

Fordham International Law Journal

Volume 14, Issue 3

1990

Article 8

Regina v. Secretary of State for Transport Ex Parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law

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Regina v. Secretary of State for Transport Ex Parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law

Jay J. Arangónés

Abstract

This Comment argues that the Factortame judgment is compatible with the traditional U.K. doctrine of the supremacy of Parliament. Part I examines the Court of Justice's approach to the supremacy of Community law and the traditional U.K. approach to supremacy. Part II discusses the factual and procedural background of Factortame, the judgment of the Court of Justice, and the reasoning of the opinion of Advocate General Tesouro. Part III suggests that Factortame indicates a willingness of the Court of Justice to allow the United Kingdom to adhere to its traditional view of Community law precedence, provided that directly effective Community rights are practically protected. This Comment concludes that despite the U.K. approach to the supremacy of Community law, U.K. courts recognize that Parliament is subject to the ultimate sovereignty of the Community.

COMMENTS

*REGINA v. SECRETARY OF STATE FOR TRANSPORT EX PARTE FACTORTAME LTD.: THE LIMITS OF PARLIAMENTARY SOVEREIGNTY AND THE RULE OF COMMUNITY LAW**

*"Could we," I said, "somehow contrive one of those lies that come into being in case of need, of which we were just now speaking, some one noble lie to persuade, in the best case, even the rulers, but if not them, the rest of the city?"*¹

INTRODUCTION

Since the inception of the European Economic Community (the "Community" or the "EEC"),² the Court of Justice of the European Communities (the "Court of Justice") has been at the forefront of the legal integration of the Community.³ The area in which legal integration contributes most closely to political integration is perhaps that of the relation between

* This Comment received the 1991 Orlando Conseils Award at Fordham University School of Law.

1. PLATO, *THE REPUBLIC* 414b-c (A. Bloom trans. 1968).

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty]. The European Communities were founded upon three treaties: the EEC Treaty; the Treaty Establishing the European Coal and Steel Community, April 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140; and the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 295 U.N.T.S. 259.

3. See P.J.G. KAPTEYN & P. VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES AFTER THE COMING INTO FORCE OF THE SINGLE EUROPEAN ACT* 169-73 (2d ed. 1989) (noting that Court of Justice has often acted as motor of integration to ensure that Community institutions and Member States comply with obligations imposed upon them); Kakouris, *La relation de l'ordre juridique communautaire avec les ordres juridiques des Etats membres (Quelques réflexions parfois peu conformistes)*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION*, Liber Amicorum, P. Pescatore, 319 (1987) (arguing that legal relationship of Community and Member States is essentially federal); Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 *EUR. L. REV.* 28, 29 (Feb. 1988) (criticizing Court of Justice's excessive "normative supranationalism" in jurisprudence of 1960s and 1970s); Cappelletti, *Is the European Court of Justice "Running Wild"?*, 12 *EUR. L. REV.* 3, 8 (Feb. 1987) (advocating legitimacy, based upon Preamble and first Articles of EEC Treaty, of Court of Justice's pro-integration jurisprudence).

Community law and the national law of the Member States.⁴ To this end, the Court of Justice holds that Community law has primacy over the national law, including the constitutional law, of the Member States.⁵ While Member States accept that Community law⁶ prevails over inconsistent national law,⁷ the Member States differ in their understanding of the nature of this precedence.⁸

The issue of the precedence of Community law is particularly controversial in the United Kingdom because of the traditional constitutional principles of the sovereignty of Parliament and the rule of law.⁹ The doctrine of the sovereignty of Parliament holds that there are no legal limits to Parliament's legislative power.¹⁰ The sovereignty of Parliament means that U.K. courts cannot question the validity of acts of Parliament and that Parliament can repeal any prior legislation.¹¹ The

4. See P.J.G. KAPTEYN & P. VAN THEMAAT, *supra* note 3, at 169-70.

5. See *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 1970 E.C.R. 1125, Common Mkt. Rep. (CCH) ¶ 8126.

6. See *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, 1978 E.C.R. 629, Common Mkt. Rep. (CCH) ¶ 8023; *Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, Common Mkt. Rep. (CCH) ¶ 8023.

7. See *infra* note 40 and accompanying text (noting that priority of Community law pertains to national legislation enacted both prior and subsequent to accession to EEC).

8. See generally H. SCHERMERS & D. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 105-24 (4th ed. 1987); T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 224-45 (1981). For example, Belgium adopted a monist position with regard to the primacy of Community law. See *Minister for Economic Affairs v. Fromagerie Franco-Suisse "Le Ski"*, [1972] C.M.L.R. 330 (Belgian Cour de Cassation). In Italy, however, a dualist view of supremacy prevails as national law and international law which produces direct effects in the internal legal system are considered separate and autonomous systems. See *S.p.A Granital v. Amministrazione Finanziaria dello Stato*, [1984] I Giur. Ital. 1521 (Corte cost. 1984); *Frontini v. Ministero delle Finanze*, [1974] 2 C.M.L.R. 372 (Corte cost. 1973).

9. See *infra* note 53 and accompanying text (discussing U.K. constitutional principles of sovereignty of Parliament and rule or supremacy of law).

10. See Wade, *The Basis of Legal Sovereignty*, [1955] CAMBRIDGE L.J., 172, 174; see *infra* notes 18-20 and accompanying text (discussing doctrine of sovereignty of Parliament).

11. A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 62 (E.C.S. Wade 10th ed. 1961). Professor Dicey stated that

[t]here is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary

doctrine of the rule of law holds that in construing legislation courts will interpret any uncertain language in favor of common law principles of the liberty of the citizen.¹² As a result of these two principles, the traditional U.K. view holds that courts must construe domestic legislation in conformity with Community law, but enforce conflicting domestic legislation if Parliament clearly expresses such a conflicting intention.¹³

In *Regina v. Secretary of State for Transport ex parte Factortame Limited* ("Factortame"),¹⁴ the Court of Justice delivered a judgment that challenges the traditional U.K. view of the sovereignty of Parliament.¹⁵ In *Factortame*, the Court of Justice held that under Community law, national courts must be able to grant interim protection to rights claimed by individuals under directly effective Community law.¹⁶ Where certain preconditions are met, national courts must be able to set aside national legislation pending the final outcome of the proceedings, as

rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality. A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority.

Id. at 62-63 (footnote omitted). The legal ability to repeal any prior legislation includes prior legislation that purports to entrench itself. *See Vauxhall Estates Ltd. v. Liverpool Corp.*, [1932] 1 K.B. 733. Judge Avory noted that

[s]peaking for myself, I should certainly hold, until the contrary were decided, that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions. . . . [If both Acts] cannot stand together . . . then the earlier Act is impliedly repealed by the later in accordance with the maxim 'Leges posteriores priores contrarias abrogant.'

Id. at 743-44; *see Ellen Street Estates, Ltd. v. Minister of Health*, [1934] 1 K.B. 590. In *Ellen Street Estates, Ltd.*, Lord Justice Maugham observed that

[t]he Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.

Id. at 597.

12. *See infra* notes 56-61 and accompanying text (discussing Professor A.V. Dicey's doctrine of the rule of law or supremacy of law).

13. *See infra* notes 53-97 and accompanying text (discussing traditional U.K. view of supremacy of Community law).

14. Case C-213/89, 1989 E.C.R. —, Common Mkt. Rep. (CCH) [1990] 2 CEC 189.

15. *Id.* at 218-22.

16. *Id.* at 221.

well as pending receipt of a response to questions sent to the Court of Justice for a preliminary ruling under Article 177 of the Treaty Establishing the European Economic Community (the "Treaty").¹⁷ Confronting traditional notions of parliamentary sovereignty, *Factortame* thus declares that U.K. courts must be given the power to order the temporary disapplication of an act of Parliament.¹⁸

This Comment argues that the *Factortame* judgment is compatible with the traditional U.K. doctrine of the supremacy of Parliament. Part I examines the Court of Justice's approach to the supremacy of Community law and the traditional U.K. approach to supremacy. Part II discusses the factual and procedural background of *Factortame*, the judgment of the Court of Justice, and the reasoning of the opinion of Advocate General Tesouro. Part III suggests that *Factortame* indicates a willingness of the Court of Justice to allow the United Kingdom to adhere to its traditional view of Community law precedence, provided that directly effective Community rights are practically protected. This Comment concludes that despite the U.K. approach to the supremacy of Community law, U.K. courts recognize that Parliament is subject to the ultimate sovereignty of the Community.

I. TWO APPROACHES TO THE SUPREMACY OF COMMUNITY LAW

A. *The Court of Justice's View of Supremacy*

The jurisprudence of the Court of Justice maintains that

17. *Id.*; see EEC Treaty, *supra* note 1, art. 177. Article 177 provides that [t]he Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

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

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

Id.

18. *Factortame*, [1990] 2 CEC at 221.

the Community and national legal regimes have become a unified legal order.¹⁹ In this unified order, Community norms possess their own supreme identity separate from national law.²⁰ Three principal judgments of the Court of Justice set forth the Community law approach to supremacy.²¹

The first case, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen* ("Van Gend & Loos"),²² decided that some Treaty provisions can have direct effect in national law so that nationals and undertakings may claim rights under the Treaty provisions in national courts.²³ The Court of Justice in *Van Gend & Loos* asserted that the Treaty is more than an agreement that merely creates mutual obligations between the Member States.²⁴ Instead, the Court of Justice noted that the Community constitutes a "new legal order" in exchange for which the Member States have limited their sovereignty.²⁵ The Court of Justice

19. H. SCHERMERS & D. WAELBROECK, *supra* note 8, at 111. According to Messrs. Schermers and Waelbroeck, the jurisprudence of the Court of Justice requires a monist view of the relationship between national law and Community. *Id.* They state that

[t]he Court of Justice has repeatedly ruled that it considers the relationship between national law and Community law to be monist. There can be no transformation of Community law into national law. It must be of direct use to Community citizens within their national legal orders, and in the case of a conflict arising Community law must take priority over national law irrespective of the date when the latter legislation was adopted.

Id. According to Dr. Ami Barav, the Court of Justice considers that the Community and national legal orders have become a single and unified order in which Community law is supreme. See Barav, *Cour constitutionnelle italienne et droit communautaire: le fantôme de Simmenthal*, 21 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN*, 313, 330 (1985).

Dr. Barav comments that

[p]our la Cour de justice, les ordres juridiques communautaire et national fusionnent pour constituer un ordre unitaire à l'intérieur duquel les normes communautaires préservent leurs caractères propres, dont la primauté sur le droit interne.

Id.

20. See Barav, *supra* note 19, at 330.

21. See H. SCHERMERS & D. WAELBROECK, *supra* note 8, at 111-15 (discussing *Van Gend & Loos*, *Costa*, and *Simmenthal II*).

22. Case 26/62, 1963 E.C.R. I, Common Mkt. Rep. (CCH) ¶ 8008.

23. *Id.* at 13, Common Mkt. Rep. (CCH) ¶ 8008, at 7215. The obligations and rights conferred by Community law are not limited to those expressly enumerated in the Treaty. *Id.* at 12, Common Mkt. Rep. (CCH) ¶ 8008, at 7214. "These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community." *Id.*

24. *Id.*

25. *Id.*

held that Community law imposes obligations and rights on individuals that become part of their legal heritage independent of the legislation of each Member State.²⁶

The second landmark judgment that defines the EEC view of the supremacy of Community law is *Costa v. ENEL*.²⁷ *Costa* involved an alleged conflict between certain Treaty Articles and a subsequent Italian law nationalizing an electrical utility.²⁸ The question before the Court of Justice was whether Community law entitled individual claimants to rely on the Treaty articles in the national courts as against subsequent national laws.²⁹ The Court of Justice once again emphasized that the Treaty created its own legal system that became an integral part of the legal systems of the Member States.³⁰ The Court of Justice held that Community law cannot be called into question by subsequent national legislation.³¹ Community law is an in-

26. *Id.*

27. Case 6/64, 1964 E.C.R. 585, Common Mkt. Rep. (CCH) ¶ 8023.

28. *Id.* at 588, Common Mkt. Rep. (CCH) ¶ 8023, at 7387.

29. *Id.* at 594, Common Mkt. Rep. (CCH) ¶ 8023, at 7390-91.

30. *Id.* at 593, Common Mkt. Rep. (CCH) ¶ 8023, at 7390. The *Costa* Court suggested that unlike ordinary international treaties, the Community is an emergent polity. *See id.* The Court of Justice stated that

[b]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Id.

31. *Id.* at 593-94, Common Mkt. Rep. ¶ 8023, at 7390-91. The *Costa* judgment suggested that it is Community law that defines the valid scope and activities of national law. *See id.* The Court of Justice stated that

[w]herever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93(3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8(4), 17(4), 25, 26, 73, the third subparagraph of Article 93(2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. . . . The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied

dependent source of law, the Court of Justice observed, with a "special and original nature" that cannot be overridden by domestic law without infringing the legal basis of the Community itself.³²

The third seminal judgment defining the supremacy of Community law is *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* ("*Simmenthal II*").³³ In *Simmenthal II*, an Italian importer contested an Italian law mandating veterinary and public health inspections and fees as contrary to the free movement of goods under Community law.³⁴ The issue before the Court of Justice concerned the possible conflict between Community rules on the common organization of the bovine market and the subsequent Italian veterinary and public health law.³⁵ The Court of Justice examined the Italian Constitutional Court's rule requiring a trial court to inquire of the Italian Constitutional Court as to the existence of any alleged conflict between an EEC rule and a national statute and its mode of resolution.³⁶ The Court of Justice held the Italian Constitutional Court's procedural rule incompatible with Community law.³⁷ The Court of Justice noted that upon its entry into force, Community law renders "automatically inapplicable" any conflicting provisions of present national law.³⁸ The Court of Justice added that Community law also precludes the "valid adoption" of any future conflicting national law.³⁹ This obligation requires, if need be, that every national court refuse "of its own motion" to apply any prior or subsequent conflicting national provisions.⁴⁰ Consequently, the Court of Justice con-

regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

Id. at 594.

32. *Id.*

33. Case 106/77, 1978 E.C.R. 629, Common Mkt. Rep. (CCH) ¶ 8476. Community law includes the proposition that national courts possess Community-conferred authority in addition to their national authority. *See id.* at 644, Common Mkt. Rep. (CCH) ¶ 8476, at 8610.

34. *Id.* at 631, Common Mkt. Rep. (CCH) ¶ 8476, at 8602.

35. *Id.*

36. *Id.* at 641-42, Common Mkt. Rep. (CCH) ¶ 8476, at 8609.

37. *Id.* at 645-46, Common Mkt. Rep. (CCH) ¶ 8476, at 8610-11.

38. *Id.* at 643, Common Mkt. Rep. (CCH) ¶ 8476, at 8610.

39. *Id.*

40. *Id.* at 644, Common Mkt. Rep. (CCH) ¶ 8476, at 8611. The Court in *Simmenthal II* said that

cluded that every national court must apply Community law in its entirety and effectively protect rights conferred by Community law.⁴¹

The Court of Justice's view is that the constitutional law of each Member State cannot independently determine the hierarchy and effect of Community law in each domestic legal or-

[a] national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

Id.

41. *Id.* In *Simmenthal II*, the Court of Justice considered the Italian Constitutional Court's intermediate position to be a procedural bottleneck impeding the effective application of Community law. La Pergola & Del Duca, *Community Law, International Law, and the Italian Constitution*, 79 AM. J. INT'L L. 598, 612 (1985). The Italian Constitutional Court subsequently accepted the priority of EEC law over both prior and subsequent national laws without the need for resort to centralized constitutional review. See *S.p.A. Granital v. Amministrazione Finanziaria dello Stato*, [1984] I Giur. Ital. 1521 (Corte cost. 1984); *B.E.C.A. S.p.A. v. Amministrazione Finanziaria dello Stato*, [1985] I Giur. Cost. 694 (Corte cost. 1985). Despite this recognition by the Italian courts of the direct protection of EEC rights, Italy and the EEC continue to differ as to the theories justifying this conclusion. See La Pergola & Del Duca, *supra* at 615. Messrs. La Pergola and Del Duca write that

[t]he Community Court's notion of a permanent cession of sovereignty is a monist theory, whereas the Constitutional Court's theory is a dualist one. The Constitutional Court maintains that Italian law and Community law are two separate legal orders. Italy applies Community law because the Constitutional Court interprets Italian constitutional principles as indicating that the Italian legal order chooses not to impede the application of Community law, not because Italian law is subordinate to Community law as maintained by the Court of Justice.

Id.; see Darmon, *Juridictions constitutionnelles et droit communautaire*, 24 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN, 217, 225 (1988); Petriccione, *Italy: Supremacy of Community Law Over National Law*, 11 EUR. L. REV. 320 (1986). Professor Petriccione observes that

[w]ith its decision in *B.E.C.A.* the Italian Constitutional Court has indeed confirmed once more its willingness to ensure supremacy of Community law in Italy, and to contribute to its equal and uniform application in all Member States. As a last remark, one might ask if the fear is really justified that the peculiar line of reasoning followed by the Constitutional Court may lead to further conflicts with the European Court. On the contrary, the 'dualist' approach taken by the Constitutional Court, even though in sharp contrast with the "monist" view adopted by the European Court seems equally effective in achieving results consistent with a Member State's obligations under the Treaty.

Id. at 327.

der.⁴² The Court of Justice's jurisprudence has condemned a dualist approach to the supremacy of Community law without explicitly endorsing a monist conception.⁴³ As *Van Gend & Loos* and *Costa* suggested, the Community treaties (the "Treaties")⁴⁴ possess a constitutive character entirely different from ordi-

42. *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 1970 E.C.R. 1125, 1134, Common Mkt. Rep. (CCH) ¶ 8126, 7424. In *Internationale Handelsgesellschaft*, the Court of Justice asserted the supremacy of Community law over the constitutional law of the Member States. *Id.* The Court of Justice stated that

the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

Id.; see Contantinesco, *La spécificité du droit communautaire*, 2 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 1, 16 (1966) (stating: "[l]a solution correcte de ce problème ne peut être trouvée qu'en partant d'un point de vue communautaire").

43. See Barav, *supra* note 19, at 327-28. Dr. Barav notes that la Cour de justice condamne, certes, toute manifestation d'un dualisme organique et procédural mais . . . elle n'affirme pas pour autant un monisme juridictionnel. [Professeur Kovar] considère que ce qui est exigé du juge national n'est que la consécration procédurale des rapports normatifs entre les ordres juridiques communautaire et national. Dans certains cas, l'immédiateté normative implique une réduction de la marge de l'autonomie institutionnelle. "Cette marge" conclut le Professeur R. Kovar, "tend à se réduire au titre à exercer la compétence nationale communautairement définie dans son exercice."

Id. at 327-28 (quoting Kovar, *Rapports entre le droit communautaire et les droits nationaux*, in COMMISSION DES COMMUNAUTÉS EUROPÉENNES, TRENTE ANS DE DROIT COMMUNAUTAIRE, 115, 157 (1981)). Dr. Barav believes that since the *Simmenthal II* judgment, the primacy and direct effect of Community law precludes the *valid* adoption of new but inconsistent national laws. *Id.* at 324. Dr. Barav notes that the subsequent inconsistent national law is stricken with an "inherent defect." *Id.* Dr. Barav writes:

[la Cour] fait donc une distinction entre la loi antérieure qui, elle, devient inapplicable, et la loi postérieure qui, en revanche, est empêchée d'être valablement formée. C'est parce qu'elle est entachée d'un vice inné d'incompétence que la loi postérieure ne saurait être valablement formée. Selon la Cour, la validité, même provisoire, d'une loi intervenant dans le domaine relevant de la compétence communautaire, mettrait en question les bases mêmes de la Communauté.

Id.; see Van Der Meersch, *L'arrêt du 9 mars 1978 de la Cour de Justice des Communautés Européennes et la règle de l'application directe du droit communautaire dans le droit interne des états membres*, 55 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 24, 38-39 & n.55 (1978) (noting superior hierarchical position of Community law *vis-à-vis* national law implied by *Simmenthal II*).

44. See *supra* note 2 (discussing treaties forming three European Communities).

nary international treaties.⁴⁵ The Treaties are not merely a set of reciprocal obligations between the Community and each of the Member States, but a new legal order for the benefit of which the Member States have limited their sovereignty.⁴⁶ The Treaties create a relationship among the Member States that is collective and interdependent, and not merely bilateral and divisible.⁴⁷

As a result, the position and effects of Community law in each Member State must be the same as the position and effects of Community law in the legal orders of each of the other Member States.⁴⁸ As a body of unitary law,⁴⁹ Community law must have the same effect and rank at the same time throughout the Community.⁵⁰ If Community law is to preserve its communal character, the relation of Community law to national law, including constitutional law, must be determined by Community law.⁵¹ This implies that in the event of a conflict between the Treaties and a Member State's constitution, the Member State would be obliged to modify or amend its constitution.⁵²

45. See *Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, 593, Common Mkt. Rep. (CCH) ¶ 8023, at 7390; *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, 1963 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 8008; see also *Contantinesco*, *supra* note 42, at 8-9 (discussing unique constitutive character of Community treaties).

46. See *Contantinesco*, *supra* note 42, at 14-15.

47. See *id.* at 15.

48. *Id.*

49. See *Hartley, Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. OF COMP. L. 229, 247 (1986) (noting that Community has already acquired many federal features).

50. See *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, 1978 E.C.R. 629, 634-44, Common Mkt. Rep. (CCH) ¶ 8476, 8610; see also *Contantinesco*, *supra* note 42, at 15. As *Contantinesco* observes, "[e]n effet, le principe de l'égalité des Etats membres serait lésé et le droit communautaire perdrait son caractère communautaire et unitaire si ses effets variaient d'un Etat membre à l'autre, selon leur volonté." *Id.*

51. *Contantinesco*, *supra* note 42, at 16.

52. *Id.* at 21. According to Professor *Contantinesco*,

[I]a conclusion, pour ce qui est de notre hypothèse, est que l'Etat membre qui constate, des années après la ratification des traités, une contradiction entre ceux-ci et sa propre Constitution, ne doit plus pouvoir mettre en doute la validité du traité, mais au contraire, devra modifier sa Constitution, pour la mettre en accord avec ses obligations internationales.

Id.

B. *The United Kingdom Approach to Supremacy*

In Professor A.V. Dicey's classic formulation, the sovereignty of Parliament and the rule of law are the two fundamental features of the U.K. constitution.⁵³ The U.K. doctrine of the sovereignty of Parliament requires that U.K. courts enforce clear expressions of Parliament's will.⁵⁴ As a result, U.K. courts cannot question the "validity" of legislation.⁵⁵ The

53. A.V. DICEY, *supra* note 11, at 39-85 & 183-205. According to Professor Dicey, the sovereignty of Parliament and the supremacy of the law of the land are the two cardinal and mutually supporting principles of the U.K. constitution. *Id.* He defined parliamentary sovereignty as meaning

neither more nor less than this, namely, that Parliament [defined as the "Queen in Parliament" or the Monarch, the House of Lords, and the House of Commons acting together] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

Id. at 39-40. The second fundamental characteristic of the English constitution is the rule or supremacy of law. *Id.* at 184. Once a political decision is taken to effect a certain policy in the form of an act, the judiciary must fix the content and scope of the new legislation. *Id.* at 413-14. Professor Dicey stated that

[t]he fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles . . . in a spirit of legality.

Id.

54. *See id.* at 40.

55. *See id.* Professor Phillips states that constitutional orthodoxy requires, even in the Community setting, that U.K. courts refrain from reviewing the validity of statutes. Phillips, *Has the "Incoming Tide" Reached the Palace of Westminster?*, 95 L.Q.R. 167, 168-69 (1979). Professor Phillips notes that

[t]he concept of the 'supremacy' (in its wide sense) of Community law over the legislatures of Member States may be accepted by the European Court and by the constitutional laws of other Member States, but the dualist or pluralist theory adopted by British constitutional law requires the courts of the United Kingdom to look at Community law through the medium of Parliament. British courts do not apply Community law directly, but indirectly in accordance with the authority conferred on them by the European Communities Act. The expression 'supremacy of Community law,' if used in the context of our domestic law, must refer to construction, not legislative power; to judicial interpretation, *not review of validity*. The 'supremacy' of

doctrine of the rule or supremacy of law, however, requires that the actions of governmental and civil authorities be justified in law.⁵⁶ The common law therefore protects individual freedom by permitting governmental encroachment upon it only where such infringement is clearly authorized by law.⁵⁷

In the context of statutes, the rule of law requires that citizens be bound by, and entitled to rely on, the law as it is expressed in the words of the statute.⁵⁸ This means that the courts do not seek to apply what Parliament meant, rather they seek the true meaning of what Parliament said.⁵⁹ In seeking the true meaning, courts will interpret any ambiguous language in favor of the liberty of the citizen and common law

Community law in this sense applies, not as is often said, so long as the United Kingdom remains a Member of the Community, but so long as the European Communities Act in substantially its present form remains in force. From the proposition that certain rights created by the Treaty and Community Regulations are enforceable by individuals in national courts without further enactment by national legislation, which is recognised by section 2(1) of the European Communities Act, it does not follow that a national legislature cannot constitutionally enact later statutes conflicting with such rights; nor does section 2(4) of the Act purport to restrict—even if it could effectively do so—the power of Parliament after 1972 to legislate contrary to Community law.

Id. (emphasis added); see T. HARTLEY, *supra* note 8, at 244-45; Phillips, *High Tide in the Strand? Post-1972 Acts and Community Law*, 96 L.Q.R. 31 (1980); Allan, *Parliamentary Sovereignty and the EEC*, PUB. L. 562 (1982).

56. See Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44(1) CAMBRIDGE L.J. 111, 117 (1985). The doctrine of the rule of law has three meanings. A.V. DICEY, *supra* note 11, at 202-03. First, it means the absolute supremacy of regular as opposed to arbitrary law. *Id.* at 202. Professor Dicey writes that "Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else." *Id.* Second, it means the equality of government officials and ordinary citizens before the ordinary common law courts. *Id.* Third, the rule of law expresses the fact that in the United Kingdom, a nation with no written constitution, constitutional law is the "result of judicial decisions determining the rights of private persons in particular cases brought before the courts." *Id.* at 195.

57. See Allan, *supra* note 56, at 116. As Professor Allan notes, "[t]he residual nature of the freedoms protected by the common law is reflected in Dicey's insistence that they were derived, not from a constitutional code of enacted rights, but from the particular cases in which officials had asserted their authority to act." *Id.*

58. *Id.* at 117.

59. *Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591, 613G; see Allan, *supra* note 56, at 118. Lord Reid stated in *Black-Clawson* that judges "often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said." *Black-Clawson*, [1975] A.C. at 613G.

principles.⁶⁰ The rule of law thus qualifies the will of Parliament because courts, absent a distinct and clear enactment, will presume Parliament did not intend to violate rules of common and international law.⁶¹

In the United Kingdom, international treaties can only affect existing domestic law if the treaties are specifically incorporated into domestic law by an act of Parliament.⁶² In *Blackburn v. Attorney-General*,⁶³ Mr. Blackburn sought declarations

60. Allan, *supra* note 56, at 119. In the words of one commentator, the rule of law is a principle of "institutional morality" which U.K. courts employ against executive action in two ways. Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* 19 (J. Jowell & D. Oliver eds. 1989). First, as guardians of Parliament's purpose, they set aside decisions or actions that are beyond the powers conferred by the applicable statute. *Id.* Second, courts supply the "omission of the legislature" if the statute is silent on a point and insist on procedural legality. *Id.* Professor Allan explains that

[a]s a guiding principle of interpretation, the rule of law provides a natural and powerful means for the expression of our constitutional attachment to the freedom of the individual. Its scope is reflected in the "well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a strict construction." The court is bound to give effect to the clearly expressed intentions of Parliament, but "where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed."

Allan, *supra* note 56, at 121 (quoting *Attorney-General for Canada v. Halley and Carey Ltd.*, [1952] A.C. 472, 450 (Lord Radcliffe)).

61. See A.V. DICEY, *supra* note 11, at 202-03 (noting three elements of doctrine of rule of law). As Professor Allan notes, the judicial *interpretation* of statutes ensures that in the statutes' *application* political morality will be respected. Allan, *supra* note 56, at 130. He notes that because the judge

is bound to administer justice *according to law*, including legislation of which he may disapprove, he must faithfully accord every Act of Parliament its full and proper application. But in administering *justice* according to law he can hardly be indifferent to the expectations and aspirations of the governed—those from whom, in our political theory, all governmental authority is ultimately derived. Hence the importance of those presumptions of legislative intent which operate to exclude harsh and retrospective changes in the law in the absence of clear and unambiguous enactment. The rule of law therefore assists in preventing the subversion of the political sovereignty of the people by manipulation of the legal sovereignty of Parliament.

Id. (emphasis in original).

62. See *Blackburn v. Attorney-General*, [1971] 2 All E.R. 1380, 1382, [1971] 1 W.L.R. 1037, 1039-40 (C.A.). In *Blackburn*, Lord Denning stated that "[e]ven if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us." *Id.*; see L. COLLINS, *EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM* 24-25 (4th ed. 1990).

63. [1971] 2 All E.R. 1380.

that upon signing the EEC Treaty, the U.K. government would violate U.K. law because the government thereby would surrender part of the sovereignty of the Crown in Parliament. Lord Denning, noting the *Costa* judgment, accepted that U.K. accession to the EEC would limit the sovereignty of the United Kingdom.⁶⁴ Lord Denning noted, however, that negotiations to sign the EEC Treaty were still under way, and that even if the Treaty were signed, U.K. courts only take notice of treaties to the extent they are embodied in acts of Parliament.⁶⁵ Mr. Blackburn also claimed that in the event Parliament did enact implementing legislation, in doing so Parliament would contravene the legal rule that no Parliament can bind its successors.⁶⁶ On this point, Lord Denning agreed that it was settled legal doctrine that one Parliament cannot bind another and that no act is irreversible.⁶⁷ Observing, however, that "legal theory must give way to practical politics,"⁶⁸ Lord Denning dismissed this point on the ground that the court would not address the question of Parliament's power to revoke any eventual implementing legislation unless and until that unlikely event occurred.⁶⁹

Parliament gave legal effect to Community law in the United Kingdom when it enacted the European Communities Act 1972.⁷⁰ The European Communities Act 1972 provides that all acts of Parliament and subordinate legislation, passed or to be passed in the future, shall be construed and effective subject to Community law.⁷¹ Under section 3(1), U.K. courts

64. *Id.* at 1381.

65. *Id.* at 1382.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1383.

70. European Communities Act 1972, ch. 68.

71. *Id.*, ch. 68, § 2(1); see L. COLLINS, *supra* note 62, at 28. Section 2(1) of the European Communities Act 1972 provides that

[a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

must defer to the jurisprudence of the Court of Justice in all legal proceedings in which questions as to the meaning or effect of Community law arise.⁷²

The traditional view of the European Communities Act 1972 is that it embodies a rule of construction.⁷³ The effect of this rule is that U.K. courts should interpret subsequent legislation, if at all possible, consistently with Community law and read subsequent and inadvertently inconsistent legislation as subject to Community law.⁷⁴ This rule preserves the ultimate sovereignty of Parliament, however, because the European Communities Act 1972 does not state expressly that Parliament cannot repeal the European Communities Act 1972 or pass legislation deliberately contravening Community law.⁷⁵

The European Communities Act 1972 requires, and judicial opinions confirm,⁷⁶ that U.K. courts must give Community

European Communities Act 1972, ch. 68, § 2(1). Section 2(4) of the Act provides that

[t]he provision that may be made under subsection (2) above includes, subject to Schedule 2 to this act, any such provision (or any such extent) as might be made by act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any act passed after this act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this act to make Orders in Council and regulations.

Id. § 2(4).

72. European Communities Act 1972, ch. 68, § 3(1). Section 3(1) of the Act provides that

[f]or the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the Court of Justice, be for determination as such in accordance with the principles laid down by and any relevant decision of the Court of Justice [or any court attached thereto]).

Id.

73. See L. COLLINS, *supra* note 62, at 28.

74. See *id.* at 28-29.

75. See *id.* at 28.

76. See, e.g., *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1989] 3 C.M.L.R. 1, 10 (H.L.); *Litster v. Forth Dry Dock and Eng'g Co.*, [1989] 1 All E.R. 1134, 1140 (H.L.); *Duke v. G.E.C. Reliance Ltd.*, [1988] 1 A.C. 618, 623 (H.L.); *Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1983] 3 C.M.L.R. 43, 49-50 (H.L.); *Garland v. British Rail Eng'g Ltd.*, [1982] 2 C.M.L.R. 174, 178 (H.L.); *Director of Public Prosecutions v. Henn & Darby*, [1980] 2 C.M.L.R. 229, 233-34 (H.L.); *Shields v. E. Coomes (Holdings) Ltd.*, [1979] 1 All E.R. 456, 460-61 (C.A.); *Macarthy's Ltd. v. Smith*, [1981] 1 All E.R. 111 (C.A.).

law precedence over existing and subsequent national law.⁷⁷ The traditional U.K. view, however, holds that Community law is applicable in the United Kingdom only because the European Communities Act 1972 incorporates Community law into domestic law.⁷⁸ Consequently, according to the traditional view, U.K. courts consider Community law to be a part of U.K. law that, pursuant to the European Communities Act 1972, overrides any other part of U.K. law that is inconsistent with it.⁷⁹

U.K. courts interpret section 2(4) of the European Communities Act 1972 as a rule of construction that requires national legislation, including acts of Parliament, to be construed consistently with directly effective Community law.⁸⁰ This rule presumes the intention of Parliament not to legislate deliberately contrary to Community law.⁸¹ Consequently, this interpretative approach prevents only the implied repeal of Com-

77. European Communities Act 1972, ch. 68, §§ 2(1) & 2(4); *see supra* note 71 and accompanying text (setting forth relevant provisions of European Communities Act 1972).

78. L. COLLINS, *supra* note 62, at 39-40.

79. *Macarthy's Ltd.*, [1981] 1 All E.R. at 121.

80. *Garland*, [1982] 2 C.M.L.R. at 178; *see* L. COLLINS, *supra* note 62, at 28. In *Garland*, Lord Diplock said before the House of Lords that

it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject-matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it. *A fortiori* is this the case where the Treaty obligation arises under one of the Community Treaties to which section 2 of the European Communities Act 1972 applies.

Garland, [1982] 2 C.M.L.R. at 178. Professor Collins notes that

[i]t has been suggested that s2(4) has effected a degree of entrenchment by denying effectiveness to subsequent legislation inconsistent with Community law. But it is submitted that the better view is that, in so far as it relates to future legislation, s2(4) only expresses a rule of construction which must give way to a contrary intention.

L. COLLINS, *supra* note 62, at 28 (footnote omitted); *see* Forman, *The European Communities Act 1972: The Government's Position on the Meaning and Effect of its Constitutional Provisions*, 10 COMMON MKT. L. REV. 39, 52 (noting that when Parliament debated provisions of European Communities Act 1972 it was widely accepted that future Parliament retained right to expressly exclude or override Community obligations).

81. *See* Forman, *supra* note 80, at 52 (noting that in event of "inadvertent conflict between Community and national law, the Government suggested that the courts would try 'in accordance with the traditional approach' to interpret that statute" according to U.K. international obligations (emphasis in original)).

munity rights, because in principle Parliament retains the power to amend or repeal deliberately the European Communities Act 1972.⁸²

The classic expression of the interpretative approach to the application of Community law in the United Kingdom is that of Lord Denning in *Macarthy's Ltd. v. Smith*.⁸³ *Macarthy's Ltd.* involved a possible conflict between Community equal pay provisions and subsequent U.K. equal pay legislation.⁸⁴ Lord Denning observed that as a result of sections 2(1) and 2(4) of

82. L. COLLINS, *supra* note 62, at 39. According to Professor Collins the relationship of Community law and U.K. law is regulated by U.K. law. *Id.* at 39-41. He argues that

at present, whatever may be the position in the future, the correct position in United Kingdom constitutional law is the orthodox one, that the courts must and will give effect to subsequent United Kingdom legislation, even if it is inconsistent with Community law, subject to the important rule of construction in s 2(4). If the United Kingdom remains in the European Communities, it will be under an obligation to repeal such legislation, but its judges will not be able to declare the legislation inapplicable unless they are satisfied that there is no intention to depart from the principles established by s 2(1) and s 2(4) of the 1972 Act. There will therefore be a breach of the principle in the *Simmenthal* case, that a national court should not have to await the repeal of inconsistent legislation before giving full effect to Community law The decisions and writings in the other member states, although of great interest with regard to Community law, cannot without considerable reservation be treated as even of persuasive authority in relation to the problem of the relationship of Community law and national law at the national level in the United Kingdom. *This is a matter not primarily of Community law, but of constitutional law.*

Id. (emphasis added) (footnote omitted). According to Messrs. Kapteyn and Van Themaat, however, the relationship of Community and national law is a matter regulated by Community law. P.J.G. KAPTEYN & P. VAN THEMAAT, *supra* note 3, at 350. They maintain that

[t]he principle of the priority of Community law is a principle of Community law itself. Thus it is Community law and not national law which decrees such priority. Thus, for example, a Dutch judge, in the event of a conflict with rules of Community law, would refuse to apply the relevant national provisions not on account of incompatibility with Article 94 of the Dutch Constitution but on account of their incompatibility with Community law. In the United Kingdom whilst the European Communities Act 1972 was the vehicle for the entry of Community law into the national legal systems, the priority which Community law has occurs by virtue of Community law.

Id.; see Mitchell, *What Happened to the Constitution on 1st January 1973?*, 11 CAMBRIAN L. REV. 69, 76 (1980) (arguing that source of U.K. solidarity to Community law is Community legal order itself and not European Communities Act 1972).

83. [1979] 1 W.L.R. 1189, [1979] 3 All E.R. 325 (C.A.), *Article 177 referral*, Case 129/79, [1980] E.C.R. 1275, Common Mkt. Rep. (CCH) ¶ 8653, *on remand*, [1981] 1 All E.R. 111 (C.A.).

84. [1979] 3 All E.R. 325, 328 (C.A.).

the European Communities Act 1972, U.K. courts were bound to apply the directly effective Community rule.⁸⁵ Lord Denning conceded that if U.K. legislation is unintentionally "deficient" or inconsistent with Community law, U.K. courts must give effect to the latter.⁸⁶ As one commentator observes, Community law can supplement a deficiency or inconsistency in U.K. law.⁸⁷ Lord Denning added in dictum, however, that if Parliament deliberately passes an act with the clear intention of repudiating the Treaty or any Community provision, then U.K. courts must abide by the conflicting parliamentary statute.⁸⁸

The Court of Appeal perceived a possible conflict between the domestic legislation and the relevant Community provisions, and accordingly made a reference under Article 177 to the Court of Justice on the interpretation of the applicable Community law.⁸⁹ In its preliminary ruling in *Macarthy's Ltd. v. Smith*,⁹⁰ the Court of Justice held that the Community law provision applied.⁹¹ When the case returned to the Court of Appeal on the question of costs, Lord Denning reiterated that the Treaty provisions take priority over any inconsistent domestic equal pay rules.⁹² He accepted that Community law is part of U.K. law, and that in the event of any inconsistency, Community law takes priority.⁹³ Lord Denning stressed, however, that the priority of Community law is "given" by the European

85. *Id.* at 329.

86. *Id.* Lord Denning stated that

[i]n construing our statute, we are entitled to look to the Treaty as an aid to its construction; but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law. Such is the result of s2(1) and (4) of the European Communities Act 1972.

Id.

87. L. COLLINS, *supra* note 62, at 33.

88. *Macarthy's Ltd.*, 3 All E.R. at 329. Lord Denning cautioned, "I do not however envisage any such situation. As I said in *Blackburn v. Attorney-General*: '[b]ut, if Parliament should do so, then I say we will consider that event when it happens.' Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty." *Id.* (citation omitted).

89. *Id.* at 331.

90. *Macarthy's Ltd. v. Smith*, Case 129/79, 1980 E.C.R. 1275, Common Mkt. Rep. (CCH) ¶ 8653.

91. *Id.* at 1290-91, Common Mkt. Rep. (CCH) ¶ 8653, at 7744.

92. *Macarthy's Ltd. v. Smith*, [1981] 1 All E.R. at 120 (C.A.).

93. *Id.*

Communities Act 1972 itself.⁹⁴

There is thus no constitutional limitation on the power of Parliament to override, at the domestic level, the Treaty obligations of the Crown.⁹⁵ As long as the United Kingdom remains a member of the Community, however, there is a presumption that Parliament does not intend to legislate contrary to these EEC obligations.⁹⁶ As a result, if a certain piece of legislation is ambiguous, and one of the possible meanings is consistent with a Treaty obligation and the other is not, U.K. courts will prefer the meaning that is compatible.⁹⁷ U.K.

94. *Id.* Messrs. Kapteyn and Van Themaat take issue with Lord Denning's view of the supremacy of Community law, stating that

[w]ith respect to the learned Master of the Rolls his observation appears to confuse two points. The priority of Community law is a principle of that law; that law (including the principle) is recognised by the European Communities Act 1972 but is not (as such) given by the Act. The substitution of the word 'recognised' for the word 'given' would have rendered the learned Master of the Rolls' remarks unobjectionable.

P.J.G. KAPTEYN & P. VAN THEMAAT, *supra* note 3, at 350 n.397; see Gormley, *The Application of Community Law in the United Kingdom, 1976-1985*, 23 *COMMON MKT. L. REV.* 287 (1986). Professor Gormley stated that

[t]he decision of the Court of Appeal applying the preliminary ruling in Case 129/79 *Macarthy's Ltd. v. Smith* showed that, unless the European Communities Act 1972 is amended, it should be possible for courts in the United Kingdom to give full effect to the principle of the supremacy of Community law. An unsatisfactory (though unsurprising) feature of the judgment was that the basis for the principle of supremacy was found not in Community law itself but in the force of the 1972 Act.

Id. at 307 (footnotes omitted).

95. L. COLLINS, *supra* note 62, at 42.

96. *Id.* Professor Collins observes that

[w]hether the United Kingdom courts will come to accept, as the courts of the other member states have come to accept, the full implications of the supremacy of Community law remains open. They have certainly not yet accepted them, and the indications are that the orthodox view of Parliamentary supremacy will prevail for some time to come.

Id.

97. *Litster v. Forth Dry Dock and Eng'g Co.*, 1 All E.R. 1134, 1140 (1989). Lord Oliver said that

[i]f the legislation can reasonably be construed so as to conform with [Treaty] obligations, obligations which are to be ascertained not only from the wording of the relevant directive but from the interpretation placed on it by the Court of Justice of the European Communities, such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.

Id. Professor Allan observed that

[t]he result, however, is an interesting recognition by the courts of a special

courts therefore, will interpret the parliamentary act as being compatible or consistent with Community law. This interpretative method, effectuated by the European Communities Act 1972, operates as a veil that insulates the "validity" of acts of Parliament from judicial review while ensuring that directly effective Community law is applied in the United Kingdom.

II. REGINA v. SECRETARY OF STATE FOR TRANSPORT, EX PARTE FACTORTAME LTD.

A. *Factual Background*

The appellants in *Factortame* brought suit to enjoin the application of an act of Parliament preventing them from fishing against the U.K. fishing quota.⁹⁸ The appellants included a number of companies incorporated under the laws of the United Kingdom.⁹⁹ The directors and shareholders of those companies, most of whom were Spanish nationals, owned or managed ninety-five fishing vessels that were registered as British fishing vessels under the Merchant Shipping Act 1894.¹⁰⁰ As a result, these companies operated mainly from Spanish ports and landed most of their catches in Spain both before and after Spain's accession to the EEC in 1985.¹⁰¹ This system of registration under the 1894 Act allowed the appellants to fish against the U.K. quotas under the EEC Common Fisheries Policy, and elude the restrictions placed on Spanish fishing interests under the EEC-Spain Fisheries Agreement of

requirement of form for legislation of a certain type. In other words, section 2(1) of the European Communities Act 1972, providing for the recognition of directly applicable Community law as part of English law, has been entrenched by the stipulation in section 2(4) that 'any enactment passed or to be passed . . . shall be construed and have effect subject to the foregoing provisions of this section.' Maugham L.J.'s dictum in *Ellen Street Estates v. Minister of Health* that 'the legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation' must now be treated as subject to that (limited) qualification.

Allan, *supra* note 55, at 564 (citation omitted).

98. *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1989] 2 C.M.L.R. 353, 357-60 (Div. Ct.).

99. *Regina v. Secretary of State for Transport ex parte Factortame*, Case C-213/89, 1989 E.C.R. ___, Common Mkt. Rep. [1990] CEC 189, 190.

100. Merchant Shipping Act, 1894, 57 & 58 Vict., ch. 60.

101. *See Factortame*, [1989] 2 C.M.L.R. at 367.

1980 and the Iberian Act of Accession of 1985.¹⁰²

In 1988, Parliament radically altered the statutory scheme governing the registration of British fishing vessels in the Merchant Shipping Act 1988 (the "1988 Act")¹⁰³ and the Merchant Shipping Regulations 1988.¹⁰⁴ The objective of the new legislation was to stop this practice, known as "quota hopping," whereby the U.K. fishing quotas were "plundered" by vessels that flew the British flag or were registered in the United Kingdom yet lacked any genuine link with the United Kingdom.¹⁰⁵ The 1988 Act directed that a fishing vessel only could be registered as British if the vessel was British-owned and managed and its operations were directed from within the United Kingdom.¹⁰⁶ Under the new legislation, the appellants would lose their existing registration and licenses and be forced out of business.¹⁰⁷ In December 1988, the appellants challenged the 1988 legislation on the ground that it infringed

102. See Churchill, *Quota Hopping: The Common Fisheries Policy Wrongfooted?*, 27 COMMON MKT. L. REV. 209, 210-12 (1990).

103. Merchant Shipping Act 1988, ch.12.

104. Merchant Shipping Regulations 1988 —; *Factortame*, Case C-213/89, 1989 E.C.R. —, Common Mkt. Rep. [1990] 2 CEC at 190-91.

105. *Id.* at 191.

106. *Factortame*, Case C-213/89, 1989 E.C.R. —, Common Mkt. Rep. [1990] 2 CEC at 191. As summarized in the Report for the Hearing of the Court of Justice, the conditions laid down in section 14 of the 1988 Act that must be fulfilled cumulatively are as follows:

a) *Nationality*

The legal title to the vessel must be vested wholly in qualified British citizens or companies.

At least 75% of the beneficial ownership of the vessel must be vested in qualified British citizens or companies.

A company is "qualified" if it is incorporated in the UK and has its principal place of business there, and if at least 75 per cent of its shares are held by legal owners and beneficial owners who are British citizens. Furthermore, at least 75 per cent of its directors must be British citizens.

The figure of 75 per cent may be raised provisionally to 100 per cent pursuant to regulations adopted under the 1988 Act. The UK has not yet availed itself of this possibility.

That nationality requirement also applies to a charterer or operator of the vessel, whether he be a natural person or a company.

b) *Residence and Domicile*

This is a further requirement along with nationality.

c) *Direction and Control*

The vessel must be managed, and its operations directed and controlled, from the UK.

Id.

107. *Id.*

various directly effective Community rights including those relating to the prohibition of discrimination on grounds of nationality and the freedom of establishment of companies.¹⁰⁸

B. Procedural Background

In addition to the challenge of the 1988 legislation, the appellants applied for a grant of interim relief pending a final determination of the issues.¹⁰⁹ The Divisional Court of the Queen's Bench Division sought a preliminary ruling from the Court of Justice on the question of the substantive extent of the claimed EEC rights.¹¹⁰ The Divisional Court granted interim relief and disapplied the 1988 Act because it might take months or years for the Court of Justice response to be given.¹¹¹ The Divisional Court restrained the Secretary of State from enforcing the 1988 Act, and allowed the appellants to fish as British vessels under the Merchant Shipping Act 1894 pending the final determination of their rights under Community law.¹¹² In his concurrence, Judge Hodgson observed that a court that has jurisdiction to make a final order disapplying the provision of a U.K. statute should also have jurisdiction to make an interim order to the same temporary effect.¹¹³

In March 1989, the Secretary of State appealed from the Divisional Court's injunctive order, and the Court of Appeal

108. *Id.* The appellants relied upon EEC Treaty Articles 7 (prohibiting discrimination on grounds of nationality), 52 (freedom of establishment of nationals of Member State in territory of another Member State), 58 (freedom of establishment of companies of Member State in territory of another Member State) and 221 (requiring equality of treatment as regards participation in the capital of companies). See *Regina v. Secretary of State ex parte Factortame Ltd.*, [1989] 2 C.M.L.R. 353, 362 (Div. Ct.).

109. *Regina v. Secretary of State ex parte Factortame Ltd.*, Case C-213/89, 1989 E.C.R. —, Common Mkt. Rep. [1990] 2 CEC 189, 191.

110. See *id.*; see also *Regina v. Secretary of State for Transport, ex parte Factortame, Ltd.*, Case C-221/89, action brought July 17, 1989 (judgment not yet delivered).

111. *Factortame*, [1989] 2 C.M.L.R. at 384 (Div. Ct.).

112. *Id.*

113. *Id.* at 381. Judge Hodgson said that

[i]n any case I find it difficult to believe that a court which has jurisdiction to make a final order disapplying the provisions of an English statute does not also have jurisdiction in a proper case to make an interim order to the same temporary effect. If the court is not constrained by authority, and I believe it is not, it seems to me clear that to deny the court the power to make an interim order would be wrong.

Id.

held that the Divisional Court did not have the power to disapply an act of Parliament.¹¹⁴ The Court of Appeal noted that prior to accession to the Community, U.K. courts had no jurisdiction to dispense with the operation of a statute.¹¹⁵ Furthermore, the Court of Appeal believed that there was no express or implied principle—in the Treaty, in the European Communities Act 1972, or in the jurisprudence of the Court of Justice—empowering a national court to override national law in favor of alleged but not yet finally determined Community rights.¹¹⁶ The Court of Appeal conceded that if the Court of Justice upheld the appellants' claimed Community rights, those rights would prevail over the restrictions of the 1988 Act, and subsequently the Divisional Court would be obliged to enforce those rights.¹¹⁷ The Court of Appeal stressed, however, that unless and until the Court of Justice established that the U.K. statute was incompatible with Community law, the statute remained inviolable and could not be disapplied by the Divisional Court.¹¹⁸

The House of Lords, affirming the Court of Appeal, held that under traditional U.K. common law concepts, U.K. courts may not suspend the operation of a U.K. statute.¹¹⁹ In addition, the Lords held that U.K. law does not permit U.K. courts to issue interim injunctions against the Crown in either civil proceedings or in proceedings on an application for judicial review.¹²⁰

As for the application of Community law, the House of Lords confirmed that under section 2(1) of the European Communities Act 1972, directly enforceable Community rights must be granted full recognition in the United Kingdom.¹²¹ The Lords also confirmed that under section 2(4) of the European Communities Act 1972, acts of Parliament passed subsequent to the European Communities Act 1972 must be con-

114. *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1989] 2 C.M.L.R. 392, 407 (C.A.).

115. *Id.* at 404.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1989] 3 C.M.L.R. 1, 13-14 (H.L.).

120. *Id.* at 20-22.

121. *Id.* at 10.

strued and enforced subject to directly enforceable Community rights.¹²² The Lords observed that an act passed subsequent to the European Communities Act 1972 must be read as if a section were incorporated in the act which provided that its provisions are consistent with directly enforceable EEC rights.¹²³ Thus, said the Lords, if the appellants succeed in establishing the alleged EEC rights, these rights would prevail over the restrictions of the subsequent act.¹²⁴

The House of Lords stressed, however, that if the disputed U.K. statute is clear and self-executing, as was the 1988 Act, U.K. law requires that U.K. courts observe the presumption that an act of Parliament is compatible with Community law until it is declared incompatible by the Court of Justice.¹²⁵

122. *Id.* Lord Bridge said for the House of Lords that [b]y virtue of section 2(4) of the Act of 1972 Part II of the Act of 1988 is to be construed and take effect subject to directly enforceable Community rights and those rights are, by section 2(1) of the Act of 1972, to be 'recognised and available in law, and . . . enforced, allowed and followed accordingly; . . .' This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member-State of the EEC. Thus it is common ground that, in so far as the appellants succeed before the [Court of Justice] in obtaining a ruling in support of the Community rights which they claim, those rights will prevail over the restrictions imposed on registration of British fishing vessels by Part II of the Act of 1988 and the Divisional Court will, in the final determination of the application for judicial review, be obliged to make appropriate declarations to give effect to those rights.

Id.

123. *Id.*

124. *Id.*

125. *Id.* at 13. As Lord Bridge explained,

[i]n this situation the difficulty which confronts the appellants is that the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid. But an order granting the appellants the interim relief which they seek will only serve their purpose if it declares that which Parliament has enacted to be the law from 1 December 1988, and to take effect in relation to vessels previously registered under the Act of 1894 from 31 March 1989, not to be the law until some uncertain future date. Effective relief can only be given if it requires the Secretary of State to treat the appellants' vessels as entitled to registration under Part II of the Act in direct contravention of its provisions. Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the appellants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the [Court of Justice] has been given.

The House of Lords noted that an order granting the requested interim relief effectively would declare that which Parliament has enacted to be the law not to be the law pending the Court of Justice's judgment.¹²⁶ The Lords viewed the presumption of validity which attaches to acts of Parliament as the chief obstacle to the granting of interim protection.¹²⁷

Consequently, the House of Lords held that the appeal must be dismissed unless there is an overriding principle of Community law that compels national courts to assert the power to provide interim relief for alleged but not yet finally determined EEC rights.¹²⁸ The Lords decided that the appellants erroneously relied on Court of Justice jurisprudence which suggested that rules of national law hindering the exercise of directly enforceable Community rights must be overridden.¹²⁹ Nevertheless, the Lords agreed that Article 177 of the Treaty required them to seek a preliminary ruling from the Court of Justice to determine whether, in circumstances such as these, Community law either empowers or requires a national court to make an interim order protecting claimed, but not yet determined, directly effective rights.¹³⁰

Id.

126. *Id.*

127. *Id.*

128. *Id.* at 14.

129. *Id.* at 22-23. The Lords were persuaded by the U.K. Solicitor General, who, in his analysis of the Court of Justice's case law, argued that the Community law propositions on which the appellants relied were inapposite. *Id.* The Solicitor General argued that the Community law rules on which the appellants relied were all made by reference to rights which the Court of Justice was itself then affirming, or by reference to the protection of rights whose existence had already been established by previous Court of Justice judgments. *Id.* at 23.

130. *Id.* at 23-24. The House of Lords referred the following questions to the Court of Justice:

1. Where—(i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law ('the rights claimed'), (ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under Article 177 as to whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim pro-

C. *The Judgment of the Court of Justice and the Opinion of Advocate General Tesouro*

In a concise judgment, the Court of Justice interpreted the question before it to be whether a national court that believes that a rule of national law is the sole obstacle preventing it from granting interim relief in a case concerning Community law must disapply that rule.¹³¹ The manner in which the Court of Justice rephrased the House of Lords' question allowed it to rule that national courts must have the power to grant interim relief without addressing the second part of the Lords' question concerning the criteria national courts must employ in deciding whether to grant such relief.¹³² The question thus formulated, the Court of Justice held that a national court confronting an issue of Community law must set aside any national rule that it considers to be the sole obstacle preventing it from granting interim relief.¹³³ As Professor Toth observes, it is doubtful whether the judgment, as formulated, provides the legal basis for U.K. courts to create the necessary jurisdiction to grant interim relief where none existed before.¹³⁴

tection, does Community law either (a) oblige the national court to grant such interim protection of the rights claimed; or (b) give the court power to grant such interim protection of the rights claimed? 2. If question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?

Id. In August 1989, the Commission of the European Communities brought an Article 169 action against the United Kingdom alleging infringement of Community law by the nationality provisions of the 1988 Act, and applied to the Court of Justice for an interim injunction under Article 186 for suspension of enforcement of those provisions. See *Re Nationality of Fishermen: Commission v. United Kingdom*, Case 246/89R, 1989 E.C.R. __, [1989] 3 C.M.L.R. 601. The President of the Court of Justice, Ole Due, granted the requested injunction to suspend application of the contested nationality requirements. *Id.* at 610. Parliament complied with the President's order and amended the 1988 Act to give effect to that order. Merchant Shipping Act 1988 (Amendment) Order 1989, S.I. 1989 No. 2006.

131. *Regina v. Secretary of State for Transport ex parte Factortame*, Case C-213/89, 1989 E.C.R. __, Common Mkt. Rep. (CCH) [1990] CEC 189, 220.

132. *Id.*

133. *Factortame*, Case C-213/89, 1989 E.C.R. __, Common Mkt. Rep. (CCH) [1990] 2 CEC at 221.

134. See Toth, *Court of Justice Decision in Factortame*, 27 COMMON MKT. L. REV. 573, 586 (1990). Professor Toth states that

[i]t is clear from the judgments of the Court of Appeal and of the House of Lords that the main difficulty encountered by them was not so much that English law contained a *positive* rule preventing the courts from granting in-

The Court of Justice rested its conclusion upon two main points of Community law.¹³⁵ The Court of Justice first reiterated its established precedent that the manner of the protection of directly effective rights depends, under Article 5 principles of cooperation, upon national procedural and substantive law.¹³⁶ To this effect, the Court of Justice cited its 1980 judgments in *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.*¹³⁷ and *Amministrazione delle Finanze dello Stato v. MIRECO*.¹³⁸ *Ariete* and *MIRECO* both cite the established principle that in the absence of Community norms governing a particular area of law, each national legal system must designate the courts and procedures necessary to protect directly effective Community rights.¹³⁹ It is a corollary of this principle that such national conditions cannot be less favorable than those relating to similar actions of a domestic nature.¹⁴⁰ Under no circumstances, however, may national conditions be such as to make the exercise of directly effective Community rights practically impossible.¹⁴¹

The Court of Justice recalled its holding in *Simmenthal II* that directly applicable rules of Community law render automatically inapplicable any conflicting national provisions and must be fully and uniformly applied throughout the Community.¹⁴² The Court of Justice emphasized the principle in *Sim-*

terim injunctions against the Crown as the *absence of jurisdiction to do so*. . . . The problem is that "setting aside" (or "disapplying") an existing rule cannot, by the nature of things, have the legal effect of creating jurisdiction for the courts where none existed before. This requires some positive, creative action: the courts must "devise" a remedy. Will the judgment, as formulated, provide a legal basis for the courts to do so?

Id. (emphasis in original).

135. *Factortame*, Case C-213/89, 1989 E.C.R. ___, Common Mkt. Rep. (CCH) [1990] 2 CEC at 221.

136. *Id.*

137. Case 811/79, 1980 E.C.R. 2545, Common Mkt. Rep. (CCH) ¶ 8693.

138. Case 826/79, 1980 E.C.R. 2559, Common Mkt. Rep. (CCH) ¶ 8694.

139. *Ariete*, Case 811/79, 1980 E.C.R. at 2554, Common Mkt. Rep. (CCH) ¶ 8308 (citing *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, Case 33/76, 1976 E.C.R. 1989, Common Mkt. Rep. (CCH) ¶ 8382, and *Comet BV v. Produktschap voor Siergewassen*, Case 45/76, 1976 E.C.R. 2043, Common Mkt. Rep. (CCH) ¶ 8383).

140. *Ariete*, Case 811/79, 1980 E.C.R. at 2555, Common Mkt. Rep. (CCH) at 8308; *MIRECO*, Case 826/79, 1980 E.C.R. at 2575, Common Mkt. Rep. (CCH) ¶ 8319.

141. *Id.*

142. *Regina v. Secretary of State for Transport ex parte Factortame Limited*, Case C-213/89, 1989 E.C.R. ___, Common Mkt. Rep. (CCH) [1990] 2 CEC 189, 221.

menthal II that any national legal or judicial practice that might hinder the effectiveness of Community law by withholding from a national court the "power to do everything necessary" forthwith to set aside conflicting national law is itself incompatible with Community law.¹⁴³ The Court of Justice applied this principle to the rule of U.K. law according to which U.K. courts, even in cases governed by Community law, lack the jurisdiction to order the temporary disapplication of national law.¹⁴⁴ The Court of Justice thus concluded that "a court which in those circumstances would grant interim relief," were it not for the national rule, must disapply that rule.¹⁴⁵ The Court of Justice left unaddressed, however, the question of how a national court would decide whether or not such circumstances were present in a given situation.¹⁴⁶

In his opinion, the Advocate General noted that the two obstacles to the exercise by U.K. courts of the power to grant interim relief were the presumption of validity that attaches to a statute until a final determination is made, and the impossibility of granting an injunction against the Crown.¹⁴⁷ The Advocate General restricted his discussion to the interim protection of rights claimed under directly effective Community law.¹⁴⁸ The Advocate General observed that effective interim

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 205. The Advocate General phrased the precise question before the Court in the following terms:

Pending a ruling by the Court of Justice on the interpretation of provisions of Community law having direct effect, and where UK law does not permit the national court to suspend, by way of interim relief, the application of the allegedly conflicting national measure and thus, provisionally, to acknowledge an individual's right claimed under Community law but denied by national law: i) must (or may) the national court grant such relief on the basis of Community law? ii) If so, applying what criteria?

Id. at 203.

148. *Id.* at 206. The interpretation of the substantive Treaty provisions relied upon by the appellants was the subject of separate proceedings before the Court of Justice. See *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-221/89, action brought July 17, 1989 (judgment not yet delivered).

In 1986, the British government enacted legislation designed to control "quota hopping" by introducing new crewing, social security, and operating conditions for vessels fishing against U.K. quotas. See Churchill, *supra* 102, at 214-15. These conditions were challenged before U.K. courts for their compatibility with Community law. *Id.* at 219. In each of the cases the court made reference under Article 177 to the

relief is available in all Member States,¹⁴⁹ save possibly Denmark and the United Kingdom, and concluded that a national court must have the power to set aside provisionally a national law that conflicts with Community law.¹⁵⁰

The Advocate General's opinion first reiterated the principle in *Simmenthal II* that directly effective Community provisions confer enforceable legal rights on individuals from the date of their entry into force, regardless of contrary national provisions.¹⁵¹ The Advocate General stressed, however, that he would not engage in a "sterile dialectical discussion" of the theoretical basis of the supremacy of Community law.¹⁵² The Advocate General noted that in this case at least, the effective protection of Community rights is more important than the theoretical basis upon which it rests.¹⁵³

The Advocate General recalled that national procedures must be able to ensure the practical exercise of rights that the national courts are obliged to protect.¹⁵⁴ The Advocate Gen-

Court of Justice. *Id.* The validity of the crewing and social security conditions was challenged in *Regina v. Ministry of Agriculture, Fisheries and Food ex parte Agegate Ltd.*, Case C-3/87, 1989 E.C.R. ___, [1990] 1 C.M.L.R. 366. In *Agegate*, the Court of Justice upheld the validity of the social security condition but invalidated the crewing condition. *Agegate*, [1990] 1 C.M.L.R. at 399-400. The validity of the operating conditions was challenged, and upheld, in *Regina v. Ministry of Agriculture, Fisheries and Food ex parte Jaderow Ltd.*, Case C-216/87, [1990] 3 W.L.R. 265.

149. *Regina v. Secretary of State for Transport, ex parte Factortame Limited*, Case C-213/89, 1989 E.C.R. at ___, [1990] 2 C.E.C. 189, 212.

150. *Id.* at 214-15.

151. *Id.* at 206.

152. *Id.* The Advocate General said that "[w]hat matters, in so far as is relevant in this case, is that the national court is obliged to afford judicial protection to the rights conferred by a Community provision as from the entry into force of that provision and for so long as it continues in force." *Id.*

153. *Id.*

154. *Id.* at 207; see *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, Case 33/76, 1976 E.C.R. 1989, Common Mkt. Rep. (CCH) ¶ 8382; see also *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.*, Case 61/79, 1980 E.C.R. 1205, Common Mkt. Rep. (CCH) ¶ 8665. The Court of Justice stated in *Denkavit* that

[i]n the absence of Community rules concerning the contesting or the recovery of national charges which have been unlawfully demanded or wrongfully levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and that *under no circumstances may they be so adapted as to make*

eral noted that, absent a harmonized system of procedure, the methods for protecting Community rights remain those provided by the domestic law of Member States.¹⁵⁵ The Advocate General stressed, however, that this principle requires that national procedures be as favorable to Community rights as those procedures applying to the protection of national rights.¹⁵⁶ The Advocate General's opinion recalled the principle in *Simmenthal II* that national courts must apply EEC law either through available national methods or, failing that, of their own motion.¹⁵⁷

The third element of the Advocate General's opinion focused on the critical role of interim relief in any judicial system.¹⁵⁸ The Advocate General noted the gap between the point in time when a Community right comes into existence and later, when the existence of the right is definitively established.¹⁵⁹ The Advocate General stated that under the Article 177 procedure, judicial review only postpones the establishment of the right to a later point in time.¹⁶⁰ Once established, the right is given retroactive effect.¹⁶¹ The Advocate General

it impossible in practice to exercise the rights which the national courts are bound to protect.

Id. at 1226, Common Mkt. Rep. (CCH) ¶ 8665, at 7879 (emphasis added).

155. *Regina v. Secretary of State for Transport, ex parte Factortame Limited*, Case C-213/89, 1989 E.C.R. —, Common Mkt. Rep. (CCH) [1990] 2 CEC 189, 206-07.

156. *Id.* at 207.

157. *Id.*; see *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, 1978 E.C.R. 629, ¶ 22, Common Mkt. Rep. (CCH) ¶ 8476.

158. *Factortame*, Case C-213/89, 1989 E.C.R. —, Common Mkt. Rep. (CCH) [1990] 2 CEC at 211.

159. *Id.* at 208-09. The Advocate General noted that

[t]he problem arises from the fact that in a structured and intricate context which a modern system of judicial protection demands there is a *lack of contemporaneity* between the two points in time which mark the course of the law, namely the point when the right comes into *existence* and the point (later on) when the existence of the right is (definitively) *established*.

Id. (emphasis in original).

160. *Id.* at 209.

161. *Id.* The Advocate General noted that

[w]hat is important to stress is that at the time when an application is made the right already exists (or does not) and the provision which confers that right on (or denies it to) the individual is lawful or unlawful. The procedure for judicial review merely postpones the establishment of the existence of the right, that is to say its full and effective operation, to a later point in time and subject to the "retroactivity" of the effects of the actual establishment of the right.

noted that this is also true in a national system when a decision must be made between two or more applicable, but conflicting, provisions.¹⁶² In this situation, the Advocate General added, the ultimately applicable provision is deemed to have been effective when the petition for review was made, because at that time only the establishment of the right, and not its existence, was lacking.¹⁶³ The Advocate General observed that the very purpose of interim relief is to ensure that the time needed to establish the existence of the right does not irremediably deprive the right of substance.¹⁶⁴ This applies especially where, as here, the determination of the existence of the right involves the prior review of the validity, or compatibility, of one provision *vis-à-vis* another of a higher order.¹⁶⁵

The Advocate General argued that the U.K. "presumption of validity" of acts of Parliament was not an obstacle to the interim protection of enforceable legal rights.¹⁶⁶ The Advocate General noted that it is precisely because a presumption is involved that an interim remedy is needed to compensate for the fact that the final ruling establishing the Community right may come too late to benefit the successful party.¹⁶⁷ Where a national provision allegedly conflicts with another "of a higher order or having precedence," both the national and the "higher" provision hypothetically apply from the moment the petition for judicial review is made.¹⁶⁸ The Advocate General stated that the presumption of validity attaches to both—in this case an act of Parliament and Community provisions—and that both give rise to putative rights.¹⁶⁹

Id.

162. *Id.*

163. *Id.*

164. *Id.* at 210.

165. *Id.* at 211.

166. *Id.*

167. *Id.*

168. *Id.* at 212.

169. *Id.* Advocate General Tesauro stated that

[i]n a procedural situation of the type with which we are concerned here, in which one provision is alleged to be incompatible with another of a higher order or having precedence, it is *essential*, as has already been stressed, *to bear in mind the fact that both provisions hypothetically apply to the case in question from the moment when the application is made.* That is especially so since the final determination, whose consequences are made to take effect from the time of the application, creates nothing new as regards the existence (or the non-exist-

The Advocate General concluded that the national court must have the power and the discretion to assess whether the nature of the right alleged is such that interim protection must be granted or refused.¹⁷⁰ This depends on the extent to which each provision appears to be valid, as well as the possibility and severity of prejudice to the competing parties' interests if a provisional remedy is denied.¹⁷¹ Consequently, if a national court must disapply a national law when it is found to conflict with a directly effective Community provision, then that court must also be able to disapply that law provisionally pending the preliminary ruling of the Court of Justice.¹⁷²

ence) of the right claimed because the provisions in point are hypothetically valid and operative in the alternative (or invalid and inoperative) and to both is attached what is commonly called a presumption of validity, whilst what is postponed, owing to the time taken by the proceedings, is merely the point in time at which the final determination is made.

Id. (emphasis in original).

170. *Id.*

171. *Id.* The Advocate General noted that

[t]o give priority to the national legislation merely because it has not yet been definitively established as incompatible with Community law—and thus to proceed on the basis merely of a putative compatibility—may amount to depriving the Community rules of the effective judicial protection which is to be afforded to them “from the date of their entry into force and for so long as they continue in force.” Paradoxically, the right conferred (putatively) by the provision of Community law would as a general rule receive less, or less effective, protection than the rights conferred (also putatively) by the provision of national law.

Id. at 214 (emphasis in original). Advocate General Tesauro further observed that the majority of Member States already provide the interim protection of rights denied under a lower ranking provision, but claimed under a higher ranking provision.

Id. at 212. He added that

there is no doubt that, by means of preliminary rulings given by the Court of Justice and the “direct” competence of national courts, machinery has been introduced which essentially consists of the review of the validity (or of compatibility, if this is preferred) of a national provision in relation to a Community provision, given that the national courts have jurisdiction to rule definitively that the former is incompatible with the latter. And if therefore the national courts may, indeed must, disapply a national law which conflicts with a Community provision having direct effect, once a definitive finding has been made to that effect (or, at any rate, must achieve that substantive result), they must also be able to disapply that law provisionally, provided that the preconditions are satisfied, where the incompatibility is not entirely certain or “established” but may call for a preliminary ruling by the Court of Justice.

Id. at 213-14.

172. *Id.* The Advocate General proposed the following answers to the House of Lords' questions:

III. THE FACTORTAME JUDGMENT DOES NOT
DIRECTLY CONFRONT THE U.K. VIEW OF
PARLIAMENTARY SOVEREIGNTY, BUT
U.K. COURTS RECOGNIZE THE
SUPREMACY OF COMMUNITY LAW

A. *The Immediate Consequence of Factortame*

The immediate consequence of *Factortame* is to vest U.K. courts with the jurisdiction to order the temporary disapplication of any provision of national law which the court believes may conflict with Community law.¹⁷³ As such, the judgment can be viewed in Community law terms as a fairly narrow one that has a solid basis in established Court of Justice case law.¹⁷⁴ The judgment, therefore, is an extension of Court of Justice jurisprudence that already required the effective protection of Community and national rights.¹⁷⁵ In *Simmmenthal II*, for exam-

1) The obligation imposed by Community law on the national court to ensure the effective judicial protection of rights directly conferred on the individual by provisions of Community law includes the obligation, if the need arises and where the factual and legal preconditions are met, to afford interim and urgent protection to rights claimed on the basis of such provision of Community law, pending a final determination and any interpretation by way of a preliminary ruling given by the Court of Justice.

2) In the absence of Community harmonisation, it is the legal system of each member state which determines the procedural methods and the preconditions for the interim protection of rights vested in individuals by virtue of provisions of Community law having direct effect, on condition that those methods and preconditions do not make it impossible to exercise on an interim basis the rights claimed and are not less favourable than those provided for in order to afford protection to rights founded on national provisions, any provision of national law or any national practice having such an effect being incompatible with Community law.

Id. at 217-18; see *supra* note 130 (containing questions posed by House of Lords).

173. See Toth, *supra* note 134, at 583 (noting strong Court of Justice precedent favoring availability of interim relief under Community law).

174. *Id.* at 585-86; see Barav, *Enforcement of Community Rights in the National Courts: The Case for Jurisdiction to Grant an Interim Relief*, 26 COMMON MKT. L. REV. 369, 379 (1989) (noting that presumption of validity of national legislation may not deprive courts of power to grant interim relief); Francis, *United Kingdom Case Note-Factortame* 84 AM. J. INT'L L. 269, 274 (1990) (arguing for propriety under Community law of national court jurisdiction to entertain requests for interim protection); Hanna, *Community Rights All At Sea*, 106 L.Q.R. 2, 8 (1990) (advocating availability under Community law of interim injunction against Crown); Lewis, *Case and Comment—Statutes and the EEC: Interim Relief and the Crown*, 48 CAMBRIDGE L. J. 347, 349 (1989) (advocating court jurisdiction to grant interim relief against Crown under U.K. law).

175. See *infra* note 180 (discussing requirement of effective protection of Community rights under Court of Justice jurisprudence).

ple, the Court of Justice already had precluded the valid adoption of subsequent inconsistent national law.¹⁷⁶ The Court of Justice required that national courts be able to give full and automatic effect to Community rules by refusing, of their own motion, to apply any conflicting national rules.¹⁷⁷

Moreover, in *Salgoil S.p.A. v. Italian Ministry for Foreign Trade*,¹⁷⁸ the Court of Justice held that national courts must protect persons subject to their jurisdiction who may be affected by a possible infringement of the Treaty by ensuring the "direct and immediate" protection of their interests.¹⁷⁹ *Salgoil* and its progeny stand for the proposition that any national rule or procedure which denies national courts the ability to provide effective protection of Community rights violates Community law.¹⁸⁰ In *UNECTEF v. Heylens*,¹⁸¹ for example, the Court of Justice said that the existence of a judicial remedy against any decision of a national authority refusing the benefit of a fundamental and directly effective right is essential for its effective protection.¹⁸² In *Johnston v. Chief Constable of the Royal Ulster Constabulary*,¹⁸³ the Court of Justice had stated that the Member States are obliged to ensure that appropriate legislation and effective judicial procedures exist to give effect to Community rights.¹⁸⁴

B. Does the U.K. Approach to Supremacy Survive?

The *Factortame* judgment does not directly invalidate the United Kingdom's "interpretative" and dualist approach to ac-

176. *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, 1978 E.C.R. 629, Common Mkt. Rep. (CCH) ¶ 8476.

177. *Id.*

178. Case 13/68, 1968 E.C.R. 453, Common Mkt. Rep. (CCH) ¶ 8072.

179. *Id.* at 463, Common Mkt. Rep. (CCH) ¶ 8072, at 8063.

180. *See, e.g.*, *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.*, Case 811/79, 1980 E.C.R. 2545, Common Mkt. Rep. (CCH) ¶ 8693; *see* *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio*, Case 199/82, 1983 E.C.R. 3595, Common Mkt. Rep. ¶ 14,045; *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, Case 33/76, 1976 E.C.R. 1989, Common Mkt. Rep. (CCH) ¶ 8382; *Comet BV v. Produktschap voor Siergewassen*, Case 45/76, 1976 E.C.R. 2043, Common Mkt. Rep. (CCH) ¶ 8383; *see also* *Barav*, *supra* note 174, at 379.

181. Case 222/86, 1987 E.C.R. 4097, Common Mkt. Rep. (CCH) [1989] 1 CEC 131.

182. *Id.* at 411, Common Mkt. Rep. (CCH) [1989] 1 CEC at 145.

183. Case 222/84, 1986 E.C.R. 1651, Common Mkt. Rep. (CCH) ¶ 14,304.

184. *Id.* at 1682, Common Mkt. Rep. (CCH) ¶ 14,304, at 16,887.

comodating directly effective EEC law.¹⁸⁵ A central aspect of the United Kingdom and the House of Lords' position was the presumption, based on the express language of the European Communities Act 1972, that an act of Parliament is to be interpreted consistently with EEC law unless and until it has been declared to be incompatible.¹⁸⁶ The Lords thus accepted that an act of Parliament must be construed consistently with EEC law after the Court of Justice has delivered its Article 177 ruling.¹⁸⁷ Because the Court of Justice's ruling under Article 177 is only declarative of what Community law has been since coming into effect,¹⁸⁸ the ruling does not change the substance of Community law.¹⁸⁹ There is no reason, therefore, to exclude the possibility of interim relief because, as both national and Community provisions hypothetically apply pending the ruling, the possibly applicable act of Parliament can be construed consistently with the claimed Community rights without further infringing the "validity" of the act.¹⁹⁰

The *Factortame* judgment only seems to require that U.K. courts possess the jurisdiction to apply the same "interpreta-

185. See Toth, *supra* note 134, at 585 ("Therefore, when a court in the United Kingdom sets aside [a conflicting] Act of Parliament, whether temporarily or definitively . . . such a court merely obeys a 'command' given to it by Parliament itself (which 'command' continues to bind the courts as long as the 1972 Act remains in force)."); see Gravells, *Disapplying An Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?*, PUB. L. 568 (1989); see also Tillotson, "Fish, Please, But No Beef": *Recent Controversial Issues Affecting Intra-Community Trade*, 13 WORLD COMP. L. & ECON. REV. 33, 50 (1990).

186. *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1989] 3 C.M.L.R. 1, 23 (H.L.).

187. *Id.* at 23-24.

188. See *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.*, Case 61/79, 1980 E.C.R. 1205, Common Mkt. Rep. (CCH) ¶ 8665. The Court of Justice in *Denkavit* noted that

[t]he interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied.

Id. at 1223, Common Mkt. Rep. (CCH) ¶ 8665, at 7877-78.

189. See Gravells, *supra* note 185, at 580.

190. *Id.* at 581-83.

tive" method to disapply an act of Parliament at an earlier stage in the review process.¹⁹¹ The interpretative U.K. approach does not challenge Parliament's sovereignty because the question of the validity of the subsequent Parliamentary legislation does not arise.¹⁹² In an interim relief situation, and absent evidence of expressly contrary intent, the validity of the hypothetically applicable act is also unaffected because the act can be "construed" consistently with Community law pending the Article 177 ruling. Moreover, the practical protection of Community rights is assured because the court temporarily disapplies an "unclear" or "ambiguous" act of Parliament.¹⁹³ The required interim protection can thus be justified in reliance upon sections 2 and 3 of the European Communities Act 1972 without any further compromise of the "validity" of acts of Parliament.¹⁹⁴

C. *The Sovereignty of Parliament Is Subject to the Rule of Community Law*

The compatibility of the *Factortame* judgment with the traditional U.K. approach to supremacy may suggest that the Court of Justice is willing to countenance differing theoretical approaches to the supremacy of Community law among the legal systems of the Member States.¹⁹⁵ Any such willingness, however, depends on the assurance of the effective protection

191. See Toth, *supra* note 134, at 585.

192. See *supra* note 55 and accompanying text (discussing inability of U.K. courts to question validity of acts of Parliament). Professor Gravells argues that when the determination of the existence of a right involves a choice between two provisions of a higher and lower order, there can be no presumption as to the effect of either. Gravells, *supra* note 185, at 580-81. Professor Gravells observed that

[u]ntil a national court, or the European Court, has ruled definitively on the interpretation of Community law in the context of the 1988 Act, the position is simply that the *meaning* of the Act is unclear. And it is precisely in such a situation that it would seem to be appropriate for a court to grant interim relief in order to protect, so far as possible, the relevant interests.

Id. at 581 (emphasis in original).

193. Gravells, *supra* note 185, at 581.

194. *Id.*

195. In the view of Judge Kakouris, for example, "[l]a Cour de justice n'a pas en effet pour rôle de procéder à des constructions doctrinales, mais de procéder à la solution des questions concrètes qui lui ont été soumises. La synthèse de la jurisprudence de la Cour de justice . . . est fondée sur cette méthode d'approche." Kakouris, *supra* note 3, at 330.

of Community rights.¹⁹⁶ It might be suggested that Advocate General Tesaurò's practical perspective represents a certain judicial restraint that may distinguish the present Court of Justice from that of the 1960s and 1970s.¹⁹⁷ Nevertheless, the emphasis of the *Factortame* judgment upon the principles of *Simmenthal II* suggests that monist reasoning remains essential to the Court of Justice's jurisprudence in its treatment of the relationship of Community and national law.

Although the *Factortame* judgment seems compatible with the U.K. "interpretative" approach to supremacy, and thus with the traditional view of the sovereignty of Parliament, the Court of Justice appears to have effectively limited the practical value of these approaches. In *Murphy v. Bord Telecom Eireann*,¹⁹⁸ the Court of Justice held that a national court must, where possible, interpret and apply domestic law in a manner consistent with Community law.¹⁹⁹ To the extent that such interpretation is not possible, however, *Murphy* held that the national court must disapply the conflicting domestic law.²⁰⁰ Community law since *Costa* requires a national court to disapply a conflicting national law when such a law cannot, even under an interpreta-

196. See *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-213/89, 1989 E.C.R. __, Common Mkt. Rep. (CCH) [1990] 2 CEC at 206-07.

197. Rasmussen, *supra* note 3, at 37-38. Professor Rasmussen comments that in its endeavour to "make Europe" the European Court [has gone] too far too often. In defiance of much European tradition, the European Court engaged in a teleological, pro-Community crusade, the banner of which featured a deep involvement which led it to give primacy to pro-integrationist public policies over competing ones that were often, even outside of the ring of losing litigants, considered as meriting some protection. Moreover, this engagement seemed to increase throughout the 1970s despite the emergence of numerous warning signs indicating that society was in the process of undergoing change away from the immediate post World War II ideologies so favourable to the inception of the European Communities with their professed supranational aspirations.

Id. at 37.

198. Case 157/86, 1988 E.C.R. __, Common Mkt. Rep. (CCH) ¶ 14,445.

199. *Id.* at __, Common Mkt. Rep. (CCH) ¶ 14,445, at 18, 156.

200. *Id.* The Court of Justice stated in *Murphy* that

[i]t is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable Community law and, to the extent that this is not possible, to hold such domestic law inapplicable.

Id. (emphasis added).

tive method, be read consistently with Community law.²⁰¹ The Court of Justice thus requires that, where necessary, Community law be able to pierce the veil of the interpretative approach.

The willingness of U.K. courts to employ this interpretative practice suggests that they recognize that Parliamentary sovereignty is subject to the rule of Community law.²⁰² Following the Court of Justice's preliminary ruling in *Factortame*, in June 1990 the appellants returned to the House of Lords to seek further interim relief relating to the domicile and residence requirements of the 1988 Act.²⁰³ The House of Lords allowed the appeal and granted the requested new interim injunction.²⁰⁴ Lord Goff of Chieveley developed the general principles by which the discretion of U.K. courts should be guided in appropriate situations in deciding whether to grant interim relief.²⁰⁵ While Lord Bridge reiterated that the obligations imposed by Community law on U.K. courts derive from the European Communities Act 1972, he noted explicitly that upon accession to the EEC, Parliament voluntarily accepted the limitations on sovereignty inherent in the EEC Treaty and the jurisprudence of the Court of Justice.²⁰⁶ Lord Bridge's

201. *Id.*

202. A.V. DICEY, *supra* note 11, at 413-14; *see supra* notes 53-61 and accompanying text (discussing relationship between doctrines of sovereignty of Parliament and rule or supremacy of law).

203. *See Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1990] 3 C.M.L.R. 375 (H.L.).

204. *Id.* at 406.

205. *Id.* at 394-98.

206. *Id.* at 379-80. Lord Bridge stated that

[i]f the supremacy within the European Community of Community law over the national law of member-States was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Com-

concise dicta may signal an evolution towards greater acceptance of the legal implications of the "practical politics" of Community membership.

Moreover, judicial respect for the higher constitutional value of Community solidarity is evident in the U.K. judiciary's willingness to fix the scope and content of acts of Parliament by reference to the fundamental principles of Community law.²⁰⁷ The British constitution rests upon the twin pillars of the sovereignty of Parliament and the rule or supremacy of law.²⁰⁸ While U.K. courts must give effect to the clearly expressed intentions of Parliament,²⁰⁹ the requirements of the rule of law are reflected in traditional presumptions that courts have adopted to assist them in ascertaining the meaning of acts of Parliament.²¹⁰ The rule of law requires that ambiguities in the interpretation of statutes be resolved, so far as possible, in accordance with traditional common law notions of fairness and justice.²¹¹ In this manner, judicial adherence to the rule of law in the United Kingdom fulfills a function not unlike the protection afforded by the formal Bill of Rights and the requirements of due process in the U.S. system.²¹² To the extent

munity law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

Id. (citations omitted).

207. See Allan, *The Limits of Parliamentary Sovereignty*, PUB. L. 614, 618-19 (1985); see also Allan, *Parliamentary Sovereignty: Lord Denning's Dexterous Revolution*, 3 OXFORD J. OF LEGAL STUD. 22, 31 (1983) (arguing that "bold and creative statutory interpretation" may indicate acceptance of a limited degree of entrenchment).

208. See *supra* note 18 (discussing Professor Dicey's doctrine of sovereignty of Parliament); Allan, *supra* note 56, at 113 (discussing Professor Dicey's doctrine of supremacy of law).

209. See Allan, *supra* note 56, at 121.

210. See *id.* at 119.

211. Allan, *supra* note 56, at 133.

212. *Id.* at 136; see U.S. CONST. amends. I-X, XIV. Lord Coke's dictum in *Bonham's Case* 8 Co. Rep. 177a, 118a, 77 E.R. 638, 652 (1609), is widely viewed as foreshadowing the U.S. doctrine of judicial review. See Thorne, *Dr. Bonham's Case*, 54 L.Q.R. 543 (1938). According to Professor Thorne, however, Lord Coke in *Bonham's Case* was not appealing to natural or higher law that Parliament could not contravene, but to a familiar common law rule of statutory construction that invalidates statutory "repugnancies" or contradictions. *Id.* at 549. According to Professor Thorne, this general principle of statutory interpretation was best expressed in Lord Coke's celebrated dictum:

And it appears in our books, that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void: For when an act of Parliament is against common right and reason, or re-

that the scope and content of a statute are necessarily incomplete or uncertain upon enactment, U.K. courts interpret legislation, and fix its scope and content in a particular case, consistently with the fundamental values of society and the legal order.²¹³

This rule of interpretation that limits the scope of acts of Parliament in deference to basic principles of political morality is similar to the "interpretation" of acts of Parliament according to Community law. Just as the rule of law inhibits Parliament from enacting legislation contrary to fundamental values of the common law, the willingness of U.K. courts to interpret acts of Parliament as subject to Community law signals judicial recognition that the sovereignty of Parliament is subject to the rule of Community solidarity.

CONCLUSION

Legal differences between the Court of Justice and U.K. approaches to the supremacy of Community law continue to exist. In *Factortame*, the Court of Justice, while requiring that U.K. courts exercise the jurisdiction to disapply acts of Parliament temporarily, did not directly disturb the U.K.'s dualist approach to supremacy. Yet the willingness of U.K. courts to interpret, and where the interpretative veil is insufficient, to hold subsequent inconsistent legislation to be subject to Community law, indicates that U.K. courts recognize that parliamentary sovereignty is now subject to the fundamental political value of Community solidarity. The rule or supremacy of

pugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void.

Bonham's Case, 77 E.R. at 652; see Thorne, *supra* at 544. Compare *id.* with Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 31 (1926) ("The solution which Coke found [to curb the rising power of Crown and Parliament] was in the idea of a fundamental law which limited Crown and Parliament indifferently.") and E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 50-53 (1957). Corwin concluded that "[a]t the very least, therefore, we can assert that in *Bonham's Case* Coke deemed himself to be enforcing a rule of construction of statutes of higher intrinsic *validity* than any act of Parliament as such." *Id.* at 50 (emphasis added).

213. Allan, *supra* note 56, at 140. Professor Allan stated that "[p]roblems of ambiguity or omission, if they arise under the language of an Act, should be resolved so as to give effect to, or at the very least so as not to derogate from, the rights recognised by Magna Carta." *Id.* at 136.

Community law may have achieved a status which was once only accorded to Magna Carta.

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