

# Subsidiarity and Sovereignty: European Regionalism and Globalized Legal Relations

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Regionalism is one of those wonderful terms admitting of two apparently inconsistent, yet related, meanings.<sup>1</sup> International relations discourse often uses the term to describe supra-national institutions like NAFTA and the European Community, which sit “above” the nation-state but “below” genuine internationalism.<sup>2</sup> Increasingly regionalism is intended to connote something very different – the level below both internationalism and the nation-state<sup>3</sup> -- but the two phenomena wind up being closely intertwined. The most immediate connection concerns political authority. Supra-national regionalism nominally requires sacrificing some element of national sovereignty.<sup>4</sup> But the degree depends on how much authority national institutions possessed in the first place,<sup>5</sup> and subnational governments sometimes object that supra-national regionalism effectively transfers power over domestic affairs to agents more susceptible of control by national institutions.<sup>6</sup> Others argue, though, that supra-national regionalism permits cutting out the middlemen, enabling regions to bypass the nation-state on the path toward

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<sup>1</sup> See, e.g., Opinion CdR 353/96, *The Global Challenge of International Trade: A Market Access Strategy for the European Union*, Jan. 15, 1997, OJ 1997 C 116/26, ¶ 3.2.7 (employing “regions” to mean “regions on a global scale”).

<sup>2</sup> See, e.g., MILES KAHLER, *REGIONAL FUTURES AND TRANSATLANTIC ECONOMIC RELATIONS* (1995); ROBERT Z. LAWRENCE, *REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION* (1996).

<sup>3</sup> For a brief reflection on this use of the term, see Peter Wagstaff, *Introduction: Regions, Nations, Identities*, in *REGIONALISM IN THE EUROPEAN UNION* (Peter Wagstaff ed., 1999). I use the term “regions” throughout the remainder of this paper to refer to sub-national regions, and further include localities within that category – consistent with the problematic lumping within the Committee of the Regions. See Charlie Jeffery, *The Regions and Amsterdam: Whatever Happened to the Third Level?*, in *REFORMING THE EUROPEAN UNION – FROM MAASTRICHT TO AMSTERDAM* 136 (Philip Lynch, Nanette Neuwahl, & G. Wyn Rees eds. 2000) (noting objection by strong regions to inclusion of weaker localities).

<sup>4</sup> To the extent any such sovereignty may be said to exist. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (described varied uses, and institutional construction, of national sovereignty).

<sup>5</sup> Vivien A. Schmidt, *European ‘Federalism’ and its Encroachments on National Institutions*, 29 *PUBLIUS: THE JOURNAL OF FEDERALISM* 19 (1999).

<sup>6</sup> See, e.g., MICHAEL KEATING, *THE NEW REGIONALISM IN WESTERN EUROPE: TERRITORIAL RESTRUCTURING AND POLITICAL CHANGE* (1998); Naomi Roht-Artaiza, *The Committee on the Regions and the Role of Regional Governments in the European Union*, 20 *HASTINGS INT’L & COMP. L.J.* 413, 421-23 (1997).

Brussels, and Community institutions to forge relationships under the noses of its national principals.<sup>7</sup>

The constitutional connections between the two regionalisms are perhaps less obvious, but appear equally at cross-purposes. On the one hand, sub-national regionalism is appreciated as an antidote to the supra-national, intergovernmental character of the Community, at least in lieu of any greater prospect for a European demos and Community-wide popular sovereignty.<sup>8</sup> President Prodi described this interim approach as “radical decentralization” – the recognition that “Europe is not just run by European institutions but by national, regional and local authorities too and by civil society.”<sup>9</sup> Taken seriously, radical decentralization suggests that the classic intergovernmental form of supra-national regionalism is vestigial and, to a degree, pathological in character, and that local authority can partially remedy its democratic flaws – supposedly, from within the Community.<sup>10</sup>

A still more radical solution, however, envisions that local authority will not stay local – but instead, spurred by globalization, will contribute to the new pluralism in international politics. Like U.S. states and localities, European regions regard globalization as fundamentally dislocative, a change compelling them to seek enhanced participation in global affairs. But their constitutional situations are potentially distinguishable. While U.S. states and localities are similarly situated relative to the federal government, the traditional locus of international sovereignty, European regions not only sit below their Member States – which enjoy international functions within the Community, in coordination with the Community institutions relative to third countries, and in independent international relations with third countries – but also below the Community as well, which is at pains to protect its exclusive and mixed competence for conducting foreign relations.

This paper briefly explores these formal connections in the hope of stimulating broader consideration of the constitutional relationship between sub-national regionalism and its supra-national kin in a globalized world. First, to what extent is the Community

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<sup>7</sup> See Jackie Jones, *The Committee of the Regions, Subsidiarity and a Warning*, 22 EUR. L. REV. 312, 314 (1997); John Newhouse, *Europe's Rising Regionalism*, FOR. AFFS., Jan./Feb. 1997, at 67; Udo Bullmann, *The Politics of the Third Level*, in THE REGIONAL DIMENSION OF THE EUROPEAN UNION: TOWARDS A THIRD LEVEL IN EUROPE? (Charlie Jeffery ed., 1997); Schmidt, *supra*, at 37; e.g., Paul Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 635-39 (1994) (arguing that subsidiarity will catch states in a pincer movement between centralization and devolution to sub-national levels of society).

<sup>8</sup> For some of the many evaluations of the absence of conventional democracy at the European level, see DEIRDRE M. CURTIN, *POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY* (1997); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

<sup>9</sup> Romano Prodi, *Shaping the New Europe*, Speech 00/41 to the European Parliament (Strasbourg, Feb. 15, 2000). Nearly identical sentiments were expressed in Romano Prodi, *Reshaping Europe*, Speech before the Committee of the Regions (Brussels, Feb. 17, 2000).

<sup>10</sup> J.H.H. Weiler et al., *European Democracy and Its Critique*, 18 W. EUR. POL. 4 (1995); Antje Wiener & Vincent Della Salla, *Constitution-Making and Citizenship Practice--Bridging the Democracy Gap in the EU*, 35 J. COMMON MKT. STUD. 597 (1997).

obliged to devolve political authority downward to the regions, including responsibility for conducting international relations? Second, and conversely, do Community principles constrain the assignment by member states of foreign relations authority to regions? As explained below, the answers may be discouraging for those supposing that one form of regionalism may simply nest within the other, but will perhaps help redefine the ambitions of regionalism in a fashion better reconciled to its emerging tools. In particular, considering the proper limits to the foreign relations authority of the regions – part of what Francisco Aldecoa described as an area that “has hardly been studied at all”<sup>11</sup> – may shine light on the responsibilities that should be permitted them as well.

## I. Regionalism as a Community Obligation

The revised EC Treaty institutes regionalism in several forms. Article 265 (ex Article 198c), added by the Maastricht Treaty, requires the Council and Commission to solicit the opinion of the Committee of the Regions (successor to the Consultative Council of Regional and Local Authorities) on certain subjects-matter, and the Amsterdam Treaty expanded that range. In addition, Article 203 (ex 146) was revised to permit regional ministers to participate in the Council of Ministers.<sup>12</sup>

These provisions are less than wholly satisfactory, however, to those advocating genuine political authority for Europe’s regions. The principal reason is that they are of strictly limited scope. The Treaty implies, for example, that Council or Commission action, as appropriate, must await the timely opinion of the Committee of the Regions, but nothing requires that they consider or address any opinion, let alone heed it.<sup>13</sup> If the Committee opinion is tardy, or falls outside its limited areas of competence, the other institutions are entirely without obligation. Some accordingly regard the Committee’s advisory function as more symbolic than anything.<sup>14</sup> Regional participation via the Council, similarly, may be little more than a simulacrum of preexisting influence by subnational governments in the federal Member States.<sup>15</sup>

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<sup>11</sup> Francisco Aldecoa, *Towards Plurinational Diplomacy in the Deeper and Wider European Union (1985-2005)*, in PARADIPLMACY IN ACTION: THE FOREIGN RELATIONS OF SUBNATIONAL GOVERNMENTS 89 (Francisco Aldecoa & Michael Keating eds. 1999).

<sup>12</sup> Article 203 (ex 146) provides in relevant part that “[t]he Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State.”

<sup>13</sup> See Article 265 (ex Article 198c). Teasing out any obligation takes more work than should be necessary. Article 265 indicates that on those occasions in which the Committee must be consulted, but has exceeded its time-limit for submitting an opinion, “the absence of an opinion shall not prevent further action.” This implies that the Council and Commission are otherwise estopped from acting prior to receiving a mandatory opinion.

<sup>14</sup> See Thomas Christiansen, *Second Thoughts on Europe’s “Third Level”: The European Union’s Committee of the Regions*, 26 PUBLIUS: THE JOURNAL OF FEDERALISM 93 (Winter 1996); Hooghe & Marks, *supra*, at 75-76; but see ALEX WARLEIGH, *THE COMMITTEE OF THE REGIONS: INSTITUTIONALISING MULTI-LEVEL GOVERNANCE?* 3-4, 35-39, 42-48 (1999).

<sup>15</sup> In Germany, for example, Article 23 of the Basic Laws, and its implementing legislation, essentially guarantee the Bundesrat – the senate of state government representatives that plays such a large role in the federal legislative process – a right to participate in all matters involving the European Union, and a right to assume primary responsibility for those matters involving the exclusive legislative competencies of the *Länder*. GG art. 23 GG; Bund-Länder Law (EUZBLG) of 1993, Bund-Länder Agreement (BLV) of 1993; see also GG arts. 50, 52(3e); see generally Rogoff, *supra*, at 421-23. This is not

Neither mechanism, moreover, affords genuinely autonomous participation by the regions. The Committee of the Regions is yet another Community institution, and requires the (often strained) collective mediation of views held by highly diverse regions. Participation in the Council must remain on behalf of the Member State government, rather than the representative's region.<sup>16</sup> Representation is also plainly subject to domestic arrangements, and at present appears to be available only to Belgian regions and communities and to the German and Austrian Länder.<sup>17</sup>

Finally, and most basically, neither mechanism has succeeded in securing high-priority regional objectives, such as sustaining the level of European financial support for distressed regions – a continuing concern in light of globalization's pressures on backward regions and, more particularly, the budgetary strains likely created by enlargement. To the Committee of the Regions, among others, an effective European regional policy thus requires enhancement from institutions outside the Community, including Member State regional policies, domestic initiatives by the regions themselves, and cross-border regional ties.<sup>18</sup>

While some regions suggest that the only cure lies in a treaty reform returning authority to the Member States and to their regions,<sup>19</sup> the obstacles to any such reform are considerable, as evidenced by the de-acceleration of regionalism at Amsterdam.<sup>20</sup> Absent such reform, many perceive that the solution lies in more zealous administration of a preexisting constitutional mechanism – subsidiarity – that in fact bears a deeply problematic relationship with regionalism. Article 5 provides that:

In areas which do not fall within its exclusive competence, the Community shall take action, in

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to deny that the entitlement to participate directly has lent considerable clarity, such as in diminishing the need for Belgium to resort to abstaining from matters in which the federal minister and the relevant subnational entities could not agree. See Lenaerts & Foubert, *supra*, at 602.

<sup>16</sup> Although it is sometimes cautioned that regional representatives in Council must represent their nations as a whole, rather than any regional or pan-regional interest, it is more accurate to say that they must represent the national government – something that arguably narrows their latitude still more.

<sup>17</sup> See Liesbet Hooghe & Gary Marks, "Europe with the Regions": *Channels of Regional Representation in the European Union*, 26 PUBLIUS: THE JOURNAL OF FEDERALISM 73, 77 (Winter 1996). The details of German arrangements are set forth in Martin A. Rogoff, *The European Union, Germany, and the Länder: New Patterns of Political Relations in Europe*, 5 COLUM. J. EUR. L. 415, 425-26 (1999); the Belgian arrangements are described in Koen Lenaerts & Petra Foubert, *Belgian Law and the European Community (1993-1996)*, 22 EUR. L. REV. 599, 601-04 (1997); and the Austrian arrangements in Michael Morass, *Austria: The Case of a Federal Newcomer in European Union Politics*, in THE REGIONAL DIMENSION, *supra*, at 76 *et seq.*

<sup>18</sup> For the most recent expression, see Opinion CdR 157/2000 fin, *The Structure and Goals of European Regional Policy in the Context of Enlargement and Globalisation: Opening of the Debate*, Feb. 15, 2001.

<sup>19</sup> See, e.g., Simon Taylor, *German State Chief Calls for End to EU Power Monopoly*, EUROPEAN VOICE, March 15-21, 2001, at 10 (describing proposals by Premier of North-Rhine Westphalia).

<sup>20</sup> Charlie Jeffery, *The Regions and Amsterdam: Whatever Happened to the Third Level?*, in REFORMING THE EUROPEAN UNION – FROM MAASTRICHT TO AMSTERDAM ch. 7 (Philip Lynch, Nanette Neuwahl, & G. Wyn Rees eds. 2000).

accordance with the principle of subsidiarity, only if and insofar 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.<sup>21</sup>

Notwithstanding its malleability,<sup>22</sup> subsidiarity comprises the Community's most basic commitment to federalism,<sup>23</sup> and it is unsurprising to see it invoked to defend regional prerogatives. But Article 5, read literally, is unconcerned with promoting regional influence at the Community level, and attributes no value to the involvement of regions at the Member State level either.<sup>24</sup> Instead, the article as drafted supposes that Member States should determine whether subnational action is preferable. To be sure, subsidiarity is framed more broadly elsewhere in the Treaty -- Article 1, for example, advocates the broader ambition of pushing authority as far downward as possible.<sup>25</sup> But these other renderings lack the legal status of Article 5, and are unenforceable by the Court of Justice.<sup>26</sup>

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<sup>21</sup> EC Treaty art. 5 (ex art. 3b); see also Protocol on the Application of the Principles of Subsidiarity and Proportionality, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 1997 O.J. (C 340) 1.

<sup>22</sup> Professor Toth has suggested that "there are few concepts in the Maastricht Treaty, or indeed in Community law as a whole, which are more elusive than the concept of subsidiarity," and notes that President Jacques Delors offered a prize to anyone who could define subsidiarity. See A.G. Toth, *A Legal Analysis of Subsidiarity*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 37 (David O'Keefe & Patrick Twomey eds., 1994). The Commission, unhelpfully, has described subsidiarity as a "state of mind." See Commission of the European Communities, Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM (93) 545 final at 2 (Nov. 24, 1993) [hereinafter Commission Subsidiarity Report]. For more extreme examples of subsidiarity-bashing, see Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 *HARV. INT'L L.J.* 1, 48 n.239 (2000).

<sup>23</sup> See Speech by Sir Leon Brittan, Vice-President of the European Communities, Subsidiarity in the Constitution of the European Community, Robert Schuman Lecture, European University Institute, June 11, 1992, in Europe Doc. No. 1786 ("I predict that Article 3b of the Treaty"--incorporating subsidiarity--"will prove to be one of the most important modifications to the Community's constitution since 1957."); George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *COLUM. L. REV.* 331, 332 (1994) (noting that subsidiarity principle has "dominated discussions of European federalism for over five years").

<sup>24</sup> See Gerry Cross, *Subsidiarity and the Environment*, 15 *Y.B. EUR. L.* 107, 108 (1995) ("The first thing that must be stated with regard to Article [5] is that it enshrines what might be described as a 'sawn-off' form of subsidiarity. It is subsidiarity down as far as the national level but no farther."); see also Jason Coppel, *Edinburgh Subsidiarity*, 44 *N. IRELAND LEGAL Q.* 179, 179 (1993) (noting emphasis by federal Member States on sub-national subsidiarity).

<sup>25</sup> Article 1 declares that in the European Union "decisions are taken as openly as possible and as closely as possible to the citizen," and Article 2 generally requires the Community to pursue Treaty objectives "while respecting the principle of subsidiarity as defined in Article 5 [ex art. 3b]." TEU arts. 1 (ex art. A), 2 (ex art. B). For these broader usages, see Opinion of the Committee of the Regions of Feb. 17, 2000, on the 2000 Intergovernmental Conference, 2000 OJ C No 156/6; Opinion CdR 302/98 final, *The Principle of Subsidiarity Developing a Genuine Culture of Subsidiarity: An Appeal by the Committee of the Regions*, 1999 OJ C No 198/73, 74.

<sup>26</sup> See, e.g., Bermann, *supra*, at 342-43. As previously noted, Article 1 (ex art. A, after amendment) of the Treaty on European Union speaks generally of the need to push decision-making as close to the people as possible, but that principle is not enforceable by the Court of Justice to the same extent as Article 5. See Josephine Steiner, *Subsidiarity Under the Maastricht Treaty*, in *LEGAL ISSUES OF*

In view of these limitations, the Committee of the Regions and others would amend Article 5 so as expressly to require not only the assessment of whether objectives “cannot be sufficiently achieved by the Member States, or by the regional and local authorities endowed with powers under the domestic legislation of the Member State in question.”<sup>27</sup> Such a principle might further be applied, optimally, “by means of a co-decision process which, on a case-by-case basis, establishes the level to which powers should be assigned (European Union, Member States, regions or local authorities).”<sup>28</sup> Subsidiarity, put simply, would be married with a principle of proximity.<sup>29</sup>

The proposal is more radical than it might initially appear. As the Committee recognized, the reformulated terms “define[] the principle of subsidiarity not only as a criterion for exercising shared powers between the Union and the Member States, but also as a criterion for sharing powers and responsibilities among all levels of government participating in the European Union.”<sup>30</sup> Elsewhere it has advocated driving authority downward to the extent permissible under each nation’s laws – apparently, even where the division of authority is not guaranteed by a federal scheme. For example, the Committee noted the view expressed by Belgium, Germany, and Austria that subsidiarity ought somehow take account of subnational entities recognized by national constitutional

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THE MAASTRICHT TREATY, *supra*, at 53. See TEU art. 46 (ex art. L) (Treaty provisions relating to powers of the Court and exercise of those powers apply only to certain provisions of the TEU, not including Articles 2,3, or 6(2) (ex art. B,C, and F, after amendment)); see also Case C-167/94R, Juan Carlos Grau Gomis, [1996] 2 C.M.L.R. 129, ¶ 6 (1995) (refusing jurisdiction to interpret Article 2 (ex art. B) in context of Article 234 (ex art. 177) ruling); Opinion of Advocate General Jacobs, Case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v. Beune*, 1995 E.C.R. I-4471, ¶ 60.

<sup>27</sup> Opinion CdR 136/95, *The Revision of the Treaty of the European Union*, April 21, 1995 (<[http://europa.eu.int/en/agenda/igc-home/eu-doc/regions/crf\\_en.htm](http://europa.eu.int/en/agenda/igc-home/eu-doc/regions/crf_en.htm)>) (emphasis added); see also Opinion of the Committee of the Regions on the 2000 Intergovernmental Conference, 2000 OJ C No 156/6 (resolving that “a correct juridical definition of ‘Subsidiarity’ requires the presence of regions in the notion of and in the wording of Article 5”); *id.* (“The Committee calls for Article 5 of the Treaty to be amended so that it will not only take into consideration the levels of the Community and of the national sovereignty of the Member States, but the special status of local and regional government as well”); Opinion CdR 302/98 final, *supra*, at 74; Council of European Municipalities and Regions, *Proposals for Amendments to the Maastricht Treaty – Our Vision for Europe: Democratic, Diverse, Decentralized* (Feb. 1997) (<[http://www.ccre.org/amen\\_an.html](http://www.ccre.org/amen_an.html)>).

Attempts at revision are somewhat at cross-purposes with arguments that Article 5 reflects regional considerations as it stands, but that tension is nothing new. The pre-Amsterdam IGC noted a declaration by federal states reflecting their view that “[I]t is taken for granted that by the German, Austrian, and Belgian governments that action by the European Community in accordance with the principle of subsidiarity not only concerns the Member States but also their entities to the extent that they have their own lawmaking powers conferred on them under national constitutional law.” Declaration by Germany, Austria and Belgium on Subsidiarity, *Amsterdam Treaty*, Decl. 3, at 143. These declarations followed the unsuccessful attempt by Germany to achieve express recognition of this corollary in the Maastricht Treaty. See Bart Hessel & Kamiel Mortelmans, *Decentralized Government and Community Law: Conflicting Institutional Developments?*, 30 COMMON MKT. L. REV. 905, 910 (1993).

<sup>28</sup> Opinion CdR 302/98 final, *supra*, at 76.

<sup>29</sup> See Opinion of the Committee of the Regions on *New Forms of Governance: Europe, A Framework for Citizens’ Initiative*, OJ 2001 C No 144/1, 2 (May 15, 2001); see also Eurocities, *Toward the Revision of the Treaty on European Union: A Charter of the European Cities* (Nov. 24, 1995) (<<http://www.eurocities.org/library/eurocit/cofciten.htm>>).

<sup>30</sup> Opinion CdR 136/95, *supra*.

laws, and concluded that “it must be logically possible to apply this declaration to regional and local entities in non-federal states.”<sup>31</sup>

The Committee’s proposal is vulnerable in two respects. First, it underestimates the result’s inconsistency with the present approach, as well as that approach’s integrity: subsidiarity, as originally conceived, was intended neither to undermine a Member State’s internal arrangements nor impose a principle of subsidiarity upon Member States themselves.<sup>32</sup> Perhaps symptomatically, the Committee – while regarding itself as the institutional representation of the Community’s commitment to subsidiarity<sup>33</sup> -- tends, *ceteris paribus*, to encourage Member States to vest their regions with political power in order to protect their nation’s relative authority within the Committee.<sup>34</sup> This may have unfortunate ripple effects, as in the Major government’s (unsuccessful) attempts to frustrate the democratic selection of U.K. representatives.<sup>35</sup>

Second, the normative case for proximity -- the supposition that driving authority downward, as urged in the Amsterdam declaration, is everywhere beneficial – is also vulnerable. It seems appropriate to require that the Community heed national divisions of authority (at least to the extent that it such a division applies expressly, or by implication, to supranational authority). But where matters have not already been settled, it is not invariably the case that power is best exercised locally; it depends on the nature of a

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<sup>31</sup> Opinion of the Committee of the Regions on the 2000 Intergovernmental Conference, 2000 OJ C No 156/6; see also Opinion CdR 302/98 final, *supra*, at 75 (noting, in reference to the declaration, that “[t]he Committee also feels that, taking due account of the internal government workings of the Member States, the general thrust of this declaration must apply mutatis mutandis to regional and local authorities in non-federal Member States”).

<sup>32</sup> See, e.g., PETES E. HERZOG & HANS S. SMIT, *THE LAW OF THE EUROPEAN COMMUNITY: A COMMENTARY ON THE EEC TREATY I-64* (1998).

<sup>33</sup> See Committee of the Regions, *Subsidiarity Opinion*, OJ 1999 C 198/73, at 74 (describing itself as “custodian of the subsidiarity principle”); Opinion CdR 52/1999, *The Institutional Aspects of Enlargement: Local and Regional Government at the Heart of Europe*, Sept. 15, 1999 (“The Committee of the Regions has a key role to play in promoting the principle of subsidiarity in the European Union”); Opinion CdR 145/98, *Cross-Border and Transnational Cooperation Between Local Authorities*, Feb. 22, 1999, OJ 1999 C 51/21, ¶ 11.1 (“Formal participation by local authorities in the EU opinion-forming process, e.g., via the Committee of the Regions, is the political aspect of the subsidiarity principle.”).

The Committee is not alone in this perception. See European Parliament, Intergovernmental Conference Task Force, 2 White Paper on the 1996 Intergovernmental Conference: Summary of Positions of the Member States of the European Union with a View to the 1996 Intergovernmental Conference – Belgium <<http://europa.eu.int/en/agenda/igc-home/ms-doc/state-be/pos.htm>> (“On relations between the European Union, Belgium as a federal Member State and the Belgian Communities and Regions, the Belgian Government considers subsidiarity to be an essential principle for such relations, which takes physical form in the Committee of the Regions of the Union . . .”). But the Committee’s Amsterdam initiative to attain for itself and regions with legislative powers the right to initiate annulment proceedings under Article 230 (ex Article 173) failed, as did most of its other suggestions. See CdR 136/95, *supra*.

<sup>34</sup> A somewhat similar argument, though not framed in terms of subsidiarity, is made in Jones, *supra*. I would distinguish for these purposes instances in which a regionalist movement was merely inspired by European developments, which seems entirely unobjectionable.

<sup>35</sup> See John Peterson, *Subsidiarity: A Definition to Suit Any Vision?*, 47 *PARLIAMENTARY AFF.* 1, 124 (1994).

nation's constitutional arrangements and political circumstances,<sup>36</sup> not to mention the availability of still more local alternatives.<sup>37</sup> Equating what works with the *Länder* with the resurgent regionalism in the United Kingdom<sup>38</sup> or the Netherlands<sup>39</sup> reflects a universalistic approach that is inconsistent with the premises of local governance. The result may also be a compound the complexity of subsidiarity analysis, and make it still more open to manipulation. Assuming that the Commission can ordinarily determine whether a proposed action's spillover effects require supranational intervention, it will be harder pressed to determine whether the action is best implemented at a national or regional level in all of the Member States, and intrusive to boot.<sup>40</sup>

The fact that Community institutions are not legally bound to take regional alternatives into account – and ought not be compelled to do so in the fashion proposed by the Committee – does not mean that the regions are irrelevant to subsidiarity. In accord with non-enforceable subsidiarity principles (like those in Article 1) and simple good governance, the institutions should consider the prospects for regional action as one of the many elements relevant to assessing whether Community action is necessary. In addition, it seems eminently reasonable for the institutions, in comparing Community action against its alternatives, to consider how the Member States would in fact administer a comparable initiative – including, for better or for worse, the prospects for actions that would actually be delegated under national law to regions or localities. In such a form, regional authority is genuinely ancipital, and may disadvantage both the Member State alternative and, derivatively, regional alternatives to Community action. Little wonder, then, that advocates of regionalism increasingly look to self-help.

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<sup>36</sup> See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (questioning U.S. pursuit of federalism rather than a situational, top-down decentralization); Edward L. Rubin, *Henry J. Miller Lecture Series and Symposium: "New Frontiers of Federalism": The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1009 (1997) (same).

<sup>37</sup> Cf. William M. Downs, *Accountability Payoffs in Federal Systems? Competing Logics and Evidence from Europe's Newest Federation*, 29 PUBLIUS: THE JOURNAL OF FEDERALISM 87, 101-02 (Winter 1999) (suggesting that regional authority may be seized at the expense of local authority); Jeffery, *supra* (noting indifference of localities to proposed reform of Article 5, given its necessary limitation to extent regional governments with concrete political assignments).

<sup>38</sup> For discussion of the weaknesses of U.K. regionalism, see Michael Keating & Barry Jones, *Nations, Regions, and Europe: The UK Experience*, in THE EUROPEAN UNION AND THE REGIONS, *supra*, at 113; Martin Laffin & Alys Thomas, *The United Kingdom: Federalism in Denial?*, 29 PUBLIUS: THE JOURNAL OF FEDERALISM 89 (Summer 1999).

<sup>39</sup> The devolution of power to the Dutch provinces in fact seems to owe a considerable debt to Europe. See Frank Hendriks, Jos. C.N. Raadschelders, & Theo A.J. Tooner, *The Dutch Province as a European Region: National Impediments versus European Opportunities*, *supra*, ch. 9.

<sup>40</sup> Some hint of that has been indicated even from federal systems. European Parliament, Intergovernmental Conference Task Force, 2 White Paper on the 1996 Intergovernmental Conference: Summary of Positions of the Member States of the European Union with a View to the 1996 Intergovernmental Conference – Belgium <<http://europa.eu.int/en/agenda/igc-home/ms-doc/state-be/pos.htm>> (taking position that “[a]ny renegotiation of the subsidiarity definition will only be possible if it does not affect the operation and further development of European integration and if the distribution of the Member States’ internal powers is not subject to control by the Court of Justice).



## II. Globalized Regions and Community-Law Constraints

The traditional distance between regional governments and the Community owes something to the latter's international character: according to one school of thought, the national governments of the Member States reinforced the transfer of authority to the Community and, indirectly, to themselves by treating European matters as "foreign," and hence subject to national (not subnational) control.<sup>41</sup> That depiction is no longer so forbidding,<sup>42</sup> and regions increasingly regard even broader international participation as necessary for their survival. Globalization—the increased significance and mobility of finance, technology, and knowledge as factors of production, and the new diversity of transnational actors and their relations have led to a qualitatively new kind of global integration<sup>43</sup> -- is thought to be diminishing the salience of geographic proximity and territorial integrity, thereby threatening regional well-being.<sup>44</sup>

Whether in reaction to globalization, or in spite of it, regions nowadays involve themselves in a variety of what were formerly regarded as international affairs, and have little doubt concerning the virtues of that participation.<sup>45</sup> Numerous municipal and regional governments maintain offices abroad, participate in international networks of like governments, and negotiate with foreign nations.<sup>46</sup> Some, like Flanders, are developing comprehensive foreign policies embracing relations with other regions, nations, the Community, and international organizations.<sup>47</sup> Regional diplomacy has received the official imprimatur not only of the Committee of the Regions and the

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<sup>41</sup> See Charlie Jeffery, *Conclusions: Sub-National Authorities and "European Domestic Policy,"* in REGIONAL DIMENSION, supra, at 216-17; Roht-Arriaza, supra, at 422.

<sup>42</sup> See, e.g., Franz Gress & Richard Lehne, *Länder Governance in a Global Era: The Case of Hesse*, 29 PUBLIUS: THE JOURNAL OF FEDERALISM 79, 84-87 (1999) (describing successful campaign by the Länder "for a constitutionally sanctioned role in the conduct of European affairs); Tanja Börzel, *From Cooperative Regionalism to Cooperative Federalism: The Europeanization of the Spanish State of the Autonomies*, 30 PUBLIUS: THE JOURNAL OF FEDERALISM 16 (2000) (describing more modest framework for cooperation in European affairs by Spanish autonomous communities).

<sup>43</sup> For a partial dissent, see PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* (1996).

<sup>44</sup> See, e.g., Opinion CdR 353/96, supra; Reshaping Europe, Speech by Romano Prodi before the Committee of the Regions, supra; Ash Amin & Nigel Thrift, *Holding Down the Global*, in GLOBALIZATION, INSTITUTIONS, AND REGIONAL DEVELOPMENTS IN EUROPE ch. 12 (1994); Ash Amin & Nigel Thrift, *Living in the Global*, in GLOBALIZATION, INSTITUTIONS, AND REGIONAL DEVELOPMENTS IN EUROPE, supra, at 10. For more hopeful appraisals, see COMMITTEE OF THE REGIONS, *REGIONAL AND LOCAL DEMOCRACY IN THE EUROPEAN UNION* 9-10 (1999); DANIEL J. ELAZAR, *CONSTITUTIONALIZING GLOBALIZATION: THE POSTMODERN REVIVAL OF CONFEDERAL ARRANGEMENTS* (1998).

<sup>45</sup> BRIAN HOCKING, *LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY* 8-30 (1993); PARADIPLOMACY IN ACTION, supra. For discussions focusing more particularly on the U.S. context, see EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* (1998); HEIDI H. HOBBS, *CITY HALL GOES ABROAD: THE FOREIGN POLICY OF LOCAL POLITICS* (1994); JOHN M. KLINE, *STATE GOVERNMENT INFLUENCE IN U.S. INTERNATIONAL ECONOMIC POLICY* (1983); Dennis James Palumbo, *The States and American Foreign Relations 296-98* (1960) (unpublished Ph.D. dissertation, University of Chicago).

<sup>46</sup> For a case example, see Gress & Lehne, supra (discussing Hesse).

<sup>47</sup> See Policy Memorandum 2000-2004: Foreign Policy of Flanders  
<<http://www.flanders.be/public/authority/government/policy/policymemorandum.html>>.

European Parliament,<sup>48</sup> but also the Congress of Local and Regional Authorities of Europe within the Council of Europe.<sup>49</sup> Networks of regional and local governments like Eurocities<sup>50</sup> and the Council of European Municipalities and Regions<sup>51</sup> instantiate and broadly endorse participation both in Community and in international affairs.<sup>52</sup>

As part of this enthusiasm, the Committee of the Regions has called for the “removal of legal barriers to transnational cooperation,”<sup>53</sup> arguing that:

[a]t a time when political activity is becoming increasingly international, the regions must also have a say in European and international affairs. This means enabling them to participate in the adoption of international treaties or in European bodies which adopt resolutions that affect the interests or competences of the region concerned.<sup>54</sup>

A still more comprehensive approach is suggested by the Assembly of European Regions. The Assembly’s Declaration on Regionalism in Europe not only endorses participation by the regions in foreign activities implicating their interests, subject to domestic law, but further endorses three types of activity irrespective of national constitutional arrangements: (1) the capacity of regions to act at an international level, including through the formation of international treaties, agreements, or protocol, subject to approval by the national government where required; (b) bilateral and multilateral domestic and transfrontier cooperation with other regions in joint projects; and (c) the right to set up their own representations (individually, or in conjunction with other regions) in other states and in “appropriate” international organizations.<sup>55</sup> Though the Declaration professes regard for national legal orders, and disavows any intent to legally

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<sup>48</sup> See CdR 145/98, *supra*.

<sup>49</sup> See Council of Europe, European Charter of Local Self-Government, Oct. 10, 1985 (ETS No. 122), art. 10(3) (providing that “[l]ocal authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States”); see also *id.*, European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, May 21, 1980 (ETS No. 106); *id.*, Additional Protocol European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, Nov. 9, 1995 (ETS No. 159); *id.*, Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, May 5, 1998 (ETS No. 169)

<sup>50</sup> See Towards the Revision of the Treaty on European Union: A Charter of the European Cities, Nov. 24, 1995 <<http://www.eurocities.org/library/eurocit/cofciten.htm>>.

<sup>51</sup> See Council of European Municipalities and Regions, Our Vision for Europe: Democratic, Diverse, Decentralised, Feb. 1997 <[http://www.ccre.org/amend\\_an.html](http://www.ccre.org/amend_an.html)>. On behalf of its members, the Council has endorsed a variety of internationally-oriented resolutions. See <<http://www.ccre.org/site.html>>.

<sup>52</sup> For discussion of transnational associations and networks, see Hooghe & Marks, *supra*, at 86-90; Roht-Arriaza, *supra*, at 430-32.

<sup>53</sup> See Opinion CdR 145/98, *supra*, ¶ 12.1; *id.* at ¶ 3.1.2 (citing European Parliament resolution).

<sup>54</sup> Opinion of the Committee of the Regions on the Recommendation of the Congress of Local and Regional Authorities of Europe on a European Charter of Regional Self-Government, OJ 2001 No C 144/02.

<sup>55</sup> See Assembly of European Regions, Declaration on Regionalism in Europe, art. 10 (1996) (<<http://www.are-regions-europe.org/GB/A4/A41.html>>).

bind its members, it plainly intends to apply its principles to all countries having “a federal, decentralised or autonomous structure.”<sup>56</sup>

Existing national laws – even within the relatively elaborated federal models of Austria, Belgium, and Germany – leave important questions concerning the propriety of regional foreign relations unresolved. Each exhibits a tension between a nominal national monopoly on diplomacy and the clear recognition (following constitutional reform in Austria in 1988, and in Belgium in 1993) that regions are entitled to forge their own treaties on matters within their exclusive competence – albeit, in Austria and Germany, with federal consent.<sup>57</sup> (The nice question of whether regional authority in areas of their exclusive competence is equally exclusive in foreign relations was resolved in Germany in favor of federal negotiating power subject to unanimous approval by the *Länder*,<sup>58</sup> but has not, apparently, been resolved in Austria or Belgium.) Each nation also provides for regional participation in treaties implicating their interests, undoubtedly due to the importance of regions in actually implementing international obligations.<sup>59</sup>

To date, the independent (or interdependent) ability of these regions to enter into treaties has been of little practical import, since the few such treaties actually made are typically occupied with relatively low-level cultural and educational matters.<sup>60</sup> But if we

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<sup>56</sup> Id., Preamble, ¶ 2.

<sup>57</sup> See GG art. 32(1) (“Relations with other countries shall be conducted by the Federation”); art. 32(3) (“In so far as the *Länder* have power to legislate they may, with the consent of the Federal Government, conclude treaties with other countries.”); compare Belgian Const., art. 167, sec. 1 (“The King directs the international relations, without prejudice to the competences of the Communities and the Regions to regulate the international cooperation, including the conclusion of treaties, in matters in which they are competent according to the Constitution or its basis”), 3 (“The governments of the Communities and Regions . . . conclude treaties, each in their concern on matters for which their Council is competent. These treaties have effect only after they have received approval of the Council.”).

<sup>58</sup> For closer analyses of this arrangement, see Leonardy, *Federation and Länder*, supra, at 240-43; Uwe Leonardy, *The Institutional Structures of German Federalism*, supra.

<sup>59</sup> See B-VG art. 10(3) (“Before the Federation concludes State treaties (which require implementing measures within the meaning of Article 16 or which in other ways touch upon the area of jurisdiction (*Wirkungsbereich*) of the *Länder*, it must give the *Länder* the opportunity to state their position”); GG art. 32(2) (“Before a treaty which affects the specific circumstances of a German Land is concluded that Land shall be consulted in good time”); Uwe Leonardy, *Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs*, in *FOREIGN RELATIONS AND FEDERAL STATES* 240-43 (Brian Hocking ed., 1993); Uwe Leonardy, *The Institutional Structures of German Federalism* (Friedrich Ebert Stiftung working paper, 1999) (<<http://www.fes.de/bueros/london/00538toc.htm>>).

Belgium, typically enough, has a sharper division of competences, but the King is required to receive the approval of both Chambers before a treaty may have domestic effect, and the Senate is composed in large part of appointed representatives from the Communities, see Belgian Const. arts. 67, 167(2); in practice parliamentary approval is typically sought even before entry into a treaty. See Government of Australia, Senate Legal and Constitutional Reference Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* ¶ 10.26 (Nov. 1995) (<[http://www.apf.gov.au/senate/committee/legcon-ctte/treaty/ch10\\_0.htm](http://www.apf.gov.au/senate/committee/legcon-ctte/treaty/ch10_0.htm)>).

In each of these cases I put to one side agreements that are essentially established by the national governments and delegated to regional authorities, such as cross-border cooperation in the Saar-Lor-Lux region, which is based upon a 1980 agreement among the French, German, and Luxembourg governments.

<sup>60</sup> See Nicolas Schmitt, *The Foreign Policy of Spanish Autonomous Communities Compared to that of Swiss Cantons*, in *EVALUATING FEDERAL SYSTEMS* 375 (Bertus de Villiers ed., 1994) (asserting that

are to take seriously the arguments for liberalizing regional involvement in foreign affairs, there is a substantial potential range for expansion, one that might understandably give rise to concern by national authorities. Even if national authorities are well satisfied, moreover, there remains the question of whether Community law might interpose some obstacles.

It seems fair to assume that the regions enjoy greater latitude in this situation than would their U.S. counterparts. Though its scope, rationale, and continued viability are all unclear, U.S. case law establishes what has been styled dormant foreign relations preemption, according to which the authority of state and local governments to conduct foreign relations (or, arguably, even to conduct domestic activities having undue effect on foreign relations) is truncated even in the absence of any federal statute or treaty. The premise, unavoidably, is the existence of some kind of national monopoly over foreign relations,<sup>61</sup> one nominally unfettered by federal restraints.<sup>62</sup>

For the Community, in contrast, exclusive competence is exceptional in character.<sup>63</sup> As the Court of Justice's judgment concerning the Uruguay Round Treaties made clear, even where exclusive competence may be found, any admixture of shared authority in a negotiation's subject matter means that Member State involvement has to be tolerated, regardless of any logistical difficulties it presents.<sup>64</sup> Even within areas of exclusive competence, moreover, Member State action may be regarded as compatible with the interests of the Community, such as where a convention is limited to state signatories and the Community institutions are forced to rely on the Member States as proxies.<sup>65</sup> Finally, the Court of Justice has echoed a strain in recent U.S. Supreme Court case law suggesting a preference for positive political authority over dormant doctrines of

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capacity of Swiss cantons to make treaties is diminishing, and that Austrian *Länder* have never made use of theirs); Trick or Treaty?, supra, at ¶ 10.53 (asserting that power of German *Länder* to enter into treaties covers "little more than cultural agreements"); Leonardy, *Federation and Länder*, supra, at 242 (indicating that most matters involve cultural affairs); see also B-VG art. 15; Belgian Const. arts. 127-40.

<sup>61</sup> See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968). For a critical appraisal, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); for a limited defense, see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

<sup>62</sup> See *Missouri v. Holland*, 252 U.S. 416 (1920); for criticism, see Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1997).

<sup>63</sup> See I. MACLEOD, I.D. HENDRY, & STEPHEN HYATT, *THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY* (1996); DOMINICK MCGOLDRICK, *INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION* (1997); David O'Keefe, *Community and Member State Competence in External Relations Agreements of the EU*, 4 EUROPEAN FOR. AFFS. REV. 7, 8 (1999). Exclusive Community competence may arise by several means: (1) expression provisions to that effect in the Treaty or in Acts of Accession; (2) properly adopted common rules having internal effect, which deprive the Member States of the authority to enter into obligations with foreign countries affecting or altering those rules; (3) express provisions in otherwise internal measures assigning external responsibility to Community institutions; (4) internal authority involving the pursuit of Treaty objectives that cannot be attained by the adoption of independent, autonomous rules by the individual Member States to the extent that those obligations affect

<sup>64</sup> Cf. Opinion 1-94, *Re the Uruguay Round Treaties*, 1994 E.C.R. I-123, [1995] 1 C.M.L.R. 205, ¶¶ 107 (concurring with Council position that "resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in the administration of the agreements").

<sup>65</sup> See O'Keefe, supra, at 26-27.

judicial origin: to the extent that federal entities desire exclusive authority, the argument goes, they may always enact preemptive legislation – even, it would appear, in areas of shared competence.<sup>66</sup>

Given the narrow scope of exclusive Community authority relative to the Member States, it would be surprising if the mere potential for Community involvement routinely reached below the Member State level to restrict delegated regional activities. One would presume, instead, that regional competence would be constrained to the same degree as Member State competence. National governments could not evade the strictures of Community law by delegating foreign-relations authority to regional governments,<sup>67</sup> but their decision to delegate would not ordinarily entail any greater restrictions.

Yet closer analysis suggests some qualifications. The Court of Justice, as previously noted, supposes that any practical difficulties created by shared competence have no bearing on the assignment of authority to the Member States; at the same time, it has stressed the Member States' duty to cooperate in fulfilling the "requirement of unity in the international representation of the Community," particularly "in the process of negotiation and conclusion and in the fulfillment of the obligations entered into."<sup>68</sup> The Commission's position in the Uruguay Round Treaties case evidenced its skepticism as to whether these two propositions may be so easily reconciled. Moreover, its latest subsidiarity report hints that even if shared competence allows international representation to be more or less centralized, the strict coordination required in international efforts leaves no room for the formal subsidiarity analysis elsewhere employed.<sup>69</sup> If transnational elements tend to warrant Community-level action, their

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<sup>66</sup> Compare Swaine, *Negotiating Federalism*, supra (discussing increasing relevance of positive political authority, and diminished significance of dormant analysis, in recent Supreme Court case law) and Edward T. Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001) (same) with Opinion 1/94, supra, at ¶ 79 (observing, in response to the Commission's argument that exclusive external competence flowed ineluctably from internal competence, that it "suffice[s] to say that there is nothing in the Treaty which prevents the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings"); see O'Keefe, supra, at 34 (supposing that the conclusion of a Community agreement, even in areas of shared competence, binds the Member States).

<sup>67</sup> The Amsterdam Treaty reiterates, for example, that administrative implementation of Community law "shall in principle be the responsibility of Member States in accordance with their constitutional arrangements." See Declaration Relating to the Protocol on The Application of the Principles of Subsidiarity and Proportionality (No. 43), Amsterdam Treaty, at 140. The Court had previously held that Member States are permitted to adhere to their distinctive structures in discharging their Community responsibilities, see, e.g., Case 96/81, *Commission v. The Netherlands*, 1982 E.C.R. 1791, but that this has no effect on the ultimate responsibility of the Member State for any failures. See Bart Hessel & Kamiel Mortelmans, *Decentralized Government and Community Law: Conflicting Institutional Developments?*, 30 COMMON MKT. L. REV. 905, 916–17, 925–26 (1993).

<sup>68</sup> See Opinion 2/91 Re ILO Convention 170 on Chemicals at Work, [1993] I E.C.R. 1061, [1993] 3 C.M.L.R. 800, ¶ 36; see also Opinion 1-94, supra, at ¶ 108; Opinion 1/78 Re the Draft International Agreement on Natural Rubber, [1978] E.C.R. 2151, [1979] 1 C.M.L.R. 216, ¶¶ 34-36.

<sup>69</sup> Commission Report to the European Council, Better Lawmaking 2000, Com(2000) 772 final, Nov. 30, 2000, at 20-21.

effective negotiation with third parties merely reinforces the already reflexive case for centralized action.<sup>70</sup>

Whatever the strength of this argument as against Member State authority, still greater caution is needed before widespread regional relations should be countenanced. The cooperation obligatory in mixed arrangements may be wholly untenable if participation is made more diffuse by national constitutional arrangements, though it would be important to distinguish among the possible regional roles. Regional implementation of international obligations, for example, seems little different than problem created by the delegated implementation of Community obligations. In either case, Member States are free to provide for the non-contractual liability of any regions that have failed to discharge their constitutional responsibilities, thereby shifting responsibility in keeping with political authority.<sup>71</sup> This may be sufficient, but the mechanism's security would be improved considerably were regional liability established as a matter of Community law, or the Commission permitted to proceed directly against the regions via Article 226.

Care seems particularly warranted, however, as to the more dynamic and interactive elements of international politics – for example, treaty negotiation and dispute resolution under treaty regimes – in which activities undermining a coordinated approach are more difficult to monitor and remedy.<sup>72</sup> Even where cooperation is universally pursued, multiplying the parties to a negotiation, or requiring additional assent to authorize negotiations in the first place or ratify any results, plainly increases the costs of coordination and the risks that progress will be disabled by a joint-decision trap.<sup>73</sup> While one may argue that regional participation has the function of assuring third parties that the Community will fully comply with its obligations, or may in some cases increase the Community's bargaining strength by evidencing domestic constraints,<sup>74</sup> formal legal

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<sup>70</sup> Interestingly, while the Amsterdam Protocol indicated as one guideline for subsidiarity analysis whether “the issue under consideration has transnational aspects which cannot be satisfactorily regulated by Member States” (Protocol, *supra*, at ¶ 5), the Commission's latest analysis appears to converted the guideline to one unequivocally counseling in favor of Community action. See *Better Lawmaking 2000*, *supra*, at 6 (“Where the intention is to have an impact throughout the EU, Community-level action is undoubtedly the best way of ensuring homogenous treatment within national systems and stimulating effective cooperation between the Member States.”).

<sup>71</sup> C-302/97, *Konle v. Austria*, [1999] E.C.R. I-3099, [2000] 2 C.M.L.R. 963; cf. C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1991).

<sup>72</sup> In Opinion 1/94, for example, the Court's brief summary of the coordination needed to effectuate cross-retaliation under the WTO when either the Member States or the Community lack the means – given that the area in which cross-retaliation would be effectuated belonged to the other – suggested a fairly heroic leap of faith.

<sup>73</sup> See Fritz W. Scharpf, *The Joint-Decision-Trap. Lessons from German Federalism and European Integration*, 66 PUBLIC ADMINISTRATION 239 (1988). As others have stressed, applying Scharpf's analysis, which arose out of the specific conditions of German federalism, may be problematic. See Arthur Benz & Burkard Eberlein, *Regions in European Governance: The Logic of Multi-Level Interaction* (European University Institute, Working Paper RSC No 98/31 (Sept. 1998) <[http://www.iue.it/RSC/WP-Texts/98\\_31.html](http://www.iue.it/RSC/WP-Texts/98_31.html)>).

<sup>74</sup> See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 456-58 (1988). It may be doubted, though, that the same effect is obtained with multiple negotiators. See Swaine, *Negotiating Federalism*, *supra*, at 1234-37.

authority is not necessary to achieve those ends – and it is more likely that the Community’s ability to advance the common good may be held hostage by the regions “least ready to confront international competition.”<sup>75</sup>

In addition to aggravating the drawbacks of existing mixed competences, regional foreign relations initiatives also present some genuinely distinct risks. Regions most commonly assert the rights to engage in relations with their peers abroad and to conduct informal diplomatic relations in general,<sup>76</sup> matters addressed only elliptically or after the fact by domestic legal orders.<sup>77</sup> The failure to deal directly with inter-regional and informal diplomacy, coupled with the apparent enthusiasm of regions for such efforts, may pose difficult questions should they become ubiquitous.<sup>78</sup> The tendency to regard inter-regional discourse as legitimate and uncontroversial likely stems from the assumption that it is easy to distinguish regions acting in their own interests from a national actor acting on behalf of the national interest, or perhaps that regional matters are not typical fodder for traditional international relations. Both assumptions are in tension with the new paradigms of European regionalism: the new possibility of regional participation in the Council of Ministers supposes a regional interest even in assuming the national reins, and the Committee of the Regions suggests a supra-national interest in what once may have been purely “domestic” regional matters.

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<sup>75</sup> Sophie Meunier & Kalypso Nicolaidis, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, 37 J. COMMON MKT. STUDIES 477, 485 (1999) (speaking to the role of the Member States).

<sup>76</sup> See, e.g., Opinion CdR 145/98, *supra*.

<sup>77</sup> One of the first decisions of Germany’s Federal Constitutional Court confirmed the right of the *Länder* to communicate directly with foreign regions, provinces, or autonomous communities, see Leonardy, *Federation and Länder*, *supra*, at 239; Leonardy, *The Institutional Structures of German Federalism*, *supra*; the German Constitution is not clear on the point, but establishes the federal monopoly in terms of other countries or foreign states, arguably suggesting that other entities fall outside it. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 72-73 (1994); cf. Rogoff, *supra*, at 427 n.73 (noting argument of *Länder* that relations with Community institutions were not with “state” for purposes of GG art. 32(1)). Neither the Constitution nor the case law clearly address the issue of informal diplomatic relations, though that power too has been assumed by the *Länder*. Leonardy, *Federation and Länder*, *supra*, at 239; Leonardy, *The Institutional Structures of German Federalism*, *supra*.

The matter is still less clearly resolved elsewhere. Article 16(1) of the Austrian Constitution appears to confer authority on the *Länder* to make treaties with neighboring countries or their constituent governments, but I am informed that the scope and conditions of that authority are sufficiently uncertain so as to have deterred its use. See B-VG art. 16(1). Instead, as in Belgium, the *Länder* have relied on more traditional notions of reserved authority, notwithstanding countervailing bases for federal supremacy. Each case turns, at least in part, on the particular phrasings of the constitution. Article 10(1.2) of the Austrian Constitution broadly vests comprehensive authority in the federal government over “external affairs, including political and economic representation abroad, in particular the conclusion of state treaties,” which might be aggressively read to include matters with non-state entities, while Article 17 protects the rights of *Länder* in their own affairs. See B-VG arts. 10(1.2), 17. The Belgian Constitution, after establishing the authority of the Belgian King to conduct international relations, states that it is “without prejudice to the competences of the Communities and the Regions to regulate . . . the international cooperation,” including (and, presumably, not limited to) the conclusion of treaties. See Belgian Const. art. 167(1).

<sup>78</sup> See Lenaerts & Foubert, *supra*, at 600 (observing that “[t]he [Belgian] system centres around the principle of extending the internal autonomy of the federated entities as widely as possible into the international arena without sacrificing the coherence of Belgian foreign policy. It is questionable, however, whether this aim has been reached.”).

More important, the permissive approach to inter-regional diplomacy pays too little mind to aggregate bargaining power and the value of preserving legislative space. The U.S. experience in dealing with its foreign counterparts under the Articles of the Confederacy demonstrated conclusively to those framing the U.S. Constitution that national diplomacy suffered when individual states conducted diplomacy with relatively unified European governments. Europe's experience with the bilateral negotiation by Member States of agreements with the United States (including, for example, "Open Skies" agreements) has tended – in a peculiar role-reversal – to vindicate the U.S. Framers' intuition.<sup>79</sup> Introducing the further complication of regional diplomacy (preoccupied, perhaps, with the fate of local airports) would add still more complexity, and worsen collective action problems. Even if one regards inter-regional activities as amounting to some kind of paradigm shift,<sup>80</sup> the fact remains that Community bargaining authority may be dissipated by regional initiatives; any such initiative may be overcome by a Community-level common policies, but only with significant transaction costs and coordination complications, and at potentially significant internal political costs.

There are, at present, relatively few national or international safeguards against the loss of bargaining authority. Austria alone appears to provide for federal intervention: the *Länder* must notify the federal government before initiating negotiations with their neighboring countries or constituent governments, the federal government may act affirmatively to withhold its consent from a concluded treaty, and may also demand the revocation of any ratified treaties. So far as I can determine, however, there is no legal right to prohibit the *Länder* from negotiating on matters within their exclusive competence.<sup>81</sup> The principle defense for Germany's federal government appears to be judicial doctrine emphasizing federal comity (*Bundestreue*), but that is of diminishing salience as a check on the *Länder*,<sup>82</sup> and is any event a reactive, rather than prophylactic, doctrine. Belgium, like Austria, permits federal intervention to ensure respect for international and supranational obligations,<sup>83</sup> but makes no obvious provision aimed at managing negotiations in progress. If the Community interest in (relatively) unfettered bargaining is to be preserved, it is apparent that the limitation on regional diplomacy will have to come from above.

### III. Conclusion

Even if the resulting obstacles to achieving Community objectives are obvious, the ultimate cost – and the need for any Community-law limits – is not. Put bluntly, who is to say that the optimal level for determining a negotiating position is European? Identifying the circumstances in which collective action issues, or positive or negative externalities, warrant the national stewardship of foreign relations is difficult enough, but

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<sup>79</sup> See, e.g., Meunier & Nicolaidis, *supra*, at 497-98.

<sup>80</sup> See, e.g., Inaki Aguirre, *Making Sense of Paradiplomacy? An Intertextual Inquiry about a Concept in Search of a Definition*, in *PARADIPLMACY IN ACTION*, *supra*, at 185 et seq.

<sup>81</sup> B-VG. arts. 16(2), (3), (4).

<sup>82</sup> See CURRIE, *supra*, at 77-80; contrast Leonardy, *Federation and Länder*, *supra*, at 239 (indicating that *Bundestreue* principle is pertinent, at least in theory, to attempts to maintain informal diplomacy with foreign states); *id.*, *The Institutional Structures of German Federalism*, *supra* (same).

<sup>83</sup> See Belgian Const., art. 169; B-VG art. 16(3).



adding the further question of whether supra-national responsibility is warranted makes it still more challenging. Conversely, the political and social virtues of preserving local autonomy and experimentation may vary greatly by context, and are likely to be incommensurable in any event.<sup>84</sup>

Without pretending to resolve these questions, it may be helpful to consider how regional diplomacy reflects on the paradigmatic bases for regional authority. Regional competence over foreign relations seems largely to have been derived by translating domestic competence – presuming, that is, that sub-national governments ought not lose authority merely by virtue of a federal monopoly over foreign relations.<sup>85</sup> But the result is oddly anachronistic, appearing to sanction foreign-relations activity based on assumptions concerning the “local” nature of matters assignable to regions and localities.

Moving beyond this irony is the central challenge for those desiring to situate regions in a globalized setting. The risk-averse tack is zealously to avoid compromising the position that certain issues are local in nature, for the sake of preserving internal competence, but this then risks compromising the foreign relationships that many regions believe to be increasingly indispensable.

The riskier course may be to embrace subsidiarity as a defensive inquiry. If the regions are willing to make the case for the efficacy of their foreign relations – and to put the national and Community institutions to their proofs as to any diminution in bargaining authority, externalities, or other drawbacks – they may be able to rebut any argument by the Commission or other institutions that regional foreign relations activities are inconsistent with the duty of cooperation. To be sure, this version of subsidiarity may be unsatisfying insofar as it places less of the onus on the Community (though the burden of demonstrating a Community law constraint on regional foreign relations would remain with it, presumably), and exposes regional competence to a greater degree of critical inquiry. At the same time, defensive subsidiarity may transform the regions’ premises of reserved authority into a newly vital tradition of authority specific to foreign relations, in the process reinvigorating the case for formally recognizing the presumption owed alternatives to Community action at the Member State and subnational levels.

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<sup>84</sup> See Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT’L L. \_\_ (2001) (forthcoming) (describing problematics of optimizing negotiating authority).

<sup>85</sup> In the United States, conversely, the initial demise of foreign-relations federalism began with *Missouri v. Holland*, 252 U.S. 416, 432 (1920), which permitted the federal government to regulate matters by treaty that it would not be able to reach were it to rely solely on its authority over interstate commerce. As in the United States, the issue of whether the regions retain reserved authority over certain inviolable subject-matters has not significantly limited Community authority; in any case, such limitations are again likely to be derived from the regions’ domestic competence, and remain unaffected by any emerging foreign relations competence.