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THE GROWTH OF JUDICIAL POWER IN THE EUROPEAN ECONOMIC COMMUNITY

THOMAS J. SCHOENBAUM*

Created by treaty¹ in 1957, the European Economic Community has long been recognized as more than an international organization. To distinguish it from international bodies such as the Council of Europe, the United Nations, and the European Free Trade Association, the European Economic Community (hereinafter EEC) has been described as "supranational."² This term was coined to emphasize the power of certain institutions of the EEC to issue decisions binding on governments and even to issue decisions directly binding on individuals and enterprises without the intervention of governments.³

Three of the principal institutions of the EEC—the Council of Ministers, the Commission, and the Court of Justice—possess some measure of supranational power.⁴ In fact, one of the most remarkable developments in recent EEC history has been the Court of Justice's assertion of its supranational power. Eric Stein, in commenting upon a 1964

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¹ Treaty Establishing the European Economic Community, done March 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as EEC Treaty].

² Robertson, *Legal Problems of European Integration*, 91 RECUEIL DES COURS 105, 143-48 (1957).

³ Legal scholars disagree as to the precise meaning of supranational. Robertson, *supra* note 2, feels that defining supranational in terms of the power to render decisions that are binding on governments is not useful or adequate because other international organizations that are not supranational, such as the Security Council of the United Nations and the International Court of Justice, have this power. Supranational, in his view, is better defined as the power to render decisions that are directly binding on individuals without the intervention of governments. Thompson, on the other hand, would consider both concepts to be essential to the definition of supranationality. Thompson, *The Common Market: A New Legal Order*, 41 WASH. L. REV. 385, 386 (1966).

⁴ Thompson, *supra* note 3, at 386. See also Houben, *The Merger of the Executives of the European Communities*, 3 COMM. MKT. L. REV. 37 (1965); Overstreet, *The Nature and Prospects of European Institutions*, 3 J. COMM. MKT. STUDIES 124, 147-48 (1965); Stein, *The New Institutions*, in 1 E. STEIN & T. NICHOLSON, *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE* 33-51 (1960).

decision of the Court, made the perceptive observation that the Court was dealing with the EEC Treaty "as if it were a constitution rather than a treaty"⁵

One can indeed view the recent history of the Court of Justice as involving quasi-constitutional crises strikingly similar to those faced by the Supreme Court of the United States in its early history. It is the writer's aim in this article to suggest that the growth of judicial power in the EEC has paralleled in many respects the early growth of the judicial power of the federal government of the United States and to suggest ways to further expand the judicial power of the EEC.⁶

I. ESSENTIAL PRINCIPLES OF FEDERAL JUDICIAL POWER

As the judicial arm of the EEC, the Court of Justice has the important task of assuring that Community law is implemented and uniformly interpreted in the member states. This task is the duty of the judicial branch in any federal system. Since a federal relationship does exist between the Community legal system and the legal systems of the member states,⁷ three principles must be firmly established in order for the Community legal order to operate effectively: (1) that the Community treaty and regulations give rise to rights that individuals can enforce in national courts; (2) that a right derived from the Community legal order is superior to a prior or even a subsequent national law; and (3) that the Community legal order will be given effect in the legal systems of the member states.⁸ While these principles have been firmly established in the federal system of the United States by express provisions

⁵ Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491, 513 (1965) [hereinafter cited as Stein]. The case commented on was *Costa v. E.N.E.L.*, 10 Recueil de la Jurisprudence de la Cour 1143 (Cour de Justice des Communautés européennes 1964).

⁶ This discussion will be limited to a consideration of those aspects of the growth of EEC judicial power evidenced by decisions of the Court of Justice and will not attempt to deal with the recently signed Convention Relating to the Jurisdiction of Courts and the Enforcement of Judgements in Civil and Criminal Matters. Although this Convention has potential constitutional significance, it will not function as does the full faith and credit clause of the United States Constitution until the Court of Justice is given the role as final arbiter of the Convention's provisions. See Hay, *The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgements—Some Considerations of Policy and Interpretation*, 16 AM. J. COMP. L. 149 (1968); Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgements: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967).

⁷ Hay, *Supremacy of Community Law in National Courts*, 16 AM. J. COMP. L. 524, 543 (1968).

⁸ These principles were first formulated by Stein, *supra* note 5, at 502-03.

in the United States Constitution, by legislative action, and by judicial decision, they are still in the process of being fashioned in the EEC with the Court of Justice taking an active part in their development.

II. THE FIRST ESSENTIAL PRINCIPLE:

THE SELF-EXECUTING CHARACTER OF COMMUNITY LAW

A. The American Parallel

No union of states can take on federal dimensions unless the legal order thereby created operates directly on individuals without the need for supplementary action by the member states of the union. In 1787, Alexander Hamilton wrote that the "great and radical vice" in the confederation of the thirteen colonies was that its principal function was to legislate "for states and governments in their corporate and collective capacities" and not for the "individuals of whom they consist."⁹ The colonies, he argued, needed to join together in a stronger union having power to operate directly on individual citizens. With the adoption of the Constitution, the colonies created such a union.

This principle was not accepted without controversy and dissent. In 1788, Patrick Henry attacked the Constitution on the grounds that the national government created thereby was to operate directly on the people and not merely upon the states.¹⁰ St. George Tucker, on the other hand, believed that the Constitution merely established an alliance between independent, sovereign states.¹¹ This latter view of the Constitution was argued to one of the justices of the Supreme Court in *Elkison v. Delles-seline*,¹² which involved the constitutionality of a South Carolina law

⁹ THE FEDERALIST No. 15, at 93-95 (J. Cooke ed. 1961) (A Hamilton).

¹⁰ 3 DEBATES OF THE STATE CONVENTIONS ON THE FEDERAL CONSTITUTION 54 (J. Elliot ed. 1836). Henry demanded to know who gave the drafters of the Constitution the right to say "we, the people" instead of "we the states." He and George Mason led the fight against ratification at the state convention of Virginia. On June 25, 1788, by a margin of only 10 votes out of 168 delegates, Virginia ratified.

¹¹ Tucker, *View of the Constitution of the United States*, in 1 W. BLACKSTONE, COMMENTARIES app. D, at 141 (S. Tucker ed. 1803). On the occasion of lectures given at the College of William and Mary, Tucker argued that the member states of the United States could still exercise sovereign powers to an unlimited extent. *Id.* 187.

¹² 8 F. Cas. 493 (No. 4366) (C.C.S.C. 1823). This case arose after the Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 repealed the Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 90 and reinstated the original Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, as amended Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333. The repeal meant that the justices of the Supreme Court were required to return to circuit riding. They served on two courts, the circuit court, essentially a *nisi prius* court, and the Supreme

authorizing the seizure and imprisonment of free Negroes brought into the state on board any foreign or domestic vessel.¹³ Relying upon the commerce clause of the Constitution, Mr. Justice Johnson held the law unconstitutional.¹⁴

In arguing that the state law should be upheld, counsel for the defendant reasoned that "South Carolina was a sovereign state when she adopted the constitution; a sovereign state cannot surrender a right of vital importance; South Carolina, therefore, either did not surrender this right or still possesses the power to resume it, and whether it is necessary . . . to resume it, she is herself the sovereign judge."¹⁵ In effect, the defendant was contending that the federal government could not affect the rights of individuals within a member state of the union without that state's consent.

Mr. Justice Johnson rejected this argument, declaring that it would lead to dissolution of the union and was a direct attack upon the sovereignty of the United States.¹⁶ He also declared that the plaintiff had a right under the laws and treaties of the United States to come into the port of Charleston in the capacity of a seaman.¹⁷ This right was held to be self-executing and to apply directly to individuals; the right, therefore, could be vindicated in the state courts of South Carolina.¹⁸

B. The European Experience

In the early years of the European Common Market, it was not clear

Court, essentially an appellate court. *Elkison* came before Mr. Justice Johnson in his capacity as a judge of the Southern Circuit Court (comprising the districts of South Carolina and Georgia). See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 4-55, 69-77, 86-89, 96-102, 219 (1928); H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 42-47, 79-80 (1953); Mann, *The Marshall Court: Nationalization of Private Rights and Personal Liberty from the Authority of the Commerce Clause*, 38 IND. L.J. 117, 120, 131-49 (1963) [hereinafter cited as Mann].

¹³ The law, entitled An Act for the Better Regulation and Government of Free Negroes and Persons of Color, and for other purposes, Law of Dec. 21, 1822, no. 2277, 6 S.C. Stat. 179 (1839), grew out of fear on the part of white residents of slave uprisings. See H. APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* 268 (1943); J. CARROLL, *SLAVE INSURRECTIONS IN THE UNITED STATES, 1800-1865*, at 12 (1938).

¹⁴ 8 F. Cas. at 495.

¹⁵ *Id.* at 494.

¹⁶ *Id.*

¹⁷ *Id.* at 495. By laws and treaties of the United States, the court evidently was referring to the commerce clause of the Constitution and to the 1815 commercial convention with Great Britain. *Id.* at 495-96.

¹⁸ It was held that plaintiff had an action for trespass in the state court. *Id.* at 496.

whether the Community Treaty contained self-executing provisions.¹⁹ The Court of Justice resolved this question in 1963 in *N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Fiscal Administration*.²⁰ The issue was whether Article 12 of the EEC Treaty²¹—a provision that by its language was expressly binding only on member states—created individual rights that member states could not refuse. Three governments, Germany, Belgium, and the Netherlands, submitted comments arguing that an individual could not acquire from Article 12 a right that he could assert in a national court. Similarly, the Advocate General of the Court presented his conclusion that Article 12 of the treaty was binding only upon member states.²² Nevertheless, the Court held that the Community Treaty contains provisions “having a direct effect and giving rise to individual rights which the national courts must vindicate.”²³ The Court further held that the Community constitutes a new legal order whose subjects are not only the member states but their nationals as well.²⁴

The *Van Gend* decision was a milestone because it not only finally resolved the question of whether the Community Treaty created rights directly affecting individuals but also because it represented a quantum increase in the judicial power of the Community. The clear import of

¹⁹ See, e.g., Stein & Hay, *Legal Remedies of Enterprises in the European Economic Community*, 9 AM. J. COMP. L. 375, 400-03 (1960).

²⁰ 9 Recueil de la Jurisprudence de la Cour 1 (Cour de Justice des Communautés européennes 1963).

²¹ Article 12 prohibits member states from introducing, as between themselves, any new or increased customs duties on importation or exportation. In *Van Gend*, a Dutch importer of chemicals manufactured in Germany sued in a Dutch court to recover customs duties imposed by a Dutch law adopted after the EEC Treaty went into effect. The question was referred to the Court of Justice under Article 177 of the EEC Treaty. *Id.*

²² *Id.* at 47.

²³ *Id.* at 23-24.

²⁴ *Id.* at 23. There have been many excellent comments on the *Van Gend* case. See Bülow, *Zur unmittelbaren Wirkung von Stillhalteverpflichtungen im EWG-Vertrag*, 1963 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 162; Ehle, *Wirtschaftslenkung und Verfassungsrechtsschutz im Gemeinsamen Markt*, 1963 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 157; Gori, *Una pietra miliare nell'affermazione del diritto europeo*, 1963 Giur. Ital. IV, at 49; Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21 (1963); Riesenfeld & Buxbaum, *N.V. Algemene Transport-en Expeditie Onderneming Van Gend & Loos c. Administration Fiscale Néerlandaise: A Pioneering Decision of the Court of Justice of the European Economic Communities*, 58 AM. J. INT'L L. 152 (1964); Robert, *Sur une égalité de droits devant la C. e.e. des ressortissants des États membres avec ces États eux-mêmes*, 1963 Rec. Sirey Chron. 29; Rodière, *L'art. 177 du Traité de Rome*, 1964 Foro Ital. V, at 1, 4; Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695 (1966); Stein, *supra*

the decision is that with respect to the Community Treaty the traditional approach, whereby each treaty partner has the power to determine for itself the effect of a treaty on its nationals, is no longer valid.²⁵ Henceforth this power is to be exercised by the Court of Justice.

The Court has recognized, however, that not every treaty provision is self-executing; the issue must be resolved on a case-by-case basis.²⁶ In *Lütticke v. Hauptzollamt Saarlouis*²⁷ the Court faced a new aspect of the problem of self-execution. The *Van Gend* decision had held only that a standstill treaty provision, a provision requiring no affirmative action by member states, can be self-executing. *Lütticke* involved the question of whether a provision of the treaty requiring affirmative action by member states can be self-executing. The provision in question was Article 95(3), which requires member states to abolish by the beginning of the second stage all internal charges on products from other member states in excess of those applied on similar domestic products. The plaintiff was challenging a compensatory turnover tax collected under German law on goods imported from Luxemburg. The Court held that Article 95(3) could be enforced by individuals in national courts.²⁸

The concept of Community law as a new legal order operating directly on individuals has been firmly established by the *Van Gend-Lütticke* line of decisions. Consequently, the "great and radical vice" delineated by

note 5, at 496-99; Amphoux, Note, 1964 Rev. Gen. de Droit Int. Pub. 1; Bréban, Note, 1963 Rec. Dalloz 623; Durante, Note, 1963 Rivista di diritto internazionale 415; Ehle, Note, 1963 Neue Juristische Wochenschrift 974; Jeantet, Observations, 1963 Juriscl. Per. II, at 13177; Rigaux, Observations, 1963 J. des Tribunaux 190; Ronzitti, 1964 Foro Ital. IV, at 98; Rousseau, Note, 1963 Rev. Gen. de Droit Int. Pub. 421; "Sk.", Comment, 11 Soc. Ec. Wet. 227 (1963).

²⁵ See P. HAY, *FEDERALISM AND SUPRANATIONAL ORGANIZATIONS: PATTERNS FOR NEW LEGAL STRUCTURES* 163-64 (1966) [hereinafter cited as P. HAY].

²⁶ The Court recognized the self-executory nature of Articles 93(3), 53 and 37(2) but not of Articles 102, 93(1), 93(2), or 37(1) in *Costa v. E.N.E.L.*, 10 Recueil de la Jurisprudence de la Cour 1143 (Cour de Justice des Communautés européennes 1964). In *Albatros v. S.O.P.E.C.O.*, 11 Recueil de la Jurisprudence de la Cour 1 (Cour de Justice des Communautés européennes 1965), the Court recognized that Articles 31(1) and 32(1) are self-executing but not articles 32(2), 33 or 37(3). See Sasse, *supra* note 24, at 698; Amphoux, Note 1965 *CAHIERS DE DROIT EUROPÉEN* 59.

²⁷ 12 Recueil de la Jurisprudence de la Cour 293 (Cour de Justice des Communautés européennes 1966).

²⁸ *Id.* at 302. For comment on the *Lütticke* case see Hay, *Supremacy of Community Law in National Courts*, 16 AM. J. COMP. L. 524 (1968); Sasse, *supra* note 24, at 699-700; Ulmer, *Das Verbot der steuerlichen Diskriminierung von Einfuhrwaren in Artikel 95 des EWG-Vertrages, und seine Auswirkung auf das nationale Abgabenrecht*, 1966 AUSSENWIRTSCHAFTSDIENST DES BETRIEBSBERATERS 277; Waelbroeck, *The Application of the EEC Law by National Courts*,

Hamilton is no longer a threat to the evolution of the European Community into a federalistic structure. At the same time, the Court of Justice has successfully overcome a crisis of constitutional dimensions and firmly asserted its power.²⁹

III. THE SUPREMACY OF COMMUNITY LAW

A. The American Experience

No federal form of government can succeed unless it is well established that federal legal norms prevail over inconsistent member-state legal norms with respect to issues within the sphere of federal competence. The drafters of the United States Constitution were well aware of this axiom and inserted a supremacy clause³⁰ to assure the supremacy of federal law. This clause, however, was not of itself capable of assuring the supremacy of federal law; the national government was too weak for its legislative enactments and executive regulations to bind the much stronger governments of its member states. The task of establishing the supremacy of federal law was largely the work of the Supreme Court of the United States under Chief Justice John Marshall. The vehicle used was not only the supremacy clause but also the commerce clause³¹ of the United States Constitution.

The supremacy issue was squarely faced by the Marshall Court in *Gibbons v. Ogden*.³² This litigation arose out of exclusive franchises

19 STAN. L. REV. 1248, 1269-72 (1967); Wendt, *Ungeklärte Fragen im Streit um die Umsatzausgleichsteuer*, 1967 AUSSENWIRTSCHAFTSDIENST DES BETRIEBSBERATERS 348; Ipsen, Note, 1966 EUROPARECHT 352; Mailander, Note, 4 COMM. MKT. L. REV. 327 (1967); Waelbroeck, Note, 1967 CAHIERS DE DROIT EUROPÉEN 180.

²⁹ There is another aspect of the problem of self-execution that has not been discussed in this article: the question of whether directives of the Council of Ministers of the EEC give rise to individual rights enforceable in national courts. This question has been much debated. See P. HAY, *supra* note 25, at 152-53; Desmedt, *Les Deux directives du Conseil de la Cee concernant la police des étrangers*, 1966 CAHIERS DE DROIT EUROPÉEN 55; Dumon, *L'afflux européen dans les droits et les institutions des États membres des Communautés européennes*, 1965 CAHIERS DE DROIT EUROPÉEN 10; Fuss, *Rechtsschutz gegen deutsche Hoheitsakte zur Ausführung des Europäischen Gemeinschaftsrechts*, 1966 NEUE JURISTISCHE WOCHENSCHRIFT 1782; Waelbroeck, *Application of EEC Law by National Courts*, 19 STAN. L. REV. 1248, 1272-75 (1967).

³⁰ U.S. CONST. art. VI, para. 2.

³¹ *Id.* art. I, § 8.

³² 22 U.S. (9 Wheat.) 1 (1824). For comment on this decision see 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 250-80 (1953); F. FRANKFURTER, *THE COMMERCE CLAUSE* 11-45 (1937); T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 49-

granted Colonel Aaron Ogden by the legislatures of New York and New Jersey to operate steamboats between Elizabethtown Point, New Jersey, and points on Staten and Manhattan Islands. Thomas Gibbons operated his two steamboats in competition with Ogden without legal authorization from either New York or New Jersey. Colonel Ogden filed a bill in chancery in New York asking for a permanent injunction and other relief against the operation of the steamboats by Gibbons. In his answer to the bill, Gibbons stated that he had a right to navigate the nation's public waters by virtue of a license granted to him under an act of Congress.³³ Chancellor Kent granted the permanent injunction.³⁴ In his view the nation and its member states were separate, independent governmental entities. He regarded the license granted by Congress as being subject to the laws of the member states; thus there was no collision between the act of Congress and the acts of the states creating the steamboat monopoly.³⁵

Chancellor Kent's decision was affirmed on appeal by the New York Court of Errors,³⁶ and Gibbons then appealed to the Supreme Court of the United States.³⁷ In the Supreme Court, the supremacy issue was argued by counsel in the context of whether the national government had exclusive or concurrent power to regulate commerce under the commerce clause. Daniel Webster and William Wirt,³⁸ arguing for Gibbons, contended that the power to regulate commerce resides exclusively in the national government and that, since this power is exclusive, the states are without competence to legislate in this area.³⁹ In the alternative, they argued that even if the power to regulate commerce is concurrently vested in the national government and the states, rights claimed under state law

53 (1956); F. RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* 20-52 (1937); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 587-632 (rev. ed. 1937); Mann, *supra* note 12, at 173-238.

³³ Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. This law was passed by Congress to encourage coastal trade by American-owned ships.

³⁴ *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N.Y. Ch. Ct. 1819).

³⁵ *Id.* at 158-59.

³⁶ *Gibbons v. Ogden*, 17 Johns. 488 (N.Y. Ct. Err. 1820).

³⁷ For interesting accounts of the background of the appeal, see Kendall, *Mr. Gibbons and Colonel Ogden*, 26 MICH. S.B.J. 22 (1947) and Mann, *supra* note 12, at 182-87.

³⁸ Webster had appeared before the Supreme Court in many landmark cases: *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Wirt was a noted attorney who had opposed Webster in the *Dartmouth College* case.

³⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 10 (1824).

must be inoperative when they interfere with rights claimed under national law. They argued that in such a case the national law must prevail.⁴⁰

Counsel for Ogden, on the other hand, argued that Congress's constitutional power to regulate commerce is not exclusive because it was not made exclusive in express terms.⁴¹ Moreover, their concept of concurrent power avoided the supremacy issue. They contended that state powers as complete as those of any other nation-state continued to exist after the adoption of the Constitution and that by ratifying the Constitution the member states had transferred none of their power over commerce to the national government.⁴²

Chief Justice Marshall delivered the opinion of the Court.⁴³ Stating that the power of the national government over commerce is not limited by the existence of the states but that it is limited only by the Constitution,⁴⁴ he rejected the concept of state sovereignty advanced by counsel for Ogden. Marshall also refused to adopt Webster's thesis of exclusive power as a basis for the invalidation of state power. Instead, he held it irrelevant whether the New York franchise was granted by virtue of a concurrent power to regulate commerce or by virtue of a power "to regulate . . . domestic trade and police"⁴⁵ and viewed the issue as one of supremacy of national law over state law.

In argument . . . it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pur-

⁴⁰ *Id.* at 27.

⁴¹ *Id.* at 35.

⁴² *Id.* at 35-36, 105-07.

⁴³ *Id.* at 186-222. A concurring opinion was filed by Mr. Justice Johnson. *Id.* at 222-40.

⁴⁴ *Id.* at 196-97.

⁴⁵ *Id.* at 210.

suance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.⁴⁶

In positing unequivocally the principle that the national legal order is supreme over the legal orders of the states in areas where both are competent to act, Marshall was stating that the Constitution had created a nation with powers independent of and not limited by the existence of the member states. Beyond this, he established that it is the function of the Supreme Court to resolve conflicts between the respective powers of the national government and the states.

B. The Supremacy Problem in the EEC

Unlike the United States Constitution, the EEC Treaty contains no supremacy or other clause that may be construed to expressly resolve conflicts between the legal orders of the Community and its member states. Nevertheless, in *Costa v. E.N.E.L.*,⁴⁷ a case of the magnitude of *Gibbons v. Ogden*, the Court of Justice declared the absolute supremacy of Community law.⁴⁸ Although strikingly similar in result to *Gibbons*, the *Costa* case arose from an entirely different milieu.

Before *Costa*, there was much discussion as to whether Community law took precedence over the national law of member states.⁴⁹ Scholars

⁴⁶ *Id.* at 210-11.

⁴⁷ 10 Recueil de la Jurisprudence de la Cour 1143 (Cour de Justice des Communautés européennes 1964).

⁴⁸ The *Costa* decision has inspired much comment. See P. HAY, *supra* note 25, at 165-75; Constantinesco, *La spécificité du droit communautaire*, 1966 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 1; Frowein, *Zum Verhältnis zwischen dem EWG-Recht und nationalem Recht aus der Sicht des Gerichtshofes der europäischen Gemeinschaften*, 1964 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 233; Gori, *La preminenza del diritto della Comunità Europea sul diritto degli stati membri*, 1964 Guir. Ital. I. 1073; Hay, *Supremacy of Community Law in National Courts*, *supra* note 7, at 543-44; Sasse, *supra* note 24, Stein, *supra* note 5; Waelbroeck, *The Application of EEC Law by National Courts*, 19 STAN. L. REV. 1248, 1263-65 (1967); Virole, Note, 1965 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 369.

⁴⁹ See L. ERADES & W. GOULD, *THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES* (1961); Cahier, *Le droit interne des organisations internationales*, 1963 REV. GEN. DE DROIT INT. PUB. 563; Catalano, *Portata dell' art. 11 della Costituzione in relazione ai Trattati istitutivi della Comunità Europea*, 1964 Foro Ital. I. 465; Hayoit de Termicourt, *Le Conflit 'Traité-Loi interne'*, 78 J. DES TRIBUNAUX 481 (1963); Ipsen, *The Relationship Between the Law of the European Communities and National Law*, 2 COMM. MKT. L. REV. 379 (1965); Ipsen & Nicholaysen, *Europäischen Gemeinschaftsrecht*, 1964 NEUE JURISTISCHE WOCHENSCHRIFT 339, 342; Ophüls,

took part in a great debate over the nature of the relationship between Community and national law. One group of writers believed that the relationship could only be determined by referring to the practice in each member state regarding treaty-national law supremacy. Upon examining national practice, it was generally concluded that at the time of the *Costa* decision the supremacy of Community law was not in doubt in the Netherlands and in Luxemburg⁵⁰ but was in doubt in Italy and Germany, and perhaps also in France and Belgium.⁵¹

A second group of writers argued that the member states had, upon ratifying the treaty, transferred their sovereign rights in certain areas to a new legal entity—the Community—and, therefore, that they were wholly

Quellen und Aufbau des europäischen Gemeinschaftsrechts, 1963 NEUE JURISTISCHE WOCHENSCHRIFT 1697; Pescatore, *L'autorité, en droit interne, des traités internationaux selon la jurisprudence luxembourgeoise*, 18 PASICRISIE LUXEMBOURGEOISE 99 (1962); Piola-Caselli, *Verhältnis des EWG-Vertrages zum nationalen Recht*, 1964 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 219; Schlochauer, *Das Verhältnis des Rechts der Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten*, 11 ARCHIV DES VOLKERRECHTS 1 (1963); Van Panhuys, *The Netherlands Constitution and International Law*, 58 AM. J. INT'L L. 88 (1964); Waelbroeck, *Belgian Judge Before the International and Community Law*, 1965 REVUE BELGE DE DROIT INTERNATIONAL 348; Wohlfarth, *Anfänge einer europäischen Rechtsordnung und ihr Verhältnis zum deutschen Recht*, 1962 JURISTEN-JAHRBUCH 241; Zweigert, *Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht*, 29 BEIHEFT ZUR ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 1 (1965); Zweigert, *Der Einfluss des europäischen Gemeinschaftsrechts auf die Rechtsordnung der Mitgliedstaaten*, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 601 (1964).

⁵⁰ Conclusions of Advocate General Lagrange, 10 Recueil de la Jurisprudence de la Cour 1177. See Pescatore, *supra* note 49; Van Panhuys, *supra* note 49.

⁵¹ Italy and Germany are unique among the Six in possessing constitutional courts with the power to pass on the constitutionality of national treaties. See CONST. OF ITALY, art. 134 (1948); BASIC LAW OF GER. FED. REP., art. 100 (1949). Regarding German law on this point see Judgment of March 20, 1963, 15 BVerfG 337; regarding Italy see Judgment of Dec. 27, 1965, [1966] Foro. Ital. I, 8. Moreover, both countries require a "transformation" of a treaty into a national legal order by the passage of a statute so that it was at best doubtful whether subsequent national legislation could take precedence over an existing treaty. C. FABOZZI, *L'ATTUAZIONE DEI TRATTATI INTERNAZIONALI MEDIANTE ORDINE DI ESECUZIONE* 162-64 (1961); Sasse, *supra* note 24, at 724-25. Although article 55 of the French Constitution specifically states that international treaties are absolutely superior to national law, some writers doubted that French courts would feel empowered to ignore a statute contrary to a treaty. La Grange, *La primauté du droit communautaire sur le droit national*, 1964 SEMAINE DE BRUGES, DROIT COMMUNAUTAIRE ET DROIT NATIONAL 21, 41; Waelbroeck, *supra* note 48, at 1260. The status of the Community Treaty was in doubt in Belgium for similar reasons. In a recent decision, however, the treaty was considered absolutely supreme to national law. Judgment of June 9, 1966, [1966] Pasicrisie belge III, 120; 5 COMM. MKT. L. REV. 326 (1967) (Court of Brussels).

without competence to act in those areas in which power to act had been transferred. These writers rejected the view that the supremacy problem should be solved by reference to national practice.⁵²

Professor Zweigert, however, eschewed both groups and theorized that the supremacy of Community law springs from the treaty itself. His view was that it is implicit in the treaty that Community law must prevail since Community law must have uniform application.⁵³

It was in this setting that the Court of Justice decided *Costa*, which involved the issue of a direct conflict between a provision of the EEC Treaty and a subsequent national law.⁵⁴ By the time the case reached the Court of Justice on referral from the Milan trial court, the Italian Constitutional Court had held in effect that the trial court must disregard a treaty right if it conflicts with a subsequent national law.⁵⁵ The Advocate General of the Court of Justice believed that there was little the Court could do to safeguard the principle of supremacy of Community law. He argued that under the circumstances the Court of Justice must defer to Italian practice regarding treaty-national law supremacy, and that Italy should either amend its Constitution to make it compatible with the treaty or denounce the treaty.⁵⁶

The Court of Justice, however, refused to accept the Advocate General's views in this regard. Instead, the Court relied on a relinquishment of sovereignty theory as the point of departure for recognizing the absolute supremacy of Community law.

Unlike ordinary international treaties, the EEC Treaty established its own legal order, which was incorporated into the legal systems of

⁵² This view originated with Ophüls, *supra* note 49. See Ipsen, *supra* note 49; Wohlfarth, *supra* note 49. See also P. HAY, *supra* note 25, at 184-85, for an argument against this theory.

⁵³ Zweigert, *Der Einfluss des europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten*, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 601, 638-40 (1964).

⁵⁴ For a precise account of how the case arose and how it came to be referred to the Court of Justice see Stein, *supra* note 5, at 493-96. See also Sasse, *supra* note 24, at 700-04.

The treaty provision in question was article 37, which prohibits certain types of state monopolies. The law in question was the Italian nationalization law of 1962, under which the private Milan electric power system was nationalized. Law of Dec. 6, 1962, n. 1643, Gaz. uff. n. 316, Dec. 12, 1962; Leggi e decreti 1962, n. 1643, at 5523.

⁵⁵ Decision of March 7, 1964, [1964] Foro Ital. I. 516; [1964] Guir. Ital. I. 465. The trial court judge had referred the case to the Italian Constitutional Court, as well as to the Court of Justice. See Stein, *supra* note 5, at 493-96.

⁵⁶ Conclusions of Advocate General Lagrange, 10 Recueil de la Jurisprudence de la Cour 1180.

the Member States at the time the Treaty came into force and to which the courts of the Member States are bound. In fact, by establishing a Community of unlimited duration, having its own institutions, personality and legal capacity, the ability to be represented on the international level and, particularly, real powers resulting from a limitation of the jurisdiction of the States or from a transfer of their powers to the Community, the States relinquished, albeit in limited areas, their sovereign rights and thus created a body of law applicable to their nationals and to themselves.⁵⁷

The Court then found the actual basis for the supremacy of Community law in the EEC Treaty itself. It held that Article 189, under which Community regulations are made binding and directly applicable in each member state, would be meaningless if a member state could unilaterally nullify them through subsequent legislation.⁵⁸ As Professor Stein has pointed out,⁵⁹ the Court used a principle of implied power in dealing with the Treaty that is similar to the method used by Chief Justice Marshall in interpreting the United States Constitution in *McCulloch v. Maryland*.⁶⁰

That Community law takes precedence even over an inconsistent provision of a national constitution is implicit in the Court's decision. The Court, in its relinquishment of sovereignty theory, assumes that the Treaty, when it was adopted, did not contravene the existing constitutional provisions of any member state;⁶¹ and the Court's unqualified statement that no unilateral measure in conflict with the Treaty could validly be enacted in a member state would seem to include subsequent constitutional provisions adopted by member states.

The real importance of the *Costa* decision, however, goes beyond the establishment of the principle of the absolute supremacy of Community law. Even before *Costa*, there was near unanimous agreement that Community law should be considered supreme.⁶² What was distinctive was the manner in which the Court established the supremacy principle. As

⁵⁷ *Id.* at 1158-59, translated in 2 CCH COMM. MKT. REP. ¶ 8023 at 7390.

⁵⁸ 10 Recueil de la Jurisprudence de la Cour at 1159-60. This holding prompted one commentator to call article 189 the "supremacy clause" of the EEC Treaty. P. HAY, *supra* note 25, at 172.

⁵⁹ Stein, *supra* note 5, at 511.

⁶⁰ 17 U.S. (4 Wheat.) 316 (1819).

⁶¹ It was to be expected that the Court would not elaborate on this point. It has ruled that it is not competent to interpret or apply national law or national constitutional provisions. *Friedrich Stork & Co. v. High Authority*, 5 Recueil de la Jurisprudence de la Cour 48 (Cour de Justice des Communautés européennes 1959).

⁶² See authorities cited note 49 *supra*.

Professor Stein has pointed out, the Court firmly asserted *its own power* to determine the relationship between the Treaty and the national legal order in each member state.⁶³ National practice regarding treaty-national law supremacy is not, therefore, relevant with respect to the Community Treaty. The thrust of the *Costa* decision is that the principle of supremacy will apply not only in the Community Court but also in the national courts of member states. So considered, the *Costa* decision is remarkably similar to Marshall's opinion in *Gibbons v. Ogden*.

C. Pre-emption

The question of the pre-emption of national law by Community law is intimately related to the supremacy issue. By assuming the responsibility for protecting the supremacy of Community law in *Costa*, the Court of Justice, in addition, necessarily assumed the responsibility for developing a doctrine of pre-emption for the Community.

In the United States it has long been recognized that it is the constitutional duty of the Supreme Court to decide, when presented with the issue, whether it is necessary to invalidate a state law in order to preserve federal supremacy.⁶⁴ In carrying out this duty, the Supreme Court has dealt with the issue of pre-emption in numerous cases.⁶⁵

These cases reject a doctrine of strictly exclusive powers, such as that propounded by Webster in *Gibbons v. Ogden*,⁶⁶ that would block out fixed spheres of state and federal responsibility. Broadly speaking, the Court has taken the view that, except in those relatively few areas in which exclusive power is granted to the federal government, the plan of the Constitution is to permit the states to continue to act until the federal government elects to intervene. Even where the federal government has acted, the Court has taken a weighing-of-interests approach in deciding whether the state action should be permitted to stand. When the federal interest in avoiding multiple and conflicting state regulation

⁶³ Stein, *supra* note 5, at 513.

⁶⁴ Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-10 (1959). This duty is, of course, derived from the supremacy clause. U.S. CONST. art. VI, § 2.

⁶⁵ The Court dealt with this issue very recently in *Zschernig v. Miller*, 389 U.S. 429 (1968). In this case the Oregon courts held that an East German next of kin of an Oregon intestate could not take personalty because of an Oregon statute that provided for escheat unless the non-resident alien claimant established that reciprocity was given to American citizens by the alien's government. The Supreme Court barred the application of this statute on the ground that it conflicted with the federal foreign relations power.

⁶⁶ See p. 39 *supra*.

is paramount, the Court will bar the application of the state statute; when it is not, the statute will be upheld.⁶⁷

Like the decision of the Supreme Court in *Gibbons v. Ogden*,⁶⁸ the opinion of the Court of Justice in *Costa* left unanswered the question of the pre-emptive effect of Community law. Recently, however, the Court was faced squarely with this question in *Wilhelm v. Bundeskartellamt*,⁶⁹ which approaches *Van Gend* and *Costa* in importance. In *Wilhelm*, several German manufacturers of dyes had been fined by the German Bundeskartellamt for violation of sections 1 and 38 of the German Law against Restraints of Competition. The Commission of the EEC also instituted a proceeding, charging a violation of article 85, the basic anti-trust provision of the Treaty. The manufacturers, denying the existence of any price-fixing agreement and claiming that the Bundeskartellamt did not have the right to apply German law since a proceeding had already been initiated by the EEC Commission, appealed the decision to the Kammergericht of Berlin. Pursuant to article 177, the Kammergericht asked the Court of Justice to rule on the question of whether the member states must refrain from applying national law protecting competition in a case in which Community law may also be applicable.⁷⁰

The German manufacturers argued that the supremacy of Community law requires article 85 to be applied *exclusively* to any fact situation to which that article of the Treaty may apply. This argument resembles Webster and Wirt's contention in *Gibbons v. Ogden* that exclusive power to regulate commerce is vested in the United States.⁷¹ It is also similar to the transfer of sovereignty doctrine⁷² that by granting sovereign powers to Community institutions in certain areas, the member states necessarily deprived themselves of all powers to act in those areas.

Three intervening governments, Germany, France, and the Netherlands, disputed the manufacturers' argument. They argued that with

⁶⁷ This broad generalization, of course, hides many of the nuances of the pre-emption problem in the United States. For complete discussions of the problem see Fleischer, "Federal Corporation Law": An Assessment, 78 HARV. L. REV. 1146 (1965); Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561 (1954); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Schwarzer, *Enforcing Federal Supremacy: Relief Against Federal-State Regulatory Conflicts*, 43 CALIF. L. REV. 234 (1955); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

⁶⁸ See pp. 40-41 *supra*.

⁶⁹ 2 CCH COMM. MKT. REP. ¶ 8056 (Feb. 13, 1969).

⁷⁰ *Id.* ¶ 8056 at 7868-69.

⁷¹ See p. 39 *supra*.

⁷² See pp. 42-43 *supra*.

respect to the various legal schemes enacted to protect competition the principle of co-existence and parallel application of Community and national law is embodied in the Treaty. Under this view, competition agreements are permissible only when they overcome the "double barrier" of both Community and national law.

The EEC Commission submitted a third argument for consideration. It agreed in principle with the double barrier theory, but recognized that under certain circumstances a conflict could arise between Community and national law. Such a clash could occur either when the Commission permits a practice that is declared illegal under national law or when the Commission prohibits a practice that is exempt under national law. In either case action on the part of the national authorities would prevent the Commission from uniformly applying and enforcing Community law and would thus contravene article 5 of the EEC Treaty.⁷³ The Commission took the position that in the event of a conflict, the national authorities would be required to defer to Community law.

The opinion of the Court of Justice essentially upheld the position of the Commission. It affirmed that the parallel application of national law and Community law is permissible, thereby impliedly rejecting the transfer of sovereignty theory.⁷⁴ Nevertheless, the Court recognized that such parallel application of national and Community law is possible only when it does not jeopardize the uniform application of the Community cartel rules. When national action conflicts with Community action, national law must yield. The Court based its decision not only on article 5 of the Treaty, but also on the principle of supremacy of Community law announced in *Costa*.⁷⁵

The Court's view of the pre-emptive effect of Community law bears a close resemblance to the doctrine of pre-emption in the United States. With the exception of those powers that are expressly made exclusive in the Treaty or the Constitution,⁷⁶ both the Community Court and the

⁷³ Article 5 requires member states to take all measures to insure the carrying out of the obligations of the Treaty and acts of the institutions of the Community.

⁷⁴ Advanced by Professor Ophüls, the transfer of sovereignty theory has been criticized as being "absolutist." Note, *Review of Literature*, 1 COMM. MKT. L. REV. 374, 377-78 (1963). Professor Hay believes that Ophüls' approach confuses the problem of identifying the substantive area appropriate for Community regulation with the problem of allocation of jurisdiction. P. HAY, *supra* note 25, at 183-85.

⁷⁵ See pp. 43-44 *supra*.

⁷⁶ Like the United States Constitution, the Community Treaties, in certain instances, vest exclusive power in the Community. Article 65 of the European Coal and Steel Community Treaty, for example, provides that price agreements between coal and steel enterprises may be examined only with regard to Community Law.

Supreme Court have rejected an exclusive power theory as the basis for federal pre-emption. Moreover, both courts seem to use a balancing test and will allow member-state actions to stand if the uniform application and enforcement of the superior law is not jeopardized.

IV. THE EFFECTIVENESS OF THE COMMUNITY LEGAL ORDER: JUDICIAL REVIEW

To assure the effectiveness and the implementation of either a federal or a supranational legal order, some type of check must be maintained over the legislative and administrative acts of both the federal or supranational entity and its member states. In the EEC, as well as in the United States, much of the responsibility for such control has been delegated to or assumed by the judiciary.

A. *The American Parallel*

Most commentators use the term "judicial review" broadly to refer to judicial power to disregard or strike down state or federal statutes found to be unconstitutional.⁷⁷ The prevailing view among scholars is that the doctrine was established in the United States in 1803 by Chief Justice Marshall in *Marbury v. Madison*.⁷⁸

One writer, Dean Frank R. Strong, has demonstrated, however, that the term "judicial review" is in reality a multi-dimensional concept of American administrative-constitutional law.⁷⁹ Dean Strong asserts that the concept embraces two distinct methods of protecting the individual from an undue exercise of governmental power. He draws a distinction between judicial consideration of legislative and executive action through the processes of fact finding, statutory interpretation, and application of the intended governing rule to the specific facts, which he calls *ordinary judicial review*, and judicial consideration of the constitutionality of governmental acts, which he calls *constitutional judicial review*.⁸⁰

⁷⁷ E.g., H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 7-27 (1953); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁷⁸ 5 U.S. (1 Cranch) 137 (1803).

⁷⁹ Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law* (pts. I & II), 69 W. VA. L. REV. 111, 249 (1967) [hereinafter cited as Strong].

⁸⁰ *Id.* 250-51.

Constitutional judicial review, although hotly debated, has become well established in the United States. Some writers have attempted to demonstrate that the framers of the Constitution intended the judiciary to have this power.⁸¹ Others have attempted to trace the doctrine to English law.⁸² Regardless of its origin, the doctrine has been continually applied by the Supreme Court of the United States.⁸³

Dean Strong distinguishes two types of constitutional judicial review, direct and indirect, both having the identical objective of protecting the individual from unwarranted government action. Direct constitutional judicial review offers protection through a direct assertion that certain acts of government have no legal validity.⁸⁴ Indirect constitutional judicial review, on the other hand, offers protection by assuring the dilution of government power through the distribution of that power between the states and the federal government and among the three branches of the federal government.⁸⁵

Although of much broader application, ordinary judicial review⁸⁶ has been widely used in the field of administrative law. In this area, however, the federal courts of the United States have embraced several legal rules that severely restrict its scope. First, they have limited their power with respect to fact determinations through development of the rule that the courts should defer to the expertise of administrative bodies if the determinations of fact are supported by substantial evidence.⁸⁷

⁸¹ Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); Wechsler, *Toward Neutral Principles of Constitutional Law*, 37 HARV. L. REV. 1 (1959).

⁸² It has been asserted that *Dr. Bonham's Case*, 8 Co. 113b, 77 Eng. Rep. 646 (C.P. 1610), is the forerunner of judicial review. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926); Smith, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297 (1966).

⁸³ The doctrine was recently applied in *Powell v. McCormack*, 395 U.S. 486 (1969), and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). Dean Strong advances the interesting theory that constitutional judicial review was not established but merely begun by Marshall's decision in *Marbury v. Madison*. He states that the establishment of the doctrine in the United States took most of the nineteenth century. Strong 120.

⁸⁴ Strong 115.

⁸⁵ *Id.* 112-14. This indirect limitation of governmental powers was exercised in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Supreme Court declared that President Truman's order seizing the steel industry's production facilities could not be sustained because the President was not granted this power under the Constitution. The Court held that this power could only be exercised by Congress.

⁸⁶ Dean Strong finds the basis for this type of judicial review in the doctrine of separation-of-powers. Strong 253-54.

⁸⁷ This is the general federal rule. *E.g.*, *Consolidated Edison Co. v. NLRB*,

Second, the Supreme Court on a number of occasions has held that administrative interpretation of federal statutes, traditionally a question of law, should be allowed to stand when there is found to be a "rational basis" for the conclusions of the administrative body.⁸⁸ Only in cases involving the protection of a constitutional right is it clear that the Supreme Court will go beyond these limiting doctrines.⁸⁹ One leading writer has concluded that the unmistakable trend in American law is toward a narrowing of the scope of judicial review of administrative action. This is in direct contrast with the French system where the trend is toward a broadening of review.⁹⁰

B. The EEC Experience

As Professor Hay has pointed out,⁹¹ there are principally two jurisdictional categories through which the Court of Justice is able to effect constitutional control of a federal nature over the Community: (1) appeals by member states, individuals and enterprises against legislative and administrative acts of the Community (article 173)⁹² and (2) cases in which questions of Community law have been referred to the Court of Justice by courts of member states (article 177).⁹³ Judicial review

305 U.S. 197, 229 (1938); K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 29.01, 29.11 (1959).

⁸⁸ *E.g.*, SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Hearst Publications, 332 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934). Professor Davis finds the cases on this point inconsistent. K. DAVIS, *supra* note 87, at § 30.07.

⁸⁹ St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Cromwell v. Benson, 285 U.S. 22 (1932); Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). Dean Strong explains these decisions in terms of the distinction between ordinary judicial review and constitutional judicial review. Strong 271. Others have explained them as involving issues of constitutional or jurisdictional facts. W. GELLHORN AND C. BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 472-92 (1960); B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 229-31 (1954); Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957). Many writers doubt the continuing validity of the Ben Avon Doctrine. K. DAVIS, *supra* note 87, at § 29.11. But Dean Strong has defended it. Strong 82.

⁹⁰ B. SCHWARTZ, *supra* note 89, at 249.

⁹¹ P. HAY, *supra* note 25, at 109.

⁹² See generally G. BEBR, JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 138-47 (1962); P. HAY, *supra* note 25, at 110-20; D. G. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (1965); Buergenthal, *Appeals for Annulment by Enterprises in the ECSC*, 10 AM. J. COMP. L. 227 (1961); Stein & Hay, *Legal Remedies of Enterprises in the European Economic Community*, 9 AM. J. COMP. L. 375 (1960).

⁹³ See generally G. BEBR, *supra* note 92; Chevallier, *Le droit de la Communauté*

by the Court of Justice is exercised primarily in actions falling into these categories. Moreover, on the basis of these jurisdictional categories, the Court of Justice has established its competence to exercise both constitutional judicial review and ordinary judicial review.

1. Constitutional Judicial Review

The EEC Treaty confers on Community institutions the power to take both legislative and administrative or executive action,⁹⁴ and it establishes the power of the Court of Justice to declare that a legislative or administrative act is invalid. The Court may exercise this power under article 173 and even, as Professor Hay has shown,⁹⁵ under article 177.

The four grounds of appeal under article 173 of the EEC Treaty—lack of jurisdiction, violation of basic procedural rules, infringement of the Treaty, and abuse of power—are modeled on French administrative law.⁹⁶ Under French law an administrative action can be challenged for *excès de pouvoir*, that is, to prevent governmental agencies from exceeding their powers.⁹⁷ Court review of administrative acts on this ground is ordinary judicial review since it involves examining the administrative act against the legislative grant of authority.

However, the incorporation of this ground of appeal into the EEC Treaty results in a fundamental change in the type of review exercised by the Court. The issue on review is no longer limited to whether the governmental act conforms to the *legislative* grant of authority; also at issue is whether the governmental act conforms to the powers granted by the *Treaty-Constitution*. The function of review in the latter case is to

européenne et les juridictions françaises, 78 REVUE DU DROIT PUBLIC ET LA SCIENCE POLITIQUE 646 (1962); Ehle, *Vorlage an den Europäischen Gerichtshof gemäss Art. 177 EWG-Vertrag*, 16 NEUE JURISTISCHE WOCHENSCHRIFT 933 (1963); Ireland, *The European Court of Justice and the Struggle for Integration*, 6 VA. J. INT'L L. 114 (1965); Martinez, *The Nature and Functioning of Article 177 of the Rome Treaty*, 5 J. COMM. MKT. STUDIES 113 (1966); Mashaw, *Federal Issues in and About the Jurisdiction of the Court of Justice of the European Communities*, 40 TUL. L. REV. 21, 32-56 (1965); Opsahl, *National Courts and the Community Court under Article 177 of the EEC Treaty*, in FESTSKRIFT TIL FREDE CASTBERG 280 (1963); Pepy, *L'article 177 du Traité de Rome et les juridictions françaises*, 52 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 475, 475-501, 695-717 (1963); Stein & Hay, *supra* note 92.

⁹⁴ EEC Treaty, art. 189. See P. HAY, *supra* note 25, at 103-04. Regulations, which have general effect in the Community, are legislative in character as distinguished from decisions, directives and recommendations.

⁹⁵ Hay, *Supremacy of Community Law in National Courts*, 16 AM. J. COMP. L. 524, 535-38 (1968).

⁹⁶ Stein & Hay, *supra* note 92, at 383.

⁹⁷ B. SCHWARTZ, *supra* note 89, at 216-17.

safeguard the allocation of governmental power among the Community institutions themselves and between the Community and the member states. Thus it serves to fractionalize the totality of power and to mitigate its effect on the individual. Such essentially indirect constitutional judicial review is analogous to the judicial act performed by the Supreme Court of the United States in considering whether the President has usurped a legislative power or whether Congress has attempted to exercise a power belonging to the states.⁹⁸

Governmental acts of member states are also subject to indirect constitutional judicial review by the Court of Justice. Professor Hay has shown⁹⁹ that this method of judicial review was exercised under article 177 in *Costa v. E.N.E.L.*¹⁰⁰ In that case the Court was actually reviewing national law for its "constitutionality" under Community law. While it lacked the power to declare the national law invalid, the Court was protecting the Community legal order against the encroachment of a governmental act by a member state.

2. Ordinary Judicial Review

Although article 177 can be and is used by the Court of Justice as a vehicle for the exercise of constitutional judicial review, it is more generally used for the purposes analogous to ordinary judicial review. The main purpose of article 177, therefore, is to assure the effectiveness and uniform application of Community law in national courts. Thus article 177 requires that a national court of last resort refer any question concerning the interpretation of the Treaty or the acts of Community institutions to the Court of Justice. Other national courts may, but are not required, to make such a referral. The Community Court's power of ordinary judicial review is, however, more limited than that of the federal courts in the United States. The Community Court merely has the power to interpret; it does not have the power under article 177 to apply Community law to a specific case.¹⁰¹ Nevertheless, the Court through

⁹⁸ An example of the latter type of review in American law is *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which held that Congress had no authority under the Constitution to prohibit the transportation in interstate commerce of goods manufactured in factories in which children under the age of fourteen were employed. This decision was overruled in *United States v. Darby*, 312 U.S. 100 (1941).

⁹⁹ Hay, *supra* note 95, at 535-36.

¹⁰⁰ 10 Recueil de la Jurisprudence de la Cour 1143 (Cour de Justice des Communautés européennes 1964). See pp. 43-44 *supra*.

¹⁰¹ See Conclusions of Advocate General Roemer, *Wilhelm v. Bundeskartellamt*, 2 CCH COMM. MKT. REP. ¶ 8056 at 7868-69 (Feb. 13, 1969).

its powers under article 177 has prompted member states to give effect to the Community legal order.¹⁰²

V. CONCLUSION

In a relatively short period, the Court of Justice has developed doctrines of judicial power that to a remarkable degree parallel those developed by the Supreme Court of the United States. Many obstacles to the exercise of federal judicial power by the Court of Justice have been overcome. However, a serious difficulty remains: the inherent weakness of the article 177 referral procedure.

Article 177 was intended to assure judicial review of substantially all cases arising in national courts involving the Community legal order. Because of a faulty referral mechanism, however, the article has been unable to provide such assurance. Neither the Court of Justice nor individual litigants have the power to compel a referral under article 177. This power is, instead, vested in the national courts, and even courts of last resort have in many instances refused to issue an order of referral.¹⁰³ A recent example of this problem is the decision by the French Conseil d'Etat that regulation 19 of the Council of Ministers of the EEC, prohibiting certain domestic preferences in the cereals sector, was ineffective in France because of a subsequent law governing tariff preferences for Algerian wheat.¹⁰⁴

This decision touched off sharp reaction and criticism from many quarters.¹⁰⁵ The EEC Commission's reaction to the decision was ex-

¹⁰² See Hay, *supra* note 95, at 538-41.

¹⁰³ In fact, national courts of last resort have used extensively several doctrines to severely limit their duty to refer questions of Community law to the Court of Justice. One doctrine holds it unnecessary to refer a question of Community law if the case can be decided on independent national law grounds. A referral is also unnecessary if the question of Community law is *acte clair* or if the Court of Justice has already ruled on the matter. Judgment of Jan. 5, 1967, [1967] Recueil Dalloz-Sirey 465 (Cour de Cassation); Judgment of Dec. 12, 1966, [1967] AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 67 (Verwaltungsgericht Frankfurt); See also Written Question 100/67, *Journal Officiel* No. 270, Nov. 8, 1967, translated in 2 CCH COMM. MKT. REP. ¶9200; P. HAY, *supra* note 25, at 134-35; Hay, *supra* note 95, at 531-35; Tallon & Kovar, *The Application of Community Law in France*, 4 COMM. MKT. L. REV. 64 (1966).

¹⁰⁴ Syndicat général des fabricants de sémoules de France, 1968 Recueil Dalloz-Sirey 285 (Conseil d'Etat).

¹⁰⁵ See Buxbaum, *Article 177 of the Rome Treaty as a Federalizing Device*, 21 STAN. L. REV. 1041 (1969); Hay, *supra* note 95, at 549-50; Constantinesco, Comment, 3 EUROPARECHT 318 (1968); Ipsen, Comment, 3 EUROPARECHT 330 (1968); Kovar Note, 57 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 527 (1968); M.L. (La Grange), Note, 1968 Recueil Dalloz-Sirey 286.

pressed in response to a written question submitted by a member of the European Parliament. The Commission stated that the decision was contrary to the principle of supremacy of Community law established by *Costa* in that a subsequent national law was given effect over a Community act intended to have binding effect.¹⁰⁶

This occasion was not the first on which the Commission has commented on the decisions of the French Conseil d'Etat. On November 8, 1967, the Commission called attention to other decisions of the Conseil d'Etat in which a question of Community law was decided without invocation of the article 177 referral process. It concluded that, although extreme caution should be exercised, article 169¹⁰⁷ of the Treaty, which gives the Commission the right to institute proceedings against any member state that fails to fulfill its treaty obligations, is applicable where the court of a member state violates its duty of referral under article 177.¹⁰⁸

It is questionable, however, whether article 169 provides a satisfactory solution. Such a procedure could not function as does the certiorari procedure in the United States because the control of the litigation would be in the hands of the Commission, not in the hands of the private parties involved.¹⁰⁹ This objection may not be as serious as it first appears. Although desirable, it is not absolutely essential that private parties have control of the litigation.

The primary purpose of the certiorari procedure in the United States is not the vindication of private rights; it is designed more to resolve conflicts of opinion that have arisen among lower courts and to decide questions the resolution of which will have immediate importance far beyond the particular facts and parties involved.¹¹⁰ Similarly, the pur-

¹⁰⁶ Written Question 28/68, *Journal Official* No. C71, July 17, 1968, translated in 2 CCH COMM. MKT. REP. ¶ 9246.

¹⁰⁷ Article 169 provides:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter; the State concerned must be given the prior opportunity to submit its comments.

If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

¹⁰⁸ Written Question 100/67, *supra* note 103.

¹⁰⁹ P. HAY, *supra* note 25, at 135-36.

¹¹⁰ Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, quoted in R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 150 (1962). See also *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452-54 (1959); *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923) (Frankfurter, J., dissenting).

pose of article 177 is not so much to vindicate private rights as to achieve uniform application of Community law throughout the member nations. Such purpose could be effectively fulfilled by the device of the Commission occasioning referrals under article 169.

Moreover, an article 169 action by the Commission in an appropriate case may be desirable in order to provide the Court of Justice with the opportunity to interpret article 177. Such a proceeding may also give national courts a greater incentive to comply with their obligation to make a referral.

Of course, the best solution to the problem would be an amendment of article 177 to give individual litigants the right to invoke the jurisdiction of the Court of Justice. Such a procedure could, as suggested by several writers,¹¹¹ be modeled on the certiorari procedure of the United States Supreme Court, with such modifications as may be necessary in the light of Community experience. This procedure might also be adopted without recourse to Treaty amendment by using the gap-filling procedure of article 235.¹¹²

¹¹¹ Hay, *supra* note 95, at 551; Buxbaum, *supra* note 105, at 1056. See also Mok, *Should the "first paragraph" of art. 177 of the EEC Treaty be read as a separate clause?*, 5 COMM. MKT. L. REV. 458 (1968).

¹¹² Article 235 provides:

Where action by the Community appears necessary to achieve, in the course of operation of the Common Market, one of the objectives of the Community, and where this Treaty has not provided for the necessary powers of action, the Council shall, by unanimous decision, on a proposal from the Commission and after the Assembly has been consulted, take the appropriate steps.