

Fordham International Law Journal

Volume 18, Issue 2

1994

Article 7

Subsidiarity and Sovereignty in the European Union

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Paul D. Marquardt

Abstract

The institutional quick fix may support the nation-state in the short run, but the underlying logic of subsidiarity reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state's claims to loyalty. In reaching this conclusion, this Article first explores the origins and underpinnings of the doctrine of subsidiarity. Second, it examines the application of subsidiarity to the European Community. Finally, it examines the compatibility of the principles developed with today's understanding of sovereignty in Western Europe.

SUBSIDIARITY AND SOVEREIGNTY IN THE EUROPEAN UNION

*Paul D. Marquardt**

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INTRODUCTION

The European Union¹ ("EU") has become a victim of its own success. It has finally begun to realize some of the goals intended by its founders, becoming an important actor in its own right in both European and global politics. The iconic success of the "1992" initiative,² followed closely by the Maastricht Treaty and plans for even further integration in the immediate future, have combined with dramatic shifts in the global order to thrust the European Union into the limelight of European politics. The EU's development as an institution of primary importance to lawyers, bureaucrats, and political scientists, though, did not adequately prepare it for the sudden transformation from an institution of which the European public was more or less dimly aware to the focal point of major policy debates.

Public suspicion of the EU's sudden prominence became painfully obvious during national ratification of the Maastricht

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1. See Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (1992) [hereinafter TEU] (amending the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). The TEU, also known as the Maastricht Treaty, officially adopted the name "European Union" for the former European Communities. TEU, *supra*, art. A.

2. SEA, *supra* note 1.

Treaty. A referendum on the Maastricht Treaty in Denmark actually failed, British parliamentary support was questionable, and even in traditionally pro-EC France a referendum passed by the narrowest of margins.³

Suspicion of the EU tended to focus on two issues: the legitimacy of EU institutions themselves—the “democratic deficit”—and the threat the EU posed to the independence and survival of the member countries. I have discussed the democratic deficit at length elsewhere, and argued that supporters of the European Community advanced “technocratic” solutions that attempted to resolve problems of democratic legitimacy with marginal institutional adjustments rather than genuine efforts to mobilize European publics and involve them in the Community.⁴ The same spirit of the institutional quick fix animates the proposed solution to the tension between the EU and the survival of national polities and societies: the subsidiarity principle.

Subsidiarity is the latest buzzword of Euro-speak. The principle is laid out as follows in the Maastricht Treaty:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁵

The subsidiarity principle is designed to ensure that “decisions are taken as closely as possible to the citizen.”⁶ More broadly, subsidiarity stands as the great limiting principle that will defend national sovereignty against incursion by the ever-expanding Brussels bureaucracy. It will assuage fears that the European

3. See, e.g., *Half-Maastricht*, *ECONOMIST*, Sept. 26, 1992, at 15 (discussing French referendum); *The Danes Say No*, *ECONOMIST*, June 6, 1992, at 10 (discussing failed Danish referendum); see also DAVID ARTER, *THE POLITICS OF EUROPEAN INTEGRATION IN THE TWENTIETH CENTURY* 212-16 (1993) (explaining turmoil surrounding ratification of Maastricht Treaty).

4. Paul D. Marquardt, *Deficit Reduction: Democracy, Technocracy, and Constitutionalism in the European Union*, 4 *DUKE J. COMP. & INT'L L.* 265 (1994).

5. Treaty Establishing the European Community, Feb. 7, 1992, art. 3b, [1992] C.M.L.R. 573, 590 [hereinafter EC Treaty], incorporating changes made by TEU, *supra* note 1.

6. TEU, *supra* note 1, pmbl.

Union seeks to obliterate national autonomy and identity.⁷

Or will it? Many commentators have questioned whether subsidiarity will be an effective limiting principle in practice, describing it in terms such as "weak, subjective, and open-ended."⁸ However, few have noted a subtler point: even if subsidiarity works exactly as intended, its principles are fundamentally corrosive to rather than supportive of the sovereignty of the nation-state. The institutional quick fix may support the nation-state in the short run, but the underlying logic of subsidiarity reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state's claims to loyalty. In reaching this conclusion, this Article first explores the origins and underpinnings of the doctrine of subsidiarity. Second, it examines the application of subsidiarity to the European Community. Finally, it examines the compatibility of the principles developed with today's understanding of sovereignty in Western Europe.

I. *THE ROOTS OF SUBSIDIARITY*

The notion that power should be allocated so as to favor local control except where broader common interests predominate is, at least in its implicit forms, an old one. It seems, for example, to be an element of the design of many federal plans, including the U.S. Constitution.⁹ However, the principle was first explicitly enunciated as an aspect of Catholic social doctrine.

In the 1931 encyclical *Quadragesimo Anno*, Pope Pius XI laid out the principle of subsidiarity as follows:

Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it

7. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *COLUM. L. REV.* 331, 334 (1994); *The Low Road to Edinburgh*, *ECONOMIST*, July 4, 1992, at 48.

8. Frank Vibert, *Europe's Constitutional Deficit*, in JAMES M. BUCHANAN ET AL., *EUROPE'S CONSTITUTIONAL FUTURE* 69, 80 (1990). Criticisms of subsidiarity will be discussed in Part III or this Article.

9. See, e.g., U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help [subsidium] to the members of the body social, and never destroy and absorb them.¹⁰

Pius XI was primarily concerned with the relationship between the individual and society, not between different levels of political organization. The encyclical, issued on the fortieth anniversary of Leo XIII's encyclical on workers' rights, was in large part a response to the growing role of the modern state and to the centralizing tendencies of capitalism and socialism.¹¹ Rather than drawing a sharp contrast between a private sphere of atomistic individuals and a public sphere controlled by the state, Catholic social theory cast society as a complex web of family, social, religious, and governmental ties with the ultimate goal of encouraging and empowering the individual exercise of responsibility. Thus, the role of each level of social organization was to facilitate independent action by the groups below it, in the end supporting the maximum personal and spiritual development of the individuals who are the ultimate base of all organizations.¹² In this system, subsidiarity served to reject claims of the state as the focus of all public activity and to preserve the role of the church in the social order.¹³

Subsidiarity made the transition from a principle of social organization to an explicitly political rule of institutional design through German federalist thought. The word itself comes from the German translation of *Quadragesimo Anno*, and that encyclical was heavily influenced by the German church.¹⁴ German political thinkers seized upon the concept in the aftermath of World War II, and transformed it from a social to a legal princi-

10. PIUS XI, *QUADRAGESIMO ANNO* (1931), reprinted in *THE PAPAL ENCYCLICALS 1903-1939* 415, § 79 (Claudia Carlen ed., 1990).

11. Andrew M. Greeley, *What is Subsidiarity? A Voice from Sleepy Hollow*, 153 *AM. 292*, 293-94 (1985).

12. Joseph A. Komonchak, *Subsidiarity in the Church: The State of the Question*, 48 *JURIST* 298, 301 (1988).

13. *Id.*

14. Marc Wilke & Helen Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community* (1990) (Royal Inst. of Int'l Aff. Discussion Paper No. 27).

ple.¹⁵

Subsidiarity was a central idea in the reconstruction of the political order in the Federal Republic and was a natural antithesis to the extreme centralizing tendencies of the Nazi regime. Although the word itself does not appear in the German Basic Law, the Federal Republic's assumption that all power flows from the Länder, and presumptively lies there unless explicitly granted to the central authority, clearly was informed by subsidiarity.¹⁶ The influence of the Catholic Church and of the German example made subsidiarity a staple of continental federalist thought, especially among Christian Democratic parties.¹⁷

Given the importance of subsidiarity in contemporary European federalism, it is perhaps natural that the idea was picked up and applied by enthusiasts of the European Communities. The word appears in debates on EC reform as early as 1975.¹⁸ A committee led by Belgian Prime Minister Leo Tindemans had the task of re-evaluating the development of European political union in light of the stagnation of the 1970's and proposing new initiatives.¹⁹ The final report contained controversial recommendations for strengthening the independent European Commission, and the Commission's own submission to the committee discussed the principle of subsidiarity as a safeguard against worries of over-expansion.²⁰ The Tindemans report had little immediate effect, though, and it was much later that subsidiarity made the transition from a historical footnote to an important idea in EC political debate.

The first important force in revitalizing subsidiarity was the

15. Nicholas Emiliou, *Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition"?*, 17 EUR. L. REV. 383, 385 (1992).

16. GRUNDGESETZ [Constitution], art. 30 (Ger.) The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder insofar as this Basic Law does not otherwise prescribe or permit. Emiliou, *supra* note 15, at 388-90.

17. MICHAEL BURGESS, *FEDERALISM AND EUROPEAN UNION* 149-54 (1989).

18. Commission of the European Communities, *Report on European Union*, 8 E.C. BULL., no. 6, at 6 (1975).

19. See generally DEREK W. URWIN, *THE COMMUNITY OF EUROPE* 218-20 (1991) (describing historical context of Tindemans report).

20. *Report on European Union*, *supra* note 18, at 6; see Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107, 1112 (1992) (discussing origins of subsidiarity); BURGESS, *supra* note 17, at 86-92 (providing useful overview of circumstances surrounding Tindemans Report on EC reform).

European Parliament (or "EP"). The EP has long been the weakest organ of the European Community, and has worked in relative obscurity.²¹ In 1979, though, the European Community replaced a system in which members of the European Parliament were appointed by their national governments with one of direct popular elections.²² The change energized the European Parliament, boosted its visibility, and led it to push for further institutional reforms. Any change emphasizing EC institutions at the expense of Member States enhanced the power of the Parliament, whose institutional interests now lay firmly with the EC rather than with national governments.

The European Parliament was also energized by the entry of Altiero Spinelli as an Italian delegate. Spinelli had long been one of the foremost federalist thinkers in the European Community. His vision for the Community was one in which the Community evolved into a new political superstructure supplanting the existing nation-states through an explicitly political process of transformation and centralization.²³ The federalist view that Spinelli championed stood in opposition to that of Jean Monnet, who saw the future of European integration in a gradual growth of European powers driven by practical considerations.²⁴ In this "neofunctionalist" view, the gradual implementation of cooperative measures would create pressures for even greater cooperation, both because of the positive example set by earlier initiatives and because increasing integration would create a greater need for joint policy initiatives to achieve national goals. As national societies became more closely entwined, the growth of practical ties and the experience of working together would in the end lead to the evolution of a new pan-European political society.²⁵

21. See, e.g., Juliet Lodge, *The European Parliament—From 'Assembly' to Co-Legislature*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 58, 58-61 (Juliet Lodge ed., 1989); Shirley Williams, *Sovereignty and Accountability in the European Community*, in *THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE* 155, 169 (Robert O. Keohane & Stanley Hoffman eds., 1991).

22. NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY* 120-23 (1989).

23. For a thorough exposition of Spinelli's views and their contrast with Monnet's, see BURGESS, *supra* note 17, at 43-63.

24. Monnet's fascinating career is further described in JEAN MONNET, *THE PATH TO EUROPEAN UNITY* (Douglas Brinkley & Clifford Hackett eds., 1991).

25. Ernst Haas is generally credited with formalizing neofunctionalist analysis. See ERNST B. HAAS, *THE UNITING OF EUROPE* (1958); see also LEON N. LINDBERG & STUART A.

Though Monnet's vision dominated the development of European institutions, Spinelli was able to use the European Parliament as a forum to promote his vision of a politically-driven federal Europe. The body of Euro-legislators was naturally receptive to his view of the primacy of politics. Buoyed by its newfound democratic legitimacy and a widespread sense of institutional crisis and opportunity brought about by the long "Euroclerosis" of the 1970s, the Parliament began pushing for fundamental reform of the EC.²⁶ The end result was the 1984 Draft European Union Treaty ("Draft EUT") (not to be confused with the Treaty on European Union signed at Maastricht in 1992), adopted at the urging of a group of legislators led by Spinelli.²⁷

The Draft EUT was an ambitious document that would have restructured the European Community to form something very like a unitary federal state. In contrast to the previous gradual evolution of EC powers, the Draft EUT explicitly reallocated a broad range of political powers to the Member States, the Union, or both concurrently. The principle of subsidiarity, a cornerstone of continental federalism in fact if not in name, figured prominently in that division of authority. The definitions of the European Parliament were slightly different from those eventually adopted at Maastricht. The Union was to be entrusted "only with those powers required to complete successfully those tasks that they may carry out more satisfactorily than the States acting independently."²⁸ Furthermore, the Draft EUT provided that "[t]he Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers."²⁹

At first glance, these allocations of power and principles of decision closely resemble those found in the Maastricht provi-

SCHEINGOLD, *REGIONAL INTEGRATION: THEORY AND RESEARCH* (1971) (comprehensive survey of subject).

26. See BURGESS, *supra* note 17, at 162-73; Juliet Lodge, *Institutional Provisions: Towards a Parliamentary Democracy, in EUROPEAN UNION: THE EUROPEAN COMMUNITY IN SEARCH OF A FUTURE* 49-50 (Juliet Lodge ed., 1986).

27. Draft Treaty Establishing the European Union, 1984 O.J. C77/33 [hereinafter Draft EUT]; see BURGESS, *supra* note 17, at 162-73; EUROPEAN UNION: THE EUROPEAN COMMUNITY IN SEARCH OF A FUTURE (Juliet Lodge ed., 1986).

28. Draft EUT, *supra* note 27, pmbl.

29. *Id.* art. 12.

sion quoted at the beginning of this Article. However, the Draft EUT lacks Maastricht's explicit presumption in favor of local authority; its version of subsidiarity is more a principle of rationality allocating power solely on the basis of efficiency. To draw a domestic legal analogy, the burden of proof is different under the European Parliament's formulation: there is no presumption that the smaller polity is the appropriate arena for action. Spinelli made it clear that he so understood the provision: "The transition from one sphere to the other is subject to the principle of subsidiarity in cases when an objective may be achieved more effectively in common. . . . I shall not dwell here on the special procedures and guarantees provided for to ensure the transition to a higher level of unity."³⁰ Thus, the function of the principle was to promote centralization as much as to guard against it.

When the debate on subsidiarity later was picked up by other EC institutions, the European Parliament more clearly advanced this position. The EP created a committee, chaired by former French President Valerie Giscard d'Estaing, to produce a report on the principle of subsidiarity.³¹ The report explicitly emphasized the importance of transferring powers to the Community as well as retaining them in the Member States as part of the implementation of the principle.³²

While the European Parliament's efforts were important in sparking the relaunch of the European Community in the 1980s, the Draft EUT was more a catalyst (though an important one) for other reform efforts than a source of specific proposals for action.³³ There was little governmental interest in the European Parliament's approach of adopting a new, comprehensive constitutional document. The European Council of heads of state and the European Commission did not initially seize upon the idea of a general institutional reform, opting instead for the more limited, but still ambitious, Single European Act³⁴ ("SEA"). The

30. ALTIERO SPINELLI, *TOWARDS THE EUROPEAN UNION* 19 (1983) (emphasis added).

31. European Parliament, Interim Report on the Principle of Subsidiarity, Eur. Parl. Doc. A3-163/90/Part B (1990) [hereinafter Interim Report].

32. *Id.* at 2.

33. See Sophie Vanhoonacker, *The European Parliament and European Political Union*, in *THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION* 215 (Finn Laursen & Sophie Vanhoonacker eds., 1992).

34. *Id.*

principle of subsidiarity did enter the SEA, though not labelled as such, in the provision governing the environment.³⁵ Environmental policy was a specially sensitive area of overlapping national and transnational concerns, and subsidiarity principles provided a useful way of approaching the boundary. Indeed, the fundamental approach of the SEA, favoring mutual recognition of national standards over uniform Community legislation in removing regulatory barriers to trade, is consistent with subsidiarity principles.³⁶ Mutual recognition allows maximum flexibility to respond to local conditions and traditions while creating a least common denominator to respond to cross-border concerns.³⁷ Despite casting its shadow across the SEA, however, subsidiarity did not immediately assume a prominent role in the wider European debate.

At this point, though, a new player entered. The President of the European Commission, Jacques Delors, came away from a meeting with representatives of the German Länder convinced that subsidiarity had a vital role to play in the European Community.³⁸ His initial exposure to the problem, interestingly, was not a question of the balance of power between the European Community and the Member States. Instead, the Länder were concerned with the domestic principles of subsidiarity in German federalism. Increased Community action was shifting power to the central government through its control of the EC delegation, and the Länder argued for an increased role in Community decision-making to preserve their own power.³⁹ Catholic social theory was influential in Delors's thinking, and the German federalist principle thus fell on fertile ground.⁴⁰ Subsidiarity promised to be an extremely useful concept: not only did it hold out

35. SEA, *supra* note 1, art. 130r(4) ("The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."); see Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 *FORDHAM INT'L L.J.* 846 (1994) (discussing subsidiarity's effects on environmental policy and comparing Article 130r with Article 3b).

36. Lenaerts, *supra* note 35, at 856-58; see Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final (June 1985) (explaining rationale underlying SEA).

37. Lenaerts, *supra* note 35, at 856-58.

38. Guenther F. Schaefer, *Institutional Choices: The Rise and Fall of Subsidiarity*, 23 *FUTURES* 681, 689 (1991).

39. *Id.*

40. Wilke & Wallace, *supra* note 14, at 30.

the promise of a more smoothly integrated Europe, but it provided an obvious answer to critics who claimed that the EC was excessively centralist.

It is perhaps fitting that the man who became subsidiarity's chief champion was directly influenced by all of the idea's sources: Catholic thought, German federalism, and the need for an answer to critics of the EC's alleged centralizing tendencies. It is this last point, however, that became most important in the debate over subsidiarity.

II. SUBSIDIARITY AND MAASTRICHT

The momentum generated by the Single European Act (better known as the "1992" initiative), the end of the Cold War, and the rekindling of interest in EC institutional reform led to intergovernmental conferences on political union and on economic and monetary union, conferences which culminated in the Maastricht Treaty.⁴¹ Delors, in his role as Commission President, stressed in many European fora the role of subsidiarity in balancing EC and national powers in order to allay fears of European overreaching, but did so most importantly in the intergovernmental conferences.⁴²

In the Intergovernmental Conference on Political Union, the subsidiarity principle that Delors championed found its way into formal governmental proposals for EC reform, as some countries (most notably the UK and Denmark) resisted further strengthening of the supranational power of the EC and required reassurance that the expansion of the EU would not undercut national societies.⁴³ The end result was the inclusion of the subsidiarity clause laid out above.⁴⁴

Subsidiarity provided useful cover to national politicians facing Euro-skeptical criticism of Maastricht at home. John Major, for example, relied heavily on the principle in his statements on the EC Treaty.⁴⁵ What began as a statement of principle of secondary importance, though, became much more prominent af-

41. MARTIN HOLLAND, *EUROPEAN COMMUNITY INTEGRATION* 73-88 (1993).

42. Wilke & Wallace, *supra* note 14, at 31.

43. See Finn Laurusen et al., *Overview of the Negotiations, in THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION*, *supra* note 33, at 3.

44. See *supra* note 5 and accompanying text.

45. See, e.g., Nikki Knewstrub, *Prime Minister Major Warns EC Against "Misjudgment"*, *GUARDIAN*, Nov. 21, 1991, at 8.

ter the Danish rejection of Maastricht. The failure of the Danish referendum, the narrowness of French approval, and public doubts about the Maastricht Treaty in other countries threw the entire process into turmoil.⁴⁶ Supporters of the EU seized upon the subsidiarity principle and pressed it into service as a damage control measure to reassure those suspicious of the growth of EU power.⁴⁷ Subsidiarity was presented as a primary safeguard for the prerogatives of the nation-state.

The immediate challenge was to convert a vague statement of principle into a convincing safeguard against European expansion.⁴⁸ The European Commission delivered the first response with a report designed to clarify exactly what subsidiarity meant and begin to put it into practice. The report emphasized that "national powers are the rule and the Community's the exception"⁴⁹ and repeated the Commission's recognition that proposals for Community action required explicit justification in terms of subsidiarity, justification that it undertook to provide in writing with each new proposal.⁵⁰ The caveat was that the principle of subsidiarity would not itself determine the areas in which the EU was competent to act, as this was the job of the treaties. Neither would it apply to the areas in which the EU has exclusive jurisdiction, such as the removal of barriers to the internal market.⁵¹ Subsidiarity thus could not vest the EU with authority to act where it had none, nor could it return authority to the Member States where the community had taken over entirely. Both the level of detail and the implementation of EC regulations, however, would be subject to the principle, leaving the maximum feasible freedom of action to the Member States.⁵² The Commission openly recognized that it was answering critics who "conclude that there are no precise limits to intervention by the Community, which stands accused of being able to meddle where it pleases."⁵³ The Commission also undertook a separate

46. Anthony L. Teasdale, *Subsidiarity in Post-Maastricht Europe*, 64 *POL. Q.* 187, 193-95 (1993).

47. *Id.*

48. Commission of the European Communities, *The Subsidiarity Principle*, 25 *E.C. BULL.*, no. 10, at 116 (1992).

49. *Id.* at 119.

50. *Id.* at 117.

51. *Id.* at 119-20

52. *Id.* at 124-25; see Lenaerts, *supra* note 35, at 850-52.

53. *The Subsidiarity Principle*, *supra* note 48, at 119.

review of existing legislation for conformity with the subsidiarity principle, and presented the European Council with a list of initiatives to be withdrawn or modified in light of the analysis.⁵⁴ Thus, the Commission staged a concrete demonstration of subsidiarity's constraining effect on Community legislation.

The European Council, for its part, used the Edinburgh summit of December 1992 to welcome and expand upon the Commission's efforts to give additional content to subsidiarity as a response to the ratification crisis.⁵⁵ It issued a detailed communique drawn up by the foreign ministers, specifying that all EU institutions were to include principles of subsidiarity in their policy analyses and giving the Court of Justice some role in overseeing the principle's interpretation and use.⁵⁶ At the same time, the communique carefully stated that the new principle did not alter the powers allocated to the Community and its institutions, nor provide a rule of direct effect with which to mount judicial challenges to legislation.⁵⁷ It also issued guidelines for determining whether subsidiarity's requirements are met: 1) the issue has significant transnational aspects; and/or 2) independent action by the Member States would damage a collateral treaty goal (such as by distorting trade) or otherwise harm Member State interests; and/or 3) action at the EU level would produce clear benefits of scale or effectiveness as compared with independent action.⁵⁸ These conclusions are to be substantiated by qualitative or quantitative analyses. As a procedural matter, the Council declaration formalized consideration of subsidiarity issues as an integral part of the EU legislative process.⁵⁹

Subsidiarity thus made the transition from an obscure and awkwardly named principle of social theory to a front-line

54. European Council, Conclusions of the December 11-12 Edinburgh Summit, pt. A, annex 2 (1992), reprinted in REUTER EUR. COMMUNITY REP. (Dec. 14, 1992).

55. *Id.*

56. *Id.*

57. *Id.* annex 1.

58. *Id.* Lenaerts makes the interesting observation that a careful parsing of the language of article 3b does not support the use of efficiency as an independent basis for Community action; rather, it seems to set up the absolute inability of Member States to achieve the desired goal as a prerequisite. However, Lenaerts correctly notes that the Council's interpretation is the general understanding, and argues that the text permits such an interpretation if efficiency is understood as a substantive goal of the EU. Lenaerts, *supra* note 35, at 876-79.

59. Conclusions of the December 11-12 Edinburgh Summit, *supra* note 54, annex 1.

weapon of the battle in defense of national identity. As the development of the idea outlined above shows, though, subsidiarity is not one principle but many. While it is touted as the rule preserving national independence against supranational encroachment, it has also served as a fundamental principle of domestic social organization and as a doctrine of the allocation of powers that is very nearly neutral in deciding which powers belong where. Despite the European institutions' attempts to solidify subsidiarity's meaning, the slipperiness of the concept has fueled skepticism about its real utility.

III. CRITICISMS OF SUBSIDIARITY

The existing analysis of subsidiarity has largely been devoted to explaining the concept and trying to outline the institutional mechanisms and rules that might be used to put its theory into practice.⁶⁰ In these analyses, there seems to be a general consensus that the principle is not well-defined at this point, and that it is unclear as yet how much practical impact the rhetoric of subsidiarity will have on the practice of the EU. Current criticisms of subsidiarity as the supposed savior of the European states have centered on four major points: the multiple meanings of the word, its incomplete application to EU institutions to date, the difficulty of conducting the required analyses, and its unenforceability.

The first ground for criticism has already been laid out in the discussion of the European Parliament's subsidiarity proposals. Subsidiarity means different things to different people; indeed, one commentator has gone so far as to call it "an empty shell devoid of concrete substance . . . a golden rule, a fashionable term, a concept with which anyone might agree in principle, because all can define for themselves what it means in any specific case."⁶¹ Not all formulations of the principle show significant bias towards national action. More importantly, the analysis of the level at which a policy may best be implemented is bound

60. See, e.g., Bermann, *supra* note 7; Emiliou, *supra* note 15; Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213 (1993).

61. Schaefer, *supra* note 38, at 688; see Thomas C. Fischer, "Federalism" in the European Community and the United States: A Rose By Any Other Name, 17 FORDHAM INT'L L.J. 389 (1994) (criticizing vagueness of principle); Teasdale, *supra* note 46, at 187 (criticizing vagueness of principle).

to be highly subjective and can cut in favor of centralization as well as against it.⁶² After all, a notion that Community action is of some instrumental value is likely to underlie most decisions other than those designed to create uniformity for its own sake. The argument that subsidiarity can run in favor of centralization as well as against it is borne out by the theological experience, in which theorists argue that "it can and should be called into service as a no less necessary amber light to warn local communities not to make authoritative decisions which affect the well-being of the wider community."⁶³

The slipperiness of subsidiarity also leads to widely varying assessments of its novelty and importance. Some argue that subsidiarity is utterly inconsistent with the existing treaties, which follow an all-or-nothing approach in their allocation of authority, and subsidiarity analysis will merely gum up the works if it does anything.⁶⁴ Many of its proponents, on the other hand, argue that subsidiarity has been a fundamental principle underlying the EC from its inception⁶⁵—which makes the argument that the principle is a substantial new check on the expansion of EU power a bit unconvincing, if not schizophrenic.

The second criticism is that subsidiarity is incompletely applied. As developed in the German federal tradition, subsidiarity is primarily a doctrine of institutional design and allocation of powers.⁶⁶ The European Parliament used it in such a way in drawing up a comprehensive division of powers in the draft EUT. However, that vision was distorted in a Maastricht Treaty that makes incremental adjustments to existing institutions instead, and excludes the principle of subsidiarity from consideration altogether in the question of when the EU or its Member States have authority to act in an area at all.⁶⁷ The explicit exclusion of subsidiarity principles from this fundamental question reduces subsidiarity to a prudential doctrine of legislative self-

62. Cass, *supra* note 20, at 1108-09.

63. Roger Greenacre, *Subsidiarity in State and Church*, 260 CONTEMP. REV. 287, 288 (1992); see Cass, *supra* note 20, at 1111-12.

64. A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079, 1081 (1992).

65. Wilke & Wallace, *supra* note 14, at 36-37; Interim Report, *supra* note 31, at 3-4.

66. See *supra* notes 14-17 and accompanying text (explaining role of subsidiarity in German federalism).

67. Emiliou, *supra* note 15, at 392; Hartley, *supra* note 60, at 215-16; Toth, *supra* note 64, at 1091.

restraint and policy implementation rather than a real control on the distribution of power.⁶⁸

The third critique focuses on the complexity and difficulty of applying subsidiarity even when its abstract meaning is clear.⁶⁹ Subsidiarity requires an analysis of the comparative utility of EU action, Member State action, and no action at all. Predicting the outcome of a known policy is difficult enough, but trying to predict what action the Member States or the market would take in the absence of EU action adds a virtually insurmountable layer of difficulty to the task. Furthermore, the necessarily contextual nature of the effectiveness analysis might lead to inconsistent results in different states; water quality standards at Mediterranean beaches, for example, have greater cross-boundary effects based on proximity and tourism than the very same standards on Scottish beaches.⁷⁰ Finally, the various values that go into determining the optimal response could cut against each other. For example, the Member States and the EU might both be capable of achieving a certain goal, but state action might require much more complex and intrusive regulation. It is unclear how such competing values could be quantified and traded off. There could also be negative externalities to subsidiarity, such as overburdening local authorities or encouraging destructive regulatory competition, that must be taken into account.⁷¹

The last criticism builds on the first and is both the most common and the most vehement. Multiple commentators have noted that the principle of subsidiarity is bound to be non-justiciable.⁷² The imprecision of its meaning, together with the difficulty of producing a definitive objective analysis of such a complex policy question as the "best" level of national action, means that it is highly unlikely the principle can be meaningfully applied to stop expansionist exercises of power. The judgments involved are inherently political and uncertain, and the European Court of Justice is ill-equipped to second-guess the policy analyses of the other Community organs. Even if the Court of Justice were to find the principle justiciable, its own biases have been expansionist in the past and it seems unlikely to reverse

68. Bermann, *supra* note 7, at 365-67.

69. *Id.* at 383-86.

70. Toth, *supra* note 64, at 1098.

71. *Id.*; Bermann, *supra* note 7, at 386-90, 451-53.

72. Bermann, *supra* note 7, at 395; Emiliou, *supra* note 15, at 402.

many initiatives.⁷³ Some have made proposals for innovative methods of binding subsidiarity review, such as a panel of distinguished former public servants with no duty other than to deliberate such questions.⁷⁴ A more common argument, however, is that subsidiarity is bound to be nothing more than a "leitmotif," a political principle that may or may not be applied by the same powers that now have decisional authority.⁷⁵

These criticisms are significant, if not necessarily of decisive importance. The EU can try to confine the multiple personalities of subsidiarity through careful definition, though ideas are difficult to nail down. The incoherence of a partial application of subsidiarity to avoid the question of institutional competencies could be corrected by raising questions of subsidiarity in institutional reform debates. Even a non-justiciable principle can have important constraining effects on an institution, especially when influential players (i.e., reluctant national governments like those of the United Kingdom and Denmark) can use the principle as rhetorical and normative ammunition to oppose new initiatives without merely appearing obstructionist.

This is not to dismiss the existing criticisms, but it seems that in focusing solely on difficulties in implementing the restrictive interpretation of subsidiarity they miss an important point. Asking only whether subsidiarity will be meaningfully applied overlooks a more fundamental question: whether the deep logic of subsidiarity is in fact supportive of the nation-state, or instead subtly corrosive to its very essence.

IV. SOVEREIGNTY IN THE EUROPEAN UNION

The debate over subsidiarity and the proper scope of EU action is often presented as a debate over national sovereignty, most notably in the United Kingdom. Sovereignty is a difficult concept to unpack, especially in the European Union. Before proceeding further, however, it is necessary to define exactly what those defending the nation-state from the expansion of EU powers are trying to preserve. In the United Kingdom, at least, the defenders themselves use "sovereignty" to describe the

73. Schaefer, *supra* note 38, at 690-93.

74. Teasdale, *supra* note 46, at 196-97.

75. Schaefer, *supra* note 38, at 693; *see supra* note 72 and accompanying text (discussing justiciability).

stakes.⁷⁶

William Wallace distinguishes three main ideas entangled in the contemporary European discourse of sovereignty.⁷⁷ First, there is formal sovereignty, the legal supremacy of an authority's decision over all other decisions purporting to apply to the same polity. Second is effective sovereignty, the practical power to exercise the legal powers enjoyed in theory. Finally comes autonomy, the ability to achieve desired goals through the unilateral exercise of rights.⁷⁸ Though the rhetoric of each strand of sovereignty plays some role, it is really the last two that are at the core of the EU debate.

Let us turn first to formal sovereignty. The classical theory of sovereignty, concerned almost exclusively with formal sovereignty rather than practical constraints on its exercise, admitted of no possibility of division or limitation of sovereignty; the ruler was answerable to God alone. Either an authority was sovereign or it was not. Thus, Jean Bodin, the originator of classical notions of sovereignty, argued that attempts to divide the power of the state were "egregious absurdities" and "contrary to the laws and to natural reason,"⁷⁹ and that "[s]overeignty. . . is not limited either in power, or in function, or in length of time."⁸⁰ Similar notions can be found in Hobbes and Rousseau.⁸¹

Even as the notions of absolute power concentrated in one sovereign gave way to theories of the separation of powers and popular sovereignty, the central idea that there was no power superior to that of the nation remained. In Revolutionary France, for example, the primary argument used to overcome the king's constitutional immunity from trial or punishment was that the sovereignty of the nation's people was illimitable.⁸² In the United States, while internal power is divided vertically between the states and the federal government and horizontally

76. Wilke & Wallace, *supra* note 14, at 17; William Wallace, *What Price Interdependence? Sovereignty and Interdependence in British Politics*, 62 INT'L AFF. 367, 370-88 (1986).

77. Wallace, *supra* note 76, at 368-69.

78. *Id.*

79. JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 27, 104 (Julian H. Franklin trans. & ed., 1992).

80. *Id.* at 3; *id.* at 11 ("the prince is not subject to the law").

81. THOMAS HOBBS, LEVIATHAN 228-239 (C.B. Macpherson ed., 1968); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 69-78 (Maurice Cranston trans., 1968).

82. See, e.g., REGICIDE AND REVOLUTION: SPEECHES AT THE TRIAL OF LOUIS XVI 97-98 (Michael Walzer ed., 1974) (speech of Jean-Baptiste Mairle).

between the branches of government, the Supreme Court has held that the United States as a whole has all necessary powers in its external relations as an inescapable consequence of its status as a sovereign state.⁸³

Paradoxes of overlapping sovereignty are nothing new in federal societies, but it is very difficult to locate a single national sovereign in a system of overlapping authority.⁸⁴ Although federalism is a loaded word in the EU debate, if by federalism one means "pluralistic democracy in which two sets of governments, neither being fully at the mercy of the other, legislate and administer within their separate yet interlocked jurisdictions,"⁸⁵ then the EU clearly is a federal order. It is also questionable whether the modern notion of sovereignty admits of no limitations on the authority of the nation, especially in democratic societies subscribing to liberal Western notions of human rights.⁸⁶ But if sovereignty no longer means that all power must lie in the hands of one person or body, it is still used to draw boundaries around communities within which the most fundamental powers of ordering society lie and across which legal authority does not pass. Indeed, one can make a strong argument that the primary function of sovereignty in the global system today is to reify and reinforce existing borders.⁸⁷

If formal sovereignty is so understood, then it seems that EU members have already ceded sovereignty in the formal sense. Indeed, it is common to speak, as the European Court of Justice has, of limitations on national sovereignty or the pooling of sovereignty within the EU.⁸⁸ The combination of the Court's doctrines of direct effect and supremacy means that EU law enters the domestic legal order and trumps even later-enacted inconsis-

83. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317-19 (1936).

84. DANIEL J. ELEAZAR, *EXPLORING FEDERALISM* 90-91 (1987); PRESTON KING, *FEDERALISM AND FEDERATION* 133-41 (1982).

85. Ivo Duchacek, *Perforated Sovereignties: Towards a Typology of New Actors in International Relations*, in *FEDERALISM AND INTERNATIONAL RELATIONS: CONFLICT AND COOPERATION* 1, 3 (Hans J. Michelmann & Panayotis Soldatos eds., 1990).

86. KING, *supra* note 84, at 141.

87. John Kincaid, *Constituent Diplomacy in Federal Polities and the Nation-State*, in *FEDERALISM AND INTERNATIONAL RELATIONS: CONFLICT AND CO-OPERATION*, *supra* note 85, at 54, 60-62.

88. See, e.g., *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105; Robert O. Keohane & Stanley Hoffman, *Institutional Change in Europe in the 1980s*, in *THE NEW EUROPEAN COMMUNITY: DECISION-MAKING AND INSTITUTIONAL CHANGE*, *supra* note 21, at 1, 13.

tent national law, an intrusion into the domestic legal order far beyond anything ordinarily found in international law governing responsibility between states.⁸⁹ It could be argued that Member States retain the ultimate sanction of withdrawal from the EU, however remote the possibility.⁹⁰ While it is most likely true that any state wishing to withdraw would be allowed to do so, such an act would be so costly and disruptive as to resemble a secession more than an ordinary exercise of legal authority—rather as if Quebec decided to leave Canada.

Formal sovereignty is thus a thing of the past in the European Union. The Member States have all accepted a regime in which the national government is no longer the supreme law-making authority within the state and national authorities can find themselves without authority to act in the face of superior Community law. The means of enforcement, of course, still lie with national authorities, and a state can simply defy European law. As a formal matter, though, such an act would be a violation of the accepted legal order. Despite frequent invocation of the rhetoric of national parliamentary sovereignty, especially in Britain, it is already gone in its absolute form.

However, effective sovereignty and autonomy are not all-or-nothing concepts. European nations do still hold predominant power, and though that power is no longer absolute, the question of when it operates in an unconstrained way is still critically important. The issue over which states battle in the EU today is not whether EU action can preempt national powers, but in what areas the EU should do so. Frequently, the objections to EU policies are rooted as much in their collateral effects on national identity and autonomy as in their nominal effects on the legal regime.

Thus, national sovereignty in the EU has changed significantly. What the Member States are fighting to preserve using the rhetoric of majesty and the illimitable power of a people is really only relative freedom of action. The limits on sovereignty in the EU go beyond the practical limitations on the power of the state to achieve its goals that have always existed. The Mem-

89. J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2413-22 (1991).

90. Some argue, though, that EC members have no formal right to withdraw without consent of membership, making the following secession analogy even more appropriate. See Williams, *supra* note 21, at 158.

ber States have given up their trump card, their formal right to have the last word on the legal order within their borders. As Joseph Weiler cogently argues, they have compensated for this loss in part by tightening intergovernmental control over the EU.⁹¹ George Bermann, implicitly building on Weiler's analysis, sees subsidiarity as an additional mechanism for defending national prerogatives developed in response to the new transfers of power to the EU in the Single European Act and Maastricht.⁹² However, the subsidiarity principle is precisely the wrong instrument for attempting to consolidate the position of Member States in the long run.

V. SUBSIDIARITY AND SUBVERSION

Subsidiarity, as the EU defines it, creates a presumption against taking more powers away from the nation-state. Thus, in the short run subsidiarity will protect Member State prerogatives. It also forecloses the possibility of a unitary and centralized European state. In the longer term, though, the logic behind subsidiarity will contribute to the erosion of effective sovereignty and autonomy and undercut their remaining claims to the normative legacy of the classical theory of formal sovereignty: that the authority of existing states is somehow a good in itself.

Other commentators have noted that in its most basic formulation—that powers should be allocated to the lowest level that can most effectively carry out a particular function—subsidiarity can be used to justify further centralization of power as well as its decentralization.⁹³ What is less well-noted is that the logic of subsidiarity does not only run from the nation-state up to the European Union. It also runs from the state down to sub-national levels of society. Subsidiarity did not develop as a principle of international order, but of social and political organization within the state. Already some are starting to cite the principle against national governments to encourage devolution of national political authority.⁹⁴ Nationalist movements within states and supporters of a federal Europe based on local regions instead of the existing Member States have also begun to use prin-

91. Weiler, *supra* note 89, at 2410-31.

92. Bermann, *supra* note 7, at 348-65; see Lenaerts, *supra* note 35, at 851-52.

93. See *supra* notes 29-32 and accompanying text.

94. *Subsidiarity Begins at Home*, *ECONOMIST*, Aug. 8, 1992, at 46.

ciples of subsidiarity to support their claims.⁹⁵

If history is any guide, the decentralizing pressure on states will only grow. Recall that the Catholic Church developed subsidiarity in part to protect itself and social groups affiliated with it from the growing encroachment of state authority.⁹⁶ Reformers seeking to decentralize the Church itself seized upon the principle, though, beginning with the Vatican II reforms and continuing through the Synod of Bishops today.⁹⁷ The debate about subsidiarity in the Catholic Church now is a debate over how power can flow away from the Vatican and towards local church groups.⁹⁸

Subsidiarity, when fully understood, will thus put Member States under pressure to yield power in both directions, to the EU and to sub-national groups. Moreover, its ability to resist these pressures will be seriously undercut by the vision of sovereignty implicit in the subsidiarity debate. Subsidiarity reduces the question of sovereignty to one of efficiency. Without the emotional and historical appeal of the classical vision of sovereignty, the state is reduced to a functional justification.

In the end, Monnet's vision of European federalism has won out. It is common to characterize the grand institutional question as one of supranationalism, in which EC institutions make Europe-wide decisions, against intergovernmentalism, where the Member States retain extensive powers and progress is made through direct bargaining.⁹⁹ Because subsidiarity places obstacles in the way of excessive centralization, it appears to favor intergovernmentalism as a normative principle. In fact, it actually lies altogether outside the supranational/intergovernmental dichotomy. Subsidiarity is a check on centralization, but

95. Andrew Scott et al., *Subsidiarity: A "Europe of the Regions" v. the British Constitution?*, 32 J. COMMON MKT. STUD. 47, 58-61 (1994); see Michael Keating, *Introduction*, in REGIONS IN THE EUROPEAN COMMUNITY 1, 5-6 (Michael Keating & Barry Jones eds., 1985) (describing reliance of small nationalist movements on Community as realistic framework for independence).

96. See *supra* notes 11-12 and accompanying text.

97. Franz-Xaver Kaufmann, *The Principle of Subsidiarity Viewed by the Sociology of Organizations*, 48 JURIST 275 (1988).

98. Komonchak, *supra* note 12, at 305-16.

99. See, e.g., HOLLAND, *supra* note 41, at 87-88; CHRISTOPHER TUGENDHAT, MAKING SENSE OF EUROPE 72-73 (1986); Andrew Moravcsik, *Negotiating the Single European Act*, in THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE, *supra* note 21, at 41.

there is nothing in it favoring the nation-state as such other than inertia. As a normative principle, it calls for the allocation of authority to the lowest possible level consistent with purely technocratic criteria of policy success. As Monnet would have hoped, the principle looks only to the logic of policy implementation and not to nationalist appeal.¹⁰⁰

In the long run, nation-states forced to fight on subsidiarity's field of functional efficiency must lose power. Not only could subsidiarity justify transfers of power to both larger and smaller units, but the logic of democracy and the logic of the market imply that subsidiarity will call for such transfers.

The basic problem for the state is that there are few functions for which a mid-sized actor is most efficient. The logic of the market, broadly construed, is that bigger is better. A larger market, more fully integrated, is better for economic growth than a smaller, segmented economy. Many other public functions benefit from economies of scale as well. A united Europe has a greater voice in foreign affairs and a better ability to defend itself than a collection of squabbling countries. European programs drawing on a common resource pool allow expensive public projects like space exploration and high-technology research to proceed even if they would be beyond the capacity of any single state.¹⁰¹ The list of projects that can be better carried out through joint action goes on, and provides the major impetus behind EU cooperation today. Moreover, the dynamic is self-reinforcing: the greater the interdependence of European economies and societies, the greater the efficiency gains from joint action as transboundary effects increase.¹⁰²

The logic of democracy, on the other hand, holds that the

100. Joel Trachtman shares this view of subsidiarity as an essentially functionalist principle. See Joel P. Trachtman, *L'Etat, C'Est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. J. INT'L L. 459 (1992). Neofunctionalism is enjoying some revival as an explanation of European integration after a long period of dormancy. See, e.g., David R. Cameron, *The 1992 Initiative: Causes and Consequences*, in EURO POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 23 (Alberta M. Sbragia ed., 1992); Finn Laursen, *Explaining the Intergovernmental Conference on Political Union*, in THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION, *supra* note 33, at 229; David Mutimer, *1992 and the Political Integration of Europe: Neofunctionalism Reconsidered*, 13 J. EUR. INTEGRATION 75 (1989).

101. H.W. Armstrong, *Subsidiarity and the Operation of European Community Regional Policy in Britain*, 27 REGIONAL STUD. 575 (1993).

102. *Id.*

nation-state is *not* the optimal unit for many of the remaining functions. The notion that smaller polities allow greater democratic control over public policy is familiar to democratic theory.¹⁰³ It may make sense in some cases to accept some dilution of democratic control to increase the capabilities of the polity. In such a case, relative control is traded for absolute power. However, if bigger is better—if localism is limited in its ability to achieve public goals—why stop at the nation-state? Precisely those issues of macroeconomic coordination and international power that are usually cited as a strong justification for ceding democratic control from the local community to the nation can be even better achieved at the European level. For “soft” questions like education, culture, housing, and so forth, greater localism means greater flexibility and democracy; there is no reason why such decisions need be taken on the national level.¹⁰⁴ Even for such “mid-sized” problems as do exist, there is no guarantee that national borders determined historically rather than functionally will coincide with the boundaries of the problem, especially in densely-populated Europe. Sub-national “paradiplomacy” between adjacent local governments in different countries is already an important evolving response to such regional problems.

Of course, the historical importance of nation-states will leave them an important role. Especially in relatively homogeneous states, existing cultural and social ties create issues and problems that are delimited by the existing borders. National governments will most likely continue to be the best fora for dealing with such issues. Moreover, subsidiarity is only a word. Subjective emotional ties of identity play a critical role in the constitution of communities, and these ties will not disappear overnight just because they no longer make sense under the prevailing formal justification of the distribution of power.

It is important to recognize, though, that subsidiarity does not fill the role prescribed for it as the great defender of national sovereignty. In fact, the principle of subsidiarity itself exerts strong centrifugal pressure for the flow of power to European or regional institutions at the expense of the nation-state.

103. Weiler, *supra* note 89, at 2471.

104. Hans J. Michelmann, *Conclusion*, in *FEDERALISM AND INTERNATIONAL RELATIONS: CONFLICT AND COOPERATION*, *supra* note 85, at 299, 306-08.

By taking the last elements of majesty out of the discussion of sovereignty, subsidiarity leaves the European state with no distinctive claim to authority once the principle is turned on the state itself. Inertia provides a negative justification for state authority if the presumption is against altering the status quo, and cultural or historical ties may create a positive justification for some powers at the level of the nation. The question is posed most starkly, though, in federal states, where the European Union can take over most of the functions of external sovereignty—such as foreign affairs, trade, and defense—that have traditionally justified the federation.¹⁰⁵ Here the logic of subsidiarity may well mean the end of the traditional state. To put it bluntly, why does a Basque need Spain in a united Europe?

CONCLUSION

Subsidiarity has been hurriedly pressed into service as the “plug and play” institutional solution to perceived threats to national independence as European centralization progresses. In one sense, the principle is up to the task; it does provide a coherent principle by which some powers but not others should be allocated to European central authorities. However, just because subsidiarity provides a check on integration does not mean that it is protective of national prerogatives. If in modern Europe national sovereignty has been reduced to the relative importance of national governments as decisionmaking arenas, subsidiarity is in fact a further source of its erosion. An examination of the historical roots of the doctrine quickly reveals how easily subsidiarity can be used to problematize the state itself and increase rather than decrease the flow of power away from national capitals. Whatever political purposes subsidiarity may serve in the short run, the long-run institutional implications of this particular quick fix may be just the opposite of those intended by champions of the European state.

If the primary objection European publics have to the growth of the European Union is emotional rather than functional, a rather different prescription emerges. The problem is not merely one of institutional design, to be solved with more or better rules. It is also the technocratic world view, of which sub-

105. See Duchacek, *supra* note 85, at 4-5 (noting typical characteristics of federal constitutions).

sidiarity is a product. Principles of efficiency simply do not address the emotional questions of identity and trust—misfiled under the label of “sovereignty”—that seem to underlie public alienation from the EU. Those who wish to preserve national identity in the European Union to come would do better to focus on mobilizing and engaging public opinion than on adjusting the institutions and cajoling the elites. Only through the process of public involvement and consensus can a stable new European identity be formed.¹⁰⁶ As it is, the champions of national identity have embraced a solution proposed by the technocrats, and the two groups may eventually find that they have been talking past one another.

106. See Marquardt, *supra* note 4 (offering more complete discussion of importance of deliberate political mobilization to forge new European identity).