The Emerging Constitution of the European Community

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On January 1, 1958 the European Economic Community came into existence. Together with the older European Coal and Steel Community and the European Atomic Energy Community, it constitutes what is often referred to as the European Community or the European Common Market. Originally composed of six member states (Belgium, France, the Federal Republic of Germany, Italy, Luxemburg, and the Netherlands), it was enlarged in 1973 by the accession of Denmark, Ireland, and the United Kingdom. At present, the membership applications of Greece and Portugal are under consideration. The European Community has become an important factor in international trade and politics.

Internally, its jurisdiction extends to a whole range of matters familiar to the American student of federal powers under the Constitution, in particular its interstate and foreign commerce clause. The European Community, however, does not operate under a constitution. Instead it is governed by international treaties, albeit with common law making institutions, including a Court of Justice in Luxemburg.

The thesis of this paper is a simple one and hardly novel. The paper maintains that the treaties (the emphasis here is on the so-called Treaty of Rome establishing the European Economic Community) are increasingly functioning in the manner of a federal constitution. By this characterization I mean to point to (1) vertical, rather than horizontal, authority structures, (2) partial integration of law, and (3) considerable reliance on formal rather than informal mechanisms for dispute resolution. The proof offered for the thesis is the jurisprudence of the Court of Justice on the supremacy of Community law. As any student of American constitutional history knows, the subject of supremacy is important in terms of jurisdiction, practical politics, and political theory. I argue that the most striking features of the Court’s decisions in this area, rendered over a period of less than fifteen years, have been the swiftness, boldness, and forcefulness with which the Court of Justice has pronounced the primacy of Community law. That jurisprudence has mostly eschewed the opportunities, frequently offered by the member states, to view the Treaty of Rome in an “international law” mode, rather than a constitutional one.

“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could

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This paper was presented at the Seventy-Second Annual Meeting of the American Society of International Law, in Washington, D.C., on April 28, 1978. A slightly different version will be published in the Proceedings of the Society.
not make that declaration as to the laws of the several states."

Holmes's famous remark suggests that he viewed judicial enforcement, in particular enforcement by the Supreme Court, of the supremacy clause in Article VI as the cornerstone of American constitutionalism. In the early years of the federation, judicial review of state legislation served to consolidate the understanding, expressly put forward by Article VI, of the American constitution as law. Likewise, though with a slightly different twist, the treatment by the Court of Justice of the Treaty of Rome and secondary Community law as supreme law has served to consolidate the status of the Treaty as the Community constitution.

A caveat is in order. My comments do not imply any views about the political stability and economic survival of the European Community. The following observations concern certain legal developments which I believe to be important and to possess some independent weight. To a modest extent the jurisprudence of the Court of Justice may be viewed as an autonomous factor in the development of the Community.

Holmes referred to the power of the Supreme Court to declare state laws void. We know, of course, that in theory this power of the United States Supreme Court is not as far-reaching as the power of the German and Italian constitutional courts to make such declarations with a "repeal" effect. Nevertheless, the practical consequences of American court decisions holding statutes unconstitutional are often indistinguishable from judicial "repeal."

The Court of Justice of the European Community possesses no such power with respect to national legislation, not even in the case of proceedings under Articles 169 and 170. As a matter of fact, the Treaty does not even know the equivalent of the express supremacy clause in Article VI of the United States Constitution. While Article 169 does clothe certain Community measures with a binding effect and makes them directly applicable, it fails to state their supremacy.

More importantly perhaps, the Court of Jus-

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1. O.W. Holmes, Jr., Collected Legal Papers 295/96 (1920).
2. U.S. Constitution, Article VI, clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
3. Article 169, Treaty Establishing the European Economic Community: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. "If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

Article 170, Treaty Establishing the European Economic Community: "A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice."

"Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

"The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. "If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice."

4. Article 189, Treaty Establishing the European Economic Community: "In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. "A decision shall be binding in its entirety upon those to whom it is addressed.
tice does not possess the appellate jurisdiction conferred by means of Article III of the United States Constitution and federal legislation on the American Supreme Court. Quite to the contrary, one could argue that the interlocutory powers granted the Court of Justice in Article 177 were so designed as to eschew any notion of plenary appellate power over questions of Community law.

As one looks back over the very short period—a mere twenty years—the Community has been in existence, one of the most striking features of the Court's decisions concerning the supremacy of Community law has been the swiftness, boldness, and forcefulness with which the Court of Justice has pronounced the primacy of Community law.

Commenting on *van Gend & Loos*, in 1964, Professors Riesenfeld and Buxbaum stressed the caution with which the Court had avoided any direct statement on the question how national courts should resolve a conflict between national law and the Treaty. Riesenfeld and Buxbaum pointed out how the Court “must work with materials much less robust than those that were available to the Supreme Court of the United States for its great blueprint cases.”

A reference under Art. 177, *van Gend & Loos* involved a clash between a Benelux customs agreement and a Dutch statute on the one hand and the Treaty on the other. The Dutch law had been enacted after the Treaty of Rome went into effect. In its decision, the Court of Justice referred to the Community as “a new legal order of international law,” emphasized that the members had limited their sovereignty, and that the Treaty conferred rights and imposed obligations directly on nationals of the member states. In identifying the nature of this “new legal order,” the Court made one argument reminiscent of *McCulloch v. Maryland*, and, one might add, as tenuous in this context as it was in John Marshall’s great poem. In explicating its view that the Treaty was more than an ordinary international agreement creating mutual obligations between the contracting states, the Court said: “This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples.”

Perhaps more to the point was what I would call the “jurisdictional” interpretation of Article 177. The Court saw in Article 177 an acknowledgment by the member states “that Community law has an authority which can be invoked by their nationals” before national courts and tribunals. While the Court formally declined to pass on the collision problem, its actual ruling told the Dutch tribunal that it “must protect” the individual rights created by the Treaty.

Whether one views *van Gend & Loos* as a diplomatic masterpiece in the art of directing and avoiding or as a “great blueprint” case is, in retrospect, not very interesting. The fact of the matter is that, within a little more than a year, the Court of Justice was prepared to turn

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“Recommendations and opinions shall have no binding force.”

5. Article 177, Treaty Establishing the European Economic Community:

“The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”


8. Id. at 158.

9. 4 Wheat. 316 (1819).


11. Ibid.
Article 189 into a supremacy clause and to direct national courts in no uncertain terms to treat Community law as supreme.

With respect to the Treaty, Costa v. ENEL\(^\text{12}\) involved a spurious claim. Again a submission under Article 177, the case challenged the nationalization, in 1962, of the production and distribution of electric energy in Italy. What was important about the case was its history. The substantive question had, a few months earlier, led to a decision of the Italian Corte Costituzionale. That court had refused even to consider whether the Italian statute violated the Treaty of Rome, because the 1962 statute was subsequent to the statute approving the Treaty.\(^\text{13}\)

The Court of Justice reacted by ruling that a subsequent unilateral measure cannot take precedence over Community law, thus holding the submission by the Milan court admissible. Justifying this supremacy, the Court again contrasted the Community system with ordinary international treaties and found it to have "created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply."\(^\text{14}\) The Court also saw the precedence of Community law confirmed by Article 189.\(^\text{15}\)

Thus, within six years of the entry into force of the Treaty, the Court had (1) demonstrated the ease with which Article 177 could be turned into a vehicle for appellate review, (2) asserted the supremacy of Community law as in the nature of things, (3) found Article 189 to be a supremacy clause—though unnecessary, (4) expressly stated that even subsequent national legislation had to yield in case of conflict, and (5) left no doubt about the obligations of national judges.

The American constitutional historian is reminded of Justice Story's commentary on the supremacy clause in Article VI:

"The propriety of this clause would seem to result from the very nature of the constitution. If it was to establish a national government, that government ought, to the extent of its power and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers; and yet, that in the exercise of those powers it should not be supreme. What other inference could have been drawn than of their supremacy, if the constitution had been totally silent?"\(^\text{16}\)

To be sure, I am not arguing that the Court of Justice had to adopt the constitutional law model of the Treaty rather than a more "horizontal" one. Indeed, even in Costa the Court conceptualized its solution in not altogether hierarchical terms. I am referring to the identification of Community law as "its own legal system," though integrated. The language the Court used was close to, but not identical with, the opinion of the Advocate General, Lagrange, who had attempted to show "that the system of the Common Market is based upon the creation of a legal system separate from that of the Member States, but nevertheless intimately and even organically tied to it . . . ."\(^\text{17}\)

On the one hand "separateness" is a troublesome concept, on the other hand nothing follows from it as concerns supremacy. Probably, it represents no more than the often encountered discomfort of lawyers vis-a-vis a new phenomenon that does not fit their previously established categories.

It could be argued that the conceptualization has not been quite as harmless as I have made it out to be, because doubters and cunctators may use it for their own legal and political purposes. Thus, the German Federal Constitutional Court began its famous opinion in Internationale Handelsgesellschaft\(^\text{18}\) by invoking the "separate legal systems" conceptualization. The

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15. Id. at 594.
case concerned the constitutionality, under the German Basic Law, of a deposit required by Community law to secure the actual performance of exports for which a license had previously been obtained. The German constitutional court held that the requirement did not violate the German constitution. Nevertheless, it made use of the opportunity offered to state the position that, given the incomplete state of European integration, it had the power to review Community regulations, even those upheld by the Court of Justice, for violation of basic rights guaranteed by the German constitution. The German court claimed that power for as long as the European parliament had not enacted an adequate bill of rights.

The decision was poorly reasoned, though by no means as obviously wrong as most commentators seem to believe. However this may be, it has probably been taken much too seriously, and the dispute may indeed amount to no more than, to use Judge Donner's characterization, a "querelle allemande." For our purposes, it should simply be noted that the Federal Constitutional Court began by reaffirming its jurisprudence that Community law was part neither of the national legal system nor public international law, but was an "autonomous" legal system. The judges stressed that this view was "in accord with the jurisprudence of the Court of Justice." The irrelevance of the "autonomous" legal system argument for the supremacy point is perhaps best illustrated by the fact that the dissent of Judge Rupp used the same concept for reaching the opposite result.

The Court of Justice, for its part, had previously rejected the claim that the German constitution was relevant to the determination whether the incriminated Community regulations were legal. The Court had stressed that recourse to national constitutions would have an adverse effect on the uniformity and efficacy of Community law and could not be reconciled with the very nature of law stemming from the Treaty, which it, too, characterized once again as "an independent source of law."

In short, the Court of Justice came to the conclusion that maintenance of a uniform Community legal system mandates a hierarchical authority structure which supersedes even national constitutions. In view of these developments it seems to me preferable to drop the notion of "separate" systems. To the extent of supremacy, Community law and national legal systems appear to be fully integrated. But differently, the Court of Justice has adopted the last part of the supremacy clause of Article VI of the United States Constitution, which after defining the supreme law of the land continues that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [My emphasis.]

Almost two hundred years ago, the Federalist No. 44 had made most of the relevant arguments. Defending that part of the clause which proclaims the supremacy of federal law over state constitutions, Madison said:

"[A]s the constitutions of some of the states do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such states, have brought into question every power contained in the proposed constitution . . . [A]s the constitutions of the states differ much from each other, it might happen, that a treaty or national law, of great and equal importance to the states, would interfere with some, and not with other constitutions, and would consequently be valid in some of

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19. Quoted in Ipsen, BVerfG versus EuGH re Grundrechte, 1975 Europarecht 1, 3. Charmingly enough, the French use the phrase "a German quarrel" to characterize the picking of a fight.
20. BVerfGE 37, 271, at 277.
21. Id. at 291.
the states, at the same time, that it would have no effect in others. In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."

The Court of Justice has made it clear that the Treaty cannot suffer such inversion. To that extent the Treaty is indistinguishable from the constitution of a federal state such as the United States.

How radical all of these developments have been, can perhaps best be judged by the fact that the constitutionalization of the Treaty of Rome has led to the introduction of judicial review, or what one might more appropriately call Community review, into those countries which do not recognize the power of their courts to pass on the constitutionality of legislation. Indeed the Court of Justice has recently ruled that national courts are not even free to follow their ordinary procedures for determining the inapplicability of national law.

The problem had been posed by the Italian Corte Costituionale. While the highest courts of countries such as Belgium and France had given precedence to Community law over subsequent national legislation in the context of deciding specific cases or controversies, Italy had embarked on an obstacle course. Though the Italian Constitutional Court has abandoned Costa and accepted the supremacy of Community law, it also has attempted to extend its monopoly to declare Italian legislation unconstitutional to alleged violations of Community law. Italian courts finding a conflict between Italian law and Community law were thus forced to delay adjudication until an interlocutory decision of the Constitutional Court could be had. When an Italian court made use of Article 177 to have the Court of Justice review this ruling of the Corte Costituionale, the Court of Justice responded by requiring the Italian judges to disregard national law, without waiting for an adjudication by the Constitutional Court.

"Querelles allemandes et italiennes" aside, it seems to me clear that the Court of Justice has treated the question of supremacy as one to be decided exclusively in terms of the Treaty of Rome. If speaking of the Community legal

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23. The Federalist (Cook, ed.) p. 306.
24. In the case of the Netherlands, Community review was granted by means of an express constitutional provision, Article 66.
27. For an earlier example, see the following sequence. In 1968, the Court of Justice had found that a 1939 Italian law levying an export tax on the export of art treasures was in violation of Article 16 of the Treaty of Rome. When Italy did not effect a repeal of the law, a Turin court asked for a preliminary ruling under Article 177, and the Court of Justice held that national courts must protect the rights conferred by Article 16. The Turin court then decided in favor of the plaintiff and against application of the 1939 law. The Italian government apparently appealed that decision, whereupon the Commission brought its second Article 169 proceeding, this time claiming a violation of Article 171. Before the decision of the Court of Justice in favor of the Commission was announced, Italy informed the Court of its repeal of the law, effective as of January 1, 1969, the date the Court had previously determined as the starting point of the violation. Case 7/68, Commission of the European Communities v. Italian Republic, [1969] E.C.R. 423; Case 18/71, Eunomia di Moro eC. v. Ministry of Education of the Italian Republic, [1971] E.C.R. 811; Case 48/71, Commission of the European Communities v. Italian Republic, [1972] E.C.R. 527.
28. In this last case, at 534, the Advocate-General, Roemer, offers a detailed discussion of the sequence.
32. Ipsen, supra note 19. There is now the potential for a "querelle française" as well, centering on the notion of French sovereignty. Cf. the decision of the Conseil
system as independent and autonomous made that task easier, so be it. John Marshall used a similar approach. What seems not merely misleading, but false, is to assert “separateness,” as legal commentators continue to do. The proposition of the German Constitutional Court that Community law is “not part” of the national legal system is outright nonsense. The fact of the matter is that, where the Community is competent to act, its law is also supreme. Period. At least this is the “constitutional” view taken by the jurisprudence of the Court of Justice.

It might be noted, in passing, that the Court has recently added the temporary restraining order to its (admittedly still limited) arsenal of remedies against state law alleged to be in violation of Community law. The United Kingdom had ignored a decision of the Commission rendered in accordance with Article 93 and had continued state aid measures for pig producers. When the Commission referred the case to the Court of Justice, the Court granted an interlocutory decision ordering the United Kingdom to “forthwith cease to apply the aid measure which it has been operating since January 31, 1977.”

The overall development has been marked by surprisingly few concessions to the member states. Some of the concessions which have been made have had the ironic effect, for better or for worse, of strengthening the judicial review power of the Court of Justice. I am referring to the protection of basic rights by the Court of Justice within the context of the Court’s jurisdiction. The Court, as it were, has responded to German and Italian critics by saying: your position is not only doctrinally wrong, but also unnecessary. This, in connection with the Court’s expansive view of the direct effect of Community norms, shows the extent to which penetration, including interpenetration, has taken place. The direct effect of Community norms may now be invoked even in litigation between private parties. For instance, what the United States has been trying to do by means of federal civil rights legislation, the Court of Justice has attempted to accomplish by giving direct effect to Article 119, which provides that member states “shall ensure” application of the principle of equal pay for men and women.

The American constitutional historian cannot help but view some aspects of this “constitutionalization” of the Treaty of Rome with concern, if not alarm. The spectre of substantive due process seems to loom over the Community. The former President of the Court of

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33. See at note 20 supra.

34. Article 93, Treaty Establishing the European Economic Community:

"1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

"2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. . . ."


36. An excellent overview of and commentary on the problem can be found in E. Stein, P. Hay and M. Waelbroeck, European Community Law and Institutions in Perspective 274 ff (1978).

37. Contrary to the express wording of Article 189, the Court has gone as far as giving direct effect to directives. See, e.g., Case 41/74, Yvonne van Duyven v. Home Office, [1974] E.C.R. 1337.


Justice recently complained that there is much talk about a Europe of agriculture, even a Europe of technocrats, "but nobody talks about the Europe of judges". It is about time that this deficiency be remedied. In less than twenty years, the constitutionalization of European Community law has led to the point where, as in the United States, the supremacy of law seems to mean, at least to some extent, the supremacy of judges.