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Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions

Richard B. Stewart†

Is the European Community’s environmental policy marching forward, hand-in-hand with economic and political integration, to secure a high level of environmental protection throughout the European Union? The achievements of the European Community’s successive environmental programs, the explicit recognition of environmental objectives in the Single European Act ("SEA"), and the Maastricht initiatives all point to an affirmative answer. There are good reasons to suppose that progressive European Community ("Community" or "EC") environmental policy could help promote economic and political integration and that such integration could, in turn, favor progressive environmental policies.

Community regulation of products promotes environmental, health, and safety objectives and, at the same time, furthers the internal market. Common controls on pollution and waste disposal prevent potentially self-defeating competition among Member States in regulatory laxity. Joint efforts to further the shared interest in environmental protection promote political and social solidarity.

Nevertheless, optimism must be tempered by caution. The completion of an internal market will put serious strains on Community environmental policy. Economic growth will cause an increase in polluting activities unless additional preventive measures are taken. Open frontiers will erode the Member States’ ability to control toxic wastes. Cooperation among the Member States to protect the environment will continue to be compromised by wide differences in the importance attached to that goal, by administrative capabilities, and by economic rivalry between Member States. The completion of the internal market will intensify that rivalry. Community institutions are at present far too weak to ensure effective implementation and enforcement of a common environmental

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policy throughout the Community. Efforts to strengthen central institutions will be resisted and may impede agreement on new Community legislation. Popular opposition to Maastricht in many Member States, driven by concerns over excessive centralization and loss of national sovereignty to Brussels “Eurocrats,” has blunted enthusiasm for strong Community initiatives. An effective, comprehensive, Community-wide environmental policy is by no means assured.

In the United States, environmental policy has developed in an historical and institutional context very different than that in Europe. In the United States, concern with environmental issues arose long after far-reaching economic, political, and social integration had occurred. The United States is a mature federal system with strong central institutions that possess and exercise direct authority to implement and enforce federal environmental laws and regulations. While state and regional interests remain important actors in environmental politics, most issues are dominated by nationally organized industrial and environmental interests who are not committed to state autonomy for its own sake.

Despite the Single European Act and the additional steps toward economic and political integration launched in Maastricht, the Community remains a supranational organization. The dreaded “F” word has still not been admitted to its lexicon. Among other matters, the Community still lacks direct implementation and enforcement powers. Further, the authority of the only directly elected Community institution—the European Parliament—is still significantly less than that of the Council, which is the voice of the Member States. Europe-wide interest groups in general, and environmental groups in particular, are weaker than their counterparts in the United States. The Member States, many of whom are concerned with preserving substantial policy independence, play a relatively larger role. Another complicating factor is the possibility of further expansion in the membership of the Community. If nations of Central and Eastern Europe become associated with the Community, the devastated condition of their environment and industrial infrastructure will pose an acute challenge for Community environmental policy.

Because of these historical and institutional differences, the evolutionary path of environmental policy is far more indeterminate in the Community than in the United States. In Europe, eco-

1 The dreaded “F” word is, of course, “federal.”
nomic and political integration is ongoing but incomplete, not only shaping but also shaped by the development of environmental policy. Nonetheless, there are important functional similarities in the types of environmental problems presented in a federal system such as the United States and in supranational systems such as the Community. Most important are the different types of spillovers—pollution, product, competitive, and preservation—that occur among Member States. The welfare losses caused by these spillovers often make cooperative measures dealing with these spillovers mutually advantageous. Moreover, there is a common array of institutional tools—such as regulation, liability rules, subsidies, and pollution charges—available to deal with different types of spillovers. There is also a similar array of potential legal and administrative means for implementing and enforcing environmental protection measures. These common elements provide a foundation for comparative analysis.

The United States experience also provides warnings for the Community about the dangers of an over-centralized command style of environmental policy. In the United States, such an approach has led to an excessively clumsy, costly, and legalistic system of regulation that has impeded achievement of environmental goals. These dangers are at present less evident in the Community, in part because enforcement is weaker. Litigation is also far less extensive in the Community than in the United States. But even without high levels of litigation, the Community’s reliance on centralized command and control directives to achieve environmental, public health, and safety objectives is beginning to display some of the same dysfunctions it has in the United States: centralized information-processing overload, excessive rigidity and cost in regulatory measures, a “democracy deficit” resulting from an opaque, remote political/bureaucratic decisionmaking process, and the growth of a new class of regulatory lawyers and lobbyists seeking to influence that process to the economic advantage of their clients. Concerns in the Member States over these developments may well play a role in the popular unease over the Maastricht Treaty that is now evident.²

² See Alison Smith, The Liberal Democrats at Harrogate: The Danish Minister Hopes for a French Yes, Financial Times 12 (Sept 15, 1992), reporting the remarks of Mr. Otte Ellemann-Jensen, the Danish Foreign Minister. Mr. Ellemann-Jensen argued that the Community must become more accountable and less bureaucratic by developing subsidiarity as a counter to centralizing tendencies. “Unless the Community is able to convince the European populations that we mean what we say when we talk about subsidiarity, the European integration will be brought to an abrupt halt,” he warned. Id.
Community environmental legislation will not ensure strong environmental protection or promote political integration unless it is effectively enforced. But Community legislation must simultaneously provide the flexibility needed to accommodate different national and regional situations and concerns. Today, such flexibility is largely secured by differences in the implementation and enforcement of Community environmental legislation in the Member States. States with a strong commitment to given Community measures tend to implement them effectively. Compliance in other states is more of a paper exercise.

Obviously such “implementation gaps” are a poor way to achieve regulatory flexibility. Reliance on ever-more-detailed central regulations, directives, and decisions to close these implementation gaps may give an appearance of progress but ultimately prove self-defeating. This strategy of techno-bureaucratic central planning threatens to exacerbate the Community's democracy deficit and undermine the perceived legitimacy of Community measures in the Member States. The United States experience suggests two antidotes. The first antidote is to encourage an expanded role for environmental and citizen groups at the Member State level by affording them new enforcement and other remedies through Community law. Second, the EC should make greater use of economic incentives to achieve environmental objectives.

I. Determinants of Environmental Policy in a Multijurisdictional System

The evolution of environmental policy in a federal or supranational polity is driven by the interplay among three factors: the character of different environmental spillovers, the interests of the constituent member states and cross-cutting interest groups, and legal and political institutions.

A. Spillovers

The raison d'être of a federal or supranational polity is to reap benefits from cooperation. Decentralized decisionmaking by independent states often fails to secure citizens' welfare because of various kinds of inter-state externalities or spillovers. Because of these externalities, a system of independent states may “fail” for reasons similar to why markets composed of independent economic actors sometimes “fail.” In both situations, collective action may reduce the costs associated with these spillovers and prove mutually beneficial. On the other hand, rivalry among individuals or states for
economic advantage may prevent or undermine such cooperation. There are several distinct types of environmental spillovers. The response of a federal or supranational polity to such spillovers depends on the type of spillover involved and how it affects incentives for rivalry and cooperation.\(^5\)

Product spillovers are created by the free movement of goods in a common market. Some states may seek to exclude products from other states on the ground that they are environmentally deficient, creating trade barriers. In addition, imposition of different product regulations by states may prevent realization of scale economies in manufacturing and marketing. Both effects undermine the objectives of a common market and impair economic integration.

Pollution spillovers occur when pollutants or wastes generated by industry, transport, or agriculture cross state boundaries. The polluter state will have little or no incentive to take the interests of the receiving state into account in deciding on the extent of environmentally protective measures. As a result, excessive pollution or waste will be generated.

Competitive spillovers are created by the effects of state environmental regulatory decisions on competition and industrial location. A state will be reluctant to impose strict controls on its industry for fear that its industry will suffer a competitive disadvantage relative to industry in other states. The mobility of capital and other production factors within the common market may encourage states to adopt lax environmental controls in order to attract industrial development. These pressures will be intensified by uncertainty regarding the strategic responses of other states. As a result, all states may suffer from greater pollution than would occur if there were no economic spillovers.

A final category consists of preservation spillovers. An especially scenic or ecologically significant natural resource located in one state will be admired by citizens in other states, who will wish to visit it or simply know that it is being preserved. The state in which the resource is located, however, is likely to disregard out-of-
state interests, and fail adequately to protect and preserve the resource. Many environmental problems involve more than one type of spillover. Consider, for example, the contribution of emissions from automobiles produced by different manufacturers in western Europe to transboundary air pollution that injures ancient German forests. Further, spillovers may be global as well as regional. A regional or other group of nations with similar global environmental interests can enhance its influence by adopting common environmental measures. This is an additional incentive for developing common policies.

B. Interests

Adoption of common or cooperative measures to deal with these types of spillovers can advance mutual welfare. Such measures, however, involve not only benefits but also burdens. Moreover, both the benefits and the burdens of cooperation are almost always distributed unequally. The situation is further complicated by the fact that different states will have different preferences for environmental quality versus economic growth, depending on their culture, history, and wealth. Each state will attempt to secure the adoption of common measures that will maximize the benefits that it enjoys and minimize the burdens. But this objective typically entails lower benefits and higher burdens for other states. Rivalry for relative advantage often prevents or delays the adoption of common measures, as illustrated by the experience in the United States with respect to radioactive waste disposal, solid and hazardous waste disposal, and acid deposition.

The situation is further complicated by the role played by cross-cutting political interests, such as industry trade associations and environmental groups. Yet another factor is the presence of scale economies and diseconomies in decisionmaking and adminis-

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* Insofar as citizens of other states come to view and enjoy the resource, the state in which it is located may be able to charge them an entrance fee. This technique, however, may be infeasible for some resources, such as magnificent scenic vistas. Moreover, there is no feasible way to charge citizens of other states for the non-use benefits (existence and option values) which they enjoy by knowing that a treasured resource elsewhere is preserved.


* For example, federal legislation addressing acid deposition was stymied for ten years by regional rivalries before Congress finally addressed the problem in Title IV of the 1990 Clean Air Act Amendments. Clean Air Act, §§ 401-416, 42 USC §§ 7651-7651e.
tration. It may, for example, be cheaper to do research and analysis of environmental issues and policy choices once on a central basis. On the other hand, collecting information at the center about relevant conditions in Member States, making decisions, and ensuring their effective implementation involves many difficulties. Efforts by central institutions to extend their own size and power can produce overcentralization.

C. Constitutional Arrangements

The final key variable in the determination of environmental policy consists of the institutional structure, including decision rules for determining common measures. These constitutional arrangements are not, of course, fixed. They must themselves be chosen, and may be modified. Choices of constitutional arrangements will reflect an evaluation by affected interests of relative benefits and burdens similar to that underlying their evaluation of particular environmental measures, but at a much higher level of generality. What is remarkable, to the United States observer, is the emergence in the Community of different decision rules—for example, unanimous versus qualified majority voting in the Council—for legislation in different fields of substantive policy. Indeed, under the Single European Act, different decision rules apply to the adoption of environmental measures, depending on their rationale. These variations introduce additional complexity and unpredictability into the evolution of environmental policy. They also create challenges for the European Court of Justice ("ECJ") in policing adherence to the rules of the game.

Until recently, however, Council voting on Community environmental legislation—legislation based on Articles 100 and 235—was governed by a rule of unanimity. The unanimity rule reflected the relative dominance of the Member States in Commu-

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7 See Treaty Est the Eur Eco Comm, Arts 100A, 130S.
8 The leading case is the ECJ's decision on Community Directive 89/428, imposing controls on titanium dioxide processing wastes. The court agreed with the Commission that the legislation could be adopted with qualified majority voting under Article 100A, rejecting the Council's position that it must be adopted through unanimous voting under Article 130S. Case C-300/89, Commission v Council, 1991 ECR 1-2821. See Koen Lenaerts, Some Thoughts About the Interaction Between Judges and Politicians, 1992 U Chi Legal F 93, 126-28.
nity politics, strong concerns about maintenance of national sovereignty, and a corresponding principle of subsidiarity, belatedly enshrined in the Single European Act in Article 130R(4). The principle of subsidiarity holds that common measures should not be adopted unless a Community solution would be superior to reliance on decentralized measures adopted by the various Member States. Under a decision rule of unanimity, this superiority must presumably be established to the satisfaction of each Member State.

Even when operating under the unanimity rule, the Community adopted a surprisingly large corpus of environmental legislation. I use the word "surprisingly" because a rule of unanimous agreement encourages strategic behavior and creates the risk of deadlock. The difficulties of agreement are compounded by the increasing number of Member States and the great differences among them. Professor Rehbinder and I suggested several reasons why the Community has, nonetheless, made so much legislative progress. First, Member States often had a policy of reciprocal forbearance of the veto power. Apparently, Member States that would otherwise oppose a particular measure have been persuaded to forbear their veto right, in the expectation that others will similarly forbear opposing measures of special concern to them. Second, the Member States would compromise, sometimes accepting two alternative approaches for dealing with a given environmental problem, in order to secure unanimous agreement. The leading example is the adoption in the 1976 Aquatic Environment Directive of both emission limitations and ambient quality strategies for dealing with discharges of hazardous water pollutants. Third, there were important implementation gaps. Weaknesses in the Community's means of ensuring effective implementation and enforcement of environmental legislation has made it easier for
Member States to acquiesce in measures that they would oppose if they were required to achieve prompt and full compliance.

The Single European Act explicitly recognizes environmental protection as a distinct Community objective, adding a new Title XII to the Treaty entitled "Environment." The addition of an environmental title to the Treaty was an event of greater political than legal significance. Community environmental legislation had already been liberated from the narrower goal of harmonizing Member State measures to promote economic integration and had begun to pursue environmental protection for its own sake. But the SEA made other constitutional changes of considerable importance. It adopted qualified majority voting in the Council for environmental measures related to the achievement of the internal market and enlarged the role of the Commission and the Parliament in such legislation through the so-called "co-operation procedure." The Maastricht draft treaty would extend these new arrangements to almost all environmental legislation.

The rule of qualified majority voting, along with the enhanced role given the Commission and the Parliament in the legislative process through the co-operation procedure, has already accelerated the output of economic legislation to achieve the program of

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14 See EEC, Arts 100A, 149.
15 Maastricht draft treaty Article 130S, as revised, would authorize qualified majority voting for all environmental legislation except for "provisions primarily of a fiscal nature," "measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources," and "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply." 31 ILM at 286.

These changes should largely eliminate the current controversy between the Commission and the Council as to whether Community legislation imposing controls on industrial processes and wastes should be based (as the Commission prefers) on Article 100A, which provides for qualified majority voting, or (as the Council prefers) on Article 130S, which currently requires a unanimous vote unless the Council otherwise provides. See the "Titanium Dioxide" decision, Case C-300/89, Commission v Council, 1991 ECR I-2821, in which the ECJ sided with the Commission in holding that Article 100A authorizes adoption of process control legislation by qualified majority. See note 8.

16 Under Article 149, the Commission proposes legislation to the Council. If the Council adopts legislation (which may differ from the Commission's proposal), it must submit such legislation, along with the Commission's proposal, to the Parliament. If the Parliament either approves the Council's measure or fails to act, the Council's measure becomes law. If the Parliament rejects the Council's measure, the Council must readopt it unanimously for it to become law. If the Parliament proposes amendments, the Commission reexamines its original proposal in light of those proposed amendments and submits its reexamined proposal to the Council. The Council may then adopt the Commission's new proposal by qualified majority, or an alternative by unanimous consent. Article 149 establishes various deadlines for these steps.
completing the internal market in 1992. These new constitutional arrangements, which are an important step towards transforming the Community into a federal polity, should also make it easier to adopt environmental legislation. Especially significant is the fact that both the Commission and the Parliament strongly favor stronger Community environmental initiatives. There are, however, complicating factors, quite apart from the general reverberations from popular opposition to Maastricht, which suggest that the road to a stronger Community environmental policy may not be altogether straight and easy.

The pace achieved in legislating for the internal market may not be matched in the environmental area. All Member States have a large common interest in the economic dividends created by economic integration. Conflicts of interest are perhaps more evident in environmental policy.

Moreover, the U.S. experience suggests that, over the long run, a complex legislative process that divides authority among differently constituted political organs increases the risk of stalemate. This process, along with the relative decline in the authority of the Member States, will enhance the relative influence of cross-cutting industrial or environmental interests organized on a Community-wide basis, further dividing power among different political actors and increasing the risk of deadlock.

In addition, a rule of non-unanimous decision is likely to undermine norms of reciprocity among the Member States. The existence of a mutual veto gave each Member State some assurance that intense views on a particular matter would be accorded respect by others with less pressing concerns, in the expectation of reciprocal deference on other issues. The continuing expansion of the number of Member States will also erode norms of reciprocity. The effects of a breakdown in reciprocity are, however, two-sided. Member States forming a minority on an issue will feel freer to...

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19 The new legislative procedures in the Community, however, contain deadlines and other procedural devices to prevent deadlock and thus far have not in fact produced serious problems of deadlock. See Ehlermann, 11 Mich J Intl L at 1107-8 (cited in note 17).
20 Professor Reh binder and I hypothesized that Member State governments may support Community legislation to adopt environmental measures that they would like to adopt domestically but are reluctant to do so because of domestic opposition from industry or development interests. See Reh binder & Stewart, Integration Through Law (cited in note 3). To the extent that such interests effectively organize on a Community-wide basis to influence Community policy, the efficacy of this “end run” strategy will be undercut.
pERSIST IN OPPOSITION. SIMILARLY, MAJORITY MEMBER STATES WILL BE LESS INHIBITED IN PRESSING FORWARD DESPITE OPPOSITION.21

The new legislative arrangements will, on balance, probably make it easier to adopt stronger and more far-reaching Community environmental legislation. Yet, such legislation would create two problems. The first is that minority Member States who wished to adopt stronger measures of environmental protection may find that their ability unilaterally to adopt such measures domestically has been preempted by Community legislation which they regard as insufficiently protective. This problem typically arises in the case of product regulation.

The second and more troublesome problem is that minority Member States who oppose new environmental legislation because they regard it as unduly stringent may simply drag their feet in compliance. The right of veto in the Council may be replaced by a tactic of passive nullification. Implementation gaps are likely to become more severe. This problem typically arises in the context of process regulation. As discussed more fully below,22 the Community's existing institutional arrangements do not provide a very effective remedy for this problem. Unless ways are found to strengthen implementation and enforcement of Community environmental legislation, while also accommodating differences in the concerns and conditions of the differing Member States, actual progress in Community-wide environmental protection will be undermined.

II. COMMUNITY REGULATION OF SPILLOVERS AND THE INTERNAL MARKET

This part of my Article examines the issues discussed above in the context of different types of environmental spillovers. The fundamental distinction is between regulation of products and regulation of industrial, commercial, and agricultural processes and the residuals that they generate.23

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21 This does not necessarily mean that divided votes will actually occur. The high percentage of unanimous votes under majority voting suggests that minority states will often acquiesce in a result that is predetermined under majority voting rules rather than publicly register their lack of influence.
22 See Part II B of this Article.
23 This Article does not discuss the issue of resource preservation, which is likely to present especially serious problems of implementation and enforcement, particularly if the Community adopted ambitious protective measures like the U.S. Endangered Species Act, 16 USC §§ 1531-1544 (1988). Thus far, the only important Community legislation in this area is the significant but narrow migratory bird directive, Council Dir 79/409, 1979 OJ
A. Regulation of Products and Wastes

Different state product regulations pose an obvious and immediate threat to the realization of an internal market and the associated economic integration that are basic objectives of a federal or supranational political system. Accordingly, harmonization of such measures must be a central objective of such systems.

The threat to the internal market stems from the strong strategic position of states importing products manufactured elsewhere. A state that is downwind of an air pollution source in another state cannot block the pollution. Nor can it block lax environmental regulation in another state that gives industry in the other state a competitive advantage in world markets. In these situations, collective action is needed to prevent the spillover. In the case of products, however, self-help is readily available. A state may simply prohibit the import of products from other states that it judges deficient from the viewpoint of environment, health, or safety. This form of self-help, however, can and has been used for protectionist purposes. Further, self-help threatens to create a tangle of conflicting or cumulatively burdensome requirements in different states, preventing full realization of scale economies in manufacture, distribution, and marketing. Experience dating back to the American Articles of Confederation indicates the extreme difficulty in dealing with this problem through voluntary harmonization, at least if the number of states involved is substantial. Some

L103, but additional measures are under active consideration. This Article also does not discuss the implementation of the environmental impact assessment directive, Council Dir 85/337, 1985 OJ L175, or deal with the growing role of international environmental protection negotiations and agreements in the development of Community environmental policy.

Collective action is also necessary in order to prevent destruction in another state of highly valued environmental resources.

Such exclusions have typically been justified on the ground that the product itself causes harm, such as when a state seeks to bar the import of a particular model of automobile because of excessive emissions. But a state might also conceivably seek to bar a product on the ground that the means by which it was produced was environmentally destructive. For example, the United States, as required by congressional legislation, has barred the importation of tuna caught by Mexican fishing boats on the ground that the rate of dolphin kill associated with the Mexican fleet's take of tuna was significantly greater than that required of the U.S. fleet. As concern with the impact of environmental regulation on international competitiveness increases, states may also seek to impose a tax on imported goods manufactured in states with laxer process regulation.

The threat to free trade posed by measures aimed at environmental conditions in the exporting state is potentially far more sweeping than that posed by measures aimed at the characteristics of the imported product itself. A panel of the GATT has found that the U.S. ban on imports of Mexican tuna is a violation of the GATT on precisely this ground. GATT Panel Report, "United States—Restrictions on the Import of Tuna," D521/R (Sept 3, 1991).
central authority must police the states' exercise of the power of self-help.

In both the United States and the Community, this responsibility has fallen to the high Court. In the United States, the Supreme Court invokes the negative commerce clause doctrine. In the Community, the ECJ utilizes Articles 30, 34, and 36, prohibiting Member State measures that have the effect of restricting or hindering trade, unless they are justified as promoting "the protection of health and life of humans, animals, or plants" and do not represent a "means of arbitrary discrimination or a disguised restriction on trade." While one might read "protection of life and health" narrowly as not including certain measures to protect environmental resources, the ECJ has held that the permissible justifications for restrictive Member State measures include "mandatory requirements" under Community law and that these, in turn, include environmental protection.

From *Rewe-Zentrale-AG v Bundesmonopolverwaltung für Branntwein* ("Cassis de Dijon"), to the Danish returnable bottle case, to the Walloon wastes decision, the ECJ has sought to balance the interests in a common market and economic integration with the interests of a Member State in environmental, health, and safety protection, through techniques quite similar to those employed by the United States Supreme Court. The Danish bottle case, which bears a striking resemblance to a U.S. decision upholding an Oregon recycling measure, shows that the ECJ is prepared to uphold Member State environmental measures despite their ad-

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27 EEC, Art 36.


31 Case C-2/90, *Commission v Belgium* (July 9, 1992).

32 The common judicial techniques include a prohibition on overtly discriminatory measures, an assessment of other trade-burdening measures by examining the proportionality between the benefits secured and burdens imposed, the availability of less restrictive alternative measures, and other evidence of discriminatory purpose. See cases cited in note 26. The Walloon Wastes decision, however, upheld a discriminatory ban on solid waste imports. See text at notes 55-57.

verse impact on trade and potentially protectionist motives. These decisions can be understood as a form of partial negative harmonization of Member State law. The harmonization is negative, because it proceeds by invalidating Member State law, as opposed to legislating uniform standards. It is partial, because Member State regulation may be sustained if its adverse impact on trade is outweighed by the states’ legitimate environmental interests. As the Danish returnable bottle case indicates, this balancing test can result in some aspects of a state’s product regulation being upheld while others are invalidated.\(^4\)

The other means of dealing with the problems created by decentralized product regulation is through affirmative central legislation.\(^3\) Unlike partial negative harmonization, however, legislation can be a means to promote environmental protection on a common basis. It also has advantages in dealing with the threats to economic integration posed by disparate Member State product regulation. The process of case-by-case adjudication is slow and somewhat unpredictable. For those products of greatest environmental and market significance, legislation potentially provides a swifter and surer remedy for conflicts between trade and environmental policy. Both industry and environmental groups have reason to favor product legislation, although they will disagree over how stringent it should be. Such arguments, and the differing interests of Member States, may result in stalemate. The great advantage of dealing with the problem of divergent state product regulations judicially is that the court must hear and decide a controversy properly before it. On the other hand, a court decision which highlights a product regulation issue and resolves it in a manner many Member States may not like can often precipitate legislation in response.

Both the United States and the European Community have adopted uniform standards for the most environmentally significant categories of products, including motor vehicles, fuels, deter-

\(^{4}\) The ECJ upheld Denmark’s requirement that all manufacturers of beverages ensure recycling of beverage containers, but invalidated requirements that manufacturers use one of 24 standardized containers. Non-Danish manufacturers had attacked these requirements as protectionist measures imposing a disproportionate burden on imported beverages. Case 302/86, Re Disposable Beer Cans, 1988 ECR 4607, 1989:1 CMLR 619.

\(^{3}\) Informal, voluntary harmonization through industry trade associations is another alternative which has been successfully used, sometimes under the aegis of Community legislation, when highly technical and relatively non-controversial specifications are involved. However, such techniques are less successful when higher-visibility environmental issues with significant trade implications are involved.
gents, pesticides, and other chemical products. Community product legislation is far more systematic than process legislation because of the mutual interest of all states in avoiding barriers to the free flow of products throughout the internal market. The principle of mutual recognition, originally developed by the ECJ in the Cassis de Dijon case, when supplemented by Community legislation that focuses on harmonization of common standards for the most essential attributes of products and relies on private standard-setting organizations to fill in the details, has proved a useful means of obtaining workable harmonization of Member State product regulation without imposing either detailed, rigid, and inevitably obsolescent uniformity or provoking incessant litigation.

There is no great problem in enforcing Community product standards, because Member States can effectively prohibit the sale or use of non-complying products within their borders.

A key question, however, is whether Member States may establish and enforce product standards more stringent than those adopted through Community legislation. To the extent that they can, the threat to the internal market remains. The federal courts in the United States regularly confront this issue under the rubric of preemption, asking whether Congress meant to exclude more stringent state regulation. Sometimes statutes clearly answer the question one way or another, but often, because of political stalemate among state interests and various nationally-organized interest groups, statutes are silent or ambiguous. The decisions of the

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37 Conflicts of interest among states are more pronounced in the case of process regulation, where differences in regulatory standards can result in differences in competitive advantage. See Eckard Rehbinder and Richard Stewart, Legal Integration in Federal Systems: European Community Environmental Law, 33 Am J Comp L 371, 393-98 (1985).


Supreme Court on this subject do not provide much illumination for the ECJ, which must consider similar issues in a different constitutional context.

Under the formerly prevailing rule of unanimity in Council voting, an “environmental” state such as Denmark could block preemptive Community legislation that established what it regarded as an unduly low level of protection and seek unilaterally to impose a higher level of protection through national law. With qualified majority voting, that veto is gone. Particularly given the impetus to harmonization by the push to achieve the internal market, “environmental” states run the risk of being forced to adhere to standards, adopted by a majority, which they regard as insufficiently protective. In order to deal with this problem, the SEA adopted a special procedure which may allow a Member State to “opt out” of Community legislation by adopting a more stringent standard.

Article 100A of the Treaty authorizes legislation, approved by a qualified majority, for the harmonization of Member State measures in order to promote the establishment or functioning of the internal market. Article 100A(4) provides that if a Member State wishes to adopt different national provisions “on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment,” it shall so notify the Commission. “The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

Further, “the Commission or any Member State may bring the matter directly before the Court of Justice if it considers

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41 Such unilateral regulation might, however, be challenged under Articles 30 and 34. Thus, the extent to which the ECJ allows such states to adopt unilateral measures will significantly affect their position on Community legislation.

The use of this example should not imply that some states are invariably “environmental” states and other states invariably not. The identity of those states that support, and oppose, more stringent environmental measures will often shift depending on the precise issue in question.

42 EEC, Art 100A.

43 Under Article 130S, by contrast, voting must be unanimous, retaining the Member State veto. This difference in procedures has generated controversy over what types of legislation may be adopted under Article 100A and what types must be adopted under Article 130S. See notes 8 and 15. Article 130T, however, provides that “the protective measure adopted in common pursuant to Article 130S shall not prevent any Member State from maintaining or introducing more stringent measures compatible with the Treaty.” EEC, Art 130T. It is unclear what principles the ECJ will develop to interpret this provision.

44 EEC, Art 100A.
that another Member State is making improper use" of its power to adopt different national measures.\textsuperscript{4}

This procedure raises two basic problems. First, does the ECJ have the power to invalidate a more stringent Member State standard? To the American observer, the answer must surely be "yes." More stringent state product regulation could pose a grave threat to the internal market. Given the overriding importance attached to the internal market in the Community scheme, the ECJ could not appropriately uphold a state measure simply because it is proclaimed by the Member State to serve health, safety, and environmental goals. At the very least, the ECJ must satisfy itself that the measure in fact substantially promotes such goals and is not a disguised protectionist measure. As a short and well-justified further step, the ECJ could insist that the adverse impact on the internal market is not unduly disproportionate to the environmental, health, and safety interests secured by the measure.

A second problem is how the ECJ should structure its inquiry into these issues. Should it give weight to the background and rationale for the Community legislation in question? The issue is not, as in the United States, one of preemption. Article 104A(4) provides that Community legislation may be denied preemptive effect even if the legislation includes an explicit preemption provision. Still, if the legislation reflects a careful consideration of environmental concerns and a well-supported judgment that more stringent Member State standards would pose a serious threat to the internal market, those factors should be given weight.

Moreover, what weight should the ECJ give to the views of the Commission? The provisions of 100A(4) could be read to imply that the Commission's determination is conclusive. However, this seems inconsistent with the provision giving Member States, as well as the Commission, the right to challenge a Member State provision before the ECJ. This interpretation is also contrary to general principles of administrative law, which imply that the Commission's reasoning, and perhaps any relevant factual determinations, should be reviewed by the ECJ. However, the Commission's views surely merit substantial deference. This follows not only from the structure of 100A(4), but also because the Commission can be expected to evaluate conscientiously the competing interests in free trade and the internal market.

\textsuperscript{4} Id.
An additional question is what weight the ECJ will give to the admonition in 100A(3) that Community legislation adopted pursuant to 100A which concerns "health, safety, environmental protection and consumer protection" will "take as a base a high level of protection." It seems doubtful that the ECJ would directly invalidate Community legislation for failure to adhere to such a subjective standard. But the ECJ should be readier to permit more stringent state regulation if it judges the Community legislation unduly lax.

Finally, to what extent will the ECJ, in deciding cases arising under Article 100A(4), draw on the jurisprudence that it has developed in cases arising under Articles 30, 34, and 36, which govern in the absence of relevant Community legislation?45

Until the ECJ clarifies these questions, the impact of the new procedures for environmental legislation on the amount of product regulation in the Community will remain unclear. As already noted, qualified majority voting deprives "environmental" states of the right to veto Community legislation that they regard as unduly lax. On the other hand, qualified majority voting may result in legislation adopting a higher level of protection than would otherwise be the case because states opposed to more stringent regulation have also lost the veto. The enhanced role of the Commission and Parliament in environmental legislation under the new procedures should also favor more stringent legislation, as the history of Community legislation on automobile emissions illustrates.46 As Judge

44 A further question is how the ECJ will deal with situations where environmental legislation is adopted under 130S rather than 100A. The Maastricht accords, if ratified, provide for qualified majority voting for most such legislation. Maastricht would also amend 130T to provide that: "The protective measures adopted pursuant to Article 130S shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission." Does this provide the equivalent of the procedure provided under 100A? Does it simply restate the procedure already available under Articles 30, 34, and 36? Or does it imply some new and different procedure?

45 See Lomas, 33 McGill L J at 524-31 (cited at note 5); Bradford S. Gentry, Environmental Regulation in Europe: Hazardous Wastes and Contaminated Sites, 10 NW J Intl L & Bus 397, 407-08 (1990). Community legislation imposing emission limitations on automobiles was originally driven by concern to prevent obstacles to economic integration posed by differing Member State standards. In the 1980s, however, environmental concerns generated proposals to make Community standards more stringent. These efforts were opposed by some Member States worried about costs and international competitiveness. The Council adopted a compromise, imposing relatively strong standards for large and medium cars and substantially less stringent standards for small cars. The Parliament, however, increased the stringency of these measures, and its changes were supported by the Commission. The Council could not muster a unanimous vote to restore its original version. The alternative of not legislating at all on the subject was politically unacceptable. The Council accordingly
Lenaerts points out, no case under Article 100A has been brought since its adoption. Member States who have threatened to invoke the Article 100A procedure to adopt unilaterally more stringent measures have succeeded in stimulating Community legislation that is more responsive to their concerns. This practice shows that the Member States would rather compromise their differences in a forum that they control by adopting legislation on the issue in the Council than surrender the issue to the vagaries of adjudication in the ECJ.48

A further complicating factor is the interplay between Member State product regulation, adjudication under Articles 30, 34, and 36, and new Community legislation. A decision, such as the Danish returnable bottle case,49 upholding Member State product regulation notwithstanding its adverse trade impacts, may be thought to favor environmental protection. Such a decision may indeed do so within the Member State adopting the measure, but it simultaneously removes the incentive of that Member State to support a Community directive on the matter, which the Member State would certainly do if its regulation were judicially invalidated. Freedom for the environmentalist states to adopt relatively protective regulations may result in a level of protection in the rest of the Community that is lower than it might otherwise be. But there is an offsetting tendency: the interest in market access by firms in other Member States may lead them to favor Community legislation—provided that it is preemptive of stricter state standards—even though it is more stringent than they would otherwise favor. The balance among these considerations will in turn be affected by the jurisprudence, yet to be established, under Article 100A(4).

One potential solution to these tensions is the use of alternative harmonization in Community product legislation. When the United States adopted regulatory limitations on automobile emissions in 1967, the California delegation to Congress insisted on California’s right to adopt stricter standards in order to deal with the acute smog problem in Los Angeles and other areas of the


48 Lenaerts, 1992 U Chi Legal F at 110-12 (cited in note 8).

state.\textsuperscript{50} Congress acquiesced, but on the condition that the federal Environmental Protection Agency approve the California standards as necessary to meet serious air quality problems.\textsuperscript{51} Subsequently, Congress provided that other states with serious smog problems could also adopt the California standard.\textsuperscript{52} A number of Northeastern states are taking advantage of this provision. The result is a "two car" strategy, with one level of controls on cars sold in most areas, and tighter controls on cars sold in California and other states adopting the California standard.\textsuperscript{53} This dual system of controls has apparently not impaired the achievement of scale economies in manufacture and distribution, and it has provided a useful "technology forcing" feature by requiring progressively tighter controls for a limited market which, if successful, can later be adopted nationwide. The 100A procedure, with the active leadership of the Commission, could potentially develop similar strategies. But the surer and more direct route would be adoption of a "two product" approach in Community legislation.\textsuperscript{54}

Special problems are presented by interstate shipments of hazardous waste, which can be viewed as a negative product. The United States Supreme Court has held that waste is a proper article of commerce and has invalidated discriminatory state legislation prohibiting disposal of waste originating from other states.\textsuperscript{55} The recent decision by the ECJ in \textit{Commission v Belgium},\textsuperscript{56} agreed that wastes were "goods" protected by the free trade principles of Article 30. Nonetheless, the ECJ upheld legislation by the Walloon region of Belgium imposing a ban on wastes imported from outside the region for disposal, insofar as it was applied to bar imports of non-hazardous solid waste from the Netherlands.

\textsuperscript{50} Pub L No 90-148, 1967 USCCAN 1939, 1956-58.
\textsuperscript{52} Clean Air Act § 177, 42 USCA § 7507 (1983 & Supp 1992).
\textsuperscript{54} For example, cars with higher control levels might be required in the urban "core" of the Community, and cars with lesser controls allowed in the less developed "fringe." The mobility of cars and open borders may cause some problems with a two-car strategy, but U.S. experience indicates that car registration procedures provide an adequate safeguard against evasion of the more stringent control requirements.
\textsuperscript{55} City of Philadelphia v New Jersey, 437 US 617 (1978). Notwithstanding this decision, strong local opposition to disposal of out-of-state wastes have led states, such as Alabama, with substantial disposal capacity to find various ways to exclude out-of-state wastes. The Supreme Court has invalidated such discriminatory measures. See \textit{Chemical Waste Management, Inc. v Hunt}, 112 S Ct 2009 (1992). Advocate General Jacobs notes a similar phenomenon in Europe. See Jacobs, 1992 U Chi Legal F at 10-11 (cited in note 28).
\textsuperscript{56} Case 2/90, \textit{Commission v Belgium} (July 9, 1992).
The ECJ validated this facially discriminatory measure by characterizing waste as a special case because of its environmental effects, referring to a waste disposal “emergency” in Wallonia, and invoking the principles of “self-sufficiency” and “proximity” for waste disposal set forth in Article 130R of the Treaty. On the other hand, the court held that the legislation was preempted insofar as it was applied to bar inputs of toxic wastes from the Netherlands because the law did not conform to a Community directive that requires the exporting state to notify the receiving state of shipments and relies on the latter to police compliance with Community requirements. The ECJ’s decision upholding Wallonia’s ban as applied to solid waste has caused controversy and confusion and will likely stimulate further Community legislation on interstate waste shipments.

The effectiveness of EC transboundary waste controls will likely be weakened once an internal market with open frontiers is established. Open frontiers will not pose a major problem for Member States who validly wish to ban products regarded as unduly polluting or hazardous. While they may not be able to turn back product imports at the border, they will be able, as in the United States, to ban their sale or use. But exporters of hazardous waste, unlike sellers of goods, have no reason to hawk their wares. Elimination of border controls will undermine the current system of decentralized monitoring and enforcement and points to the need for a new Community institution, such as the European Environment Agency, to exercise monitoring and oversight responsibilities. In its absence, the ECJ may well be disposed to uphold supplementary Member State regulation of interstate shipments pursuant to Article 100A(4).

B. Regulation of Industrial Processes

Now consider the problem of pollution, wastes, and other residuals from industrial, commercial and agricultural processes and facilities. These residuals can create pollution spillovers. Their regulation gives rise to competitive spillovers.

89 Created by Council Reg 1210/90, 1990 OJ L120:1, but not yet established because of unresolved controversy over its site.
Process regulation presents problems for a federal or supranational political system that are fundamentally different from the problems created by product regulation. States adversely affected by the pollution and economic spillovers associated with processes and their regulation cannot protect themselves through the self-help mechanisms available in the product context. Moreover, litigation is, as a practical matter, of little assistance in the case of most pollution spillovers and affords no remedy for competitive spillovers. Accordingly, states must obtain relief through Community legislation.

There are, however, obstacles to the adoption of such legislation. Community regulation of industrial processes, unlike product legislation, does not provide economic benefits to all by advancing the internal market and free trade. Industry is generally opposed to process regulation because it increases costs and other compliance burdens. Businesses in Member States that have already adopted stringent process regulation will, however, favor Community legislation that imposes similar requirements on their competitors in other Member States. On the other hand, Member States who value economic development over environmental protection will oppose such legislation. Until recently, the unanimity rule that governed Community environmental legislation gave such states a veto power.

As already noted, the amount of legislation dealing with pollution by industrial processes that the Community has enacted despite these obstacles is remarkable. However, there remain major gaps, most notably in the areas of hazardous air and water pollution and toxic waste cleanup. In addition, there have been serious problems in implementing and enforcing such legislation. Process regulations must be enforced by the states against their own industries. States that place a higher priority on industrial development or are concerned about the relative competitive position of their

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60 Even if an injured person in the receiving state can obtain jurisdiction over pollution sources in the polluting state and enforce a judgment against them, private litigation is ill-suited for dealing with pollution from multiple sources, especially if such pollution originates in many different states. Most of the serious transboundary pollution problems in Europe and the United States have this character.

61 This pattern may reflect the fact that such hazards are less likely to result in extensive transboundary problems than conventional air and water pollutants. The pollution of the Rhine by toxic releases is a notable exception to this generalization. See Jan M. van Dunne, ed, Transboundary Pollution and Liability: The Case of the River Rhine (Lelystad: Vermande, 1991).

industry will be tempted to delay and compromise the execution of Community environmental legislation. The absence of direct Community enforcement authority and the lack of strong sanctions for Member State recalcitrance invite such footdragging. Ironically, the record of Community legislation may be as extensive as it is precisely because Member States do not expect to be held to full and prompt compliance with the requirements adopted.

Implementation and enforcement failures can be grouped as formal and informal. A formal default occurs when a Member State fails to implement a Community directive through national legislation in a timely manner. The Commission responds with an infringement action, which in most cases eventually produces formal compliance, either as a result of a decision by the ECJ or the threat thereof. However, implementing legislation is only the first step. Administrative regulations must be written, permits issued, monitoring performed, and enforcement actions instituted to correct and deter non-compliance. Failures in these informal parts of the process, which are especially serious in Member States that lack a strong political commitment to environmental protection or have weak administrative systems, are much harder to detect and correct. Implementation failures are especially severe in the case of hazardous wastes, which are produced by many sources and can be easily transported. In addition, the extremely decentralized system of implementation produces wide variations in effective substantive law in different Member States. Disparities in implementation and enforcement will likely become even more serious if nations in Eastern and Central Europe were granted some form of membership in the Community.

The Commission is increasingly concerned with implementation and enforcement problems, but the legal and administrative resources available to it for dealing with them are quite limited. These problems will be exacerbated by the environmental pressures generated by the 1992 completion of the internal market.

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63 Greater use of regulations in Community environmental legislation has been urged, in order to eliminate the delays involved in the adoption of national legislation to implement directives. See Rolf Wagenbaur, *Regulating the European Environment: The EC Experience*, 1992 U Chi Legal F 17, 20. However, the Council's continued reliance on directives indicates that Member States are willing to agree on new environmental legislation only if they have considerable flexibility in implementing and enforcing such legislation.


The completion of an internal market comprising an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" and the development of a common currency are expected to stimulate a higher level of economic development, which threatens to create commensurate increases in pollution and other forms of environmental degradation. A Commission report predicts that these increases will outstrip current Community regulatory efforts to reduce air pollution to safe levels, and will exacerbate transboundary hazardous waste problems. Moreover, the completion of an internal market will increase the importance of economic spillovers. By making it easier for investment capital to search for the best business opportunities throughout the Community, economic integration increases the temptation of Member States to soft-pedal environmental enforcement in hopes of attracting such investment. Development pressures are also expected to impose serious strains on land and other natural resources, particularly in the Community’s southern tier.

The Community has sought to accommodate the interests of its less industrially developed members in two ways. First, the EC has, in one instance, adopted different levels of control for different Member States. The 1988 directive on large combustion plants establishes ceilings on total loadings of $SO_2$, $NO_x$, and TSP through a differential formula that allows some of the industrializing Member States to increase their existing emissions while forcing already industrialized states to achieve significant reductions. This compromise emerged only after a long struggle. This may be an acceptable solution for dealing with emissions of pollutants that disperse and cause problems, such as acid deposition, on

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64 Id.
69 Id.
70 Fewer differences in industrial development exist among states in the United States than in the Community, but they still play an important role in the development of environmental policy. For example, states in the West that are less developed and have relatively clean air have opposed stringent national emission limitations on new sources and prevention-of-significant-deterioration restrictions on increases in pollution loadings. These measures have been favored by the industrialized states in the Midwest and Northeast, who fear a shift in development to the West. See generally Bruce A. Ackerman and William T. Hassler, Clean Coal/Dirty Air: or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers and What Should be Done About It (Yale, 1981); B. Peter Pashigian, Environmental Regulation: Whose Self-Interests Are Being Protected?, 23 Economic Inquiry 551 (1985).
a wide scale. However, more extensive use of non-uniform regulation would undermine the logic of Community legislation and provoke sharp resistance from the more industrialized states and from environmental interests.

The other technique for dealing with the situation of the industrializing Member States is financial transfers. The Community has used its European Regional Development Fund to finance environmental protection measures in less affluent regions. Maastricht endorsed a greatly expanded program of Community aid to industrializing regions and those with especially severe environmental problems in order to cushion the burden of complying with Community legislation. But the Member States are already beginning to resist paying the $75 billion cost of this and other Maastricht initiatives. It, therefore, remains to be seen whether the funding needed to carry out this strategy will be forthcoming.

Such measures can help ameliorate opposition to Community legislation by the less industrialized Member States, but they will not necessarily ensure full and prompt compliance with such legislation. Other measures are needed to overcome the threat of persistent implementation gaps. These are discussed below.

Transboundary pollution from industrial, commercial, and agricultural processes presents special problems that are likely to become more apparent as Community environmental regulation matures. The Community, like the United States, has sought to deal with transboundary spillovers by the adoption of common measures to reduce pollution from all Member States. The U.S. experience suggests, however, that this will not be a wholly adequate long-run strategy. As controls become more stringent and more ex-

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72 Compare the allocation of pollution entitlement among different states under Phases I and II of the Sulfur Trading provisions in the 1990 Clean Air Act Amendments. See Clean Air Act § 404, 42 USCA § 7651(c), Table A (Supp 1992). As developed in Part III B of this Article, a system of tradeable emission rights would be a superior means of dealing with disparities in regional development.

73 See Wügenbaur, 1992 U Chi Legal F at 31-32 (cited in note 63).


75 See Part III of this Article.

76 For general discussion of transboundary pollution issues in the Community context, see Note, The Environmental Policy of the European Economic Community to Control Transnational Pollution—Time to Make Critical Choices, 12 Loyola LA Intl & Comp L J 579 (1990). The magnitude of transboundary pollution problems in the Community is illustrated by the fact that in eight out of the twelve Member States, pollution originating outside the Member State accounts for between one-third and three-fourths of acid deposition within the state. See Note, EC Regulation of Sulfur Dioxide Levels: Directive 89/427, 14 BC Intl & Comp L Rev 369, 375 n 54, chart A (1991).
pensive, downwind or downstream states will seek to shift more of the costs of control to upwind or upstream states. When the receiving state has already imposed extensive controls pursuant to common legislation and problems persist because of pollution from the originating state, there is a strong claim that the originating state should bear the burden of the additional controls needed to solve the problem. In the United States, the courts have sought to shift responsibility for dealing with such problems to the federal Environmental Protection Agency, declaring themselves institutionally unfit to resolve complicated interstate disputes grounded in federal regulatory law. The Community at present has no similar institutional means for resolving such disputes, which are likely to become increasingly prominent.

III. **Recommendations for Implementing and Enforcing Community Environmental Policy**

The most obvious solution to the weaknesses in current Community environmental policy is to strengthen the Community's ability to ensure effective implementation and enforcement of its legislation. The Commission is increasingly concerned about the implementation gap problem and is exploring ways to cure it. Elements of such a solution would include legislation in the form of very specific directives or regulations so as to reduce Member State discretion; creation of a specialized Community environmental regulatory agency; and adoption of direct Community enforcement authority against polluters and stronger sanctions for non-complying Member States.

This is a recipe familiar to Americans, for Congress has made extensive use of these techniques in an effort to ensure that federal environmental legislation is effectively carried out. If the Community moves forward to fuller integration, the gradual development of stronger Community implementation and enforcement capacities is both likely and desirable. But consideration of the

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77 See the dispute between Arkansas (the upstream State) and Oklahoma (the downstream State) in *Oklahoma v EPA*, 112 S Ct 1046 (1992).
79 There are two basic mechanisms for resolving such disputes. One would be for the ECJ or the Court of First Instance to rely heavily on the views of the Commission to ensure consistency with Community policies. The other would be to enact Community legislation providing for Commission resolution of disputes, subject to judicial review in the Community courts.
80 See Wagenbaur, 14 Fordham Int'l L J 455 (cited in note 62).
81 See Stewart, 86 Yale L J 1196 (cited in note 3).
United States experience and the present state of the Community counsel against undue reliance on centralized “top down” command and control techniques.

The near-term prospects for any significant expansion of Community implementation and enforcement powers are dim, particularly in light of public resistance to the Maastricht Treaty. Even if it is ratified, supporters of European integration will be cautious, extolling the importance of the subsidiarity principle. The Maastricht Treaty empowers the Commission to seek fines from Member States who fail to comply with judgments of the ECJ. This provision could be used to deal with the problem of Member State failure to implement Community environmental legislation. However, it remains to be seen how often the Commission will be willing to seek such fines and how large they will be. Moreover, such sanctions, like the infringement actions upon which they would be based, will, for both practical and political reasons, be directed at only the most obvious and uncontestable forms of non-implementation, such as the failure to enact timely national legislation to carry out a Community directive. As already explained, however, such formal failures are only the tip of the implementation gap problem, a problem which is deeply rooted in administrative weaknesses and in public and official attitudes in many Member States. Fines are hardly an apt way of dealing with these systemic deficiencies.

One possible response to the implementation gap problem is the development of Community authority to enforce Community requirements directly against polluters. The European Environmental Agency was authorized with deliberately modest powers—to coordinate monitoring of environmental conditions in the Community and assist the Commission in formulating policy proposals—in order to allay fears that it would grow into an enforcement inspectorate or “green police.” The Agency has not yet been actually established because of persistent and embarrassing Member State conflict over its location. Moreover, industrial and development interests will strongly oppose any proposals to give the Agency additional powers, such as the power to monitor and

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enforce compliance with Community environmental regulation, that could help close implementation gaps. They would much prefer to continue to deal with the Member State authorities with whom they have long-established working relationships. Member State authorities are likely to share this opposition, fearing erosion of their own power.

Moreover, for reasons already discussed, strengthening Community implementation and enforcement capacities would not necessarily ensure a commensurate strengthening of environmental protection in the Community. Member States who may be willing to acquiesce in new Community legislation with possible implementation and enforcement gaps may oppose such legislation if they know that it will be executed.

Also, experience in the United States indicates that there are serious drawbacks to excessive use of centralized direction. The effort to frame highly detailed directives at the center to govern activities throughout a vast and varied region creates serious information-processing and decisionmaking overload. Such directives are likely to yield rigid, uniform, costly requirements that are not appropriate for many of their applications and to provoke resentment. Moreover, these regulations emerge from a remote political-bureaucratic process that enjoys scant political and popular legitimacy. The job of implementing and enforcing environmentally protective measures cannot be done entirely or even primarily by central authorities. The American experience shows that the center will inevitably lack the resources, information, and responsiveness to deal with the vast and varied problems of promoting compliance by hundreds of thousands of different facilities and operations throughout a huge area. Substantial decentralization of this effort to state, regional, and local authorities is not only desirable but inevitable.

Europe is, of course, a long way from experiencing the acute dysfunctions that plague the environmental regulatory system in the United States. Gradual steps should be taken to strengthen Community implementation and enforcement capacities. However, the political obstacles to such steps and the inherent limitations of a dirigisme strategy suggest consideration of other techniques to promote the efficacy of Community environmental policy while embracing the subsidiarity principle. The United States experience

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**Footnotes:**

88 See Stewart, 86 Yale L J at 1199-1202 (cited in note 3).
suggests two candidates: authorization of citizen suit litigation to
police compliance by Member States and regulated firms with
Community legislation, and increased use of economic incentives,
particularly transferrable pollution rights.

A. New Remedies For Environmental Plaintiffs

At the present time in the Community, standing and other le-
gal principles governing access to judicial review of governmental
decisions are governed by the law of the Member States. In many
Member States, access is unduly restricted. As a result, environ-
mental plaintiffs may be unable effectively to challenge failures by
Member States to implement Community legislation. The fact that
standing is more liberally granted in some Member States than
others may also contribute to uneven implementation and enforce-
ment of Community directives.

Moreover, environmental plain-
tiffs generally lack the power to enforce requirements established
pursuant to Community legislation directly against regulated
entities.

During the past 25 years, there has been remarkable growth in
the U.S. in the legal remedies available to beneficiaries of environ-
mental and other regulatory programs who wish to correct inade-
quate implementation and enforcement of those programs. Courts
and legislators have created two basic types of remedies for such
beneficiaries.

The first remedies are rights of initiation and review that em-
power individuals or environmental groups to secure judicial reme-
dies against government regulatory agencies who fail to implement
environmental protection programs adequately. The normal rem-
edy is an order or judgment requiring the agency to carry out the
law. The major federal environmental regulatory statutes contain
"citizen suit" provisions authorizing "action forcing" litigation by
environmental plaintiffs against the Administrator of the Environ-
mental Protection Agency for failure to honor statutory require-
ments mandating regulatory initiatives. In addition, general
administrative law, much of it judge-made, also enables environ-
mental plaintiffs to obtain court review of administrative decisions

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*See Rehbinder & Stewart, Integration Through Law at 149-64 (cited in note 3).
*See Lenaerts, 1992 U Chi Legal F at 125 (cited in note 8).
*See, for example, Clean Air Act § 304(a)(2), 42 USCA § 7604(a)(2) (1983 & Supp 1992).
(including, in most cases, refusals to take action) that fall short of statutory requirements. Traditionally, review rights were limited to regulated firms. During the last 25 years, however, the judges extended review rights to include regulatory beneficiaries in order to ensure that their collective interests are adequately vindicated in the administrative process.60

The second basic type of remedy for regulatory beneficiaries, also found in the “citizen suit” provisions of the major federal environmental regulatory statutes, is a private right of action against polluters.61 These provisions empower environmental plaintiffs to bring enforcement actions directly against pollution sources that are in violation of applicable regulations and permit conditions. The plaintiffs can obtain injunctive relief, civil penalties (payable to the government), and their litigation expenses.

These private remedies have proved an invaluable supplement or prod to federal and state implementation and enforcement of federal environmental laws. Government enforcement resources are limited. States are often reluctant to implement fully federal requirements that will impose costs and other burdens on local industry and commerce. The availability of private remedies, and the impetus which they have given to environmental group initiative, have gone far to close the implementation and enforcement gaps that would otherwise occur. This experience points to the desirability of developing a new Community law of remedies regarding access to judicial review and private enforcement.

Private rights of initiation and review might be created by the ECJ, following two principles established by the federal courts in the United States. The first principle holds that where federal substantive rights are at issue in state court proceedings, state courts may not adhere to state procedural or remedial rules that fail to effectively secure such rights, but must instead follow federal procedures and remedial rules.62 This principle has not, however, been extensively applied because the federal courts are generally available to vindicate federal substantive rights, and plaintiffs almost always prefer the federal forum. At present, the Community lacks the equivalent of the federal district courts. Accordingly, in Europe, the parallel question of whether Community law should govern remedies in Member State courts to vindicate rights established by Community legislation is far more important.

60 See Stewart & Sunstein, 95 Harv L Rev at 1202-20 (cited in note 88).
The second principle has already been mentioned: that environmental plaintiffs have standing to secure judicial review of administrative decisions that have an adverse impact on such plaintiffs. This principle relates to standing before federal courts to challenge federal administrative decisions but could logically be extended to standing in state court to challenge state administrative decisions based on federal law.

By combining these two principles, the ECJ could establish that Community law governs the issue of standing to secure judicial review by a Member State court of administrative failure to adopt and implement Community legislation and that standing should be liberally granted to environmental plaintiffs. This step, which would be based upon the developing ECJ requirement that Member State procedural rules ensure the effectiveness of Community law, would enable environmental plaintiffs to challenge non-implementation of Community legislation.

As noted by Judge Lenaerts and Advocate General Jacobs, there are indications that the ECJ may be prepared to take such a step. In its October 1991 decision in Commission v Germany, the ECJ found, at the insistence of the Commission, that Germany had failed adequately to implement Community legislation regarding the quality of surface waters used for drinking water supplies. The ECJ remarked in pointed dicta that where a Member State had failed to carry out clear duties mandated by Community legislation for the protection of health, those whose health was adversely affected were entitled to a remedy for the violation of their rights. However, the opinion does not make clear the precise nature of the remedy.

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93 The fact that the harm is diffuse and shared by many others does not defeat standing. For example, a single resident of Los Angeles would have standing to complain that regional air pollution control plans approved by the federal Environmental Protection Agency were inadequate and therefore violated federal statutory requirements, even though the impact on air quality was marginal and was shared by millions of others. See Sierra Club v Morton, 405 US 727 (1972).

94 This extension has not in fact occurred because an adequate remedy in federal court is available in most cases. The Supreme Court has, however, held that the federal constitutional requirement of due process protects the interest of a beneficiary of a state regulatory program against arbitrary deprivation of protection. Logan v Zimmerman Brush Co., 455 US 422 (1982).

95 See Lenaerts, 1992 U Chi Legal F at 99-100 (cited in note 8).

96 Case C-58/89, Commission v Germany (October 17, 1991).

97 Id at ¶ 14.
The ECJ took a far more decisive step in *Francovitch v Italy*,\(^9\) holding that a Member State that caused injury to one of its citizens as a result of its failure to implement Community legislation must allow the injured person to maintain an action against the Member State for the resulting damages. The plaintiff was a former employee of a now-insolvent company that had failed to pay him his wages. The Italian Government had failed to implement a Community directive requiring that Member States establish a system of insurance funds to make good such defaults.

This decision would be revolutionary in the American context, and has apparently caused surprise in Europe as well. The United States has long recognized the principle of state sovereign immunity, enshrined in the Eleventh Amendment of the Constitution. Federal courts have never thought that this principle precluded injunctive or declaratory relief against actions by state officials that violate federal law. They have, however, been unwilling to impose damage liability against state governments unless explicitly authorized by Congress. This distinction between injunctive relief and damage liability is based in part on the legislative background of the Eleventh Amendment, in part on the tradition of common law remedies against government officers, and in part on the view that imposition of money damages is a far more serious invasion of state sovereignty than an injunction requiring state officials to comply with federal law.\(^9\)

The present situation in the Community is precisely the reverse. The ECJ has, without the benefit of Community legislation, recognized an action for damages against Member States by a beneficiary of Community legislation, but has not yet explicitly recognized the right of such a person to seek specific relief. This may in part represent a judgment, certainly defensible, that a money judgment intrudes less on state sovereignty than mandatory relief. Or, as the dictum in *Commission v Germany* suggests,\(^1\) it may be that the ECJ is simply waiting for an appropriate case in which to establish that specific relief is also available.

The threat of *Francovitch* liability, however, is unlikely to spur prompter and stronger Member State implementation and

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\(^1\) Compare *Edelman v Jordan*, 415 US 651 (1974) (refusing to award monetary relief against state), with *Ex Parte Young*, 209 US 123 (1908) (awarding injunctive relief against state official).

\(^1\) Case C-58/89, *Commission v Germany* at ¶ 14.
enforcement of Community environmental legislation. One of the principal reasons that such legislation is necessary is the weakness of private law litigation in redressing and deterring harms caused by pollution and other forms of environmental degradation. That weakness is attributable to the factual difficulty in showing that the diffuse risks created by pollution have caused specific harm to specific individuals that can be quantified in money damages. This difficulty will make it rare that a plaintiff can show that a Member State’s failure to implement and enforce Community legislation caused him compensable harm. Further, this difficulty is compounded by the problems in determining what steps beyond the adoption of national legislation would constitute sufficient implementation and enforcement of Community legislation to avoid liability.

The alternative remedy would be the creation, pursuant to Community law, of rights of private plaintiffs to enforce Community legislation directly against polluters. Such remedies might be recognized by the ECJ on the model of federal court decisions in the United States “implying” private rights of action under federal regulatory statutes. As Professor Rasmussen points out, however, the ECJ has consistently refused to find that Community directives have “horizontal” legal effects creating rights and duties among private persons. Rather, the ECJ has limited the directives’ effect to the “vertical” legal relations between Member States and their citizens. Such jurisprudence is a telling indication that the Community is not yet a federal system like the United States, in which the authority of the federal government vis-a-vis citizens of the states was established from the beginning.

Community legislation could create private remedies. The draft hazardous waste liability directive sets a potential precedent in this respect by authorizing private plaintiffs to bring damage actions. By contrast, in Francovitch there was a clear causal link between Italy’s failure to implement a Community directive (requiring creation of an independent insurance fund for employees to cover an employer’s insolvency) and the plaintiff’s injuries (employee failed to recover wages from an insolvent employer).

See Stewart & Sunstein, 95 Harv L Rev at 1206 (cited in note 88). See Hjalte Rasmussen, Towards a Normative Theory of Interpretation of Community Law, 1992 U Chi Legal F 135, 143-46. Professor Rasmussen suggests, however, that the decision in Case C-106/89, Marleasing SA v La Comercial Internacional De Alimentacion, 1990 ECR 4156, 1990:1 CMLR 305, portends possible change. But, the factual situation in Marleasing suggests that the case is far from recognizing affirmative rights to enforce Community legislation through liability sanctions for non-compliance by private parties.
actions against other private parties who violate the directive. The directive, however, has not yet been adopted, in part precisely because of opposition to this remedial innovation. But some of this opposition reflects the view that private law should remain the preserve of the Member States. The private enforcement remedies proposed here would be an offshoot of public law. They could, as in the United States, be limited to specific relief. Even with this limitation, it might be feared that such remedies would unduly interfere with appropriate administrative discretion in implementation and enforcement and would force the courts to decide issues that ought first be resolved in the administrative process. This problem can, however, be addressed by requiring private enforcers to give notice to public enforcement authorities and allowing those authorities to assume control of the enforcement action if they wish. This is the technique used in the citizen suit provisions in American environmental regulatory statutes.

The recommendation of new private remedies to deal with Member State implementation and enforcement failures may seem inconsistent with the caution against excessive legalization sounded earlier. But the problems of excessive legalization in the United States have been most pronounced at the federal level, with the development of elaborate rulemaking procedures, protracted judicial review proceedings, and “action forcing” litigation against the Environmental Protection Agency. It may well be unwise to transplant this elaborate legal apparatus to Brussels. On the other hand, excessive legalization has proved less severe at the state level in the United States. This experience, plus the importance of the supremacy principle in Community as well as federal law, could justify creating citizen remedies for Member States’ failure to implement and enforce Community legislation, while refus-

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106 This concern may underlie the Supreme Court’s current reluctance to imply private rights of action under federal regulatory statutes.

107 See, for example, Natural Resources Defense Council, Inc. v EPA, 656 F2d 768 (DC Cir 1981); Natural Resources Defense Council, Inc. v Train, 411 F Supp 864 (S D NY 1976); Citizens Against the Refinery’s Effects v EPA, 643 F2d 183 (4th Cir 1981).
ing to authorize similar remedies against the legislative organs of the Community.\textsuperscript{108}

There is a need in many Member States to develop stronger and more effective environmental constituencies. The Freedom of Environmental Information directive should encourage this development by increasing the transparency of administrative decision-making.\textsuperscript{109} Giving environmental groups standing to challenge official shortcomings or to directly enforce the law against polluters would provide an important additional stimulus. In the United States, the creation of citizen suit enforcement actions and expanded access to judicial review catalyzed the growth of environmental groups, who used these new remedies to advance environmental goals. Once formed, however, these groups did not limit themselves to litigation, but expanded into administrative, political, and public education activities. While social circumstances are different in Europe, the creation of new legal remedies should likewise help to encourage the growth of organized environmental constituencies at the Member State level. Such a development would go far to promote effective implementation and enforcement of Community legislation.

B. Economic Incentives

The use of economic incentives for environmental protection in lieu of command and control regulation is attracting growing interest in the United States and the Community. Some Member States have used effluent charges and pollution taxes, although the prime objective has generally been to raise revenues rather than create incentives for pollution reduction. A panel of experts convened by the Commission has recommended use of economic incentives in Community environmental legislation,\textsuperscript{110} as has the European Parliament Committee on Environment, Public Health, and Consumer Protection.\textsuperscript{111} The Council is negotiating over a tax

\textsuperscript{108} For discussion of the ECJ's refusal to recognize such remedies, see Rasmussen, 1992 U Chi Legal F at 150-52 (cited in note 103).


on carbon in fossil fuels to reduce emissions of CO$_2$. The United States has used tradeable pollution reduction credits to phase out lead in gasoline and provide flexibility in air pollution control regulation. The EPA is implementing an ambitious new trading program to halve SO$_2$ emissions in the United States, and Southern California is likely to adopt a broad trading scheme for smog sources.

The American experience confirms the economic advantages of market-based schemes over command and control systems: greater flexibility, substantially lower compliance costs, and positive incentives for the development of environmentally superior technologies. Over the long run, market-based systems should also greatly ease the information overload at the center and the excessive legalism associated with a regulatory system of central planning. Under trading, for example, the basic functions of the government are two: to determine the total quantity of pollution allowed and to monitor sources to ensure that their emissions do not exceed the amount authorized by the permits that they hold.

In contrast to a command and control regulatory system, economic incentive programs do not require the government to determine, on the basis of detailed, complex, and changing technological and economic data, the emissions allowed each of tens of thousands of industrial and commercial facilities throughout a vast area. In addition, economic incentives would encourage source reduction, shifts in economic activity among sectors, and structural changes; the Commission Task Force on the Environment and the Internal Market found that such changes would be needed to achieve environmental quality goals in the face of the pressures unleashed by the internal market and that traditional regulatory controls would not be able to achieve such changes.


115 Stewart, 13 Colum J Envir L at 159-60 (cited in note 113).

116 Citizen enforcement actions could be authorized to supplement government enforcement efforts.

Most relevant here, however, are the political and administrative advantages of economic incentives that facilitate adoption of progressive environmental policies in the context of a federal or supranational polity. One method by which the EC could reap these advantages is through trading schemes, which are most attractive in the case of widespread pollutants such as SO$_2$, NO$_x$, CO$_2$, and hydrocarbons.

First, the use of trading in Community environmental legislation would make appropriate use of the scale economies and wider comparative advantage afforded by the internal market. A Community-wide trading program would lower the costs to each Member State of achieving a given level of environmental quality, compared to the costs of achieving that level independently. This advantage, which is not achieved by Community command and control legislation, should encourage the adoption of progressive measures at the Community level by reducing their cost.

Second, a trading system could be designed to accommodate Member State autonomy by allowing such states a free hand in the initial domestic allocation of their permit allowances.

Third, a trading system eases the Community’s “legitimacy deficit.” Command and control regulation aggravates that deficit by requiring that Brussels “Eurocrats” issue and seek to enforce through the Member States a uniform central plan for environmental protection. Trading addresses this deficit by making the basic policy choice—the overall amount of pollution allowed—more transparent and by eliminating the need for detailed central commands.$^{118}$

Fourth, trading furnishes an effective and politically palatable way of transferring capital and pollution-reducing technologies from the more industrialized to the less industrialized regions of the Community. The latter can be given relatively more allowances in recognition of their need for industrial development. Firms in the industrialized regions facing relatively high costs for reducing pollution could invest in pollution reductions in the industrializing regions, where costs would likely be lower. These investments would include the use of sophisticated, environmentally superior technologies in new plants. Private investment, driven by competitive market forces, would encourage technological innovation and probably prove more effective and less costly than expenditures by

$^{118}$ See Ackerman & Stewart, 13 Colum J Envir L at 188-91 (cited in note 113).
public authorities for the same purpose. This feature of a tradeable permit system provides another illustration of how trading harnesses the economic advantages of the internal market to environmental protection goals in order to create an "ecological market economy."

While pollution fees or taxes share all of the economic advantages of trading, they share only some of the political and administrative advantages. For example, they do not permit Member State flexibility in the allocation of pollution allowances, and do not harness market forces to transfer capital and technology to the industrializing regions in order to promote development that is environment-friendly. There is also a tension between the revenue and incentive aspects of a pollution tax or fee. In order to have a significant incentive effect, the tax must in most cases be relatively high, generating large revenues. Receipts from pollution taxes could be incorporated into the fiscal base, presumably on a revenue-neutral basis. The notion of shifting part of the tax burden from labor and capital to pollution is attractive. Finance ministers, however, want a dependable fiscal base. The very purpose of a pollution tax, however, is to erode the fiscal base by reducing pollution. Moreover, polluting industries are likely to oppose a pollution tax strenuously. Their opposition to a trading system is likely to be less intense because they would probably not have to pay for their permits, and they may be able to make a profit by reducing their pollution and selling their excess permits. These considerations suggest that greater attention should be given to the use of trading approaches in Community legislation, although taxes and fees undoubtedly have a useful role to play in many contexts.

There are other economic incentive systems which not only harmonize economic and environmental goals but also facilitate the adoption of progressive environmental measures at the Community level. For example, a Community system which imposed a fee on the generation of hazardous wastes and refunded that fee

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119 The United States has proposed a scheme of international trading in greenhouse gas reduction credits in order to channel capital and appropriate environment-friendly technology from the developed countries to the less developed countries. This scheme would limit the greenhouse gas emissions associated with their economic development.

120 Part of the proceeds of a pollution fee or tax could be earmarked for investment in environmental protection in the industrializing regions, but investment decisions would be made by public authorities.

121 Under a trading system the government could auction off permits, but in practice permits have been given to existing firms in proportion to the allowed emissions under pre-existing regulatory requirements.
(at least in part) upon a demonstration that the wastes had been properly treated and disposed of would ameliorate the problem of transboundary waste shipments by making improper disposal unprofitable and providing the private sector with incentives to accurately track such wastes. The recently developed Community program of eco-labelling\textsuperscript{122} would harness consumer demand throughout the internal market for environment-friendly products. While there may be difficulties in implementing a Community eco-labelling program, they are likely to be less than the difficulties in agreeing on Community product standards. Even if some of these economic incentive programs are not adopted at the Community level, Community environmental legislation should not preclude or discourage their use by Member States interested in experimenting with new policy instruments. In particular, care must be taken in Community efforts to harmonize taxes to allow Member States flexibility to experiment with environmental fees or charges.\textsuperscript{123}

The Community could not rely solely on economic incentives to achieve environmental protection goals. Traditional regulatory approaches have an important role to play, for example, in controlling locally harmful toxic emissions. The environmental regulatory program of the future should follow a mixed strategy, employing different types of instruments, each in the context in which they are most appropriate. Still, economic incentives should play a large role in such a program in order to nurture complementary economic and ecological goals.

**Conclusion**

The Community has made substantial progress in developing a common program for environmental protection, and prospects for the future are encouraging. But the experience of the United States suggests hazards in relying exclusively on a central planning approach that attempts to direct environmental protection measures in the Member States through a Brussels blueprint. While the Community needs to strengthen its implementation and enforcement capacities, a “top-down” approach is likely to be self-defeating if pressed too far. In order to maintain healthy and balanced progress, direction from the center needs to be comple-

\textsuperscript{122} See Wügenbaur, 1992 U Chi Legal F at 30 (cited in note 62).

mented by approaches, such as those advocated here, that encourage decentralized initiative and innovation.