state, slimming of the bureaucracy, new public private partnerships, decentralization and devolution, revalidation of and local authorities plus rebuilding of local democracy. If this is the case, clearly the enabling state demonstrates that some of the things that go around come around, so to speak.

Growing complexity within the federal order posed by governance networks within the enabling state deserves recognition as a challenge to autonomy. Governance networks are new frameworks for policy and program development and implementation, comprised of governmental officials and leaders, public and private, on public issues (Agranoff and McGuire 2001a). They exist at all levels of government, and do not supplant traditional public functions, but become important elements of a community of public operations. They are similar to the urban "regime" identified by Clarence Stone's (1989) research on Atlanta and explicated into a theory of urban politics by Stoker and Mossberger (1995). Governance networks differ from corporatism models in many ways, the primary differences being that a variety of interests, often differing, are brought to the decision structure and that government is not the petitioned by a set of closed interests for settlement, but the various interests decide with and implement with government.

The forces behind governance networks relate to basic changes in society and the economy. Work and also many public problems are less labor and more human capital oriented, often symbolic – analytic in nature (Reich 1991). Knowledge, however, must be integrated, because creative activity or change management depends on the type of collaboration where people must be exposed to other's thinking (Agranoff and McGuire 2001b; John 1994; Pasternak and Viscio 1998). The most important technological and social developments come through combined technology, human capital and financial capital. Successfully collaborated integrated strategies build on integrated platforms, e.g. trust, creative opportunity, continuous learning that potentially adds public value (Bardach 1998). Indeed, collaboration can be employed to gain several advantages: shared knowledge, shared tangible resources, economies of scale, pooled negotiating power, coordinating strategies, vertical integration (coordinating the flow of information/services between organizations), and creation of new units (e.g. new structures, joint ventures, alliances) (Campbell and Goold 1999). As a result, the age of the network has arrived as the signature structure of the information age, working as an organizational vehicle alongside previous group, hierarchy and bureaucracy structures (Lipnack and Stamps 1994), and as vehicles that help meet the challenge of greater complexity, scope, speed, flexibility, and adaptability (Alter and Hage 1993).

In this regard, O'Toole (1997) suggests five important reasons why governance models that employ networks have become important to contemporary governments. First, government is increasingly tackling "wicked policy problems," e.g. poverty, environmental degradation, structural unemployment, integration of immigrants that involve the

concerted efforts of many forces and interests in government, society and the economy. Second, there is a contemporary preference for limited government solutions, in favor of those involving non-governmental organizations, private businesses, neighborhood associations, religious organizations, and families. Third, intergovernmentalization, originally triggered by the welfare state, has led to divided political authority among levels of government. Without neatly divided competencies, it is less likely that only one government or level will be in charge or involved. Fourth, policy-makers have become increasingly aware of second-order program effects that touch multiple entities. Poverty reduction, for example, reaches beyond income to aspects of education, training, child care, housing and social services. Fifth, layers of implementation-oriented mandates and regulations that have come along with intergovernmental subventions and programs, have meant that many nongovernmental organizations, private businesses, religious organizations along with subnational governments are involved with the work of government. For these reasons, O'Toole concludes that networks must be "treated seriously."

Governance poses a challenge to autonomy under federalism if networks of general or national origin pre-empt decisions at subnational levels. This indeed can happen, as it did in the United States when federal policy-makers, NGO's and social work professionals tried to define reimbursable social services for the states. The proposal met with widespread disagreement and was ultimately withdrawn by federal officials. In most areas the proposal would not work well and it was deemed to usher in a complicated set of policy problems (Derthick 1975). The question of national preemption by governance networks would seem to be very real in federal countries like Germany, India, and Mexico, where a centralization logic in policy-making is integrated to their governance mode. Germany, for example, has experienced the convergence of nongovernmental and governmental organizations at the center at the expense of the Länder (Benz 2000; Gress and James 2001).

A contrary resolution, that respects the autonomy of U.S. state governments, is currently unfolding. The U.S. Supreme Court ruled in **Olmstead U.L.C., 527 U.S. 581 (1999)** that two mentally retarded persons who were clinically judged to be ready for community living were withheld from state institution discharge because the State of Georgia had no placement programs available for them. The Court held that Title II of the Americans with Disabilities Act of 1990 requires states to place qualified individuals with mental disabilities in community settings, rather than in institutions, whenever treatment professionals determine

that such placement is appropriate, the affected persons do not oppose such placement, and the state government can reasonably accommodate the placement, taking into account the resources available to the state and the needs of others with disabilities. In effect the litigants civil rights were being violated if they were held in an institution if not clinically necessary.

The response of the federal government, from 2000 – 2003 is to encourage state level networks of state mental retardation agencies, state advocacy groups, state associations, nonprofit service providers, and local government associations to develop “Olmstead plans” for community services. The U.S. Departments of Justice and Health and Human Services are offering micro planning grants to smooth this Olmstead process along. As of mid 2002, some 42 states have taken own-source network initiatives to investigate resources and waiting lists and to ratchet up community services. The Olmstead commissions are governance networks at work. They work in a similar way in many facets of environmental protection and economic development (Agranoff and McGuire 2003; Wondolleck and Jaffee 2000). There need not be an inherent centralization logic to governance networking in federal countries where there traditions of dual operations networks can operate in ways that respect autonomy. While governance networks no doubt complicate policy and program, they can be used to enhance federal autonomy if they operate like the Olmstead movement, focusing on the relevant stakeholders at subnational levels to create subnational programs.

The challenge for federal political leaders and administrative officials at all levels is to participate in a more strategic and political process of managing large-scale transformations towards networks of subnational governments, through joint policy and program development. This calls upon governments to engage in the new skills of “reformcraft,” (Metcalf 1993: 74), that symbolize the interactive and interdependent roles of multiple solutions (Agranoff and McGuire 2001b). Do these challenges for interorganizational reforms and capabilities replace the role of government? Probably not. They should be thought of as further extensions beyond managing at ones own level and of inter-governmentalization, where growth and power have become external and even more dynamic. Government retains important functions, at general and intermediate levels, not the least of which is that of ultimate policy decision. As Hirst (2000: 31) suggests, the democratic nation – state remains as the best available locus for “suturing together the distinct forms of subnational, national, and supranational governance.” This is because of its constitutional capacity as a source of focus for political identity and democratic legitimacy, and if internally stable, government

decisions are regarded as legitimate externally. Nevertheless, federal autonomy remains dynamically challenged because the state not only faces the emergence of overlapping intergovernmentalization and networks but "the state" is based on a rule where ordering, identity and legitimacy, and external legitimacy is by prior agreement shared among levels (Hurst 2001).

General Government Intervention and Federal Autonomy

Any reasonable theory of federal autonomy would include circumstances under which intervention is warranted. Why? Because federation means unity and diversity through the pursuit of general and constituent concerns. In addition to the ability to pursue individual unit concerns it would appear that one of the most important reasons why federations exist. The simultaneous pursuit of "general" or those concerns of all the people stands alongside autonomy as a reason to federate by compact. Clearly, this is one of the primary reasons why the United States federated (Beer 1993).

The primary situation where intervention would appear to be warranted, and is easily overlooked, are situations where there is overwhelming agreement among constituent units that general government action should be taken. In federal theory, it amounts to decisions in the interest of the overall unit, because the general government represents all of the people. The requirements for such decisions vary from federation to federation. Few undertake the compound majority consultative referenda system of Switzerland but it is one, clear approach. Most federations reach general, system wide consensus by representation through their parliamentary bodies. Some, for example Germany, place special emphasis on reaching constituent unit representation agreement through their second chambers. Shared rule does not forsake the possibility that the constituent units can "agree" to decisions on behalf of the general polity. It could be argued that the construction and solidification of Western welfare states (and, consequently intergovernmentalization) of most federations were in fact built this way (Ashford 1986; Flora and Heidenheimer 1987).

General intervention would also appear to be warranted to preserve central tenets of federal democracy. If for some reason the principles of self-rule are violated by a constituent government then it would appear appropriate for the center to act to reinstate or insure such principles. Most federal constitutions have such interventionist principles, rarely invoked but available if necessary. In the U.S., the Constitution

guarantees that states follow a "republican form of government." This is a clause that only once has been brought before the Supreme Court, in the 19th Century, to which the court ruled that it was a political matter for the Congress to decide. On the other hand, as mentioned, India uses such federal intervention indiscriminately. Nigeria and Brazil have also used such provisions as a means of instituting military coups, that have curtailed self-rule by suspending elections and appointing subnational officials. Central government self-rule guarantees may be important, but real democracy would dictate that they be used discriminately.

Analysts of federation usually agree that contemporary political systems can justifiably intervene when the rights of individuals are being violated by constituent units. The past two centuries have added a list of civil liberties, e.g. free speech, right to assembly, freedom from unnecessary government harassment, right to due process of law, and so on, that have been guaranteed by central governments. Violations by constituent units, which are expected to guarantee such rights, are not tolerated. In such cases, it is ordinarily the general government, that moves against a component unit, when it does not police its own violations. In a contemporary sense, without these liberties, there is no real democracy. As Larry Diamond (1998) maintains, in the absence of such liberties, at any and all levels of government, countries are merely "electoral democracies."

Another generally agreed upon area of potential central intervention would be for those reasons of protecting internal order and promoting external security. Any nation state has a right to protect itself from inside and outside threats. In this respect in 2002 the Spanish parliament outlawed the existence of Batasuna, a Basque regional party with close ties to the violent separatist ETA movement. Batasuna receives between 10–15% of the vote in Basque regional elections, and refuses to condemn ETA terror and is suspected of aiding the group. As a threat to the regime, the central government acted to remove Batasuna from local, regional and central election ballots and the courts have closed down their headquarters and frozen their assets. The general governments of federations stand in similar positions to central governments in unitary states. When the powers of political association threaten security, to move against constituent unit governments' threatening is a central intervention power with which few disagree.

One intervention area that is newly opened would be intervention in the affairs of a constituent unit on "domestic issues," where the general government has taken action under its international affairs/defense powers. In this era of globalization and international organizations treaty

"regimes" this is an important question. The Commonwealth Government in Australia has used signed international environmental treaties to stop economic actions of the states. The Constitutional Court has upheld such a right to intervene. One action had to do with oil exploration conflicts with Queensland and the other over a dispute with Tasmania over the building of a dam, two functions previously of clear state orientation (Galligan 1995). Perhaps not all would agree that such federal action against the states is warranted because of conflicting powers. When federations join supranational regimes, sign multiple treaties affecting "domestic concerns," engage in widespread trade and development, these opportunities to intervene will no doubt increase, however, this issue deserves a more thorough analysis than this paper can provide.

The same could be said for protecting minorities within constituent units. When is it appropriate for the general government to intervene? Beyond the protections already mentioned should the general government intervene to protect constituent unit majorities taking action that are distasteful or against the wishes of a minority within a constituent unit? Some would argue that civil liberties and freedoms are the only guarantees minorities should have. Others would say that certain minorities within constituent units should be guaranteed social, cultural, and even educational rights that, if not protected, deserve central intervention. Others argue that such guarantees are not automatic under federal democracy. Indeed, Loughlin (2000:11) suggests that tensions may exist between the rights claimed for the community – in terms of language use, education, religious customs, culture and appeals to individual rights or claims made by members of a different community. This indeed has been the case for non-Basques in the Spanish Basque provinces and non-Catalans in Catalonia (Zaldívar y Castells 1992). In Spain, it has meant central intervention in certain matters to protect minorities within minority regions (Agranoff 1993). Federations regularly face these issues, e.g. rights of indigenous peoples, minority religious groups, and non-dominant ethnic groups. The rules of intervention have generally been to respect such rights by the center as the protector of all citizens rights, forcing constituent units to conform. Because these are general rules, they are subject to numerous interpretations and applications, again which is a matter for a more in-depth application.

Conclusion

There would appear to be no other conclusion but that despite the many nuances and twists that are called federal arrangements, and despite federations' challenges internally and externally, most of the stated principles of federal autonomy should hold. Since shared rule is an integral component of the idea of federation there is no alternative but to respect elected rule by subnational governments. Intergovernmentalization, the existence of policy networks, international agreements, and all sorts of varieties of federal arrangements should not change these principles. Federal autonomy continues to amount to contracted (as opposed to granted) subnational rights to govern independent of the general government.

In this regard, federal autonomy has been defined as prior contracted agreement that subnational governments have independent control over important matters of program, policy, and the organization and operation of their governments. In a federal system, autonomy is thus a core element of shared rule. The general government must respect the integrity and independence of its constituent units, including the legitimacy of its openly elected officials. The subnational governments must possess sufficient ability to operate independently, for example over taxation and expenditures. Moreover, in this era of intergovernmentalization and networks, subnational governments in federal systems must have reasonable measures of program control over those general government sponsored vertical programs for which they share responsibility (Agranoff and McGuire 2001a). Finally, subnational governments must have reasonable ability to intervene and effect general government action.

General government intervention in federations and with federal-like arrangements has never been totally unlimited, yet the definition of "control" is ever changing. Protection of individual liberties and of minority group rights have become reasons for intervention along with general internal order and external security. There is little doubt that by consensus the government of all the people can take action on behalf of that population, a core federal value. Without such a function, another part of the federal contract cannot be fulfilled, and it clearly is not negated by the existing practices of intergovernmentalization and policy networks. "Federalists" should not forget that the general government also represents the people, and on a broader scope than that of the constituent units.

While not every proponent or analyst of federation will necessarily agree with all of the grounds for intervention, the "national" or "general" elements of federation must hold along with those related to autonomy. Federation has been a venerable arrangement that preserves unity along with the diversity promoted by contractual autonomy. It operates in many of the world's largest nations because autonomy meets the widely diverse challenges of general government transformation from small polity republican to large polity democratic principles with universal suffrage and representative government. It has also helped disparate units meet later waves of welfare state induced intergovernmentalization, internationalization, and now the age of the network.

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- 1 The author would like to acknowledge the helpful comments of Franz Gress, Uwe Leonardy, Luis Moreno and Ronald Watts.
 - 2 The author is aware of a third contemporary challenge, posed by global/international concerns, particularly such supranational organizations as the European Union. As general governments negotiate with these regimes they often leave constituent units to a secondary role, or out of the process, reducing autonomy. While international concerns affect all federations, some are more impacted than others by international regimes like the European Union. It is a topic that deserves separate analysis. With one minor exception is not undertaken here.
 - 3 The original Virginia Plan introduced to the U.S. Constitution in 1787 also contained a provision that would empower Congress to overturn state legislative decisions "in which the harmony of the United States maybe interrupted by the exercise of individual legislation." After extended debate on this matter, it was dropped from the draft and never revived (Rakove 1996: 60).

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The American Rule of Law and Secession: Juridical Ties That Bind and Divide

It is said that the right of secession, if conceded, makes our Government a mere rope of sand ... better, far better, a rope of sand than the chains of iron, and shackles of steel.

[US Senator Judah P. Benjamin, Louisiana, February 4, 1861]

I

The constitutional status of secession in a federal system of government reveals much about the nature of the ties that bind the member states together. The constitutional status of secession effects whether the ties are primarily consensual or coercive, and commensurately the balance of power between central and state governments. As expressed in the statement by Senator Benjamin *supra*, the ties binding the American States together may be "a rope of sand" or "chains of iron." A rope of sand may suffice in maintaining an enduring union based upon the consent of the States provided the collective economic, cultural, and security interests are so prominent that consensual membership suffices, even in the absence of a centralized *supranational* government with the legal authority and power to coercively maintain membership. However, when the economic, cultural, and/or security interests of the States diverge, and the consent of a member state (or states) to remain in the union is withdrawn, then compelling such a state to remain in the union would be inconsistent with of a union based upon the consent of all its member States.

In a consensual federal union, if substantial changes to the economic, cultural, and/or security needs of a member occurs, its membership in the union may be discontinued as its interests dictate. But once the centralized government assumes coercive enforcement powers to maintain the union intact, then the union becomes an end in itself, in contradistinction to an instrumental means to securing the interests of each of its member-states, and the nature of the union is substantially

changed from one designed to promote the collective interests of its members to one promoting the selective interests of a dominant coalition of members. The option of member states to secede from such a union is the only way to guarantee the consensual basis of the union. At the critical point when a member state of the union decides that its continued membership in the union is contrary to its interests, it is at that critical point that the central government's ability to keep the union intact, whether that of the US or the EU, should be a "rope of sand" if the consensual basis of the union is to be maintained. Otherwise the union is not grounded upon the consent of all its members, but upon coercion.

As evidenced by developments in American jurisprudence, the transformation of a consensual union to one based upon coercion is not necessarily contrary to the rule of law. For more than three generations the American Union was based upon the consent of all the States, but subsequently modified to one based upon national coercion. That modification was sanctioned by the US Supreme Court when it deligitimized secession in 1869 through precedent established in *Texas v. White*.¹ This substantial modification to the American rule of law was facilitated by ambiguities within the US Constitution regarding two key constitutional issues, national judicial supremacy and the constitutional status of state secession.

If European nation-states value an EU based upon the consent of its members, they should scrutinize those developments in the US regarding judicial review and state secession which, facilitated by the textual constitutional ambiguities surrounding national and state relations, transformed the Union. According to Nobel Laureate James M. Buchanan.

The lessons of the American experience for the Europe of 1990 are clear. The citizens of the separated nation-states face an opportunity to enter into a federal union that can be an instrument for achieving the enormous gains of economic integration. In this respect, the parallel of the America of 1787 is direct. In the process of establishing an effective federal union, a central political authority must come into being with sovereignty over citizens in all of the nation-states.. But the ultimate powers of this central unit must be reckoned with, and checks must be included in the constitutional contract that defines the federal structure. The formal rules of such a contract will not, however, be sufficient, as the American experience so well demonstrates. There must also be some explicit acknowledgement, in the contract of establishment, of the rights of the citizens in the separate units to secede from union, upon

agreement of some designated supra-majority within the seceding jurisdiction.²

In the US the prerogatives of state high courts vis-à-vis the US Supreme Court and the constitutional status of state secession from the Union were merely implicit constitutional options, lacking the "explicit acknowledgement" recommended by Buchanan. Consequently, American judicial federalism and state secession were too contractually malleable to dominant political forces. This would not have been the case if there had been explicit provisions recognizing parity between state and national courts and a State's constitutional right to secede. The case in point, if the right of secession had been made explicit in the text of the US Constitution, President Lincoln's war against the Confederacy and *Texas v. White* would have been embarrassingly inconsistent with the American rule of law.³ Because the US Constitution lacks an explicit provision allowing state secession from the Union, the US Supreme Court had the opportunity to articulate a new rule of law that explicitly denies the constitutional right of a State to secede from the Union and thereby effectively transform the Union from one based upon the consent of the States to one of national coercion.⁴

From a public policy perspective the transformation of the American Union from one based upon consent to one of coercion is essentially the reallocation of power from the States to centralized authority, to the extent that the policy preferences of the former are displaced by the latter when prevailing national power brokers so dictate. The evolution of the American rule of law regarding this reallocation of power between the States and national authority has been substantial. Utilizing the "rule of law" as its modus operandi in a wide range of policy areas, both economic and social, the US Supreme Court has been instrumental in transforming the Union from a consensual association of States to one increasingly relying on coercion⁵ sanctioned by the rule of law. Is the European Union vulnerable to a comparable transformation? Will the EU Court of Justice play a policy role similarly played by its US counterpart? It is highly probable that the expansion of EU jurisdiction and the concomitant policy prerogatives enhance the prospects of arbitrary applications of centralized power, with the EU Court of Justice, its current deceptive obscurity notwithstanding, playing an increasingly important role in the legitimization of EU power.⁶

The EU Court of Justice's initial obscurity may be its strength and mimics the US Supreme Court's incremental rise to power in interesting ways.⁷ For example, the EU Court of Justice has been quietly facilitating European centralization and is poised to do more:

The Court of Justice is the most underrated (and perhaps the most overworked) of the five major institutions of the EU. While the Commission and Council of Ministers attract most of the media and public attention, and become embroiled in the biggest political controversies, the Court has quietly gone about its business of clarifying the meaning of European law. Its activities have been critical to the progress of European integration, and its role just as significant as that of the Commission or Parliament, yet few Europeans know what it does.⁸

In the US national supremacy was incrementally facilitated and sanctioned by the Supreme Court with the acquiescence of the States through either outright approval, inattention, or failed resistance and is now firmly ensconced in the American political process and jurisprudence. But most importantly it was the US Supreme Court's nullification of the States' implicit constitutional right to secession which resulted in the demise of a consensual federal union. To follow is an adumbration of how the Supreme Court effected that nullification.

II

Usurping national supremacy at the expense of states' rights would have been much more problematical without national judicial supremacy and the denial of a State's constitutional right to secede. Both in varying degrees preclude state-based self-government in the public policy areas where national policies are imposed against a State's policy preferences.

The rise of national judicial supremacy is attributable to the accumulative effects of court rulings that have incorporated into American case law nationalistic legal norms designed to augment nationalism by denying to state supreme courts the opportunity to juridically curtail what the State considers to be unconstitutional national policies.⁹ The subordination of state supreme courts was accomplished by removing them as co-equal partners in resolving constitutional questions. US Supreme Court justices normally resorted to the syllogism that (a) the Constitution mandates national policy uniformity, especially in the public policy area of commerce; (b) public policy uniformity and states' rights judicial federalism are incompatible; thus (c) states' rights judicial federalism is unconstitutional. The end result, the establishment of a rule of law confirming US Supreme Court dominance over state supreme courts.¹⁰

The Supreme Court's success in subordinating the state supreme courts was not easily achieved, due to the fact that the tension between centralized authority and localism (or subsidiarity) is part and parcel of the American experience. Localities versus state authority and state authorities versus national authority are manifestations of competition over the locus of sovereignty, i.e., the allocation of political power. Accordingly, the success of US Supreme Court jurisprudence is due in large measure to a fluid centripetal uniformity that provides the States enough distance from complete dominance by national power, but well within the orbit and control of that power regarding issues deemed to be of national importance. Similarly, constructing a centralized Europe has been a work in progress through a series of treaty-making prerogatives (e.g., the Common Market, the European Economic Community, the European Community, and the European Union). Nevertheless, the national policymaking prerogatives of, for example, the English parliament vis-à-vis Brussels's policy mandates are ambiguous and analogous to the ambiguous American States' reserved powers vis-à-vis the US Government's enumerated powers. In the US the Supreme Court was pivotal in establishing national supremacy by stripping the States of much of their reserved powers policy prerogatives.

Are European nation-states destined for a similar fate as the EU continues down the road of integration and expansion? The integration of new nation-states with greater economic, cultural, and political diversity will present more challenges to policy uniformity across the expanding EU, challenges which most likely will be juridically resolved. Such being the case, explicit stipulation of judicial federalism and national secession from the EU would effectively mitigate the prospects of European integration from developing a US styled rule of law that sanctions coercion as the tie that binds member nation-states to the EU.

Juridical "rule of law" developments similar to the US experience if not apparent in the EU are at least probable under the current institutional prerogatives the EU Court of Justice. The EU Court of Justice and its Court of First Instance have important roles to play in transforming the formerly sovereign nation-states of Europe into a centralized European entity.¹¹ By providing the judicial safeguards ensuring that EU community law is superior to national law, i.e., interests, the Court of Justice is well-positioned to exercise judicial review over all member nation-states. This is a tremendous power with the potential to occasionally negate or override the consent of significant segments of nationally based EU populations. Although the American and European experiences are far from identical, there are parallels in the exercise of judicial power pertinent to both the US and EU highest courts. As manifested by the US

experience, EU judicial power is substantially augmented if membership in the union is not contingent upon the consent of its members. However, if national members reserve the right to secede¹² EU judges would be compelled to be more deferential towards national policy preferences. In a worst case scenario if the EU were to ignore important nationally based policy preferences it could provoke secession as the avenue for the expression and maintenance of nation-based popular control and consent. Moreover, it should not be assumed that the EU Court of Justice would impartially adjudicate power struggles between the union and its member states. As evidenced by US Supreme Court case law on judicial federalism and state secession, the US Supreme Court was a branch of the national government and in the long run acted accordingly, i.e., nationalistically.

Indeed, an overview of US Supreme Court case law makes evident that it was institutionally determined to transfer the locus of sovereignty from the States to the Union.¹³ This transfer, however, would have been highly unlikely if the option of a State to secede had been explicitly secured in the text of the Constitution. Because the right to secede was merely implicit, the Supreme Court could effectively incorporate into the American rule of law a version of nationalism which effectively excludes secession as a component of States' rights. The relevant case law behind these developments reveals a jurisprudence that EU member nation-states should be cognizant of if they value a viable federalism and a union grounded upon the consent of member nation-states.

III

Since the Union's origins in 1789 the fundamental challenge of American case law has dealt with the balance of power between national and state governments. Contrast Tocqueville's perspective of the imbalance of power between the States and national government with the current situation:

The first difficulty Americans had to face was how to divide sovereignty so that the various states of the Union continued to govern themselves in everything to do with internal prosperity but so that the whole nation, represented by the Union, should still be a unit and should provide for all general needs. That was a complicated question and hard to resolve. ... The duties and rights of the federal government were simple and easy to define because the Union had been formed with the object of providing for certain great general needs. But the rights and duties of the governments of the states were many and complicated, for

such a government was involved in all the details of social life. Therefore the attributes of the federal government were carefully defined, and it was declared that everything not contained within that definition returned to the jurisdiction of state governments. Hence state authority remained the rule and the federal government the exception.¹⁴

Even though the "duties of the governments of the states [are] many and complicated," and, indeed, have been substantially expanded since Tocqueville's analysis, the duties and rights of the federal government are no longer simple and easy to define.

In the course of time state restrictions on the expansion of national power were for the most part ineffective, because US Supreme Court jurisprudence failed to recognize States as sovereign entities. This "first difficulty Americans had to face" was acknowledged by Publius' *imperium in imperio*. When Publius charged that the Antifederalists aimed at "things repugnant and irreconcilable; at an augmentation of federal [i.e., national] authority without a diminution of State authority; a sovereignty in the Union and complete independence in the members," he was being somewhat disingenuous. The use of a canard to place one's political opponents on the defensive may be an effective rhetorical trick, but it is plain that the States did not seek to retain "complete independence" within the Union, as is amply evidenced by the delegation of certain powers to national authority [e.g., Article 1, section 8] and limitations to state authority [Article 1, section 10]. The States were not concerned with *imperium in imperio* per se, but with the constitutional ambiguity surrounding *imperium*. In other words, how were the States [the principals] to keep the central government [their respective agent] from usurping their sovereignties?

The language and structure of the US Constitution manifest this overriding concern, as does the ratification record. Most significantly there is neither explicit nor implicit evidence that the States transferred their sovereignty to the national government. According to common law, as understood at the time of the Constitution's ratification, an implicit transfer of state sovereignty to the national government was untenable. St. George Tucker¹⁵ stated what was obvious to him and his peers:

The powers delegated to the federal government being all positive, and enumerated according to the ordinary rules of construction, whatever is not enumerated is retained; for *expressum facit tacere tacitum* [that which is expressed makes that which is implied to cease] is a maxim in all cases of construction: it is likewise a maxim of political law, that sovereign states cannot be deprived of

any of their rights by implication; nor in any manner whatever by their own voluntary consent, or by submission to a conqueror.¹⁶

There is ample evidence that the States retained ultimate sovereignty in the event of an irreconcilable conflict with the other States. As evidenced by Article V of the U.S. Constitution [the amendment article], among other constitutional provisions, Article VII [the ratification process] and Amendment 11 ["one of these United States"] the States are the constituent parts of the constitutional national compact; the States are the principals and the national government their agent. Three States conditionally acceded to the Union via their respective ratifications reserving the constitutional option to secede.¹⁷ Exercising such an option is the prerogative of sovereign authority, a prerogative acknowledged by the other States when they accepted conditional ratification. Conditional ratification and its acceptance by the other States stemmed from the political culture of the late 18th century which was predominantly anti-centralization. Stipulating the central government's constitutional prerogatives in a written document, checks and balances, separation of powers, the bill of rights, the amendment process, the absence of explicit national judicial supremacy all stem from a political culture distrustful of central authority.

This raises an axiomatic question for the American constitutional order: With all these checks on centralized power, how did the Supreme Court alter the American constitutional order to the point where state sovereignty was subordinated to national supremacy? The answer is to be found in the articulation of the American rule of law.

IV

Although the policy prerogatives of the States were diminished by rule of law developments favorable to national supremacy, this is what many of the States wanted. State supreme courts judges turned to the US Supreme Court for direction and as American colonial judges turned to Blackstone. Accordingly, when state judges incorporated into state case law the nationalistic precedents established by the US Supreme Court, the States were inadvertently conceding important aspects of state sovereignty. This does not mean that some States did not experience a boon to their political interests when national power was augmented. This is the subtle but clear thesis of Forrest McDonald's latest book.¹⁸ The pillars of nationalism are the legislative, executive, and judicial branches. These branches of government mark the actual and potential policy instruments of state coalitions, organized through the mechanisms of

political parties. In other words, power struggles between the Union and States (e.g., tariffs, admission of new States, internal improvements, slavery, etc.) were essentially contests of one coalition of States against another. The coalition that successfully implemented its policy objectives controlled some instruments, if not all, of the Union. Compromise on an issue was due to a sort of balance of power among state coalitions. Admittedly, the alignments among the States were very fluid and therefore resolvable without tearing the Union to pieces, with the exception of the war between the States 1861-1865. That crisis resulted when certain southern States capitulated to Northern and Western States all the instruments of the Union's power. Anticipating their declining ability to effect compromise due to the emergence of a regionally-based political party, i.e., the Republican Party, the Southern States seceded from the Union. They established their own confederated union, with additional checks and balances designed to more securely protect the policy prerogatives of some States vis-à-vis other States which controlled the C.S.A. centralized authority.¹⁹ Nevertheless those States which remained in the old Union, not wanting to relinquish their policy dominance over the Southern States, utilized their control of the national government to maintain through war their control over the breakaway southern States. Lincoln personified the national *Imperium*.²⁰

Publius' *Imperium in Imperio* is at the core of McDonald's *States' Rights and the Union: Imperium in Imperio, 1776-1876*: "Dividing sovereignty was generally regarded as impossible, until Americans devised a way of doing it."²¹ However, the line dividing sovereignty between the States and national government was not drawn with permanent ink in 1789. Sovereignty was not divided in 1789; albeit, the States collectively delegated to the national government certain responsibilities and the concomitant powers to fulfill those responsibilities, but not their respective sovereignties. Point to the document, process, or constitutional provision through which the States conceded sovereignty to the national government. There is none, with the important exception of American case law.

McDonald convincingly dispels the myth that the Union preceded the States, and that the locus of sovereignty was initially in the Union, and that the primacy of the Union is buttressed by the supremacy clause. Chief Justice Marshall's commentary on Article VI's supremacy clause is disingenuous. The Article VI stipulation that "The 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," are rules of construction for state judges. State judges were to decide what is and is not "pursuant" to the Constitution. As stated by the American Blackstone, St. George Tucker, the States retained their respective sovereignties. Such being the case, on what grounds can McDonald maintain that Americans successfully devised a way of dividing sovereignty?

An attentive reading of McDonald provides the answer, and it boils down to this: the loci of sovereignty are, in the final analysis, state-based. Sovereignty emanates from the States, not the national government. The national government has been and may be used as an instrument to impede upon state sovereignty, but only as the agent of States that jointly control the national government at the expense of others that do not.

The courts, following "the economic activity that underlay and drove politics"²² determined whose constitutional model would prevail, the states' rights or nationalistic model. But nationalism is essentially a phenomenon of States acting in unison towards some common goal or goals. Would it be feasible for the national government to pursue a policy objective against which a majority of the States adamantly opposed? For example, could Lincoln had succeeded in subjugating the Confederacy [the established agent of southern States' interests] without the support of northern States? Or, more specifically, with the support of a northern numerical majority, but without the support of a majority of northern States, would Lincoln's policies to keep the Union intact have prevailed? Divided sovereignty is commensurate with the various and complex political fault-lines separating the States, with the varying forms of nationalism being the manifestations of those fault-lines. North against South means northern States against southern States. Hence, the nomenclature of an American Civil War is overly simplistic. Much more descriptive is the nomenclature of a war between state coalitions, acting through their respective USA and CSA unions.

This is not to say that influential political leaders did not favor a unitary, in contradistinction to a federal, form of government. Moreover, there have been notable successes towards that transition. For example, economic interests were critical in the success of Chief Justice Marshall's jurisprudence "used to justify every manner of federal intrusion on the rights of the states". The evolution of the country's economic activity was anything but static; monetization of society, demographic changes, developments in manufacturing, and even an information revolution, profoundly effected political ideologies and public policy preferences regarding internal improvements, the protective tariffs, and slavery. As policy preferences changed so too did political activists' preferences for

states' rights and nationalism. Depending upon which model was most conducive to one's policy objectives, that model was rhetorically defended against one's political opponents. According to McDonald, this helps to explain how early in his career Daniel Webster was a hard core states' rights advocate and John C. Calhoun a nationalist.²³ Even though the original Constitution was overwhelmingly inclined towards states' rights, as the nation developed factions gained influence which favored a much stronger national government. Three regionally based groups in particular fit that description. Westerners sought internal improvements, such as roads, canals, and river dredging to be funded by the US Government, which is to say at the expense of the taxpayers from other regions. Northern manufacturers and capitalists sought US Government protection from foreign competition through the use of protective tariffs and sought the financial stability that a reconstituted, revitalized, and effectively managed Bank of the United States could provide.²⁴ The economies of the Southern States linked their interests to the status quo, i.e., a limited national government. As the North and West became increasingly nationalistic in many of their respective policy objectives, the South increasingly favored states' rights. As Southern economic productivity served as the cash cow for the internal improvements and protective tariffs of Westerners and Northerners, Southerners turned to their States for protection. Contrariwise, as Southerners turned to the national governments for enforcement of fugitive slave laws, Northerners turned to their States in the attempt to thwart national enforcement.

Has McDonald reduced American constitutional development to a sort of crass economic determinism? Not necessarily. The depth and breadth of McDonald's analysis stems from his appreciation of both the constitutional and political dynamics States' rights development. Morris, Hamilton, Jefferson, Randolph, Adams, Jackson, Calhoun, Tyler, Polk, Webster, Lincoln, Davis, etc., all left their imprints on American federalism and McDonald provides insights into the complicated forces behind those imprints, ranging from personality quirks to social conventions to election results. A brief but typically rich example makes the point.

As the territorial disputes were becoming increasingly heated, Senator Charles Sumner of Massachusetts gave a speech on the floor of the U.S. Senate that he titled "The Crime Against Kansas." Here is McDonald's account:

He called the treatment of Kansas "the rape of virgin territory, compelling it to the hateful embrace of Slavery; and it may be clearly traced to the depraved longing of a new slave State, the

hideous offspring of such a crime, in the hope of adding to the power of Slavery in the national government." Casting aside all reserve, he described the Missourians in the territory as "murderous robbers" and "hirelings, picked from the drunken spew and vomit of an uneasy civilization." On and on he railed, closing by attacking and insulting Senators Douglas, James Mason of Virginia, and Andrew Butler of South Carolina with bitterly sarcastic personal language not heard in the Senate since the days of John Randolph of Roanoke. Douglas and Mason were present to rebuke Sumner and did so in a spirited exchange. Butler was not present, but his nephew Congressman Preston Brooks was, and Brooks determined to exact revenge. ... Brooks brooded on the matter during a sleepless night. Doubtless he did not consider challenging Sumner to duel, for according to the southern code of honor, that would be to treat the senator as an equal and a gentleman. ... He settled for a caning: on the day after Sumner's insulting of Butler, Brooks accosted him in an empty Senate chamber and struck him on the head repeatedly with a gutta-percha cane, knocking him unconscious. A doctor testified that examination of Sumner revealed "nothing but flesh wounds," but Sumner relished the role of martyr and recognized its contribution to the cause. ... Though he stayed away from the Senate for three and a half years, protesting that his nervous system had been shattered and his brain damaged, he managed to tour Europe extensively and lead an active social life.²⁵

The impact of inflammatory rhetoric, regional biases, cultural distinctiveness, demagoguery (not to mention jurisprudence as the Court entered the fray in the attempt to douse the intensifying red-hot coals of territorial disputes) become manifest as reactions to the beating hardened regional cleavages. Adherence to states' rights and nationalism waxed and waned as one section maintained or lost influence over the national government.

In this scramble to cope with economic cycles and regional interests, was sectional warfare inevitable? The moderate middle did recommend six constitutional amendments [offered by Senator John Crittenden of Kentucky], which would have reestablished the Missouri Compromise status quo. "Historians agree that North and South would probably have approved these proposals by large margins." But Lincoln was "adamantly opposed to any compromise regarding slavery in the territories, and southern proslavery partisans were equally adamant on the other side."²⁶ Lincoln's rejection of the compromise measures was not based on his opposition to slavery, but a crude form of political brokering. If southern

interests could be boxed-in, northern States' interests would triumph in the national political arena. Lincoln was determined to preserve his nationalistic vision of the Union, while southerners were focused on States' rights federalism. By late 1860 and early 1861, their respective preferences jelled, if not hardened. "[L]eaders on both sides of the conflict were strangely loath to admit that it had anything to do with slavery. Abraham Lincoln insisted at the outset that the war was being fought solely to preserve the Union as he conceived the Union – namely, as one among the American people, not among the states."²⁷ The reason being that the old Union, the one with the States as its constituent parts, was an obstacle to the policy pursuits of the Republican Party's policy agenda. This does not mean that in April of 1861 Lincoln intentionally proceeded to drench American soil with the blood of Yankees and Confederates. Is it more probable that he was a very poor prognosticator of events? Because his political brokering backfired, he covered his misdeeds with a rhetoric of emancipation and charity towards all. McDonald does not explicitly say as much, but his treatment of Lincoln, such as Lincoln's relationship with his most formidable political opponent Governor Horatio Seymour of New York, Democrat, not to mention Chief Justice Taney, makes clear that Lincoln was a shrewd Machiavellian politician.²⁸ At a minimum it is evident that to a significant extent political objectives were the rails upon which the development of the American rule of law traveled. This explains why the current election/selection processes utilized to staff judgeships are more or less ultimately political in nature; as the US Government has become increasingly involved in the US economy, the nomination/confirmation process has become much more politically contentious.

From a public policy perspective States' rights passed through the war crucible *prima facie* intact, but not from a jurisprudential perspective. The military events of 1861-1865 set the stage for the substance of states' rights prerogatives to be thereafter diverted away from the States to the national government. Developments such as Reconstruction, national fiscal policy, and U.S. Supreme Court jurisprudence did not alter State and national relations not in one fell swoop, but incrementally, so that by the time of President Johnson's Great Society "the vestiges of states' rights that remained were obliterated."²⁹ Events such as the Louisiana Purchase, the Mexican War, the war between the States, *Texas v. White* (through which in 1869 the Supreme Court unpersuasively denied the constitutionality of secession), Reconstruction, the New Deal, Supreme Court Fourteenth Amendment incorporation policies, and the Great Society – to list the more notable – all contributed to the demise of States' rights.

As the US Supreme Court bestowed its imprimatur on national power, there emerged an American rule of law that not only curtailed states' rights, but sewed nationalism into the warp and woof of American life. Whether the growth of national power is exclusive of or concurrent with states' right, the States as sovereign entities have correspondingly less power vis-à-vis the national government. This is especially true since the national government determines the extent of its powers, the consent of all the States notwithstanding. In other words, the agent has been transformed into the principal.

How did this reversal of roles occur? The answer, when the constitutional tie that ultimately binds the union of States together was switched from consent to coercion, the nature of the Union was fundamentally altered. The individual States had to be constitutionally stripped of sovereignty and its locus shifted to the central authority. This is not to say that the States were unwilling to concede elements of state sovereignty when offered national public policy goodies. But those national goodies [e.g., internal improvements, protectionism, a national bank] had costs attached. Even though a sort of balance between state police and national commerce powers seemed to be somewhat settled when in 1847 Chief Justice Taney articulated a state's police powers as "The power to govern men and things within the limits of its own dominion,"³⁰ the realm of public policy prerogatives of the national government was expanding. That expansion was in large measure to the benefit of those States that had vested interests in the governmental support and protection of industrialization.³¹ Consequently, the clashing interests of an increasingly industrialized North and an agrarian South were affecting all aspects of American politics, as evidenced by the rule of law being developed by American courts. However, as long as consent was the basis of membership in the Union the expansion of national power was in accord with state-based popular control. When Southern States withdrew their consent, beginning with South Carolina on December 20, 1860, the American constitutional landscape began to develop into a Union predicated upon coercion. The watershed case marking the end of the consensual Union is the postbellum US Supreme Court case *Texas v. White*. It was this 1869 case that displaced consent and constitutionalized coercion as the epoxy of the Union.³²

V

The underlying constitutional issue in *Texas v. White* is whether the locus of sovereignty is state or nation based. This issue is as old as the Constitution, but dissimilar from previous constitutional questions about national supremacy, judicial review, state nullification and interposition, all of which were in the context of the States' continued memberships in the Union. The States acknowledged that membership in the Union curtailed a good portion of their public policy options, but the curtailment was consensual insofar as membership in the Union was consensual. This is an important qualification. National tyranny, soft and hard, is peculiarly consensual, as long as a State's continued membership in the Union is voluntary. Seceding from the Union would effectively arrest the national tyranny within the jurisdiction of the seceding State.³³ However, if membership in the Union is coercively maintained against the preference of a would-be independent State, then basis of national policies within the jurisdiction of the State is force.³⁴

In *Texas v. White* Chief Justice Chase maintains that "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."³⁵ Chase's cliché hinges on a theory that potentially destroys not only the States, but also the Union of reflection and choice, i.e., consent. The indestructible Union and its subsequent incorporation into American case law are substantial deviations from the feeble Union that predated the policies of the Lincoln Administration and Reconstruction. More than a matter of constitutional law, the "feeble Union" was a product of American culture. As noted by Tocqueville,

The federal government therefore, in spite of the efforts of its founders, is, as I have said before, one of such naturally feeble sort that it requires, more than any other, the free support of the governed in order to survive. ... If today the sovereignty of the Union was to come into conflict with one of the states, one can readily foresee that it would not succumb; I even doubt whether such a struggle would ever be seriously undertaken. Each time that determined resistance has been offered to the federal government, it has yielded. Experience has proven that up till now, when a state has been obstinately determined on anything and demanded it resolutely, it has never failed to get it; and when it has flatly refused to act, it has been allowed to refuse.³⁶

Obviously the Union emerged from the civil war transformed. Tocqueville's antebellum portrayal of a feeble Union vis-à-vis the States

does not describe postbellum America. This is not to say that states' rights were finished circa 1865. But it is to say that the groundwork, with constitutional sanction, had been laid for a dominant national government presiding over a union of subservient States. Chase's jurisprudence makes this quite evident.

In order to grasp *Texas v. White*'s long-term significance, attention must be refocused in a concept of American jurisprudence that the court did its best to bury in 1869. The concept is political obligation as manifested in what constitutes a treasonable offense in a federal system.

Southern secession from the Union is in a class by itself and should not be equated with the reams of sedition statutes that clutter US and state codes. Sedition may be treasonable because it is essentially insurrection, relying on unlawful (i.e., criminal) means to reach a political objective. But southern secession was predicated on the constitutional grounds that a State may constitutionally withdraw its political obligation from the union of States as organized and managed under the United States Government. A State's withdrawal from the Union was, in the minds of the southern leadership, constitutional if certain procedural guidelines were adhered to. The intent of the guidelines was to ensure that secession was compatible with the republican principle of grounding government in the consent of the governed, and the State, not the nation, was the unit responsible for measuring consent. If "Treason is declared to consist *only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort*,"³⁷ Confederate actions were not treasonable because they ceased to be U.S. citizens as a consequence of secession, i.e., withdrawal from the Union. Moreover, if individuals within a particular State violated republican principles in the course of secession, such actions would not constitute treason against the US. "Similar acts committed against the laws or government of a particular state, are punishable according to the laws of that state, but do not amount to treason against the United States."³⁸

Was (is) state secession from the Union treasonable? In *Texas v. White* the court answered with a qualified yes. Its answer had to be qualified because of the constitutional safeguards against politically motivated convictions for treason.³⁹ The Constitution explicitly stipulates that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."⁴⁰ If the court were to jurisprudentially equate secession with treason, then the state leaders, acting in their respective official state

capacities, would have to be charged accordingly and afforded their constitutional rights. Moreover, not only would the trials be numerous, but many of the venues would have been in the former Confederacy. To surmount this difficulty Chief Justice Chase devised a jurisprudence that sanctioned the Republican Party's war policies and a US Government grounded in coercion. To accomplish these results Chase resorted to concocting an American common law definition of treason capable of sustaining the Union at all costs, especially when the Union is confronted with state attempts to withdraw their political obligation to it. The Union was transformed from a voluntary association of States to an indestructible Union, the consent of the States notwithstanding.

To achieve the objective of an "indestructible Union" Texas v. White resorted to an unprecedented disdain for popular control within the context of American federalism. In order to criminalize secession, the court had to convert state legislatures and conventions into *locus criminis* [the place where a crime was committed]. Where in Texas's actions on February 1, 1861, is there evidence of a crime? Consistent with state secession from the British Empire in 1776⁴¹ and the contemporary actions of her sister seceding States in 1860/1861, the Texas convention approved the following ordinance:

To dissolve the Union between the State of Texas and the other States united under the Compact styled "The Constitution of the United States of America."

WHEREAS, the Federal Government has failed to accomplish the purposes of the compact of the union between these States, in giving protection either to the persons of our people upon an exposed frontier, or to the property of our citizens, and

WHEREAS, the action of the Northern States of the Union is violative of the compact between the States and the guarantees of the Constitution; and,

WHEREAS, The recent developments in Federal affairs make it evident that the power of the Federal Government is sought to be made a weapon with which to strike down the interests and property of the people of Texas, and her sister slave-holding States instead of permitting it to be, as was intended, our shield against outrage and aggression; THEREFORE,

SECTION 1.-We, the people of the State of Texas, by delegates in convention assembled, do declare and ordain that the ordinance adopted by our convention of delegates on the 4th day of July, A. D. 1845, and afterwards ratified by us, under which the Republic of

Texas was admitted into the Union with other States, and became a party to the compact styled "The Constitution of the United States of America, be, and is hereby, repealed and annulled; ..."⁴²

The court maintained that the criminal actions taken by Texas on the path to secession and membership in the Confederate States of America were the actions of an insurgent legislature engaged in rebellion.⁴³ The axioms of insurgency and rebellion are mostly assertions that the reader must accept as articles of faith in contradistinction to fundamental principles of American constitutionalism arrived at through thoughtful and reasoned legal argumentation. Albeit, Chief Justice Chase does recount the chronology of events and concedes that "acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed [when Texas was admitted into the Union as a State on 27 December 1845], and to break up her constitutional relations with the United States. ... In all respects, so far as the object could be accomplished by ordinances of the conventions, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them."⁴⁴ Nevertheless, Texas's secession and subsequent membership in the CSA were constitutionally impermissible because the "perfect Union" is indissoluble.⁴⁵ Texas' assault on the "perfect Union" constitutes the crime.

VI

Was Texas's secession from the Union criminal? In order to legitimize the Northern Union's war of aggression against the Confederate Union, Chief Justice Chase needed to resort to some very creative jurisprudence.

First and foremost, there is no jurisprudential precedent for state secession. In other words, the court never had to adjudicate the constitutionality of it. This is not to say that there was a paucity of ideological and theoretical ruminations that addressed the issue. The closest the court came to the issue was in the 1849 *Luther v. Borden*⁴⁶ case, which Chase relied on for his "guaranty clause" precedent. However, his reliance on the "guaranty clause" as articulated in that case is disingenuous. Nevertheless, Chase had to find a constitutional rationale for (a) Reconstruction policies as presidential and congressional prerogatives, (b) denoting the actions of state secessionists as criminal and their subsequent official acts as members of the Confederacy as

non-enforceable, and (c) the displacement of consent by coercion as the glue of the Union. Section 4 of Article IV was his most practical constitutional hook, even though it breaks under the weight of unbiased scrutiny.

- (a) First, Article IV, section 4 stipulated "The United States shall guarantee to every State **in this Union** a Republican form of government." But Chase ignored the obvious, that Texas ceased to be in the Union and therefore the guaranty clause ceased to be operative in Texas. Second, section 4 stipulates "and shall protect each of them against Invasion." However, the only "invading forces were those of the Union Army. And third, section 4 stipulates "and on the Application of the Legislature, or of the Executive ... against domestic violence." No such application was forthcoming from Texas, because from the Texan perspective there was no domestic violence that necessitated national intervention.

Nevertheless, Chase ruled that "In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution."⁴⁷ According to Chase, Lincoln's war and the Republican reconstruction policies in Texas (and the rest of the subjugated Confederacy) were constitutional because legitimate republican government had been displaced by non-republican government. However, neither the facts nor case law support his findings. Consider his definition of "State" within the context of the U.S. Constitution:

A State, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and established by **the consent of the governed**. It is the union of such States, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and the States which compose it one people and one country.⁴⁸

The operational phrase is "the consent of the governed." The definition holds together as long as the state government is

grounded in the consent of the governed. The United States is the collective government of States "with defined boundaries, and organized and established by the consent of the governed" within the respective States. For the State of Texas to remain within the Union, when the "free citizens" of Texas demanded secession, would have illegitimized the state government. It would have ceased to be a republican form of government.

- (b) Relying on *Luther v. Borden*, Chase maintained that it is the responsibility of the Congress to determine whether or not a state government is republican. The fact that Texas failed to apply for the assistance of the national government in securing a republican form of government is of greater significance than if she had. This failure on the part of Texas is of greater weight vis-à-vis the guaranty clause, because it is evidence that she had not been "deprived of all rightful government, by revolutionary violence."⁴⁹

But according to standards previously established by Supreme Court case law, Texas did have a republican form of government when and after it seceded from the Union. Chief Justice Taney ruled that under Article IV, section 4, "it rests with Congress to decide what government is the established one in a State. ... and whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."⁵⁰ Significantly, Texas senators and congressmen voluntarily resigned from their respective seats in the US Senate and House, in contradistinction to being disqualified because the "authority of the government under which they [were] appointed" was determined to be non-republican by the Congress. US Senator Wigfall (TX) adumbrated the same to his Senate colleagues on March 7, 1861, several weeks after Texas officially seceded. After acknowledging that South Carolina, Georgia, Florida, Alabama, Texas, and Louisiana had revoked the powers delegated to the US Government,⁵¹ he admonished his colleagues:

You must withdraw your troops; take your flag out of our country; allow us the right of self-government; enter into treaties with us afterwards or not, as you see fit; but you must do that or make up your minds to have war – war in its sternest aspect, and with all its consequences. You must

make no attempt to levy tribute upon us ... Mr. President, I have tried to explain, several times, the position which I occupy. I am not officially informed that the State which I represent has abolished the office of United States Senator. When I am so advised officially, I shall file at your desk that information; and then if, after being so informed, you shall continue to call my name, I will answer, probably if it suits my convenience...⁵²

By the US Supreme Court's own legal standards, Texas was led out of the Union and into the Confederacy by a republican government, otherwise Senator Wigfall would have been disqualified from holding his US Senate seat. Furthermore, as evidenced by Wigfall's remarks on the floor of the US Senate, his continued participation in Senate business was at the discretion of Texas, because Texas met the criterion of being a republican form of government, i.e., based upon the consent of Texans. Such was certainly the official position of Texas, as manifested in its convention which maintained that "[a]s a remedy against Executive dictation in our State (ala Governor Sam Houston) and against a ruinous administration of the Federal government (ala the Lincoln Administration), the people had but one mode of action; that was prescribed by, and for themselves, in the declaration of rights in our State Constitution, as follows: Section 1. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have, at all times, the inalienable right to alter, reform or abolish their form of government, in such manner as they may think expedient." [sic]⁵³

All the procedural safeguards taken by Texas notwithstanding, Chief Justice Chase asserted that the purpose of Texas's secession and subsequent defensive posture towards the Union was to avoid its obligations to the national government and to wage war against the United States to achieve that end.⁵⁴ Accordingly, these actions were treasonable and left Texas without a legitimate government. Hence, under the guaranty clause the national government could do whatever it deemed to be necessary and proper to restore Texas to its constitutional relations to the United States.⁵⁵ The underlying premise of Chase's circular reasoning is that whether or not a State has a republican form of government is contingent upon its membership in the Union.

Nevertheless, many of Texas's official acts between 1861 and 1865 were declared by the court to be valid, such as those "necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations,

governing the course of descents, regulating the conveyances and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government." Those which are invalid include all "acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature." The latter type is constitutionally invalid because it is "within the express definition of the Constitution, treasonable."⁵⁶ Not, however, according to St. George Tucker's commentary. Chase's assertion that Texas engaged in treason is unsupported by precedent. According to Tucker,

Were an armed multitude, arrayed in order of battle, to enter and burn the city of Richmond, destroy all the public records of the state, and commit every other possible outrage, aggravated with every atrocious circumstance imaginable, if their intention in so doing, should neither be to subvert the constitution of the United States, nor effect any object in relation to the authority of the federal government, such conduct, though, in the strictest sense it might amount to actual levying war, would only amount to treason against the *state of Virginia*, but could never be treason against the United States. For treason against the *latter*, shall consist only in levying war against THEM, &c. Nor can it be pretended that the levying war against the authority of any individual state, within the same, would be levying war against the United States in any case; except in case of insurrection or rebellion, such state should make application to the United States for such aid as the constitution guarantees to them in such cases: after which if the opposition should extend to the authority of the *United States*, it seems that the treason would also extend to *them*.⁵⁷

The scenario used by Tucker to exemplify what constitutes treason against the United States is in stark contrast to the relatively orderly procedures used by Texas to withdraw from the Union and accede to the CSA. If Tucker's hypothetical scenario does not constitute treason against the United States, how could the 1861 actions by Texas constitute treason?

- (c) Declaring secession and its "rebellion against the United States" to be the act of an "insurgent government," the United States government was authorized to suppress the rebellion and restore to Texas a state government with "peaceful" [i.e., subservient] relations to the United States. Elevating to constitutional status nationalist ideology, he posited "What can be indissoluble if a perpetual Union, made more perfect, is not?"⁵⁸

From this premise, Chief Justice Chase leads American jurisprudence away from its historical roots of popular control and consent within the context of traditional federalism, and into the implacable realm of empire:

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the **incorporation** of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through the consent of the States.⁵⁹

By the stroke of his pen, the original thirteen and all the subsequently admitted States are, for all intents and purposes, merged into one consolidated domain. [In civil law, "incorporation" is the union of one domain to another (Black's Law Dictionary, Fourth Edition).]

Moreover, by redefining the term "state", Chase makes consolidation inevitable: "A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country."⁶⁰

Hence, because a State's incorporation into the Union is irreversible, secession was the criminal action of rebels lacking legal legitimacy. "If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation."⁶¹ In his dissent opinion, Justice Grier was more blunt: "the ordinance of secession was adopted by the convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, 'by battle,' as to her right to secede, has been

against her."⁶² Justice Grier's conclusion that the war between the States was a war of conquest, was unpalatable to Chief Justice Chase. Chase realized that to concede as much was to make Washington, DC, the *locus criminis*.

But this is precisely how Southerners viewed the war. The war waged against the Confederacy "disregards all constitutional restrictions, and finds its pabulum in the proud and avaricious desire to set up a great government which will extend its power to the ends of the earth, and enable the merchant and the manufacturer of the North to make money out of all nations, kindreds and tongues; and this money to be made by so regulating commerce with the States, that the agricultural States be made tributary to the commercial and manufacturing States. From such a Union we believe it was the solemn duty of our State to withdraw; and since her withdrawal we have abundant evidence that we were right."⁶³

In conclusion, the locus of sovereignty was originally in the States. Furthermore, the formation of the American Union was based upon the collective consent of all the States, as evidenced by the drafting, ratification, and text of the US Constitution. But once a State acceded to the Union did it forfeit its right of consent in regard to its continued membership in the Union? According to the US Supreme Court the answer is a qualified yes. Qualified in the sense that a State could petition the Union to acquiesce in its withdrawal from the Union, but such acquiescence is contingent upon the consent of the other States (Chief Justice Chase doesn't stipulate if that consent had to be unanimous). And in the absence of Union acquiescence to the secession of a State (or States), the remaining option is revolution. Hence, a State determined to secede is nailed to the Union until or unless it procures the consent of the other States or successfully rebels. For the would be independent State this model of federalism approximates what Hamilton described as one predicated upon accident and force,⁶⁴ and consistent with the rule of law only insofar as it is sanctioned by the tribunal "recognized" to make such authoritative and binding legal determinations. As EU integration moves forward and the Court of Justice gains prominence over an increasingly integrated Europe, the current and the future constitutional status of secession will reveal whether the EU is grounded in the consent of its members, or the coercive powers of centralized authority. A specific treaty provision securing to nation-states within the EU the constitutional option to secede would go a long way towards securing national sovereignty vis-à-vis EU dominance and, more specifically, an EU grounded in the consent of the governed.

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- 1 Texas v. White, 74 U.S. (7 Wall.) 700 (1869).
 - 2 James M. Buchanan, *Federalism, Liberty and the Law*, in the *Collected Works of James M. Buchanan*, vol. 18 (Indianapolis, IN: Liberty Fund, 2001), 104-105.
 - 3 This in no way is meant to imply that Southerners acted unconstitutionally when they seceded from the Union. To the contrary; secession was and to a certain extent remains a constitutional prerogative of the States. For a comprehensive analysis, see John Remington Graham, *A Constitutional History of Secession* (Gretna, LA: Pelican Publishing Co., 2002).
 - 4 The *rule of law* defined as "a legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a "rule," because in unforeseen cases it is a guide or norm for their decision" (*Black's Law Dictionary*, 6th ed., 1990).
 - 5 Coercion has many manifestations, ranging from physical force (e.g., relying on the president to use or threaten to use the resources of his office to enforce a court order) to institutional usurpation (e.g., the manipulative use of judicial review to enhance institutional power).
 - 6 Over the past several centuries the vitality of arbitrary power has grown commensurate with so-called democratic institutions, particularly in Europe. See Bertrand De Jouvenel, *On Power: The Natural History of Its Growth* (Indianapolis, IN: Liberty Fund, 1993, first published in 1945).
 - 7 See William Lasser, *The Limits of Judicial Power: The Supreme Court in American Politics* (Chapel Hill, NC: The University of North Carolina press, 1988).
 - 8 John McCormick, *Understanding The European Union: A Concise Introduction*, 2nd ed. (New York, NY: Palgrave, 2002) 109.
 - 9 State based popular control and popular consent constitute the essence of early American political and constitutional developments. See Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge, Louisiana: LSU Press, 1980). In 1847, the US Supreme Court defined state popular sovereignty as a State's police powers. These are state powers to "govern men and things within the limits of its own dominion" (License Cases, 46 U.S. [5. How.] 504, 1847). The States' police powers provided policy jurisdiction over the health, safety, and morals of their respective citizens.
 - 10 See *Cohens v. Virginia* 5 L.Ed. 257 (1821) and *Martin v. Hunter's Lessee*, 4 L.Ed. 97.
 - 11 The EU's policies of direct effect and the primacy of community law are much more specific than the interpretative gymnastics utilized to convert Article I, section 8, congressional commerce powers into the *carte blanche* of national supremacy. See Gavin Smith, *The European Court of Justice: Judges or Policy Makers?* (London: The Bruges Group, July 1990). Moreover, the five main categories of EU law (regulations, directives, decisions, and recommendations) provide the EU Court of Justice with ample materials to construct a uniquely European rule of law jurisprudence.
 - 12 The operative word is "constitutionally", which would include procedures recognized by all member States as legitimate and compliant with the rule of law.
 - 13 The steady stream of Supreme Court case law that flows through the US Union's veins superficially seem non-spectacular, following the ancient riverbeds confirmed by the U.S. Constitution, e.g., Article VI supremacy clause. But upon close analysis changes to the American system of federalism has been fundamental. Due in large measure to its reliance on selectively using precedent and politically astute incrementalism, Supreme Court case law presents a continuity regarding the growth of national judicial power that is convincing, i.e., *prima facie* legitimate. But behind the scenes – *sub silentio* – forceful changes have occurred under the guise of the American rule of law as articulated by the US Supreme Court. Specifically, the flow of American case law has substantially altered the landscape of the union of States and the popular control of government it was designed to ensure. Moreover, this current landscape is increasingly inhospitable to the Jeffersonian tree of liberty, which requires a viable federalism conducive towards meaningful states' rights policy options. State supreme courts were part and parcel of states' rights policy options vis-

à-vis the national government. Without such options how are state-based popular control and popular consent to be preserved in a union? See chapter fourteen ["The Right of Resistance: Secession and the Modern State"] in Donald W. Livingston's *Philosophical Melancholy and Delirium: Hume's Pathology of Philosophy* (The University of Chicago Press, 1998).

- 14 Alexis de Tocqueville, *Democracy In America*, George Lawrence, translator and J.P. Mayer, editor (New York, NY: Harper & Row, 1969), 114-115.
- 15 The credentials of St. George Tucker as an authority on the meaning of the U.S. Constitution are impeccable. In 1803 he published an expanded and annotated edition of William Blackstone's *Commentaries on the Laws of England*. Tucker became known as the American Blackstone. Recent editors note that "For lawyers and scholars alike, *Tucker's Blackstone* remains a key source for understanding how Americans viewed English common law in the years following the adoption of the Constitution and Bill of Rights. Moreover, his work offers significant insights into the understanding of the meaning of the Constitution and Bill of Rights at the time of their adoption. In *The Founders' Constitution*, for example, Professors Philip Kurland and Ralph Lerner use passages from volumes one and two of Tucker to help explain the meaning of free speech, freedom of the press, and the right to petition. They also quote portions of Tucker to illustrate the contemporary meaning of the Second, Third, Fourth, and Tenth Amendments. In other volumes they cite Tucker to elucidate much of the rest of the Constitution"(St. George Tucker's *Blackstone's Commentaries*, Paul Finkelman and David Cobin, editors [Union, NJ: The Lawbook Exchange, Ltd., 1996], i-ii.
- 16 St. George Tucker, *View of the Constitution of the United States; With Selected Writings*, Clyde N. Wilson, ed. (Indianapolis, IN: Liberty Fund Inc., 1999), 94.
- 17 The states are Virginia, New York, and Rhode Island. See H. Newcomb Morse, "The Foundations and Meaning of Secession," *Stetson Law Review*, vol. xv (1986), 429.
- 18 *States' Rights And The Union: Imperium in Imperio, 1776-1876*, by Forrest McDonald. Lawrence, Kansas: The University Press of Kansas, 2000.
- 19 See Marshall DeRosa, *The Confederate Constitution of 1861: An Inquiry Into American Constitutionalism* (University of Missouri Press, 1991).
- 20 See Thomas DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (Roseville, CA: Prima Publishing, 2002).
- 21 McDonald, vii.
- 22 McDonald, 87.
- 23 McDonald, 84-96.
- 24 McDonald, 72.
- 25 McDonald, 171-172.
- 26 McDonald, 191.
- 27 McDonald, 193.
- 28 McDonald, 192-204. For a concise treatment of Lincoln's dealings with Chief Justice Taney, see Thomas J. DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (Roseville, CA: Prima Publishing, 2002), especially chapter 6.
- 29 McDonald, 231.
- 30 License Cases, 46 U.S. (5 How.) 504 (1847).
- 31 See Daniel J. Elazar, *Building Toward Civil War: Generational Rhythms In American Politics* (Lanham, MD: Madison Books, 1992).
- 32 The Supreme Court may indeed determine what the law is, but its determination, although constitutional, may be erroneous. Thus, if one agrees with Chief Justice Marshall that "[i]t is emphatically, the province and duty of the judicial department, to say what the law is" (*Marbury v. Madison*), then compliance with an erroneous determination by the court is required. The court by definition cannot make erroneous decisions, unless the court concedes as much in subsequent rulings.

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- 33 I do not mean to imply that for secession to be legitimate it must be in response to tyranny. Perhaps secession should not be taken for "light and transient causes," as the Declaration of Independence admonishes. As an important component of popular sovereignty, a State is not precluded from seceding for less weighty reasons.
- 34 As posited by Hamilton, "It has frequently been remarked that it seems to have been reserved to the people of this country, by their conduct an example, to decide the important question, whether societies of men are really capable of not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force (*The Federalist Papers* #1).
- 35 Texas v. White, 725.
- 36 Tocqueville, 368.
- 37 William Rawle, LL.D., *A View of the Constitution of the United States of America*, 2nd edition (Philadelphia, PA: Phillip H. Nicklin, Law bookseller, 1829), 142. This book was widely used in legal education, including West Point from 1825-1840.
- 38 Rawle, 142.
- 39 These safeguards found their way into the US Constitution due, in large measure, to the abuses the colonists endured by the Crown while asserting their rights under the English system.
- 40 Article III, section 3.
- 41 See Graham, chapter II, for the relevance of 1776 precedent.
- 42 The ordinance was ratified on 23 February 1861 by a vote of 46, 153 to 14, 747.
- 43 Texas v. White, 718.
- 44 Texas v. White, 722, 724.
- 45 Texas v. White, 725.
- 46 Luther v. Borden, 48 U.S. (7 How.) 1(1849), concerns the constitutional meaning of the "guaranty clause" in Article IV, section 4, which stipulates that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." In 1842 Rhode Island's Dorr Rebellion raised the issue of the meaning of "a Republican Form of Government." Dorr and his supporters (primarily from the growing urban areas) established a state government in protest against the incumbent government (dominated by rural interests). Martial law was declared and resulted in litigation between Mr. Luther, a Dorr partisan, and Borden, a state militiaman enforcing martial law.
- 47 Texas v. White, 729.
- 48 Texas v. White, 721, (emphasis added).
- 49 Texas v. White, 730.
- 50 Luther v. Borden, 42.
- 51 *The Congressional Globe*, March 15, 1861, p. 1441.
- 52 *The Congressional Globe*, March 15, 1861, p. 1442.
- 53 The Constitution of the State of Texas As Amended in 1861: Address to the People, Austin, March 30, 1861, p. 4.
- 54 Texas v. White, 727-728.
- 55 Texas v. White, 729.
- 56 Texas v. White, 733.
- 57 St. George Tucker, 22.
- 58 Texas v. White, 734.
- 59 Texas v. White, 725-726 (emphasis added).
- 60 Texas v. White, 721.

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- 61 Texas v. White, 726.
62 Texas v. White, 740.
63 Free Masonry and the War: Report of the Committee Under the Resolutions of 1862, Grand Lodge of Virginia, in Reference to Our Relations as Masonic Bodies and as Masons, in the North and South, Growing out of the Manner in Which the Recent War has been Prosecuted. Adopted by the Grand Lodge of Virginia, December 12, 1864, and ordered to be published. John Dove, Grand Secretary" (Rare Book Collection, UNC-CH, call number 5102 conf.).
64 See *The Federalist Papers*, #1.

Compound Federal Democracy

Federal governance by compounded majorities is a balancing act between democratic citizenship according to one person one vote, and the collective group rights and liberties of constituent regional entities. This is what makes federalism so attractive all of a sudden, to increasingly diverse societies, world-wide.

The problem I want to address in this paper is the following: There is an underlying assumption that compound majoritarianism (Elazar 1987: 19) is automatically also more democratic, that dividing government automatically offers more voice and more choice to a greater variety of people. I contend that this is not necessarily so when multilevel governance is in fact dominated by multilevel games played by dominant circles of power and influence, or when numbers and asymmetries predetermine a less than open-ended process of decision making.

The test case for democratic federalism in diverse societies is whether compound majoritarianism actually translates into a more inclusive and diverse process of political participation and representation, whether, in other words, federalism can serve diversity in a substantive rather than merely procedural way.

Three Cases

For purposes of illustration rather than with an intent of providing conclusive hard evidence, I want to introduce three different cases before making a few more systematic suggestions.

Canada

The first one has to do with the constitutional crisis that has smouldered in Canada for more than 40 years over the question how to reconcile the Francophone province of Quebec with the rest of the country (Simeon and Robinson 1990; Vipond 1991).

The original federal compromise did not pay much attention to compound democracy. The Canadian senate would be and still is government-appointed and therefore lacking all real representative legitimacy. Governance was assigned to competing majority rule at the two levels of government. Federalism became a game of executive intergovernmentalism.

Moreover, numbers and asymmetry did not allow for any kind of qualified majority decision mechanism comparable to the European Union, for instance. When the process of western expansion was completed at one end and Newfoundland had been incorporated at the other end, the Anglo-Franco equation had become 9:1, and anything but unanimity in matters of substantive provincial interest would remain unacceptable to Quebec.

The authorization of constitutional change had originally been left with the colonial government in London. The crisis was triggered by the search for a domestic amending formula. This led to the constitutional changes of 1982 which were brought about without Quebec's consent. Prevailing winds of separatism have more recently occasioned the introduction and passing of a so-called Clarity Bill by the federal government. Based on a constitutional reference ruling by the Supreme Court, it stipulates general conditions for legitimate secession including a clear question, a clear majority, and a negotiated settlement with the rest of the country (Dion 2001). What is clear, in this context, is left to the federal parliament whenever the case arises.

The Clarity Bill may in fact contribute to the eventual end of the Canadian crisis because as intended the stakes are now too high for another and perhaps successful referendum. Insofar as decisions cannot be taken by simple majorities, and even an act of regional self-determination with substantive local support requires to be embedded in a negotiated settlement involving the larger national community, Canada's constitutional provisions and Clarity Bill qualify as a regime of compound majoritarianism. Whether they live up to the demands of compound democracy is another matter.

The Clarity Bill was widely lauded by world leaders at the recent federalism summit in Switzerland (Federalism 2002), as a welcome contribution to legal certainty in the volatile field of minority politics and separatism. Yet it demands the unambiguous resolution of an issue that is by its very nature steeped in ambiguity.

United States and Germany

The second case is about juridical diversity in the United States as compared to uniformity in Germany. Possession of 650 grams or more of cocaine in Michigan gets you a mandatory life sentence, sanctioned as constitutional by the Supreme Court in a 1991 decision. In Alabama, you might only get five years (Wilson and Dilulio 1998: 55). Americans accept this diversity as a natural consequence of federalism, and I am not saying categorically that they shouldn't. After all, diversity is the name of the game: citizens of the Canadian province of Alberta don't pay sales tax when all others do, for example, and in Switzerland each canton decides upon the official language.

However, the problem in terms of compound democracy is more complicated. Simply put it is where to draw the line. Germans would be appalled at such juridical diversity. Criminal and civil law are unified national bodies of law, and they are amended on the basis of federal legislation with substantive co-determination rights for the *Länder*.

Only for or a gasping moment, shortly after reunification, there was a case of juridical division. Former East Germany had allowed abortion on demand during the first trimester, in West Germany the process was far more restricted. Until the German parliament finally managed to pass a unified law, abortion on demand was possible in the east but not so in the west. Even though 77 per cent of East Germans wanted to retain the more liberal abortion regulation, the governments on both sides had already agreed, *a priori*, in the unification treaty, that there had to be a unified solution (Conradt 2001: 31-32).

One can easily extend this comparative survey into other policy fields. Take welfare: In the United States again, the 1995 maximum AFDC benefits plus food stamps for a family of three were 1,223 dollars in Alaska but 424 dollars in Mississippi (Wilson and Dilulio 1998: 76-77). German federalism would not allow that either. In fact, the Basic Law unmistakably stipulates that Germany must be a social state (and this provision is exempt from constitutional change), and that it is the duty of governments to ensure the equitability of living conditions for all citizens (Articles 1, 20 and 72, Basic Law). This means that the German state is constitutionally responsible for equitable social policy, and by implication this means that both levels of government are constitutionally bound to the practice of extensive fiscal equalization.

The point is not to engage in a which-is-better kind of argument. It is to point out that compound majoritarianism does not necessarily mean a whole lot to citizens in real life situations, and that the diversity it allows can be as stifling and undemocratic at one end of the spectrum as forced uniformity is at the other. The task is to find criteria that would allow to make reasonable political judgments about where the line should be drawn.

Austria

The third case is somewhat different although, as I will try to show, the same issues can be raised, and in terms of federalism as a useful and promising form of multilevel governance and conflict management in a globalizing world, it is perhaps the most significant, or alarming, case - depending on where you are coming from.

The case concerns Austria which in February 2000 formed a democratically elected coalition government that included Jörg Haider's Freedom Party which was seen in Europe and elsewhere as a right-wing extremist party with xenophobic tendencies (Rodríguez-Pose 2002: 109). Other EU governments led by Germany, France and Britain decided to punish Austria with sanctions such as severing bilateral contacts, isolation at EU meetings, banning school trips, cultural exchanges and the like. The sanctions were lifted in September of the same year when a committee decided that the measures had essentially been ineffective. Probably more decisive was growing resistance among other small members such as Denmark or Ireland who feared that bullying by the big and mighty might become standard practice.

Again the point is not whether Mr. Haider is a somewhat unsavoury if not bizarre character, and whether or not his anti-immigration stance borders on racism. One of his loudest critics, French President Chirac, once campaigned for mayoral office in Paris with the slogan "ni racism, ni laxisme" (Hueglin 1997: 150). Haider probably could not have said it any better.

The case is significant and alarming because a member state of the EU was punished, or at least meant to be punished, not because there had been a violation of democratic or European rules but instead because adherence to these rules, a democratic election, had produced an undesirable outcome. In the context of federalism as a form of shared sovereignty, and as a model for regional or even global integration, the case cannot be dismissed simply as an act of rash folly - although it was exactly that, of course. What if one of the democratically elected member

state governments reintroduced the death penalty or another measure contravening basic human rights? What if Islamic fundamentalists came to power democratically in a future member state and introduced sharia law?

In all democratic states as well as international and supranational organizations there exists a code of conduct, constitutionally enshrined and/or by convention. In all these systems, however, judicial interpretation and evolution are necessary alongside with constitutional change in order to cope with changing time and circumstance as well as with the unforeseen that even the most exhaustive constitutional document cannot comprise. It is therefore very well imaginable that a situation can arise that requires action on the part of some members against others which are not covered by either constitutional stipulation or convention.

In such cases, the larger community cannot simply gang up on one or several of its members. Instead the leading question must be what the criteria are by which a community can take measures against one of their own when they are not covered by rules or conventions.

Suggestions

These are very different cases but they allow to make some general suggestions for the evaluation of federalism as a compound system of democratic governance. The first of these pertains to the tenuous relationship of individual citizenship and community. Whether differentiated sets of norms and values are justifiable and fair would seem to depend in turn on whether they affect citizens as individuals or as part of a particular collectivity. A second suggestion revolves around issues of exit, voice and reciprocity. While a precondition for the free exercise of group rights would seem to be that all group members have reasonable access to exit and voice options, external constraints or sanctions are only justifiable under conditions of reciprocity. It must be clear that the same constraints and sanctions would be applied to similar circumstances everywhere. A third and last suggestion has to do with federalism as practised democratic discourse. Under growing conditions of membership heterogeneity, it would seem that constitutional settlements cannot offer legal finality. Instead, their democratic legitimacy ought to be measured in terms of their capacity as frameworks for ongoing deliberation and compromise.

To the first suggestion: Federalism is supposed to provide a reasonable compromise between **individual citizenship and community** but I believe that it rarely does that.

It is not an exaggeration to say that federalism in the United States is more about the competitive protection of individual rights than it is about thirteen colonies protecting their autonomy and identity. The famous *Lopez* case of 1995, widely hailed as a turnabout in favour of states' rights, or at least as a stop to the tradition of limitless interpretations of the federal power over interstate commerce, only helps to underscore this argument (Palmer and Laverty 1996).

In Germany, federalism is far more about a two-level game of party competition than it is about *Länder* rights. Typically, at least, it is the *Länder* with government majorities composed of parties that are in opposition at the federal level that go to court over intergovernmental conflicts (Lehmbruch 2000). And they do so mainly for ideological reasons combined with strategic considerations of political expediency rather than concerns about regional autonomy. Only the European Union with its regional committees and funds has invited a return to a more regionalist predisposition of *Länder* politics (Leonardy 2001) but then again that is also so in other EU member states that are not formally constituted as federal systems.

In Canada, finally, to the extent that cultural and identity boundaries coincide with provincial ones, the federal system does protect deep diversity, and the late Bill Riker may be proven right when he said, years ago and with polemical intention, that Canada was the only country worth keeping its federal system (Riker 1964).

By no means do I want to be misunderstood: In all the cases cited federalism provides citizens with satisfactory levels of political involvement and control as well as policy outcomes. German federalism in 1949 was not reestablished in order to protect the non-existing identities of newly created *Länder* but quite on the contrary as a measure to create such identities, and as a shield of insulation against central power usurpation. In the same vein, I believe that Madison's republican federalism was much more concerned with the division of power issue than with community concerns.

However, if federalism wants to provide a meaningful response to globalization, migration and increasing levels of deep diversity in complex societies, it has to address the community question also when it does not happen to coincide with provincial or cantonal boundaries.

In this paper I do not want to talk about solutions that inevitably will have to entail some form of non-territorial federalism. There is a tradition for that all the way back from Althusius to Carl Friedrich and right into the 1993 Belgian constitution (Hueglin 1999). What I want to talk about instead are the theoretical and philosophical underpinnings that need to change for federalism to be able to accommodate deep diversity.

Ever since the Americans reinvented federalism in its modern form, it has been based on a combination of universalist enlightenment assumptions and Lockean principles of individual liberalism. As reformulated by John Rawls, the Lockean position essentially postulates that individual liberty is best served by allowing choices to be made in a legal framework of state neutrality (Rawls 1993). Modern federalism modifies this only insofar as it provides two different and overlapping circles of state neutrality in which such choices can be made.

Communitarians and multiculturalists in particular have pointed out that the assumption of state neutrality is not only misleading but also insufficient as a framework allowing meaningful choice. Instead, they have suggested that such choices can only be made within a familiar context of belonging. The unencumbered self in this view becomes the embedded self (Kymlicka 2002). Insofar as federalism recognizes two or more manifestations of belonging in this way, it does indeed contribute to a more complex and adequate organization of social life. However, to the extent that it only offers such complexity within a framework of universal rights and freedoms by a reason of state that is far from neutral but constitutes a predetermined ideological commitment, federalism remains a limited tool for the organization and accommodation of deep diversity.

This is why Canada's Aboriginal Peoples for instance reject the Charter of Rights and Freedoms (Boldt 1993). A more meaningful organization of federal diversity would have to begin the process from the opposite direction, bottom-up, by first recognizing communities within their diverse cultural and ideological boundaries and *then* searching for common ground. The result would probably be something like a charter of charters. The idea of regionally federalizing international organizations such as the IMF or World Bank points in the same direction (Hueglin 1999a). Obvious problems with such diversity come to mind immediately.

- On the one hand, what are the criteria for common ground under conditions of deep diversity? Can a Nigerian province legitimately practice sharia law? Can a cultural community continue with the barbaric practice of genital mutilation? Can European Union membership be denied to a country continuing with the equally

barbaric practice of the death penalty? Should Bavarian children remain exposed to crucifixes in their classrooms?

- On the other hand, what are the processes of actually searching for, and reaching common ground under such difficult conditions of deep diversity?

To the second suggestion: The search for criteria first leads to obvious considerations of **exit, voice and reciprocity**. In order to tolerate diversity and asymmetry, the members of particular communities must have a fair share in co-determining the political and ideological boundaries of that community, and they must have a right to leave if they so choose. That would seem to settle the sharia law issue fairly quickly. If women have had no significant input in the adoption of this law, and if they are barred by ties of family and tradition from leaving the area under sharia law jurisdiction, the adoption and exercise of such a law would appear to be in violation of basic principles of legitimacy.

Of course this raises the issue of universality and enlightenment all over again but I would at least contend to point out that what is accepted as universal, here, is not a particular and historically bounded standard of individual or even human rights but instead a standard of **political rights**. Since political rights are by definition procedural and not absolute rights, to govern and to be governed, as Aristotle said, they do not *a priori* determine what is right and what is wrong. Instead, they have to be agreed upon, and this agreement has to be renewed over time.

What, however, if such agreement does not come about and the violation of political principles of legitimacy continue in a particular community? When are sanctions by the larger community appropriate? Here, the concept of reciprocity can help. Sanctions are only legitimate when they are based on criteria that equally apply in the larger community. It is on this basis, that the EU sanctions against Austria must appear particularly out of place.

The tension between individual freedom of choice and obligation to particular community membership cannot be resolved. For federal systems, or, more generally, systems of multilevel governance, there is a need to rethink principles of intervention, or, as federalists would say, checks and balances. The onus of intervention is usually on the larger and more encompassing entity. While it must respect the autonomy of a particular community, it must also protect the integrity of individuals living within such a community.

A last consideration pertains to the question of particularity itself. The strongest argument in favour of uniformity and universality has always been the danger of sectarianism. Thirteen colonies coming together in a federal union obviously have a right to retain autonomy. So do French Canadians and Aboriginal Peoples because they, too, can be regarded as founding cultures of a larger union. But what about immigrants? Could the Italo-Canadians or Ukrainian Canadians demand the same set of rights as French Canadians?

In order to safeguard the integrity of an existing union or – however plural – national community, it may be necessary to develop what might be termed a concept of **principled differentiation**. It can be argued, for instance, that founding cultures ought to have more freedom of choice than immigrants who join an already existing union. The pledge to join and uphold loyally principles of citizenship that are already established does not mean that immigrants must not have any right to make choices embedded in their cultural traditions. But this right must be reasonably blended with the right of integrity on the part of the larger community. Founding cultures do not have that obligation, or at least not to the same extent (Kymlicka 1995).

To the third suggestion: In comparison to the neat if simple division of enumerated rights and powers in federal constitutions this all sounds rather fuzzy. Clearly, however, the evidence of political practice in diverse societies, including some federal systems, points to a decline of legal certainty and its replacement by cumbersome processes of ongoing **deliberation and compromise**.

Simone Chambers has written about politics as an open-ended conversation, and she remarked about Canada in particular: "What is noteworthy about the Canadian case is not that Canadians have failed to ratify their constitution; it is that they have continued to try" (Chambers 2001: 65). Melissa Williams has commented on Canada's peculiar notwithstanding clause according to which a province can override certain elements of the Charter but must renew this override every five years. She concluded that "in declining to give judges the last word... the notwithstanding clause imposes an obligation to deep deliberation" (Williams 2001: 217).

And finally, Susan Bickford has pointed out that the principles and practices of deliberation themselves are in need of rethinking. She argues that there is a long tradition from Plato to Rawls and Habermas according to which there is inherent in the notion of deliberation an assumption that the ultimate result must be the victory of the stronger argument over the weaker; as federalism is said to be a laboratory and process of

competing experiments at the end of which the stronger programs and visions will be adopted universally. Communicative action becomes strategic action. Bickford holds against this linear form of thinking that it may be inadequate for a deeply diverse reality of social life. Instead, she suggests deliberation as a form of interactive citizenship reaching consensus by remaining respectful of difference yet mindful of interdependency (Bickford 1996: 1-24).. In Williams' words again, "getting along takes precedence over getting it right" (Williams 2001: 218).

You probably will not be surprised that these are feminist voices. But you may be surprised indeed that it was Arend Lijphart who noted in his latest book that deliberative or what he calls consensus democracies are characterized by a more feminine approach favourably distinguished from the masculine type of power politics prevalent in majority democracies. Supported by impressive empirical evidence, Lijphart contends that consensus democracies are qualitatively superior to majority democracies, both in terms of democratic inclusion and policy performance (Lijphart 1999).

Conclusion

Mainly for reasons of time, I will abstain from trying to apply these theoretical considerations to the three cases discussed at the outset. I am aware that this would not be unproblematic. Instead I want to end with three thoughts as to why I think that this type of theoretical exercise is necessary to begin with.

First, modern federalism has been developed as a political practice alongside with modern liberalism. In territorially divided societies, it has been a useful technique of sustaining acceptable forms of liberalism. At the same time it has neglected if not outright suppressed other concepts and manifestations of liberty. The – shall we say – Althusian vision of a politics of the common good has been pushed aside by the predominant vision of a politics of individual rights. At the beginning of the modern age, Althusius had emphasized social solidarity as the indispensable foundation for federalism among autonomous communities (Hueglin 1999). Modern competitive federalism has become far more concerned with the exclusivity of constitutional rights than with the joint treatment of social responsibilities (Hueglin 2000). Maybe we are witnessing a turning point in this regard. In his closing address to the aforementioned federalism summit in Switzerland, the vice-president of the European constitutional convention, Giuliano Amato, mentioned Althusius four times

as an inspiration for a European federal order in which the notion of exclusivity can no longer be sustained (Amato 2002).

Second: During the past 30 years or so, coinciding with the publication, and as a critique of, John Rawls' *Theory of Justice* (1971), an enormous wealth of political philosophy has been developed. Its main labels are communitarianism, citizenship, feminism, environmentalism and multiculturalism. Its revisionism is not directed against individual liberalism *per se*. Instead it has been engaged in making that liberalism more meaningful in a world that has always been more complex than enlightenment assumptions would have it. Recent processes of globalization, migration and identity politics have only made this more glaringly obvious.

To the extent that it has remained caught within the confines of unrevised modern liberalism, the theory and practice of the modern federal state has not kept up with these developments. As a consequence, federalism has not been a source of inspiration for civil society even though it has become popularized among state-builders in recent years.

Third: Modern individual liberalism and especially post-Cold War neoliberalism are clearly not acceptable to many peoples and places in a globalizing world. These peoples and places resist being caught in what must surely be the most totalizing ideological effort in the history of humanity, indeed the *end* of history according to ideologues like Francis Fukuyama (1992), but the last hurra of western eurocentrism to its victims. Federalism can choose to be its accomplice, or to make a difference. As a humanistic project, federalism can choose to succumb to the dictates of market- and rights-driven individualism as the independent variable of social organization, and continue to conceptualize the institutional organization of thin diversity as merely a variable dependent on these dictates. Or, reversely, it can choose to conceptualize the politics of the common good as its independent variable, and construct individual rights and market structures as dependent variables that are as indispensable to liberty as they are bounded by the reality of deep diversity in a complex world.

To put it somewhat differently, there is now an all-pervasive ideology in place, that real choices are limited by the dictates of markets. If federalism is supposed to address the interests and concerns of real people with deep attachments to real issues such as poverty, gender, environmental degradation, culture and religion, it must find a way of compounding these choices instead of merely succumbing to the civic poverty of multilevel market management.

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The Principle of Homogeneity and Democracy in Austrian Federalism:

The Constitutional Court's Ruling on Direct Democracy in Vorarlberg

I. General Remarks

Every federal system seeks to combine unity and diversity.¹ In a constitutional context, this key objective of federalism particularly concerns the distribution of competences. In order to maintain a balance between these two polar positions and to prevent conflicts between the federation and the constituent states that could lead to the dissolution of the federal system, a minimum standard of homogeneity² is required between the federation and the states as well as between the constituent states themselves.

Despite the almost innumerable attempts³ to define the essential elements and principles of federal government it is well-known that in practice federal systems realize the abstract characteristics ascribed to federalism in very different manners.⁴ It seems obvious, however, that the principle of homogeneity is an indispensable precondition if a federal system is to fulfill its functions. Homogeneity, however, should accommodate diversity as well, because the constituent units have to be granted a certain standard of individuality within a larger framework of symmetry.⁵ Moreover, homogeneity should not primarily compel the constituent states to adopt as identical a legal and political system as possible, but should foster a co-ordinate, equal relationship between the federation and the constituent states and between the constituent states themselves.⁶

Federal constitutions usually provide a large number of legal instruments in order to secure homogeneity between the various units.⁷ These include explicit constitutional rules that must not be violated by the legislation or administration of the constituent states. The federal constitution may also determine that certain policies or law-making of the constituent units need the consent of the federation or an agreement between the units. It can bind state legislation to standards laid down by (ordinary) federal legislation or it can itself provide explicit or implicit

standards that bind both federal and state legislation. Very typically, compliance with these concrete legal standards of homogeneity is secured by certain procedural instruments provided by the federal constitution, including arbitration procedures, veto rights, and instruments of cooperative federalism.⁸

II. Homogeneity Provisions in the Austrian Federal Constitution

Basically, the homogeneity principle must be perceived before the background of the Austrian legal system, which is hierarchically structured, with the federal Constitution at its top and (ordinary) federal law and *Länder* law below, the latter being separate and equal to each other.⁹ The federal Constitution¹⁰ thus provides a general framework applicable both to the federation and to the nine *Länder*. This framework is based not only on the fundamental constitutional principles, such as democracy, republicanism, the rule of law,¹¹ and human rights, but also on certain constitutional provisions of a more general character, such as the duties of administrative organs or the structures of state organization.¹²

Apart from this general framework, a number of more explicit federal constitutional provisions determine the relationship between (ordinary and constitutional) federal law and (ordinary and constitutional) *Länder* law. However, there is no clause of homogeneity applicable to the relationship between federal and *Länder* law *in general*.¹³ Instead, it is important to highlight the fact that these individual provisions belong to two different categories:

One category comprises the criteria that form the *substantive* standards of homogeneity. Here, one could mention the explicit provisions pertinent to *Länder* parliament elections (Art. 95, B-VG), the status of members of *Länder* parliaments (Art. 96, B-VG), and the legislative procedure in the *Länder* (Art. 97, B-VG). The other category comprises a variety of *procedural* and *collision rules* that determine the hierarchy between the different layers of federal and *Länder* law. Several of those shall be outlined very briefly:

- The federal legislator is competent to enact framework laws in certain fields, whereas the *Länder* are competent to enact implementation laws only (for example, Art. 10 para. 2, Art 12, Art. 20 para. 4, B-VG).
- There is a hierarchy between federal constitutional and *Länder* constitutional law, as the *Länder* constitutions must not be in breach of

the federal Constitution, which is called a system of “relative constitutional autonomy” of the *Länder* (Art. 99 para. 1, B-VG¹⁴).

- A variety of constitutional provisions vests the federation and the constituent units or the Federal Assembly¹⁵ respectively with the right to consent to legal acts of the other unit or to consult with each other, which implies the possibility to influence these acts.¹⁶ Here, one could also mention the “principle of mutual consideration”,¹⁷ which was developed by the Constitutional Court, and instruments of co-operative federalism, such as Art. 15a, B-VG, according to which the constituent *Länder* may conclude treaties with each other or with the federation respectively, which enables them to harmonize – and thus homogenize – their legislation in crucial areas, in particular, if competences are formally split between them, but, practically, require a joint solution.¹⁸
- The so-called “legislation according to requirements” provides that in certain areas, the federation may enact uniform laws, although originally the *Länder* would have been competent to do so (Art. 11 para. 2, B-VG). The *Länder* may only deviate from these federal laws if this is necessary or, according to the jurisdiction of the Constitutional Court,¹⁹ “indispensable” or “required by specific circumstances.”
- In Austria, the term “principle of homogeneity” was particularly used for describing a specific constitutional provision²⁰ that obliged the *Länder*, when enacting laws pertinent to their civil servants and those of municipalities and municipal associations, to adapt to the federal legislation pertinent to federal civil servants to a degree which would allow civil servants to change between different territorial units easily.²¹ However, this specific principle of homogeneity was abolished in 1999, which was considered to be a pro-*Länder* step toward a reform of the Austrian federal system.²² Nevertheless, a specific “principle of homogeneity” has been maintained regarding the exchange of civil servants between the federation and the *Länder*. According to Art. 21 para. 4, B-VG, neither the federation nor the *Länder* may enact provisions which treat civil servants differently regarding the assessment of their former terms of service. The federation and the *Länder* must inform each other on matters regarding civil servants, the representation of staff interests, and the protection of the employed in order to ensure a homogeneous development of the law on these matters.
- In certain fields, the B-VG seeks to combine both categories, thus amalgamating substantive standards with formal rules of hierarchy. For instance, the *Länder* may establish their own Courts of Auditors,

but if they do so, these courts must be homogeneous to the Federal Court of Auditors, which is substantially determined by the B-VG;²³ a similar provision applies regarding the homogeneity between the office of the Federal Ombudsman and the offices of the *Länder* Ombudsman.²⁴

The crucial legal question in this context is: When will a law become unconstitutional on account of its heterogeneity? According to Art. 140, B-VG, the Constitutional Court may repeal both *Länder* laws and federal laws if they are in breach of federal constitutional law. But the question remains what exactly is the federal constitutional standard according to which such a law will be repealed by the Constitutional Court on account of its heterogeneity.

III. “Popular Legislation” and Democratic Homogeneity²⁵

In the following I will focus on the 2001 judgment of Austria's Constitutional Court (*Verfassungsgerichtshof*) in which the Court repealed a provision of the Constitution of the *Land Vorarlberg*.²⁶ It is the most recent case of the Court's “homogeneity jurisdiction,” which has usually been concerned with tensions between the *Länder* election acts and the federal constitutional principle of proportional representation or issues of the legislative procedure in the *Länder*.²⁷ What makes this ruling rather out of the ordinary is the Court's fundamental reflection on the relationship between representative and direct democracy in general and its effect on the “relative constitutional autonomy” of the *Länder*.

The repealed provision formed part of Art. 33 para. 6 of the Constitution of Vorarlberg,²⁸ which provided that the people of Vorarlberg were allowed to demand the enactment, amendment, or abolition of *Land* laws (including *Land* constitutional laws) by way of a citizens' petition. If petitions relating to *Land* legislation were supported by a certain number of voters or at least ten municipalities, the *Land* parliament had to decide if the petition was to be taken account of or not. If, further, the *Land* parliament refused to take account of a petition supported by at least 20 percent of voters, a referendum had to be held on the same question. If the referendum turned out to be successful, the *Land* parliament would have had to pass a bill in accordance with the demand formulated in the petition.

The provision thus compelled the *Land* parliament to enact legislation even if its members did not want to do so. Of course, several conditions would have had to be fulfilled in order to force the *Land* parliament to pass such legislation. Apart from the fact that the petition had to concern

a legislative issue, it had to be supported by at least a fifth of those entitled to vote. Further, it needed first to be refused by the *Land* parliament, then to be re-launched and confirmed by a referendum. Given these conditions, there was practically little probability that any such event would ever occur. First, it does not seem easy to get repeated support for the petition or a majority for the referendum as well. Second, it was politically improbable that, if voters should push their demand as described, the elected representatives of the *Land* people would oppose it that sharply and repeatedly, although parliament could have dissolved if it had not wanted to realize the referendum's demand. It is not surprising, therefore, that there had never been such a referendum in reality.

This practical inapplicability, however, was not taken into account by the Austrian Constitutional Court. The crucial question for the Court was whether the mere possibility of forcing the *Land* parliament to enact a certain piece of legislation in conformity with the people's will realized direct democracy to a much larger extent than the democratic principle inherent in the federal Constitution.

For this purpose, the Court analyzed what the democratic principle, which forms one of the highest standards of federal constitutional law in Austria and is protected from amendment to a higher degree than "ordinary" federal constitutional law,²⁹ implied in detail.³⁰ Given that the democratic principle, as it is provided by the federal Constitution, consists of elements of both direct and representative democracy, it needs a very thorough analysis to grasp the essence of this principle.

In its former jurisdiction,³¹ the Constitutional Court had already put emphasis on the fact that the democratic principle mainly stands for representative democracy. Elements of direct democracy, as far as they were explicitly provided by federal constitutional law, were regarded as *exceptions* to this main principle. In its more recent judgment, the Court adhered to this opinion in principle, mainly basing it on historic arguments. The Court referred to the debates preceding the enactment of the Federal Constitutional Act of 1920.³² As the possibility of adopting a provision – which compelled the federal Parliament to let the people decide on a bill in a referendum if a citizens' initiative had demanded it – had been actually discussed and, indeed, formed part of several draft enactments of the federal Constitution, but been ultimately abandoned and thus not been incorporated into the Federal Constitutional Act of 1920 the Constitutional Court concluded that the federal Constitution had preferred a representative system of democracy and had, at any rate, not wanted to vest the people with strong rights of direct democracy: According to the Constitutional Court, these historic arguments show

"that, within the legislative procedure, the federal constitutional lawmaker wanted to provide the referendum only to a limited extent. Due to the great importance which was obviously attributed to this question ... [at that time], the Court assumes that the 'extraordinary restriction' and 'repressing of the referendum in general' respectively [terms used in the referred historic documents] do not merely form a federal constitutional standard that binds the federation, but rather an essential element of the fundamental constitutional principle of representative democracy (parlamentarism) that binds the state constitutions as well."

What the Federal Constitutional Act does grant, however, is that, at the federal level, a referendum has to be held on a bill if the National Assembly does so resolve or if the majority of its members demands it.³³ People's initiatives which are supported by either at least 100,000 voters or by at least a sixth of the voters of at least three *Länder* have to be laid before the National Assembly, but need not be made into law. Further, according to Art 44. para 3, B-VG, a referendum has to be held if the federal Constitution or one of its fundamental principles is to be amended essentially by a bill of parliament,³⁴ or if it is amended not quite as essentially and at least a third of the members of the National Assembly demands it. The Constitutional Court argued that although the Federal Constitutional Act provided these elements of direct democracy, they could not be regarded as characteristics as strong as the other characteristics of the democratic principle, which, according to the Court's opinion, culminated in a representative system of democracy. In particular, the Court held that direct democracy is provided by federal constitutional law only to the extent that the people can check bills of the federal parliament, but not present them to parliament.

In fact, both Articles 43 and 44, B-VG, provide that a referendum has to be held on the question if a bill of parliament should come into force. Whereas, in the first case, it is the representative forum again that decides if a referendum is to be held on its bill, in the second case, the referendum at least does not depend on the representatives' determination if the bill concerned implies the essential amendment of a fundamental constitutional principle or one of its elements. In both cases, however, the people are not entitled to present an initiative or drafted bill originally, thus leaving the people with just the option to object to a bill of parliament or not. Thus, the people are vested with a passive right instead of an active and, as such, more creative right.

IV. Analysis of the Court's Ruling

However, three issues are crucial to this question. The first is whether less emphasis should be put on the question of active or passive rights of direct participation or of *ex ante* or *ex post* participation. Notwithstanding the answer to this first question, the second would be whether the framework of homogeneity can be fastened thus tightly, that is, whether *Länder* constitutions have to provide elements of direct democracy in exactly the same way as the federal Constitution. Related to this second question, the third is to be raised on a more abstract level, namely, which impact the principle of federalism, being itself one of the fundamental principles of the federal Constitution, has on this scenario.

As to the first question, the concerned federal constitutional provisions actually provide a very heterogeneous set of direct democratic instruments that should not be left undifferentiated, as, indeed, the Constitutional Court did in the "*Volksgesetzgebung*" case. It is clear that the provisions enabling the people's participation in accordance with the will of the federal parliament's majority are themselves inseparably linked to the system of representative democracy as the people's decision is not only limited to a pre-shaped bill of parliament, but also, in its very existence, depends on the will of parliament. By contrast, the right to decide on a major amendment of the federal Constitution, though it is limited to a passive right of consent or dissent to a bill of parliament, is directly granted to the people by the federal Constitution. In this case, the people are vested with a decisive right of veto to a bill of parliament, which must not be overruled by the latter. For this reason, this specific right is considered to form an essential part of the democratic principle as the system of representative democracy, which means that it can itself not be repealed unless the people consent to it.³⁵ If, therefore, it is admitted that the said direct democratic right is an essential element of the democratic principle, thus protected from amendment to a much higher degree than other parts of federal constitutional law, and if federal constitutional law provides several other direct democratic rights as well – apart from the said referendum rights the right to elect the federal president directly could be mentioned in this context as well – then it is difficult to perceive why the *Land* people should not be granted a right of direct participation of the kind provided by the Constitution of Vorarlberg. Without doubt, there is a difference between allowing the people to decide on a bill of parliament and allowing them to formulate a draft law themselves. There is certainly more direct democracy in the latter provision, as the people can thus operate on a more active and creative basis. However, the main point still is that the people can just act

alongside or even in opposition to parliament, and that there is a federal constitutional basis for such action.

In fact, the federal Constitution includes no explicit provision that would prevent *Länder* legislation, and *Länder* constitutions in particular, from providing elements of direct democracy. According to Art. 99, B-VG, *Länder* constitutions must not "affect" federal constitutional law. This provision specifically safeguards homogeneity between federal and *Länder* constitutional law. According to the newer doctrine, it implies that *Länder* constitutions may provide anything that does not violate federal constitutional law.³⁶ As federal constitutional law does not explicitly treat the question of direct democracy in the *Länder*, the question is whether it does so implicitly.

If the scope of *Länder* constitutional law is only restricted by the provision that it must not violate federal constitutional law and if federal constitutional law does not explicitly determine whether such elements of direct democracy may be enacted by the *Länder* parliaments, it is not clear why such an enactment should be in breach of federal constitutional law. It is true that federal constitutional law provides several elements of direct democracy – concerning the federal arena – which are not quite identical with the repealed provision in as far as either the initiative of a bill depends on the parliament or as the people's will is considered by the parliament only on a voluntary basis. Does this mean, however, that the *Länder* constitutions are obliged to contain precisely the same provisions if they want to vest their peoples with rights of direct democratic participation? The key rule applicable to the relationship of homogeneity between the federal Constitution and the *Länder* constitutions, which is enshrined in Art. 99, B-VG, does not oblige the *Länder* to adopt exactly the same rules found in federal constitutional law, but to enable them to enact their own rules unless they were in breach of federal constitutional law.³⁷ If the federal Constitution had wanted the *Länder* constitutions not to include such provisions as the one repealed by the Court, the federal Constitution would have had to contain a more explicit provision prohibiting the *Länder* from enacting such law. The mere fact that federal constitutional law includes several provisions regarding direct democratic procedures in the federal arena, maintaining though a generally representative system of democracy, does not necessarily imply that the *Länder* constitutions must contain the very same provisions. Otherwise, one could raise the question with good reasons if it were a breach of federal constitutional law if a *Land* constitution just *lacked* some of those direct democratic elements that were granted to citizens in the federal arena.³⁸

It is obviously highly problematic to follow the Constitutional Court in its opinion that the reference to historic drafts of the Federal Constitutional Act or the political discussion in preparation thereof, both themselves related only to direct democracy in the federal arena, serves as a legitimate basis for denying certain institutions of direct democracy in the *Länder*. Notwithstanding explicit rules of homogeneity – which cannot be found in this case – democratic homogeneity simply demands that the *Länder* constitutions correspond to the general *organizational* principles of federal constitutional law in as far as representative democracy forms the general system and direct democracy the (relatively) exceptional system.³⁹

Indeed, there are federal constitutional provisions (Art. 95 et seq., B-VG) which explicitly determine the election to the *Land* parliament, its composition, and the procedure of *Land* legislation. Thus, a general system of representative democracy in the *Länder* is explicitly demanded by federal constitutional law and must not be replaced by an antagonistic system of direct democracy laid down in the *Länder* constitutions. However, the *Länder* constitutions may provide elements of direct democracy as far as the general system of representative democracy can be maintained in the *Länder*. The repealed provision, however, neither legally nor practically endangered the system of representative democracy. Legally, it depended on procedural requirements that made its application difficult, if not improbable. In any case, the *Länder* parliament would have had the right to dissolve in order to evade such pressure, and, practically, this provision had never been applied until its repeal.

Another factor is of particular importance in this context. All layers of Austrian law have to be construed in accordance with the federal Constitution.⁴⁰ Federal constitutional law, in its turn, has to be construed in accordance with the fundamental principles of the Austrian federal Constitution.⁴¹ It seems obvious that the said issue could only be resolved by reference to these principles. It is true that the principle of democracy mainly is a principle of representative democracy, but, as was mentioned earlier, it includes at least one essential – and thus, better protected – element of direct democracy in the form of a compulsory referendum in the case of a major amendment of the federal Constitution.

If one does not exactly know how far democratic homogeneity goes, in particular if no explicit federal constitutional provision applies in order to define the precise scope of direct democracy in the *Länder*, it will be necessary to refer to the principle of federalism as well, which is as well one of the fundamental constitutional principles.⁴² If the democratic

principle and its predominant system of representation are principally adhered to by a *Land* constitution, then no further claim ought to be made for democratic homogeneity between federal and *Länder* constitutional law. A border must be drawn between *Länder* constitutions in breach of federal constitutional law and those not in breach of it. It would be no breach of federal constitutional law, at least not *a priori*, if elements of direct democracy were provided by the *Länder* constitutions as well as by federal constitutional law. Neither will it be a breach of federal constitutional law if elements of direct democracy are provided somehow differently by the *Länder* constitutions unless they challenged the representative system in general. Accordingly, the repealed provision did not involve any major challenge to the representative system in general as its ambit was clearly restricted by several procedural requirements as well as by the *Land* parliament's *ultima ratio* possibility to dissolve and thus quash the demand postulated in a referendum.

Any other interpretation would be in breach of the principle of federalism. However, Art. 99, B-VG, which serves as a specific rule for the homogeneous relationship between federal constitutional and *Länder* constitutional law, must be construed in accordance with all fundamental principles of the federal Constitution. These principles must be supposed to form a harmonic constitutional fundament and must thus be seen not as antagonistic, but as complementary. The Constitutional Court itself has severally⁴³ held that the fundamental principles are equal and found their respective barriers in each other. Although the argument in these cases – including the recent judgment – was in favor of the democratic principle, it is, of course, necessary to apply this *obiter dictum* to the general relationship between the leading constitutional principles.

Just the same as, for instance, the principle of equality, though one of the highest, if not the highest principle of the Constitution, does not extend as far as to compel the *Länder* to enact exactly the same law in order to secure an identical legal treatment of all state citizens, being thus limited by the principle of federalism, which essentially seeks to ensure each *Land's* legislative competences,⁴⁴ the democratic principle cannot completely overrule the principle of federalism. The distribution of competences, which is the very heart of any federal system,⁴⁵ requires the constituent *Länder* to have the right to enact their own legislation in certain areas. Also, the constitutional autonomy of the *Länder* belongs to the key elements of the principle of federalism and implies more than the right for the *Länder* to adopt "implementation laws" as a kind of secondary legislation to the federal Constitution.⁴⁶ However, one cannot even perceive that the democratic principle would demand such a tight

standard of homogeneity, as it itself includes elements of direct democracy, albeit not explicitly with regard to the *Länder*.

V. Conclusions

The conclusion must be drawn, therefore, that there is no final and exhaustive answer to the question of democratic homogeneity between the federation and the *Länder*. Rather, it turns out to be a value judgment at last, depending on the respective issue of democracy and the applying authority. The arguments brought forth by the Constitutional Court, however, are not sufficiently persuasive as to permit one to approve of its decision. If both the principle of democracy and the principle of federalism are seen as fundamental principles of Austria's federal Constitution, the principle of federalism must be considered as a principle of equal, not inferior, rank and democratic homogeneity must not be understood in a way that would leave the *Länder* constitutions with nothing but the right to restate federal law.

Somehow disappointingly, the "*Volksgesetzgebung*" case did not bring forth much reaction among the people of Vorarlberg, or Austrians generally. Neither has there been any political pressure to insert into the federal Constitution an explicit clause empowering the *Länder* to adopt such legislation as the annulled: Almost paradoxically, a referendum would be required for such an amendment, as the Constitutional Court would obviously regard such an amendment as a major revision of one of the leading constitutional principles. The case thus remains an object of academic discussion that so far has produced more fervent comments against the Court's opinion than otherwise. Still, one must not neglect the fact that the Court bases its main argument on the traditional doctrine that has probably laid too little weight on the significance of the compulsory referendum required by Art. 44 para. 3, B-VG. The question of width or narrowness regarding the principle of homogeneity and, in particular, of the borders of the constitutional autonomy of the Austrian *Länder* demand, however, to be treated with even more subtlety and carefulness in the future.

- 1 See Ronald L. Watts, Comparing Federal Systems, 2nd ed. (Montreal and Kingston: McGill-Queen's University Press, 1999), p 6 and pp 35-36; idem, "The Distribution of Powers, Responsibilities and Resources in Federations," Handbook of Federal Countries, 2002, ed. Ann L. Griffiths (Montreal and Kingston: McGill-Queen's University Press, 2002), pp 449-451. Frank N. Trager, "On Federalism," Why Federations Fail. An Inquiry into the Requisites for Successful Federalism, ed. Thomas M. Franck (New York and London: New York University Press/London University Press, 1968) stated in his introduction: "What we mean by federalism is not a fixed point on a map, but a tendency which is neither unitary nor separatist. In Aristotelian terms, it is the median between these two polar positions, and thus their true opposite." Similarly, Peter Pernthaler and Karl Weber, "Landeskompetenzen und bundesstaatliches Homogenitätsprinzip im Dienstrecht," Arbeitsleben und Rechtsordnung – Festschrift Gerhard Schnorr, eds. Oswin Martinek and Gustav Wachter (Vienna: Manz, 1988), pp 560-561.
- 2 See, for example, Heinz Schäffer, "Dienstrechtliche Homogenität im Bundesstaat," Im Dienst an Staat und Recht – Festschrift Erwin Melichar, ed. Heinz Schäffer (Vienna: Manz, 1983), p 371; Richard Novak, "Landesgesetzgebung und Verfassungsrecht – Stand, Tendenzen, Reformen," Föderalismus und Parlamentarismus in Österreich, ed. Herbert Schambeck (Vienna: Österreichische Staatsdruckerei, 1992), p 54 and idem, "Art 99 B-VG," Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar, eds. Karl Korinek and Michael Holoubek (Vienna: Springer, 1999), p 5.
- 3 Considering the plethora of literature on federalism, it is not possible to give a complete list of concepts of federal systems. For instance, K. C. Wheare, Federal Government (New York and London: Oxford University Press, 1947), p 1 or, more recently, Watts, Comparing Federal Systems, pp 6-7 have gained international reputation. Even the Austrian doctrine is split: See the complex theory of federalism (see, for example, Felix Ermacora, Österreichischer Föderalismus. Vom patrimonialen zum kooperativen Bundesstaat [Vienna: Braumüller, 1976]; Peter Pernthaler, "Der österreichische Bundesstaat im Spannungsfeld von Föderalismus und formalem Rechtspositivismus," ÖZÖR 19 [1969]: 361-379; Theo Öhlinger, Der Bundesstaat zwischen Reiner Rechtslehre und Verfassungsrealität [Vienna: Braumüller, 1976] and Karl Weber, Kriterien des Bundesstaates [Vienna: Braumüller, 1980], pp 78-85), further Kelsen's three-circle-theory (see in particular Hans Kelsen, Allgemeine Staatslehre [Berlin: Julius Springer, 1925], pp 163-225) and the related decentralisation theory (see again Hans Kelsen, Österreichisches Staatsrecht [Tübingen: J.C.B. Mohr/Paul Siebeck, 1923], p 165; Robert Walter, Österreichisches Bundesverfassungsrecht [Vienna: Manz, 1972], pp 108-109; idem and Heinz Mayer, Grundriß des österreichischen Bundesverfassungsrechts, 9th ed. [Vienna: Manz, 2000], p 79; Friedrich Koja, Allgemeine Staatslehre, 2nd ed. [Vienna: Manz, 1993], pp 349-350; Rudolf Thienel, "Ein 'komplexer' oder normativer Bundesstaatsbegriff?," AJPIL 42 [1991]: 215-252 and idem, "Der Bundesstaatsbegriff der Reinen Rechtslehre," Schwerpunkte der Reinen Rechtslehre, ed. Robert Walter [1992], pp 123-135).
- 4 See, for example, Watts, Comparing Federal Systems, pp 7-9.
- 5 Homogeneity must thus not be confounded with identity; see Pernthaler and Weber, "Landeskompetenzen und bundesstaatliches Homogenitätsprinzip im Dienstrecht," pp 557-558.
- 6 See Pernthaler and Weber, "Landeskompetenzen und bundesstaatliches Homogenitätsprinzip im Dienstrecht," p 559.
- 7 See Schäffer, "Dienstrechtliche Homogenität im Bundesstaat," p 372.
- 8 See Schäffer, "Dienstrechtliche Homogenität im Bundesstaat," p 372.
- 9 The Republic of Austria, which is a predominantly German-speaking, Roman Catholic country of little more than 8 million people, consists of nine constituent states, which are called "Länder".
- 10 Due to the lack of an "incorporation principle" Austria's federal Constitution does not only consist of its main document, i.e. the Federal Constitutional Act of 1920 ("Bundes-Verfassungsgesetz," in the following "B-VG"), which has been amended 83

times so far, but also of a large number of separate federal constitutional acts and federal constitutional provisions within (ordinary) federal laws.

- 11 If administrative matters are carried out by organs of the other unit (so-called "indirect" federal or state administration), these organs are bound by the principle of legality (Art 18, B-VG) which means that they must not deviate from the determining federal/state laws. As well, state administrative authorities are bound by federal laws, if they execute them within their own scope of competences.
- 12 See Pernthaler and Weber, "Landeskompetenzen und bundesstaatliches Homogenitätsprinzip im Dienstrecht," pp 561-564 and Novak, "Art 99 B-VG," p 8.
- 13 See the difference to Art 28 para 1 of the German Constitution.
- 14 Art 99 para 1, B-VG, which will be returned to below, reads: "The *Land* Constitution to be enacted by a *Land* constitutional law can, inasmuch as the federal Constitution is not affected thereby, be amended by a *Land* constitutional law." See the innovative approach of Friedrich Koja, *Das Verfassungsrecht der österreichischen Bundesländer*, 1st ed. (Vienna and New York: Springer, 1967), pp 17-23, and VfSlg 6783/1972; further Peter Pernthaler, "Die Verfassungsautonomie der österreichischen Bundesländer," *JBl* (1986): 477-487; Bernd-Christian Funk, "Die Bedeutung gliedstaatlichen Verfassungsrechts in der Gegenwart," *VVDStRL* 46 (1988): 57-91; Reinhard Rack, "Föderalismus als reformpolitisches Anliegen," *ÖJZ* (1990): 226-228; Siegbert Morscher, "Landesgesetzgebung und direkte Demokratie," *Föderalismus und Parlamentarismus in Österreich*, ed. Herbert Schambeck (Vienna: Österreichische Staatsdruckerei, 1992), p 140; Richard Novak, "Bundes-Verfassungsgesetz und Landesverfassungsrecht," *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung*, ed. Herbert Schambeck (Berlin: Duncker & Humblot, 1980), pp 111-146; idem, "Die relative Verfassungsautonomie der Länder," *Landesverfassungsreform*, ed. Reinhard Rack (Vienna and Graz: Böhlau, 1982), pp 35-49; idem, "Landesgesetzgebung und Verfassungsrecht," *Föderalismus und Parlamentarismus in Österreich*, ed. Herbert Schambeck (Vienna: Österreichische Staatsdruckerei, 1992), pp 53-74; idem, "Art 99 B-VG," pp 13-21.
- 15 The Federal Assembly ("*Bundesrat*") is the second chamber of the federal parliament and consists of *Länder* representatives delegated by each *Land* parliament according to their numbers of inhabitants.
- 16 See, for example, Art 3, 10 para 2, 15 para 4 and 10, 16 para 2, 23 f para 1, 42, 44 para 2, 50 para 1 and 3, 97 para 2, 98 para 2 and 3, 100 para 1, 102 para 1 and 4, 116 para 3, 118 para 7 and 129a para 2, B-VG.
- 17 See VfSlg 2447/1952; 3163/1957; 8831/1980; 10.292/1984; 15.552/1999. See also Peter Pernthaler, *Kompetenzverteilung in der Krise* (Vienna: Braumüller, 1989), pp 57-67; Heinz Schäffer, "Kompetenzverteilung und Rücksichtnahmepflicht im Bundesstaat," *ZfV* (1985): 357-366; Siegbert Morscher, "Wechselseitige Rücksichtnahmepflicht Bund-Länder," *JBl* (1985): 479-481; Ulrike Davy, "Zur Bedeutung des bundesstaatlichen Rücksichtnahmepinzips für Normenkonflikte," *ÖJZ* (1986): 225-234 and 298-302; Richard Novak, "Bundesstaatliche Rücksichtnahme," *Staat – Verfassung – Verwaltung – Festschrift Friedrich Koja*, eds. Heinz Schäffer et al. (Vienna and New York: Springer, 1998), pp 357-369; Peter Bußjäger, "Verfassungsrechtliche Fragen der Anwendung des Naturschutzrechtes der Länder auf Verkehrsprojekte," *RdU* (2000): 83-92 and Sigrid Lebitsch-Buchsteiner, *Die bundesstaatliche Rücksichtnahmepflicht* (Vienna: Braumüller, 2001).
- 18 See particularly Theo Öhlinger, *Verträge im Bundesstaat* (Vienna: Braumüller, 1978); Clemens Jabloner, "Gliederungsverträge in der österreichischen Rechtsordnung," *ÖZÖRV* 40 (1989): 225-255; Rudolf Thienel, "Art 15a B-VG," *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar*, eds. Karl Korinek and Michael Holoubek (Vienna and New York: Springer, 2000).
- 19 See VfSlg 8583/1979; 11.564/1987; 13.831/1994; 13.838/1994; 14.153/1995; 14.381/1995; 15.218/1998; 15.351/1998; 15.369/1998; 15.529/1999.
- 20 See Art 21 B-VG (after the amendment BGBl 1974/444 and before the amendment BGBl I 1999/8).

- 21 See Schäffer, "Dienstrechtliche Homogenität im Bundesstaat," pp 372-389; Pernthaler and Weber, "Landeskompetenzen und bundesstaatliches Homogenitätsprinzip im Dienstrecht," pp 557-577; Clemens Jabloner, "Verfassungsrechtliche Fragen des Dienstvertragsrechtes," Arbeitsleben und Rechtsordnung – Festschrift Gerhard Schnorr, eds. Oswin Martinek and Gustav Wachter (Vienna: Manz, 1988), pp 489-507; Heinz Mayer, "Amtswegige Versetzung in den Ruhestand und Homogenitätsprinzip," ÖJZ (1990): 771-775; Rudolf Thienel, Öffentlicher Dienst und Kompetenzverteilung (Vienna: Österreichische Staatsdruckerei, 1990), p 109; Peter Bußjäger, "Bemerkungen zur Neuordnung der Kompetenzverteilung auf dem Gebiet des Dienstrechtes der öffentlich Bediensteten," JBl (1999): 773-780.
- 22 BGBl I 1999/8.
- 23 Art 127c B-VG.
- 24 Art 148i B-VG.
- 25 From the perspective of political science see, most recently, Heinrich Oberreuter, "Direkte Demokratie und die repräsentative Verfassung der Bundesrepublik Deutschland," ZfP (2002): pp 290-305.
- 26 See VfSlg 16.241/2001, G 103/00-22 ("Vorarlberger Volksgesetzgebung"). The Constitutional Court initiated proceedings *ex officio* when hearing the appeal directed against a ruling of the Vorarlberg Land Election Agency. The ruling had dismissed the applicant's claim to initiate a people's petition. See Peter Pernthaler, "Demokratische Identität oder bundesstaatliche Homogenität der Demokratiesysteme in Bund und Ländern," JBl (2000): 808-811; Theo Öhlinger, "Bundesverfassungsrechtliche Grenzen der Volksgesetzgebung," Montfort (2000): 402-414.
- 27 See the examples given by Novak, "Art 99 B-VG," pp 6-12.
- 28 See Vorarlberger Landesverfassung, LGBl 1999/9. Historically, section 6 para 4 of the Constitution of Vorarlberg of 1919, which was in force when the B-VG was enacted (see LGBl 1919/22), provided both the people's petition and referendum, but entitled the Land parliament to amend or even dismiss the proposals of a people's petition. The decisive amendment was inserted as late as 1984 (see LGBl 1984/24), together with a number of other important issues. Among the Austrian *Länder*, Vorarlberg has been noted not only for its particular belief in federalism, but also for its high standard of direct democracy (see Peter Pernthaler and Georg Lukasser, Das Verfassungsrecht der Österreichischen Bundesländer: Vorarlberg [Vienna: Verlag Österreich, 1995], p 135, with further references).
- 29 Peter Oberndorfer, "Art 1 B-VG," Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar, eds. Karl Korinek and Michael Holoubek (Vienna and New York: Springer, 1999), p 7.
- 30 Heinz Peter Rill and Heinz Schäffer, Bundesverfassungsrecht (Vienna: Verlag Österreich, 2001), at Art 1, pp 26-37; Oberndorfer, "Art 1 B-VG," pp 13-14 (with further references); Heinz Peter Rill, Möglichkeiten und Grenzen des Ausbaus direktdemokratischer Elemente in der österreichischen Bundesverfassung (Vienna: Orac, 1987).
- 31 See, for example, early VfSlg 3134/1956; in particular VfSlg 13.500/1993 and 15.302/1998.
- 32 Vgl dazu Hans Kelsen, Georg Froehlich and Adolf Merkl, Die Bundesverfassung vom 1. Oktober 1920 (Vienna and Leipzig: Franz Deuticke, 1922), p 121; Robert Walter, Die Entstehung des Bundes-Verfassungsgesetzes 1920 in der konstituierenden Nationalversammlung (Vienna: Manz, 1984), pp 116-117; Felix Ermacora, Quellen zum Österreichischen Verfassungsrecht [1920] (Vienna: n.p., 1976), p 347; Franz Merli, "Art 43 B-VG," Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar, eds. Karl Korinek and Michael Holoubek (Vienna and New York: Springer, 1999), pp 3-5.

- 33 Art 43, B-VG. See Merli, "Art 43 B-VG"; Heinz Mayer, "Plebiscitäre Instrumente in der staatlichen Willensbildung," Festschrift 75 Jahre Bundesverfassung, ed. Österreichische Parlamentarische Gesellschaft (Vienna: Verlag Österreich, 1995), pp 341-360 and Helmut Widder, "Die plebiszitäre Komponente im Gesetzgebungsverfahren," Festschrift 75 Jahre Bundesverfassung, ed. Österreichische Parlamentarische Gesellschaft (Vienna: Verlag Österreich, 1995), pp 315-339.
- 34 Art 44 para 3, B-VG. See early VfSlg 2455/1952; further Rill and Schäffer, Bundesverfassungsrecht, at Art 1, pp 22-23; Oberndorfer, "Art 1 B-VG," p 7 (with further references); Heinz Mayer, B-VG, 3rd ed. (Vienna: Manz, 2002), p 198.
- 35 See Anna Gamper, Die verfassungsrechtliche Grundordnung als Rechtsproblem (Vienna: Verlag Österreich, 2000), p 99 (at footnote 231 with further references), and Mayer, B-VG, pp 198-199.
- 36 See, for example, Novak, "Art 99 B-VG," pp 4-5.
- 37 Art 99, B-VG is a formal instrument, which does not contain any substantive criteria itself. If Novak, "Landesgesetzgebung und Verfassungsrecht. Stand, Tendenzen, Reformen," p 54 believes that state constitutional autonomy is over-determined by federal constitutional law, it will have to be conceded that this determination does not arise from Art 99, B-VG, itself.
- 38 For example, only Art 23 para 2 of the Constitution of Salzburg provides that a "total revision of the state constitution" (see the equal wording of Art 44 para 3, B-VG) needs a referendum (similarly, if not equally, Art 35 para 2 of the Constitution of Vorarlberg); see Friedrich Koja, "Bedeutet die Einführung des Mehrheitswahlrechts für die Bestellung der Landesregierung eine Gesamtänderung der Salzburger Landesverfassung?," JRP (1998): 287-292. However, the fact that the other state constitutions have not adopted such a provision has never been regarded as a "breach of federal constitutional law".
- 39 See Friedrich Koja, Das Verfassungsrecht der österreichischen Bundesländer, 2nd ed. (Vienna and New York: Springer, 1988), pp 196-197 (with further references).
- 40 See, for example, lately, Meinrad Handstanger, "Verfassungskonforme oder berichtigende Auslegung?," ÖJZ (1998): 169-174; Ludwig K. Adamovich, Bernd-Christian Funk and Gerhart Holzinger, Österreichisches Staatsrecht, vol. 1 (Vienna and New York: Springer, 1997), p 42, and Theo Öhlinger, Verfassungsrecht, 5th ed. (Vienna: WUV, 2003), pp 36-38. The Constitutional Court has constantly applied the constitutional conformity-rule in case of doubt.
- 41 See, for example, Heinz Schäffer, Verfassungsinterpretation in Österreich (Vienna and New York: Springer, 1971), pp 72-74; Heinz Schäffer, "Weinaufsicht und mittelbare Bundesverwaltung," ZfV (1988): 361-374; Adamovich, Funk and Holzinger, Österreichisches Staatsrecht, pp 42-43 and p 127; Peter Pernthaler, Der Verfassungskern (Vienna: Manz, 1998), pp 57-61. See, for example, VfSlg 11.403/1987; 11.500/1987; 11.829/1988; 11.927/1988; VfGH, 11 October 2001, G 12/00.
- 42 See, for example, early VfSlg 1030/1928 and, as a leading case, 2455/1952. The relevant case law and literature are analyzed by Gamper, Die verfassungsrechtliche Grundordnung als Rechtsproblem, pp 135-196.
- 43 See VfSlg 13.500/1995.
- 44 See VfSlg 7038/1973; 8247/1978; 8934/1980; 9116/1981; 9804/1983; 11.979/1989; see also Peter Pernthaler, Der differenzierte Bundesstaat (Vienna: Braumüller, 1993), pp 3-7 and Gamper, Die verfassungsrechtliche Grundordnung als Rechtsproblem, pp 156-163.
- 45 See, for example, Watts, Comparing Federal Systems, p 7. Constitutional autonomy, however, is not merely a question of competences, but is an essential element of Austrian federalism on its own (see, for example, Novak, "Art 99 B-VG," p 3).
- 46 Regarding the significance of constitutional autonomy for the Austrian *Länder* see Pernthaler and Weber, "Landeskompetenzen und bundesstaatliches Homogenitätsprinzip im Dienstrecht," pp 558-559; Pernthaler, "Die Verfassungsautonomie der österreichischen Bundesländer," 477-487 and Novak, "Art 99 B-VG," pp 12-21.

Articles 6 para 3 of the EU Treaty and 151 para 4 of the EC Treaty: "How the EU takes into Account National Identity and Cultural Diversity in its Action under the Treaties"

Introduction: The legal and institutional framework – The connection between articles 6 para 3 TEU and 151 para 4 TEC

What are the common values shared by all the EU's Member states and which could be considered as fundamental for the Union? Moreover, which are the origins of these fundamental values? It is true that the Treaties of Maastricht and Amsterdam may invoke them but their original source goes many years in the past. Some of them have been emerged by the European Court of Justice; others find their origins within the European Council's political declarations. The first document that reveals them in a rather synthetic manner is the text on European identity, adopted by the Copenhagen Summit on December 14, 1973. The Heads of State or governments declared that they wished to respect legal, political and moral values such as a) the rich variety of their national **cultures**, b) the rule of law, c) the fundamental rights, d) democracy and e) social justice, which constitute the fundamental elements of the so-called "European identity".

These five fundamental values which had been initially identified as the bases of the Community's identity have been since then developed in a very differentiated way. The respect of the rule of Law and of fundamental rights has been repeatedly confirmed with no ambiguity either by the Treaties or by the European Court of Justice. On the contrary, achievements have been far more modest when referring to the principles of democracy, social justice and, finally, the reaffirmation of the **respect of cultural diversities**¹. Even if the values of national identity and cultural diversity were recognized in the 1973 Copenhagen Declaration, these principles met a considerable number of difficulties before finding their places in the Community's legal texts.

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Article 6 para 3 of the Treaty on European Union (TEU, ex-Article F) forms part of the so-called Title I «Common Provisions» and reads as follows: «*The Union respects the national identity of its Member States*». The idea is not for the Member States to be «dissolved» into the EU, but rather for them to contribute their own particular qualities. It is precisely this variety of national characteristics and identities that lends the EU its moral authority, which is in turn used for the benefit of the Community as a whole.

The **text of Article 151 para 4** (ex-Article 128) is contained in the Title XII «Culture» of the Treaty of European Community (TEC) stipulating that «*The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and promote the diversity of its cultures*». Introducing this new «Culture» chapter, the Treaty of Maastricht brought culture within the Union's sphere of responsibility. Community action is therefore not a substitute for action by the Member States but is designed to supplement it, in order to encourage cultural cooperation.

Moreover, **article 22 of the Charter of Fundamental Rights** stipulates that «*the Union shall respect cultural, religious and linguistic diversity*». Whilst the Charter has no direct legal effect – for the time being and waiting for its probable inclusion in the Constitutional Treaty of 2004 – the same cannot be said for the existing Treaty, which constitutes the primary source of Community law².

A simple reference to the above-mentioned legal texts is sufficient to prove their close relation: although being situated in totally different parts of the Treaty (-ies), they seem to play an absolutely complementary role to its other. Whilst art. 6 para 3 appears as the *lex generalis*, it can almost exclusively be seen in perfect accordance to the *lex specialis* of 151 para 4. This is the main purpose of the present paper: to demonstrate the existing close connection between these general principles of Community law and examine how they are currently being combined and implemented by the EU's actions under the Treaties (in practice, when conducting the rest of European common policies). The paper can also be regarded as an indicative survey of the way in which national and cultural aspects have been taken into account in different areas of Community action.

Cultural identity is born out of the interaction with external influences and other cultures of traditions that have been shaped by common experiences, history and living conditions. As long as localities, regions or nations retain their own way of living and outlook on life, the distinctiveness of their cultures – and hence cultural diversity is

preserved. Because of common history, the identities of Europeans naturally have some elements in common. A choice nevertheless has to be made as to what extent this similarity is to be strengthened. In any event, the preservation of diversity has been chosen as the cornerstone of Union cultural policy.

Integration, the fundamental principle underlying the EU, is based on a very idealistic goal: preserving peace between the peoples of Europe. Promoting cooperation and interaction between the peoples of Europe has successfully pursued this goal. At present, however, it appears that one of the means of achieving integration – the economy – has gained a dominant position. In our view, a more critical analysis needs to be made of whether development driven by the demands of economic integration will lead to a degree of similarity in European ways of life such that cultural diversity will inevitably suffer or even disappear.

The main idea covered under the previous principles lies on the necessity to promote the preservation of Europe's cultural heritage and particularly its local and regional diversity whilst respecting Member States national identities as well as to enhance awareness of the cultural dimension in Community action. Therefore, it is important to define - in general terms - the underlying guidelines and principles on the bases of which the special nature of culture can be taken into account in all areas of Community action (1st part). In addition to this, this paper will make an attempt to assess the community action under its cultural dimension (2nd part).

PART I: The Community Action Taking into Account National and Cultural Diversities³

The need for a definition of «Cultural aspects» is further borne out by the fact that culture is often assigned an instrumental role in other areas of policy; it is seen as a means of attaining goals in other spheres of activity⁴. To avoid this instrumental approach having a detrimental effect on culture, e.g. by emphasizing quantity rather than quality or tradition rather than innovation, EU legislation has made clear that cultural actions must operate under the special terms applicable to culture, while respecting the individuality of the activity concerned.

The European Community's decision-making in cultural affairs is governed to a large extent by the subsidiarity principle (Art. 151 para 4 requires the Community to respect the diversity of national and regional cultures). However, this means that culture is understood in a narrow

sense to meet non-commercial activity related to the arts and heritage and concerned with content.

In reality, **the Community has initially taken culture under the internal market aspect.** As they result from the Treaty, free movement of cultural goods and services has a tendency - under market economy laws - to lead to an increasing harmonization. Moreover, the Treaty had not recognized the possibility of invoking cultural objectives in order to justify a national restriction over free movement of goods or services⁵. After having showed a certain reluctance, the European Court of Justice (ECJ) finally accepted the necessity of protection for national and cultural pluralism. As it has declared in the case *Torfean vs. B&Q*, it is possible to include in the notion of «imperative reasons» provided for by article 30 (free movement of goods, ex-Article 36) or in the notion of «reasons of general interest» provided for by article 49 (free movement of services, ex-Article 59), reasons that «...constitute...the expression of certain political and economical options...» These could be, for example, «...national or regional socio-cultural particularities, the evaluation of which belongs, under the actual state of Community law, to the Member states...»⁶

By the same way, the Court generally accepts, each time more and more clearly, cultural and national pluralism as a legitimate objective which could justify - linked to the freedom of expression - possible restrictions to the free provision of services in the telebroadcasting sector. In its judgements of 25 July 1991, the Court concludes: «...The Dutch government stresses that these restrictions are justified by imperative reasons linked to its cultural policy implemented in the audiovisual sector. It explains that this policy aims at preserving the freedom of expression of different composites existing in the Netherlands, especially social, cultural, religious or philosophical ones, as far as this freedom can be demonstrated in the press, radio or television. However, this objective could be endangered by the excessive impact of publicity to the program elaboration. Under this condition, a cultural policy could certainly constitute an imperative reason of general interest justifying a restriction to the free provision of services. In fact, the maintenance of pluralism that should be guaranteed by the Dutch policy is linked to the freedom of expression, as it is protected by article 10 of the Convention on Human Rights and Fundamental freedoms, which figures between the fundamental rights preserved by the Community legal order....»⁷.

1.1 Culture and the Single Market Regulatory Aspects

In fact, laws and regulations governing cultural goods and services, copyright and even antiques are now being harmonized, at least up to certain limits. Similarly, cultural goods and services are, without exception, liable to at least minimum rates of VAT in all Member States. Though the cultural dimension has been taken into account in tax-related issues, this has often been in relation to other industrial and commercial activities and rarely from the point of view of the special nature of culture. It is intended that the subsidiarity principle be complied with in the cultural field. Therefore, in our view, the judgements of the Court of Justice should be examined critically to determine whether they have, in fact, led to circumvention of the subsidiarity principle in the cultural field.

1.1.1 Freedom of Movement of Professionals in the Cultural Sector

Further consideration has been given to the definition – even if only a loose one – of the position of artists. Self-employed artists, in particular, frequently encounter difficulties with the authorities over the interpretation of tax and social security-related issues owing to their exceptional working methods and conditions⁸.

1.1.2 Copyright and Related Rights

A high level of protection is essential but EU legislation needs to be developed further in those fields where it is inadequate (e.g. visual arts and computer applications). However, efforts have been made to agree with interested parties (beneficiaries) in this field on the level of protection that allows the widespread use of works of art and cultural products, especially for non-commercial purposes (e.g. museums and libraries).

1.1.3 Taxation

It must be possible for Member States to use several different measures to support culture. Traditionally, one of these has been tax regulation and particularly tax exemption. For example, VAT hits organizers of cultural events in many ways, both when buying services and selling their own services. As a consequence, this burden reduces the scope for cultural activities at local and regional level.

1.1.4 Competition Policy

As regards the debate on public-service broadcasting, we feel that the provision of funding should be supported on both regional and cultural grounds, insofar as operators in this sector are required to produce

programs, which serve regional needs and promote cultural values. In the commercial broadcasting sector, the most frequently encountered problem is lack of diversity in programming. If common European training measures or other initiatives could remedy this shortcoming, this would undoubtedly add a welcome new element to our cultural diversity.

1.1.5 Cultural Assets

The right of each Member State to decide itself which assets make up its national heritage conforms well to cultural aspirations. However, the same kind of practice should be applied as widely as possible in connection with other culture-related issues, also at local and regional level⁹.

1.1.6 Traditional and Regional Agricultural Products

Cultural diversity is promoted and respected by protecting the local identity of agricultural products, supporting local savoir-faire traditions and conserving traditional landscapes typical of such production.

1.1.7 Culture in the Judgement of the Court of Justice

As already observed, the Court of Justice attempts to strike a **balance between cultural and economic aspects** with due regard for the requirement of an evaluation of the «principal/secondary» effects. The aim is to prevent Member States from using culture to disguise the pursuit of economic interests, e.g. in competitive conditions.

However, the Union should take account of the cultural diversity of everyday life in seeking to create citizens' Europe and a Europe of the regions. Many small-scale commercial and productive practices include everyday cultural aspects of local and regional importance, which could change as a result of, e.g. standardization and consumer policy measures. The Court of Justice will certainly have to pay increasing attention to such circumstances on the basis of article 151 para 4.

1.2 Culture and the Community's Internal Policies

1.2.1 Culture, Cohesion and Balanced Regional Development

The Structural Funds are the main source of financing for cultural activities in the Community (representing over 80% of the total funds granted to cultural projects). A significant part of these programs aim at promoting and further enforcing cultural identity and diversity of specific

regions. However, culture has not been considered a strategic factor of wider importance in regional development programs through which the innovativeness and changes of attitude required by periods of radical change can be encouraged. To meet this deficiency, it must be underlined that nowadays every regional program should contain an explicit cultural component as well as a cultural component based on the region's local potential and needs.

1.2.2 Culture, Social Policy and Human Resources

First of all, it has to be recognized that the European Social Fund and its supplementary programs seem to offer opportunities to promote the reintegration of workers who have become unemployed in the cultural sector, to obtain support for the development of innovative forms of work in the cultural field and to use cultural activities in a variety of ways to combat exclusion.

However, the formation of a European identity depends to a very large extent on how students in schools and higher education obtain information on Europe's cultures and what kind of picture they form of Europe and Union's activities. Within the EU there is a **large number of child and youth culture «best practices»** which deserve to be supported, expanded and publicized (e.g. Programs «Erasmus» and «Socrates» for students, «Youth for Europe» for youngsters, twinning program for cities etc.).

Moreover, the **Lingua program** for the support of rare languages and the promotion of proficiency in European languages is in complete harmony with the Article 151 para 4 objectives concerning conservation of the diversity of Europe's cultures and improving knowledge of them. Such programs should certainly be extended and applied by the Community in other fields related to minority cultures¹⁰.

1.2.3 Culture and Environment

Besides seeking to preserve balance in the natural environment, environmental planning should also take account of cultural aspects. Architecture, design, town planning and planning of buildings should respect the best of regional, national and European traditions and pay attention to the attractiveness of the conditions in which we live by giving prominence to aesthetic, historical and artistic aspects.

1.2.4 Tourism and Culture

Cultural tourism has an important role to play in developing a sense of European identity. However, a serious concern should be expressed about the potential threat posed to the integrity of cultural heritage by uncontrolled flows of tourists. Local inhabitants, especially in areas undergoing major change, easily become the most poorly paid section of the workforce in the tourist industry unless special attention is paid to increasing their professional skills and know-how.

1.2.5 Audiovisual Policy¹¹

Audiovisual policy is perhaps the area of Community action, which best combines general economic and technological principles, and consideration of cultural aspects. The European area for audiovisual services – «Television without Frontiers» – contributes to the creation of a European identity and a sense of belonging together, whilst offering a forum for the diversity of Europe's cultures. The promotion of the European program industry supports the internal, qualitative aspect of culture in a valuable way and a similar kind of approach should be applied more widely in other artistic and cultural fields.

PART II: Evaluation of the Union's Activity – Forging European Identity¹²

After the presentation of the first part, one should conclude that in order to preserve the **principle of cultural pluralism**, it was necessary to insert a specific clause in the Treaties. So, the TEC under its XII Title dedicated to the Union's cultural policy, provides the Community with the obligation to preserve the Member States cultures, while respecting their national and regional diversity. Moreover, the Community has to take into account cultural aspects in its action under the Treaties. These provisions should permit the **conciliation between cultural diversity and European integration**. In addition to this, the general rule of Article 6 (ex-Article F) of the TEU underlines that «*The Union respects national identity of its Member States*». Finally, the Amsterdam Treaty reaffirms cultural pluralism by making its respect a crucial element implicated to all Union's cultural policies. Article 151 para 4 (ex-Article 128) provides that «*The Community shall take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures*». This clearly constitutes another case when a general principle has been progressively evolved by the

combined effect of both the Court's jurisprudence and the successive revisions of the Treaty¹³.

A sense of identity is evoked through identification with one's environment and genuine identification requires positive interaction, including the possibility to influence one's environment. To this view, an overall assessment of the Union's activity respecting national and cultural diversities could safely lead us to a positive outcome: whilst not eliminating national, local or regional characteristics, the Union's action certainly helps for a European identity to be gradually forged.

2.1 The Impact of Cultural Programs

The approach adopted by the Community towards culture rightly recognizes that local, regional and national identities are essential requirements for a healthy European identity. The principle of respect and preservation of cultural diversity therefore guides community measures in the cultural field. By the same token, cultural programs and other programs with a cultural dimension all emphasize the importance of promoting closer contacts and interchange: exchanges of people, transfer of information, experiences and skills, joint projects and permanent cooperation networks. Such kind of activity should be supported as they do not touch upon the subsidiarity principle but are gradually helping to **build a positive sense of European identity** in people's minds.

2.2 The Preservation of National Languages

Language is considered to be the foundation of culture. It is the most important means of communication for the members of a society and thus a prerequisite for unity. **It has been the EU's policy to give the predominant language of each Member State the status of an official language.** There has also been strong emphasis on the status of minority languages within countries; everyone must be guaranteed the right to receive an education in their mother tongue. On the other hand, multilingualism is considered to be a source of enrichment and a cultural asset which people should be encouraged to acquire by, for example, making available appropriate language training. After all, language is a means of communication and people with different mother tongues must be able to communicate with each other in a multicultural society and a multicultural Europe¹⁴.

As it was pointed out above, language is one of the most important factors helping to sustain cultural diversity. By supporting the position of

national languages, the Community underlines the importance of cultural diversity. It could promote the unifying role which language has to play in Europe by encouraging citizens to learn other European languages, in addition to their mother tongue. With respect to this general idea, the year 2001 was solemnly proclaimed as «European Year of Languages», an event accompanied by a large number of initiatives aiming either to the preservation of national languages or to the dissemination of minority (or less-spoken) languages all over Europe¹⁵.

2.3 Cultural Heritage and Tourism

The preservation and exploitation of cultural heritage through Community – funded measures and programs – primarily in the field of tourism – help to highlight the significance of cultural identity. Our personal view is that the approach adopted by the Community continues to be narrowly focused. It seems that normally only material objects such as buildings, monuments, crafts and art treasures in museums are included in heritage. Europe also possesses a priceless intellectual cultural heritage. This can be a strong strategic element serving both common identity and regional development, on the basis of which contemporary artists are constantly creating new artistic culture. The key strategic feature of European identity should be a multicultural society, which provides for an awareness, comparison and identification of common cultural features in all material and/or spiritual areas of human endeavor.

2.4 Is there a Risk of «Europeanization»?

However, the plan of implementing a «Citizens' Europe» through the strengthening of European identity may be problematic from the point of view of subsidiarity. The desire is to make the citizen once again the center of the European enterprise but our personal feeling is that citizens cannot adopt the European identity if the European dimension is not evident in their everyday life. There again, if day-to-day life is Europeanized, the traditional local and regional identities of citizens could weaken. There are many examples, which show that cultural identity cannot be given or forced on people from above. Looked at from the cultural point of view, the creation and accentuation of «European identity» seem somewhat questionable – a commercial and/or power politics phenomenon. The most important is that citizens do indeed feel that they are actively involved in Europe. Accordingly, the Community should **pay greater attention particularly in its cultural programs, to**

ensuring that its actions reach civil society organizations and citizens through the complicated processes of public authority bodies.

2.5 Future Lines of Action for the Union's Cultural Policy

These lines of action are based on measures taken to date in the cultural sphere as well as on the Union's integration goals, the achievement of which, it is felt, can be supported by cultural means. However, some aspects of these goals conflict with cultural aspirations. In this connection, we have already drawn attention to certain problematic areas, in particular. It can generally be admitted that the Community's present activities cannot be characterized as strongly and manifestly pro-cultural and therefore it is necessary to examine how the Community's cultural profile can be heightened.

To this end, and on the basis of articles 6 para 3 and 151 para 4 of the Treaties, the Union will in the future have to pay increasing attention in all areas of its competence to the effects of its action on people's everyday culture. Cultural worthy of conservation is not confined merely to localities' and regions' savoir-faire based on traditional practices and industries. One should point out that the traditions of the future are the diverse patterns of everyday life in today's Europe. If the protection of this tradition in accordance with the subsidiarity principle is impossible in the Community because of the preference given to industry and commerce, then some kind of common European identity is possible for the people of Europe – but only at the expense of diversity and individuality.

At the moment, Europe's cultural diversity and common identity are in flux and interacting with each other in the worlds of arts and culture. They – like culture generally – are being molded in localities and regions, in particular. Although delicate issues are involved, it is our personal conviction that not even the subsidiarity principle should preclude the consideration of these processes in Community documents and programs.

In our view the Union should be sought to implement the same kind of policy more widely in all areas of creative culture and art. **The Community should really do more than at present to support the distinctiveness and diversity of European cultures**, which are Europe's strength and distinguishing characteristic. In the cultural sector, in particular, drawing the line between the regional and national measures, on the one hand, and Community measures, on the other, is an extremely delicate and difficult issue. Evidently, it is because of this that the Community has tended to view culture as a means rather than an

end. In our view, however, culture should also be regarded as a result and objective of Community action.

Conclusion: Towards Homogeneity in the EU level Without Dissolution of Member States

One should always have in mind that all culture is essentially a local phenomenon. The most important right from the point of view of local culture is the right to participate in cultural activities and produce cultural goods and services. On the other hand, it should always be borne in mind that local cultures in Europe have traditionally interacted with each and thus many originally local cultural features have become very widespread and acquired a general European character. Preserving and promoting Europe's cultural diversity and Member States national identities while strengthening the basis for a common European identity and an ever-closer union among the peoples of Europe poses a special challenge. However, the argumentation presented in this paper could probably justify our final outcome: gradually reaching relative homogeneity even in the European cultural level does not necessarily presuppose elimination or dissolution of the Union's Member States.

As a conclusion, one could point out that cultural dimension is discernible in all areas of Union's action, although it has still not been taken into account to its full extent. In several sectors, there are already far more opportunities to obtain financing for cultural projects than potential applicants are aware of. Programs and documents should therefore provide more information on the significance of culture and the wealth of opportunities that exists for such projects. Community measures in the cultural field focus primarily on language, the building and crafts heritage and audiovisual culture. Support for national and minority languages is judged to be the most concrete way of contributing to the preservation of cultural diversity. Indeed, language must be regarded as the traditional factor sustaining cultural identity. Our position stresses that the Community's measures in this area are not sufficiently extensive, nor have they been adequately funded.

In addition, the Community should regard culture as a driving force of developing its own rights, which should be incorporated explicitly in all strategies. It should be underlined that the Community must also insist in the provision of information for financing culture and encourage cooperation between operators in industry and commerce on the one hand, and the cultural sector, on the other.

In our view, culture must be regarded as a goal of Community policy rather than an instrument, in other words as an opportunity for each citizen to give effect to humanity in their own lives in the truest and most profound way. Europe's greatest treasure is undoubtedly the diversity and flowering of cultures. The Union bears a heavy responsibility for the conservation of this treasure.

- 1 See for more details on the evolution of these principles in the Community Law, J.-P. JACQUE: *Droit institutionnel de l'Union européenne*, Editions Dalloz, Paris, 2001, p. 40-67.
- 2 An approach of cultural rights as part of the «traditionally respected» by the Union Human Rights can be found in COUNCIL OF THE EUROPEAN UNION : *Annual Report on Human Rights 1998-1999*, General Secretariat of the Council, Brussels, 11 October 1999, p. 33-35
- 3 For an extremely detailed analysis of the European Union's action under the Treaties referring to the respect of cultural diversity, see EUROPEAN COMMISSION : *First Report on the consideration of cultural aspects in European Community action*, COM (96) 160 final, 97/C, 116/09.
- 4 For a definition of culture as «...a learned process of mental programming which distinguishes a group or class of people from other groups or classes...», see COMMITTEE OF THE REGIONS : *Opinion on «Culture and cultural differences and their significance for the future of Europe»*, CdR 447/97 fin, Official Journal No C 180/11-6-1998, especially under point 2.2.1.
- 5 See the Court of Justice's judgement of 18-1-1985, case 229/83, *Leclerc*, Coll. p. 17
- 6 Judgement of 23 November 1989, case 145/88, Coll. p. 3851. See also the judgements of 28 February 1991 on the cases 312/89 *Conforama* and 332/89 *Marchandise*, Coll. p. 1991.
- 7 Case 288/89, *Stichting Collectieve Antennenvoorziening Gouda and others and Commissariaat voor de Media*, Coll. p. 4007 and cases 353/89, *Commission of the European Communities vs The Netherlands Kingdom*, Coll. p. 4069. See also the judgement of 5 October 1994 *TV 10 SA vs Commissariaat voor de Media*, case C-23/93, Coll. I-4795.
- 8 For a full analysis of the state of play in the internal market of services (including cultural ones) and the attempt of Member States to justify restrictions by means of «national» or «cultural» particularities, see EUROPEAN COMMISSION: *The State of the Internal Market for Services*, Report to the Council and the European Parliament, COM(2002) 441 final, Brussels, 30 July 2002.
- 9 Especially on the issue of Member States cultural heritage treated by the specific program «Raphael» (aiming to preserve national and cultural heritage), see EUROPEAN COUNCIL: *Report on the progress of the Union*, Amsterdam, 17 June 1997, p. 51.
- 10 For a general presentation of all the relevant Community initiatives, see, for example, COUNCIL OF THE EUROPEAN UNION : *The developments of the European Union 1995 - 1999*, General Secretariat of the Council, Luxembourg, 2001, p. 26-27 and EUROPEAN COUNCIL: *Report on the progress of the Union*, Amsterdam, 17 June 1997, p. 50-53.
- 11 About the particular emphasis put on the audiovisual policy, see COUNCIL OF THE EUROPEAN UNION: *Summary of the Council Activities-1995*, General Secretariat of the Council, Luxembourg, October 1998, p. 41-42 and *Summary of the Council Activities -1996*,

General Secretariat of the Council, Luxembourg, 1999, p. 46-47. See also about the importance of the issue on EU economy, EUROPEAN COMMISSION: *White Paper on Growth, Competitiveness, Employment*, Luxembourg, 1994, points 5.10-5.12, p. 125-127.

- 12 For a more detailed and comprehensive evaluation of the Community's action when taking into account cultural diversities, see COMMITTEE OF THE REGIONS: *Opinion on the European Commission's «First Report on the consideration of cultural aspects in European Community action*, CdR 206/96 fin, Official Journal No C 116/14-4-1997, p. 65.
- 13 For this dynamic Community process, see MITRANY, D.: «The Prospect of Integration : Federal or Functional», *Journal of Common Market Studies*, 1965-1966, p. 119 and SOLDATOS, P.: *Le système institutionnel et politique des Communautés européennes* (especially Chapter II), Bruxelles, Bruylant, 1989.
- 14 For a more comprehensive analysis on this issue, see COMMITTEE OF THE REGIONS: *Opinion on «Culture and cultural differences and their significance for the future of Europe»*, CdR 447/97 fin, Official Journal No C 180/11-6-1998, especially points 3.1.5 and 3.1.6.
- 15 Decision No 1934/2000/EC of the European Parliament and of the Council, *OJ L 232 of 14-9-2000* and EUROPEAN COMMISSION: *General Report on the activities of the European Union - 2000*, Luxembourg, 2001, point 508 as well as *General Report on the activities of the European Union - 2001*, Luxembourg, 2002, points 584. See also Decision of 13 June 2001 of the Committee of the Regions, *OJ C 357 of 14-12-2001*, *Bulletin des activités de l'Union européenne*, No 6-2001, point 1.4.19, Council Resolution of 29-11-2001, *Bull. No 11-2001*, point 1.4.25 and, finally, European Parliament Resolution of 13-12-2001, *Bull. No 11-2001*, point 1.4.32. All these decisions or resolutions are referring to the preservation of regional and minority languages as well as to the importance of linguistic diversity.

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