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INTRODUCTION

Member States of the European Union are faced with the problem of balancing market integration and maintaining control over economic policy within their borders. This is evident in the decisions of the European Court of Justice (ECJ) concerning Articles 34 and 35 of the Treaty of the Functioning European Union (TFEU), especially in light of the ECJ's recent tendency to favor social policy despite the economic impacts. A close analysis of the ECJ's jurisprudence on issues regarding the establishment of the common market shows a correlation between the diminishment of the Member States' economic regulatory power and the amplification of the European Parliament and Council's capabilities in the

same area. Stripping states of economic regulatory power while concurrently expanding centralized regulatory power conjures distinct comparisons to the United States' own experience. This article will focus on the role of the courts in the United States and the European Union, and will argue that the trend in the European Union is strikingly reminiscent of the Supreme Court's jurisprudence dating back to the New Deal and culminating in *United States v. Lopez*, *Gonzales v. Raich*, and the current litigation concerning the Affordable Health Care Act. The United States Supreme Court abrogated state economic power while compounding federal economic regulatory power through a broad interpretation of the Commerce Clause, a method mirrored in the ECJ's jurisprudence. Through comparison to similar decisions by the ECJ, this article will show how the ECJ's self-appointed legal supremacy, political insulation, and tendency to conduct teleological reasoning warrant Member States to take action to develop a limitation on the power of the Council and the ECJ to expand unchecked economic regulatory power, should they so desire. Member States should develop a doctrine which: 1) unambiguously defines the contours of Union economic regulatory powers; 2) preserves the power of the Union to establish a common market; and 3) allows the ECJ to nullify economic policies promulgated by the Community which are inconsistent with the purpose of establishing a common market.

It would be prudent to state the assumptions on which this article relies to conduct the following comparison and proposition and also point out what this article does *not* attempt to do. There are many sides to any story, which includes the analysis of the evolution of legislation and legal doctrines. This article does not attempt to suggest any motive or design for the usurpation of state regulatory power while expanding centralized regulatory power, but rather merely points out the similarities between the Supreme Court and the European Court of Justice's approaches. Analysis of the caselaw of each will illustrate the power of the state or Member State versus the power of the federal government or the Community to regulate economic activity and in so doing, bring to the forefront rationales by which the courts from each system are upholding increased centralized economic power. This observation should be enlightening for Member States, such as Germany, who more heavily value the principle of subsidiarity, and this proposal should provide them with a means to preserve state autonomy.

I. ORIGINS

The United States and the European Union traveled down very distinct paths to get to where they are today politically and economically. The United States, born out of a need to distance itself from an absolute monarch ruling from hundreds of miles away, was built on notions of individual freedom and limited government. The European Union, on the other hand, had very different origins. While the idea of a united Europe goes back further than Rousseau and Kant's vision of a social contract or form of perpetual peace, the foundation of what is now called the European Union did not truly begin to take shape until after World War II.[1] Created partially out of a desire to never repeat the mistakes that led to the two World Wars, but mainly to reduce the costs of doing business within Europe, the Member States that now belong to the European Union began their journey much differently than the 13 colonies that gave birth to the United States.[2] However, the different starting points of the United States and the European Union have not prevented their paths from crossing in a number of areas.[3] One especially important crossroad is the establishment of the internal market and the means by which each system has achieved this. By looking at how the respective governments approached this end, the parallels could help inform Member States regarding the Union's direction and how to counter it, if they so desired.

The following will illustrate that because the United States and the European Union share such a common governmental structure–a federal structure–their similar evolution is natural and inevitable. Therefore, it follows that the Member States of the European Union should analyze closely the evolution and common trends of both the Union and the United States in order to protect themselves from further abrogation of their powers. In each case, that evolution is demonstrated by an initial delegation of powers to the supranational government, the Court's establishment of judicial supremacy, and finally, the Court's expansion of the suprana

1. DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 5 (2nd ed. 2010).

2. The European Union began with the Netherlands, Belgium, Luxembourg, Italy, France, and Germany signing the Treaty of Paris in 1951. *See* CHALMERS, *supra* note 1, at 10.

3. *See, e.g.*, James D. Wilets, *A Unified Theory of International Law, the State and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 U. PA. J. INT'L L. 753, 789-90 (2010) (arguing that EU law is similar to U.S. domestic federal law in four respects: EU law's supremacy over Member State law, EU law's immediate direct effect on Member State law, the ECJ's power of judicial review over Member State's judicial decisions concerning EU law, and the implied powers of the EU law-making bodies).

tional entity's capabilities to regulate the market while diminishing the state or Member States' power to do the same.

II. FEDERALISM, SUPREMACY, AND ECONOMIC REGULATORY POWER

A. Federalism

While federalism is difficult to define completely, a broad understanding of the term places the United States and the European Union on a similar governmental plane. "The essence of federalism . . . is a formal contractually based limitation of power among the institutional participants of the federation."[4] In the United States, the federal government was created and granted powers by the people through the consent of the states. Similarly, the central governing body of the European Union was structured and granted authority by the Member States. The constituent parts of these systems–the states, the Member States, and the citizens that comprise them–uphold that residual power which was not ceded to the federal government. "The general or supra-constituent layer of government operates within the constraints of the concession made to it by these residuaries."[5] This being the essence of federalism, the following will address how these grants of powers evolved in the United States and the European Union.

B. The United States

Upon the failure of the Articles of Confederation, the Founders created a system which divided sovereignty between the federal and state governments. James Madison stated that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[6] The Tenth Amendment of the Constitution also illustrates the balance of power in the United States, holding that the states or the people retain the powers not granted to the federal government.[7]

Those powers held by the states and the people were arguably at their highest ebb beginning with the ratification of the Constitution and continuing until the Civil War. However, after the Civil War the United States Congress began to pass more laws that

4. Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 197 (2001).
5. *Id.*
6. THE FEDERALIST No. 45 (James Madison).
7. U.S. CONST. amend. X.

pushed the limits of its constitutionally conferred power. After the American Civil War, federalism was premised on 1) sovereign power divided between the national government and states; 2) supremacy of the national government over the state governments; 3) competency of the national government's courts being limited to defining the scope of its constitutionally granted powers; and 4) the grant to the national government of a direct relationship to the citizenry of the nation via the power ceded to it.[8] As this paper will argue, the shift in power from the states to the federal government, aided by the decisions of the Supreme Court, has pushed the limits of the federal government's constitutionally enumerated powers.

Although there has been a noticeable shift in power from the state governments to the federal government, the supremacy of the federal government in regard to its specifically delegated Constitutional powers has long been established. Chief Justice Marshall defined the supremacy of the federal government and the Supreme Court's powers in *McCulloch v. Maryland*.[9] The Chief Justice famously stated that "the government of the Union, though limited in its powers, is supreme within its sphere of action," and therefore "[t]he government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.' "[10]

While the United States federal government enjoys multiple and well-defined enumerated powers–the power to tax or the power to raise and support armies, for instance–perhaps the most significant and controversial is the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[11] The Supreme Court emphasized that the purpose for this grant of power was to open up trade among the states and to prevent them from erecting barriers to trade.[12] However, the precise definition of commerce and to what extent exactly Congress

8. Backer, *supra* note 4, at 180.
9. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
10. *Id.* at 405-06.
11. U.S. CONST. art I, § 8, cl. 3.
12. H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533 (1949) ("When victory relieved the Colonies from the pressure for solidarity that the war had exerted, a drift toward anarchy and commercial warfare between the states began . . . [E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view."); *see also* THE FEDERALIST No. 7, at 37 (Alexander Hamilton) (conflicting State regulations would lead to disagreements and eventually wars), No. 42, at 282 (James Madison) (without a national commerce power there would inevitably be constant disputes amongst the States).

can regulate it is the subject of much dispute–a dispute that is mirrored across the Atlantic.

C. The European Union

"In the twentieth and twenty-first centuries, the European Union is emerging as a new form of federal union."[13] The European Union stands in contrast to the United States because it is united by the Treaty of Lisbon, which is made up of two treaties of equal value: The Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). While the Europeans chose not to call the international agreement a constitution, the TEU and TFEU arguably are the legal equivalent of the Constitution of the United States. The TFEU grants exclusive powers to the Union though Article 3[14] and limits its powers through Article 5 of the TEU.[15] It follows that although the Union does not de-

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13. Backer, *supra* note 4, at 175-76.

14. The text of Article 3 is as follows:

> 1. The Union shall have exclusive competence in the following areas:
> (a) customs union;
> (b) the establishing of the competition rules necessary for the functioning of the internal market;
> (c) monetary policy for the Member States whose currency is the euro;
> (d) the conservation of marine biological resources under the common fisheries policy;
> (e) common commercial policy.

Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1), Mar. 30, 2010, 2010 O.J. (C 83) 59 [hereinafter TFEU].

15. The House of Lords Select Committee on the European Union summarized Article 5 as follows:

> Article 5 of the amended TEU states that 'The limits of Union competences are governed by the principle of conferral", under which "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." The amended TEU (Article 4) confirms for the first time and in the clearest terms that "competences not conferred upon the Union in the Treaties remain with the Member States". The Union "shall respect [Member States'] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."
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> Article 5 clarifies that "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level". This is the principle of subsidiarity; the Treaty refers, for the first time, to the sub-state level. Furthermore, "Union action shall not exceed what is necessary to achieve the objectives of the Treaties"–the principle of proportionality. The application of the subsidiarity and proportionality principles is described in detail in a Protocol to be annexed to the Treaties. These principles were previously included, in less specific terms, in

clare itself to be a federal government like the United States, it still holds true to the above definition.

These treaties would not have carried much force but for the essential role of the ECJ. As Larry Catá Backer points out, "[t]he power to declare fundamental rules at one level of government is the power to limit the possibility of the assertion of power by all subsidiary governments. Historically, the European Court of Justice (ECJ) has itself acquired the power to articulate fundamental norms."[16] This is distinct from the United States in that the ECJ lacks a Supremacy Clause. The ECJ established a very American notion of supremacy in *van Gend & Loos*, where the Court stated that the establishment of the internal market implied additional obligations on the part of the Member States.

> [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[17]

The *van Gend & Loos* decision not only stated that the Community constituted a "new legal order," but also established the doctrine of direct effect which established the direct relationship between the Community and the citizens of the Member States.[18] The ECJ stated that Article 28 of the TFEU "must be interpreted as producing direct effects and creating individual rights which national

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> Article 5 of the TEC. The Lisbon Treaty gives national parliaments power to police the principle of subsidiarity . . . .

Select Committee on European Union, Tenth Report, at para. 2.22-23 (Feb. 26, 2008) *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/6205.htm.

16. Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331, 1338 (1998).

17. Case 26/62, N.V. Algemene Transport– en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12.

18. *Id.*

courts must protect."[19] This decision is essentially the ECJ's *McCulloch*.[20]

D. The Establishment of a European Common Market

The formation of the European Union, unlike that of the United States, primarily centered around establishing a common European market. The following will show that the focus of the treaties which eventually led to the Treaty of Lisbon was primarily concerned with opening up trade among the Member States. This history will aid in putting the doctrinal evolution of ECJ jurisprudence on market integration into context and will bolster the argument that the EU has a reason to fear unchecked, centralized economic regulatory power. Further, the conclusion of this portion will also focus on one Member State's criticism of what the EU has become and point out the Treaty of Lisbon's troubling repercussions for democracy in the EU.

The Spaak Report, published in 1956, laid the foundation for the Treaty Establishing the European Economic Community (EEC Treaty).[21] Notably, the Spaak Report called for limited supranational oversight to matters affecting the common market while leaving Member States responsible for "more general matters of budgetary, monetary and social policy."[22] The EEC Treaty's focus was the establishment of the common market, which can be broken into seven parts: 1) the customs union, 2) the four freedoms,[23] 3) a competition policy, 4) the regulation of state intervention in the economy, 5) the regulation of Member State's fiscal policies on the importation of goods, 6) a common commercial policy, and 7) a general cooperation provision in the field of economic policy.[24] While the EEC Treaty established the end–the common market–it also established the institutional means.

It would be helpful to give a brief overview of the institutions that the EEC Treaty established. First, it established the Commission, a body of legislators independent from the Member States that is charged with "proposing legislation and checking that the Member States and other institutions complied with the Treaty

19. *Id.* at 12.

20. *Van Gend & Loos* is distinguishable from *McCulloch* in that the Supreme Court relied on the text of the Constitution to establish supremacy. The ECJ, however, relied on no such clause.

21. CHALMERS, *supra* note 1, at 11.

22. *Id.*

23. The four freedoms prohibited restrictions on "the movement of goods, workers, services and capital." *Id.* at 12.

24. *Id.*

and any secondary legislation."[25] Second, it established the Assembly,[26] composed of national parliamentarians that "had the right to be consulted in most fields of legislative activity and was the body responsible for holding the Commission to account."[27] Third, it established the Council, the institution that was composed of national governments.[28] The Council served as the final check on "almost all areas of EEC activity."[29] The final and most relevant institution that the EEC Treaty created, for the purposes of this article, was the ECJ, which "was established to monitor compliance with the Treaty. Matters could be brought before it, not only by the Member States but also by the supranational Commission, or be referred to it by national courts."[30] Some significant changes to these institutions have taken place since the EEC Treaty came into force. This article will next map the development of the ECJ's jurisprudence relating to the establishment of a common market as well as keep track of the changes to the formative treaties while ECJ case law evolved.

In response to the recession of the early 1980s, the leaders of the Member States developed A Solemn Declaration on European Union in 1983.[31] Among other suggested reforms, the Declaration sought to increase focus on achieving the four freedoms as set out in the EEC Treaty.[32] This renewed focus led to the signing of the Single European Act (SEA) of 1986. Although the SEA seemingly gave "formal recognition to pre-existing policies and institutions," one of its most important achievements was the "commitment to establish the internal market by 31 December 1992."[33] The goal of establishing the internal market is set out in Article 26(2) TFEU: "The internal market shall compromise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."[34]

The next major treaty was the TEU, signed in Maastricht on December 10, 1991.[35] The TEU "marked very definitely a change in

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25. *Id.*
26. *Id.* (although it is now called the European Parliament).
27. *Id.*
28. *Id.* at 12-13. The Council and the Commission merged by way of the Merger Treaty of 1965. *Id.* at 14, *citing* P.-H. Houben, *The Merger of the Executives of the European Communities*, 3 CML REV. 37 (1965).
29. CHALMERS, *supra* note 1, at 13.
30. *Id.*
31. *Id.* at 19.
32. *Id.*; *see* Solemn Declaration of European Union (EC) Bulletin 6/1983 of 19 June 1983.
33. CHALMERS, *supra* note 1, at 21.
34. TFEU, *supra* note 14, at art. 26(2).
35. CHALMERS, *supra* note 1, at 23.

tone" from the SEA, and it "created a new form of political project" in which a new form of polity emerged.[36] The TEU established the three pillars, which, combined, equated to a single institutional framework.[37] The first pillar was the European Community, the second was the Common Foreign and Security Policy, and the third was Justice and Home Affairs.[38] The TEU did not enter into force smoothly, however. Member States had various concerns regarding economic policy and integration of social and democratic issues.[39] Polarization due to these concerns resulted in a delayed draft treaty, and the final Treaty of Amsterdam was thus not signed until 1997.[40]

The Treaty of Amsterdam's achievements were limited.[41] However, the treaty was expansive in the areas of freedom, security, and justice defined in Article 67 of the TFEU.[42] Also, the treaty led to further supranational democratization through the codification of qualified majority voting in social policy matters and recognized a more balanced integration with the Protocol of the Application of the Principles of Subsidiarity and Proportionality.[43] After Amsterdam, despite the Treaty of Nice's institutional reforms to deal with the increased number of Member States[44] and the failure of the Constitutional Treaty,[45] the next major legal occurrence was the Treaty of Lisbon.[46]

Notably, the various treaties began with a focus on market integration and progressed to encompass more social policies. Under the Treaty of Lisbon, the Union is now a cause of concern for a major player among the member states, Germany.[47] In *Gauweiler v. Treaty of Lisbon*, the German Constitutional Court contended that the Union lacked democratic legitimacy according to national standards.[48] Germany's and other Member States' questioning of the democratic legitimacy of the Treaty of Lisbon further calls into

36. *Id.; see also* Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) art. 1 ("This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe . . .").

37. CHALMERS, *supra* note 1, at 24.

38. *Id.*

39. *Id.* at 25-27.

40. *Id.* at 27.

41. *Id.* at 34.

42. *Id.* at 28.

43. *Id.* at 29.

44. *Id.* at 35-36.

45. *See id.* at 38 ("In short, citizens did not buy into the need to create a new form of political community to which they would have loyalty and affinity and which had to be 'democratically regenerated' by them.").

46. The relevant aspects of this treaty are outlined *supra* notes 14 and 15.

47. CHALMERS, *supra* note 1, at 44-46.

48. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, (Ger.).

question some of the ECJ's rationale for striking down Member State laws under a political isolation theory. Given the foundation, growth, and current status of the Union, the focus of this article will now shift to the role the courts played in expanding economic regulatory power in the United States and European Union.

E. The Role of the Courts

Several reasons exist for the common shift of power from the state governments to the federal level in the United States and the European Union and despite the differences between the two systems, the EU should pay attention to the trends of the United States. First, the governmental structures of the United States and the European Union tend naturally to cause courts in each system to act in a certain way, expanding centralized regulatory power.[49] Second, the courts have facilitated the centralization of power because they are the most effective and legitimate institutions to achieve this.[50] It follows that a supranational government could have a much greater interest in exercising its economic regulatory power to the fullest extent and would be unable to do so without the aid of the court. The power to regulate the market directly or indirectly through legislation is perhaps one of the greatest powers that a sovereign could maintain. Regulating the market exerts direct and tangible control over constituents in a way that other legislation simply does not. By controlling supply and demand through regulation, the central government also has a direct connection to the constituents–a connection that has traditionally been maintained by the subsidiary governments in each system. The courts' participation in the centralization of economic regulatory power may be a combination of these two reasons or just one of them, but whatever the cause, the following doctrinal observations will make it clear that the EU is headed down a road very similar to that of the United States. The following will not only show a similar path followed by the Supreme Court and the ECJ,

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49. Governmental structure basically means a central government with enumerated powers and subsidiary governments holding those powers not conferred upon the central government. This structure might cause the courts to naturally cede more power to the central government because the central government's powers are definite and thus easily expanded through interpretation. One is less likely to infer that residual powers were retained.

50. See Backer, *supra* note 16, at 1351 ("The EU uses its courts to create norms to regulate the internal actions of the Member States; these courts also interpret limiting principles, such as subsidiarity, which are also the product of centralizing legislation. Subsidiarity itself concedes power to the center and away from the Community's Member States. Therefore, subsidiarity must assume a role within the federal legislative process which is also subordinate to the fundamental principles on which the Community operates.").

but will also provide a critical look at what the respective courts are saying versus what they are actually doing.

III. PREVENTING STATES FROM OBSTRUCTING COMMERCE OR THE ESTABLISHMENT OF A COMMON MARKET?

Not only do the United States and the EU share similar federal systems, but the two also recognize the benefits of striking down protectionist or discriminatory laws promulgated by their constituent states. Both governments also use the same means to prevent such laws enacted by their constituent states: the courts. While the respective courts take strong stances against discriminatory or protectionist laws that would inhibit free trade, they also in effect erode the states' power to regulate within their borders even when such laws are passed for a public, and not private, purpose. Alarmingly, while the courts hold the constituent states to the strictest scrutiny for measures allegedly prohibited by the national government's power to regulate the market, the courts allow the national governments to pass laws under the same grant of power which is only indirectly connected with that said power.

By comparing the United States Supreme Court's Dormant Commerce Clause jurisprudence to the ECJ's interpretation of Articles 34 and 35 of the TFEU, two common themes will emerge. On the one hand, the respective courts strike down laws that place burdens on out-of-state interests, unless such laws are enacted to serve a valid public policy purpose. On their face, such decisions give the courts an appearance of facilitating free trade and market integration by preventing protectionist measures.[51] On the other hand, the courts are decreasing the economic regulatory power of states even if the law in question was promulgated pursuant to a valid public policy purpose. Striking down such laws implies degradation of the states' authority to enact laws that are within their sovereign power. In so doing, the respective Courts rely on at least three theories in striking down the laws: 1) purely political theory,[52] 2) purely economic theory,[53] and 3) a mixed political and eco-

51. Notably, this helps to establish the legitimacy of the courts while further centralizing power.

52. Purely political theory posits that because State and Member State laws are passed pursuant to the interests of their constituents, the interests of those outside their borders are not considered. Therefore, the interests of out-of-state actors are unfairly absent from the ears of State legislators. GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSCHNET, PAMELA S. KARLAN, CONSTITUTIONAL LAW, 231 (2005).

53. Purely economic theory posits that it is more economically beneficial to strike down protectionist or discriminatory laws because such laws decrease efficiency by increasing transaction costs. *Id.*

nomic theory.[54] Through the Dormant Commerce Clause and Articles 34 and 35, the Courts essentially seem to be acting to limit the power of the states' economic regulatory power. The result is a shift in power from the states to the federal government or from the Member States to the Union. One might argue that no shift in power occurs because the power to regulate commerce or the market in the United States and the EU is expressly reserved to the federal government and Union respectively. However, while these powers are granted, they are given force and defined by the Supreme Court and ECJ. While the law-making bodies in each sought to exercise the power conferred upon them, the courts in each system upheld the laws and thus acquiesced and helped to define the extent to which lawmakers could exercise their power. In both the United States and the European Union, the courts appear to facilitate this shift through broad interpretation of federal or Union economic regulatory powers.

A. The Dormant Commerce Clause in the United States

The United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[55] The Tenth Amendment holds that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively."[56] Assuming that the complete authority to regulate commerce among the states resides with the federal government, one must ask what authority is left to the respective States to do the same within their boundaries.

The United States Supreme Court first articulated a view on the Dormant Commerce Clause in *Gibbons v. Ogden*.[57] *Gibbons* not only addressed Congress's regulatory power under the Commerce Clause but also set out the States' power to regulate activities affecting interstate commerce absent a federal statute.[58] Chief Justice Marshall stated, "We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general *concurrent power*, in the regulation of foreign and domestic trade, as still residing in the States."[59] Chief Justice Marshall further stated that the broad wording of the Commerce Clause is "so very general and extensive" that it should be construed as confer-

54. *Id.*
55. U.S. CONST. art I, § 8, cl. 3.
56. U.S. CONST. amend. X.
57. Gibbons v. Ogden, 22 U.S. (9. Wheat.) 1 (1824).
58. *Id.*
59. *Id.* at 13.

ring a plenary power upon Congress to legislate.[60] While Chief Justice Marshall did not explicitly define the power of the states to regulate activities affecting commerce, he did find "great force" in Justice Johnson's argument that Congress enjoyed exclusive power to regulate interstate commerce.[61]

The Supreme Court's interpretation of the Dormant Commerce Clause has evolved tremendously since 1824. The test that the Supreme Court now uses can be summarized as follows: 1) if the state law is discriminatory on its face, then it is per se invalid; 2) if the state is acting as a market participant, then an exception applies; 3) if the state law is not discriminatory on its face, then a court applies rational basis scrutiny and conducts a balancing test to determine if there is only an incidental burden on interstate commerce.[62] The test developed by the Supreme Court and its application show how narrowly the Court has construed the ability of states to regulate and also the manner in which the Court substituted its own policy concerns before concluding that the laws were invalid.

1. Where a State Law Is Discriminatory on Its Face

In *City of Philadelphia v. New Jersey*, the Supreme Court addressed a New Jersey law that prohibited the importation of waste collected outside of the state.[63] Here the Supreme Court found that the New Jersey law was facially discriminatory, stating that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."[64] Even though New Jersey might have had valid grounds to prohibit the importation of waste for various reasons beneficial to the state and its residents, ranging from reducing the cost of waste disposal to reducing pollution within the state, the appellees contended that the actual purpose of the statute was to stifle competition and reduce costs for New Jersey residents.[65] The Court, however, asserted that the purpose of the legislation was immaterial, and that although a state may wish to protect the economic and environmental interests of its residents, New Jersey could not achieve that end "by discriminating against articles of commerce coming

60. *Id.* at 14.
61. *Id.* at 209.
62. *See Id.*
63. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
64. *Id.* at 624. *See also* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533 (1949) (holding that a New York law prohibiting the exportation of milk for processing violated the Commerce Clause because the primary purpose of the statute was a prohibition on competition).
65. *City of Philadelphia,* 437 U.S. at 625-26.

from outside the State unless there is some reason, apart from their origin, to treat them differently."[66]

City of Philadelphia represents the economic theory that the Supreme Court used to strike down state laws by looking mainly at the economic effect of preventing the importation of a certain good: waste, in this case. For the Supreme Court, notably, the fact that the state sought to prevent the importation of waste for health and environmental concerns means the Court's application of strict scrutiny left little room for a public policy justification. When the Court finds a state law to be facially discriminatory, it is deemed unconstitutional unless the law survives strict scrutiny.

If a state law is discriminatory on its face, it may nevertheless be upheld if it survives strict scrutiny. Justice Blackmun,[67] writing for eight justices in *Maine v. Taylor*, stated that when a state statute is found to be discriminatory, it could only survive if the statute "serve[s] a legitimate local purpose" and that purpose could not be served by any "available nondiscriminatory means."[68] The statute at issue in *Taylor* prohibited the importation of out-of-state baitfish because of the threat to Maine's fisheries.[69] At trial, scientific experts testified that out-of-state baitfish posed a threat to local fish due to three types of parasites carried by the out-of-state baitfish and also threatened the ecology of the Maine fishery by competing with in-state species for scarce prey.[70] Further, the trial court found that there was no way to inspect the imported baitfish.[71]

The Supreme Court held that the Maine law survived strict scrutiny.[72] First, the Court stated that Maine had a legitimate purpose in guarding against environmental risks, "despite the possibility that they may ultimately prove to be negligible."[73] Second, the Supreme Court found that the Maine law did not appear to be a result of a protectionist measure despite a contrary

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66. *Id.* at 626-27; *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S 511, 522-24 (1935); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928); Edwards v. California, 314 U.S. 160, 173-74 (1941).

67. Justice Blackmun also dissented in *City of Philadelphia*.

68. Maine v. Taylor, 477 U.S. 131, 140 (1986); *see* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); *see also, e. g.,* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 957 (1982); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

69. *Taylor*, 477 U.S. at 132.

70. *Id.* at 140-41.

71. *Id.*

72. *Id.* at 131.

73. *Id.* at 148. The Court further commented, "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." *Id.* (alteration in original) (citation omitted).

holding by the Court of Appeals.[74] Finally, the Court found that although there may have been a way to develop a testing procedure and that baitfish could just swim into Maine waters from New Hampshire, "impediments to complete success . . . cannot be a ground for preventing a state from using its best efforts to limit [an environmental] risk."[75]

2. Where a Statute Is Not Facially Discriminatory

In *Pike v. Bruce Church*, the Supreme Court developed a balancing test to decide when the state statute at issue is not facially discriminatory against interstate trade.[76]

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a local legitimate purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[77]

This standard equates to strict scrutiny, which leaves states little guidance as to which laws the Supreme Court would uphold and which local interests it would find compelling enough to allow any burden on commerce. The following will illustrate examples of how the Supreme Court applied the *Pike* balancing test, while concurrently calling into question the Court's valuation of local interests.

In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court invalidated a North Carolina law that prohibited closed containers of apples shipped into the state from displaying state grades or classifications.[78] A Washington state agency challenged the law, which required the apples to display the applicable U.S. grade standard.[79] The agency brought suit to represent the interests of the apple growers and the state. The Court noted

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74. *Id.* The Court of Appeals relied on comments from the Maine Department of Fish and Wildlife which suggested that the Department favored the ban in order to bolster Maine's bait market. *Id.* at 149.

75. *Id.* at 151 (citation omitted).

76. Pike v. Bruce Church, 397 U.S. 137 (1970).

77. *Id.* at 142 (citation omitted).

78. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

79. *Id.*

the breadth of the apple industry in Washington and described the stringent and effective grading system with which Washington apple growers were statutorily obligated to comply.[80]

North Carolina attempted "to eliminate [the] source of deception and confusion by replacing the numerous state grades with a single uniform standard" and further contended that it "sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that [the] statute applie[d] to all apples sold in closed containers in the State without regard to their point of origin."[81] The Court asserted that "when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,' we are confronted with the task of effecting an accommodation of the competing national and local interests."[82]

The Court found that the statute not only had the effect of burdening interstate commerce, but also that it was discriminatory in varying ways. First, the statute increased the cost for Washington apple growers to do business in North Carolina because they would have had to alter their packaging methods in order to sell their product in North Carolina.[83] "North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment."[84] Second, the Court found that the statute had the effect of stripping from "the Washington apple industry the competitive and economic advantages it . . . earned for itself through its expensive inspection and grading system."[85] Third, by depriving the Washington apple growers from advertising under their state grade, it had a leveling effect that set North Carolina producers on an equal plane as their competition.[86] The Court stated that "[s]uch 'downgrading' offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit."[87] Although the Court found numerous examples of economic protectionism in the record, it asserted that it did not need to address the clearly discriminatory purpose of the statute.[88] Upon concluding an analysis of those effects, the Court

80. *Id.* at 336.
81. *Id.* at 349.
82. *Id.* at 350 (*citing Pike*, 397 U.S. at 142).
83. *Id.* at 350-51.
84. *Id.* at 351.
85. *Id.*
86. *Id.*
87. *Id.* at 352.
88. *Id.*

next addressed whether the means justified the ends. The Supreme Court stated, "[t]he several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades."[89]

Following soon after *Hunt*, in *Exxon Corp. v. Governor of Maryland*, the Supreme Court upheld a Maryland statute prohibiting producers or refiners of petroleum from operating retail service stations within the State.[90] Although Exxon owned 36 retail service stations in Maryland and was thus prevented from continuing the operation of those stations, the Court found that since the statute did not discriminate against interstate goods or favor local producers and refiners, there was no claim that the statute favored in-state over out-of-state interests.[91] The Court focused on the fact that "the Act create[d] no barriers whatsoever against interstate independent dealers; it [did] not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market."[92] The Court attempted to distinguish *Exxon* from *Hunt* by noting that the Maryland statute was not discriminatory towards out-of-state refiners because "refiners will [only] no longer enjoy their same status in the Maryland market."[93] The Court stated that just because there was some burden on interstate commerce, it was not sufficient to constitute a violation of the Commerce Clause.[94] *Exxon* is indicative of how the Supreme Court chose to uphold local interests, yet avoided addressing the true economic effects of the law.

Justice Blackmun, dissenting, did not have a similar view of the discriminatory effects of the Maryland statute. Blackmun asserted, "[G]iven the structure of the retail gasoline market in Maryland, the effect . . . is to exclude a class of predominantly out-of-state gasoline retailers while providing protection from competition to a class of nonintegrated retailers that is overwhelmingly composed of local businessmen."[95] While the state claimed that the statute applied equally to in-state and out-of-state actors, Blackmun pointed out that "[o]f the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms."[96] Further, Blackmun pointed out that the stat-

89. *Id.* at 353.
90. Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978).
91. *Id.* at 125.
92. *Id.* at 126.
93. *Id.*
94. *Id.*
95. *Id.* at 137.
96. *Id.* at 138.

ute would exclude producers and refiners who produced outside of the state from enhancing brand recognition, monitoring consumer preferences, and experimenting with different marketing techniques in Maryland.[97] Blackmun showed that the in-state stores did not share the same obstructions.

Notably, the majority made a passing reference to the purpose of the statute as arising out of a shortage of petroleum in 1973.[98] However, Justice Blackmun pointed out evidence of an alternative purpose. Blackmun stated that "the State's interest in competition is nothing more than a desire to protect particular competitors–less efficient local businessmen–from the legal competition of more efficient out-of-state firms."[99] Interestingly, despite the evidence that Blackmun alluded to, the majority upheld the law primarily because the statute did not restrict the flow of petroleum products into the state.

From *Gibbons* to *Exxon*, the Supreme Court held firm to the notion espoused by Justice Marshall that Congress has broad plenary power when it comes to regulating commerce and that discriminatory state laws stand in opposition to the purposes of the Commerce Clause to promote free trade among the states. However, the Supreme Court also failed to consistently apply its own standard, and invalidated laws that were arguably within the state's police power, especially laws like the one in *City of Philadelphia*. Further, the standard that the Court articulated in *Pike*

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97. *Id.* at 139-40.

98. *Id.* at 121.

99. *Id.* at 141. Also, Justice Blackmun cited to a quote from the executive director of the Greater Washington/Maryland Service Station Association testifying before the Maryland Senate:

> Now beset by the critical gasoline supply situation, the squeeze by his landlord-supplier and the shrinking service and tire, battery and accessory market, the dealer is now faced with an even more serious problem.
>
> 'That is the sinister threat of the major oil companies to complete their takeover of the retail-marketing of gasoline, not just to be in competition with their own branded dealers, but to squeeze them out and convert their stations to company operation.
>
> 'Our oil industry has grown beyond the borders of our country to where its American character has been replaced by a multinational one.
>
> 'Are the legislators of Maryland now about to let this octopus loose and unrestricted in the state of Maryland, among our small businessmen to devour them? We sincerely hope not.
>
> The men that you see here today are the back-bone of American small business . . .
>
> We are here today asking you, our own legislators to protect us from an economic giant who would take away our very livelihood and our children's future in its greed for greater profits. Please give us the protection we need to save our stations.'

Id. at 141 n.8.

left little guidance to the state legislatures as to their ability to legislate even in fields that were traditionally left to the states. These two trends of the Court's evolution of the Dormant Commerce Clause doctrine–unpredictability and lack of consistency–are similar to the ECJ's interpretation of the Member States' ability to promulgate laws that would affect the common market.[100]

B. Articles 34 & 36 and the European Dormant Commerce Clause

Article 34 of the TFEU provides, "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."[101] Article 36 TFEU provides:

> The provisions of Articles 34 and 35[102] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[103]

The cases litigated under Article 34 attempted to define what constituted a "quantitative restriction." Together, scholars suggest these two Articles form the equivalent of the United States Dormant Commerce Clause.[104] The following will track the most significant decisions interpreting the aforementioned Articles, point out the parallels between the ECJ's caselaw and the Supreme Court's approach, and, most importantly, show how the

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100. *See infra* Section VI. I will address the questionable amount of room that is left to the States and Member States to promulgate laws that would affect the common market.

101. TFEU, *supra* note 14, at art. 34.

102. Article 35 of the TFEU prohibits restrictions on exports. It applies to regulations that have a greater negative effect on export sales than domestic sales. *See id.* at art. 35.

103. *Id.* at art. 36.

104. *See* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE ECONOMIC CONSTITUTION 7 (1998); Ian H. Eliasoph, *A "Switch in Time" for the European Community? Lochner Discourse and the Recalibration of Economic and Social Rights in Europe*, 14 COLUM. J. EUR. L. 467, 481-82 (2008); Giuliano Marenco, *Competition Between National Economies and Competition Between Businesses–A Response to Judge Pescatore*, 10 FORDHAM INT'L L. J. 420, 420 n.2 (1987).

ECJ's approach is more aggressive and expansive than that of the United States Supreme Court.[105]

The parallels between the Supreme Court's Dormant Commerce Clause jurisprudence and the ECJ's interpretation of Articles 34 and 35 converged in two respects. First, the Courts analyzed laws that indirectly or arguably erected barriers to trade. Secondly, both seemingly contradicted themselves by striking down laws based on an economic theory while concurrently applying value choices to the states' or Member States' purposes in promulgating the laws. However, the most significant differentiation between the jurisprudence of each system is the values the respective Courts applied. As shown previously, the United States Supreme Court tended to concern itself only with whether the State law blatantly discriminated against out-of-state actors, or whether the State law's burden in commerce was excessive in relation to its benefits. The ECJ, as will be evident, greatly valued market integration over any other factor; it "opted to give primary consideration to the rules underpinning the construction of a completely unified market around the principles of economic freedom, free enterprise and free competition."[106]

In *Procureur du Roi v. Dassonville*, for example, the ECJ struck down a Belgian law that prohibited the importation of "products bearing . . . 'designation of origin' without a certificate from the authorities of the state of production to prove that this designation was correct."[107] Dassonville, a Belgian trader, bought cheaper Scotch whisky in France and imported it into Belgium. He had a problem, however, because he could not resell the liquor without certification from British customs. Because the French importers typically removed the designation when they received the product, Dassonville lacked the needed designation to resell the whisky in Belgium.[108] The ECJ stated, "All trading rules[109] enacted by Member States which are capable of hindering, directly, or indirectly, actually or potentially, intra-Community trade

105. *See* Eliasoph, *supra* note 104, at 486 ("[T]he ECJ's Article 28 jurisprudence sparked criticisms reminiscent to those aimed against Lochnerism in the United States. By expanding the scope of Article 28 to virtually all regulations burdening the market and subjecting such regulations to a proportionality test, the ECJ opened itself to the institutional critique that it had stepped out of its judicial role and assumed the garb of policymaker.").

106. STEFANO GIUBBONI, SOCIAL RIGHTS AND THE MARKET FREEDOM IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE 94 (Rita Inston trans., 2006).

107. CHALMERS, *supra* note 1, at 747.

108. *Id.*

109. Later cases have replaced "all trading rules" with "all rules" or "all measures." *See* Case C-88/07, Comm'n v. Spain, 2009 E.C.R. I-1353; Case C-319/05, Comm'n v. Germany, 2007 E.C.R. I-9841; Joined Cases C-158/04 & C-159/04 Alfa Vita Vassilopoulos AE v. Dimosio, 2006 E.C.R. I-8156.

are to be considered as measures having an effect equivalent to quantitative restrictions."[110] The ECJ seemingly limited this assertion in the next paragraph when it proposed that a Member State could seek to prevent unfair practices as long as was "reasonable."[111] Notably, the ECJ also stated–as the Supreme Court has previously regarding the Dormant Commerce Clause in *Hunt*–that regardless of Article 34, Member States could not propound to be protecting consumers while actually using that as justification to discriminate.[112]

Dassonville and *Hunt* are not only analogous factually, but also analogous in how the ECJ and the Supreme Court reached their conclusions. Both cases involved labeling products, which resulted in discrimination towards out-of-state products due to the increased cost of complying with the labeling requirements. The two cases are distinguishable by the stated purposes for the labeling requirements. The Belgians sought a certificate of origin in order to insure that the whisky was from where the product's label indicated. In *Hunt*, however, the Carolinians were primarily concerned with leveling the playing field for in-state apple producers. Further, the ECJ case differs because of its strong stance against any law hindering intra-community trade. This stance would have arguably been better grounded if the ECJ faced a labeling law that was as discriminatory in its effect and purpose as the North Carolina law, yet the ECJ took the opportunity to assert its position against questionable restrictions on imports. Nonetheless, both courts grounded their holdings in preventing barriers to trade under the guise of protecting consumers.

The ECJ applied *Dassonville* to an array of market-access cases, and the Court liberally applied Article 34 where there was some showing of a hindrance of imports.[113] Although *Dassonville* primarily concerned regulations on imports, the ECJ did not stop Article 34's applicability there.

Due to rapidly expanding product development, the inability for European institutions to harmonize, and political stagnation, the ECJ took an even further leap forward in its application of Ar-

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110. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 837. Scholars note this assertion by the ECJ as an example of the Court conferring broad supervisory powers upon themselves through the preliminary reference procedure. The ECJ saw this amplification of power as a timely move due to the entrenchment of national protectionist traditions. *See* CHALMERS, *supra* note 1, at 749-50.

111. *See Dassonville*, 1974 E.C.R.110 at 837.

112. *Id.*

113. "If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways." Joined Cases 177/82 & 178/82, Van De Haar, 1984 E.C.R. 1797, 1813.

ticle 34 to products regulation in *Cassis de Dijon*.[114] In *Cassis*, the ECJ invalidated a German law that set mandatory liquor content for certain types of liquor at 25 percent. In effect, the law made it necessary for those who wished to import their liquor into Germany to either comply or not do business. The Court developed a sort of balancing test. The ECJ stated in paragraph 8, "In the absence of common rules relating to the production and marketing of alcohol . . . it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory."[115] However, in the same paragraph, the ECJ added that the Member State regulation had to be "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."[116]

The Germans intended the law to protect the public health and consumers because alcoholic beverages with low alcohol content could increase tolerance, whereas beverages with higher alcohol content did not have the same effect.[117] The ECJ, however, dismissed both of these justifications. First, consumers could purchase a wide range of alcoholic beverages in Germany with alcohol contents under 25 percent.[118] Second, as to the consumer protection argument, the ECJ stated that the concern could be remedied by printing the alcohol content on the label of the bottle.[119] The Court ruled that the purpose, as espoused by the Germans, was outweighed by the "requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community."[120] The ECJ ruled that the German law constituted a measure having equivalent effect to quantitative restrictions on imports, thus violating Article 34.

The ECJ's holding in *Cassis* had a great effect on the European Union.[121] Not only did the ECJ develop a balancing test under

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114. Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [hereinafter *Cassis*]; CHALMERS, *supra* note 1, at 761.

115. *Cassis*, 1979 E.C.R. 649 at 662; *cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824) ("[I]n exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution . . . .").

116. *Cassis*, 1979 E.C.R. 649 at 662.

117. *Id.* at 662-63.

118. *Id.* at 663.

119. *Id.* at 664.

120. *Id.*

121. *See* CHALMERS, *supra* note 1, at 763; *see also* Eliasoph, *supra* note 104, at 483 ("With this holding, the parameters of state sovereignty were constricted and a wide array of laws came into question.").

which to analyze Member State laws regarding product standards, but it also developed the principles of mutual recognition and general requirements. Mutual recognition, as spelled out in *Cassis*, is the idea that "if products comply with the laws of the Member State where they are produced, then there is no reason why they should not be sold in all other Member States."[122] Mandatory requirements, better understood as public interest objectives, serve as an exception to the mutual recognition principle. If the law were necessary to achieve the public interest objective, then it would be upheld.[123] Through these two principles, the ECJ struck down Member State laws ranging from the shape of wine bottles to packaging for margarine.[124] Laws relating to product standards and consumer protection were not the only ones struck down by the ECJ for violating Article 34.

Cassis, when compared to the United States' jurisprudence, seems to be a bit more expansive than even the United States Supreme Court would be willing to go.[125] However, the balancing test established by the ECJ does closely mirror the *Pike* balancing test, which would probably be applicable should a state within the United States pass a law similar to the German one at issue in *Cassis*. The ECJ's balancing test is stricter and more far-reaching than the *Pike* balancing test. The principle of mutual recognition is absent from United States Dormant Commerce Clause jurisprudence. Perhaps this is because the Dormant Commerce Clause is more a result of an interpretive inference not codified in the United States Constitution, whereas Articles 34 and 36 are relatively well-defined when compared to the Commerce Clause.[126] Where the two tests do converge is the exception to the mutual recognition principle: mandatory requirements. The ECJ required that the means by which the Member States sought to achieve the mandatory requirements, or public interest objectives, be necessary. While the *Pike* test does not call for the means to be *necessary* to justify the valid end, the words of the Supreme Court give it the same effect.[127] The ECJ applied this strict standard in subsequent cases and continued to increase its reach under Article 34, applying the mutual recognition and mandatory requirement principles to environmental and morality laws.

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122. *See* CHALMERS, *supra* note 1, at 763.

123. *See Cassis,* 1979 E.C.R. 649 at 662; *see also* CHALMERS, *supra* note 1, at 763.

124. *See* Eliasoph, *supra* note 104, at 483.

125. *Id.* at 483-84 (stating that with *Cassis*, the ECJ placed itself at the center of "substantive policy dilemmas").

126. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

127. Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (stating that it be taken into account "whether it could be promoted as well with a lesser impact on interstate activities.").

While Article 36 generally governs environmental issues, the ECJ approached some Member States' environmental laws as a mandatory requirement falling under Article 34. In *Commission v. Denmark*, the ECJ struck down a Danish law that required beer and soft drinks to be sold in reusable containers in order to establish a viable deposit-and-return system.[128] The ECJ found that "the system for returning non-approved containers . . . affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports."[129] Thus, the Court found that the law was disproportionate in light of the purpose of the law.[130] The ECJ failed to consider the economic reality that the cheapest way to recycle is to deal with a limited range of packaging types, and the fact that the ECJ relied on "merely the theoretical fact that other kinds of containers were in principle also recyclable, suggested that environmental protection was not being taken seriously, and would be subordinated to trade."[131]

This disregard for the Member States' environmental objectives closely mirrors the Supreme Court's own disregard for New Jersey's environmental concerns in *City of Philadelphia*. Unlike the Supreme Court in *City of Philadelphia*, the ECJ struck down the Danish law despite the fact that it was enacted pursuant to a public interest objective codified in Article 36 and not facially discriminatory. Comparably, in *C & A Carbone, Inc. v. Clarkstown,* the Supreme Court struck down a city recycling scheme despite the city's interest in recycling because it favored local enterprises through regulation.[132] However, what was even more significant about the ECJ's decision in *Commission v. Denmark* was the fact that the Court seemingly favored economic policy over environmental policy. This fact also sets *Commission v. Denmark* apart from the Supreme Court's decision in *Exxon* where the Court chose to ignore the true economic effects of the state law and to uphold it only because it did not treat in-state actors differently than out-of-state actors. The ECJ continued to allow the establishment of the internal market to take precedent over Member States' objectives in the Sunday trading cases discussed below.

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128. Case 302/86 Comm'n v. Denmark, 1994 E.C.R. 4607.

129. *Id.* at 4632.

130. *Id.*

131. CHALMERS, *supra* note 1, at 771. While the ECJ received quite a bit of criticism for disregarding Denmark's assertion that the recycling scheme was essential to their environmental protection goals, the Court has recently upheld Member State laws promulgated pursuant to environmental objectives. *Id.*

132. C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

The ECJ went a step further in considering the types of laws that fell within the scope of Article 34 in *Torfaen Borough Council v. B & Q.*[133] In *Torfaen*, the ECJ held that the United Kingdom's laws regarding Sunday trading fell under Article 34 because forcing shops to close on Sunday equated to a limitation on imports. Although the Court conceded that "national rules governing the hours of work . . . constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty," it stated that "the prohibition laid down in Article [34] covers national measures governing the marketing of products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules."[134] Ultimately, the ECJ found that the United Kingdom's Sunday trading laws were valid under Article 36. However, the fact that such laws fell under Article 34 greatly threatened the Member States' regulatory schemes.[135]

The ECJ arguably narrowed the scope and applicability of Article 34 in *Keck*.[136] The Court distinguished between selling agreements, the issue in *Keck*, and products regulation by stating that Member State restrictions or prohibitions on selling agreements would not hinder trade among the Member States as long they were applied equally to the marketing of domestic products and the marketing of products from other Member States.[137] The ECJ held, "Article [34 TFEU] of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss."[138] While *Keck* did not necessarily reverse *Cassis* and *Dassonville*, it "restricted *Cassis de Dijon* to measures relating to product-requirements and reinterpreted *Dassonville* but only with reference to measures restricting or prohibiting 'selling arrangements.' "[139] Further, as Ian H. Eliasoph pointed out, the ECJ's decision in *Keck* signaled that a "substantial sphere of regulatory space was returned to the exclusive province of Member States."[140] However, the ECJ failed to define the parameters of the application of Article 34 and therefore is still liable to revert back to a more interventionist approach towards the Member States' ability to regulate.[141] Further, Eliasoph noted that *Keck*

133. Case C-145/88, Torfaen Borough Council v. B & Q, 1989 E.C.R. 3851.

134. *Id.* at 3889. At the time, Article 34 was still known as Article 28 of TEC.

135. *See* MADURO, *supra* note 104, at 7.

136. Joined Cases C-267/91 & C-268/91, Keck & Mithouard, 1993 E.C.R. I-6126.

137. *Id.* at I-6131.

138. *Id.* at I-6132. At the time, Article 34 was still known as Article 28 of TEC.

139. *See* Eliasoph, *supra* note 104, at 497 (citation omitted).

140. *Id.*

141. *See id.* at 498 ("*Keck* . . . [failed to] set clear guideposts for the very limits [it] introduced, thus retaining for the Court substantial power to police the borders of

was "also a protective response against a jurisprudence that endangered the Court's very legitimacy."[142]

Legitimacy became an issue for the ECJ mainly as a result of its activism in interpreting Article 34. This activism should give Member States pause when comparing the ECJ's jurisprudence in this area to that of the United States. While the Courts in each system used the need to establish the common market and to deregulate, the means they used to do so are questionable when compared to the rationales and methods the Courts used to uphold supranational intervention in commerce. The ECJ's stance is especially questionable given Eliasoph's and Miguel Poiares Maduro's observations. As Eliasoph stated:

> the Court tended only to invalidate regulations that were more restrictive than those common in other Member States and . . . the Court, with one exception, never invalidated Community intervention in the marketplace . . . [T]he ECJ's deregulatory jurisprudence is more likely attributable to the Court's attempt "to widen Community control over national regulation in the common market . . . .[143]

This approach by the ECJ is not new or novel; one need only look at the United States' Commerce Clause doctrine. The expansion of centralized power does not occur at only one level. While deregulation helped to establish the common market it also increased the Community's institutional legitimacy and competency in ever-broadening areas. In the United States, the Supreme Court's broad interpretation of the Commerce Clause blurred the lines between trade and production regulations and social regulations. By giving a brief snapshot of what the United States Commerce Clause originally meant to the Founders and comparing it to what it means today, it is evident that the power of the central government under this clause has greatly increased. While Community legislation has not come to encompass such broad power, recent case law implies that it too is headed in the same direction.

IV. EXPANSION OF CENTRALIZED POWER

Given the similarities between the United States Dormant Commerce Clause and the ECJ's interpretation of Article 34, the

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Community competence.").

142. *Id.* at 497.

143. *Id.* at 487 (citation omitted).

two systems are obviously on similar doctrinal paths in regard to their positions on the powers of the subsidiary governments to legislate. However, the analysis ought not stop there because the extent of the abrogation of the states' and Member States' economic regulatory powers is not clear until viewed in the light of the Supreme Court and ECJ's stance on the centralized power to regulate commerce.

The understanding of what "commerce" actually meant at the time of the founding of the United States is much debated. However, some suggest that the word meant "the activities of buying and selling that come after production and before the goods come to rest."[144] Further, one scholar counted the times that the word "commerce" appeared in Madison's notes at the Constitutional Convention and in *The Federalist*, finding that of the ninety-seven times the word appeared, commerce never referred to anything specifically beyond trade and exchange.[145] Despite the generally narrow understanding of what commerce was, the Supreme Court quickly began to supplement it with its own interpretations, beginning with *Gibbons v. Ogden*[146] and culminating with *Wickard v. Filburn*.[147]

After *Gibbons* in 1824, the Supreme Court addressed issues arising under the Commerce Clause mainly to strike down state laws interfering with commerce until 1888. Then, the Court narrowly construed Congress's power to affirmatively regulate commerce and did not alter its position until 1935.[148] Throughout this period the Supreme Court struck down multiple laws, which arguably dealt with commerce but were actually made to effect social policy choices, and also established the distinction between laws with only an indirect vs. direct connection with interstate commerce.[149] With Roosevelt's New Deal, however, came *N.L.R.B. v.*

144. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 861 (2002).

145. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114-16 (2001).

146. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

147. Wickard v. Filburn, 317 U.S. 111 (1942).

148. *See* Kidd v. Pearson, 128 U.S. 1, 20-21 (1888) (Commerce does not include manufacturing; it "consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."); United States v. E.C. Knight Co., 156 U.S. 1, 12-16 (1895) (manufacturing monopoly does not fall under commerce power); Adair v. United States, 208 U.S. 161 (1908) (Congress cannot make it a crime to fire employee because of labor union membership under the Commerce Clause); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Congress cannot prevent goods made by child labor from being shipped); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Congress's commerce power does not extend to regulation of working hours, wages, or conditions).

149. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (the distinction between the two is a fundamental one because without it "there would be virtually no limit to the federal power and for all practical purposes we should have a

Jones & Laughlin Steel Corp.,[150] *United States v. Darby*,[151] and *Wickard v. Filburn*,[152] which "greatly expanded the previously defined authority of Congress under [the Commerce] Clause."[153]

Wickard constituted one of the most substantial expansions of Congress's regulatory capacity. The Supreme Court upheld the Agricultural Adjustment Act of 1938 that attempted to control the supply of wheat. A farmer, Roscoe Filburn, was penalized under the statute for exceeding his allotted limit, even though the Court assumed that it was for personal consumption.[154] The Supreme Court stated that even if the activity by the farmer was not commerce, "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "[155] The Court then established the aggregation principle, asserting that even if the farmer's activity in the market was trivial, if other similarly-situated farmers did the same thing then the effect would be "far from trivial."[156] After *Jones & Laughlin*, *Darby*, and *Wickard*, the Supreme Court failed to strike down any federal law for violating the Commerce Clause until *Lopez* in 1995.

The Supreme Court's holdings in *Lopez*, *U.S. v. Morrison*, and *Gonzales v. Raich* outline the extent of Congress's present Commerce Clause power and indicate that Congress retains far-reaching power under the Clause. In *Lopez*, the Court defined three broad categories that it could regulate based on the aforementioned cases: channels of interstate commerce, instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce.[157] In *Lopez*, the Court found that the gun-control statute at issue failed to have a substantial relationship with interstate commerce.[158] The Court stated that to uphold the regulation as substantially related would make it "difficult to perceive of any limitation on federal power."[159] *Morrison* seemed to

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completely centralized government.").

150. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.").

151. United States v. Darby, 312 U.S. 100 (1941) (overruling *Hammer* and reaffirming the doctrine of substantial effect).

152. *Wickard*, 317 U.S. 111.

153. United States v. Lopez, 514 U.S. 549, 556 (1995).

154. *Wickard*, 317 U.S. at 118.

155. *Id.* at 125.

156. *Id.* at 128.

157. *Lopez*, 514 U.S. at 558-59.

158. *Id.* at 567.

159. *Id.* at 564. The Court also stated:

continue the contraction of the Supreme Court's Commerce Clause jurisprudence by striking down the Violence Against Women Act of 1994.[160] However, the Supreme Court called into question the alleged contraction of the doctrine in *Raich*, which arguably rivaled *Wickard* as the most far-reaching Commerce Clause case.

In *Raich*, the Supreme Court upheld the Controlled Substances Act's prohibition on home-grown cannabis. The Court stated, "Congress can regulate purely intrastate activity that is not itself 'commercial,' [in that it is] not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[161] Differing from *Wickard* in that the regulated substance was illegal, the Court nonetheless stated, "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[162]

From *Gibbons* to *Raich* one can see the massive expansion in Congress's Commerce Clause power that the United States Supreme Court facilitated and justified. By lengthening the necessary connection between commerce and the law at issue, the Supreme Court sowed the seed for entitlement laws such as Social Security, Medicare, and Medicaid. Further, if the Supreme Court upholds the Affordable Health Care Act, some allege that Congress will wield the power to force consumers to purchase certain products.[163] This expansion is troubling, especially when compared to the Dormant Commerce Clause jurisprudence. The Court requires states to meet the highest level of scrutiny in order to justify laws which impede trade, yet Congress may pass laws where the purpose is clearly not to regulate commerce or integrate the market with merely a rational connection. While Congress's Commerce Clause power is enumerated, the apparent absence of a limit

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> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68 (citations omitted).

160. United States v. Morrison, 529 U.S. 598, 598 (2000).

161. Gonzales v. Raich, 545 U.S. 1, 18 (2005).

162. *Id.* at 19.

163. Brief for State Respondents on the Minimum Coverage Provision, U.S. Dep't of Health & Human Servs. v. Florida (U.S. filed Feb. 6, 2012) (No. 11-398).

to that power leads to the inference that none exists. This is especially clear in cases like *Wickard* and *Raich*. However, the Supreme Court's decisions in *Lopez* and *Morrison* suggested that a complete lack of a nexus between commerce and legislation might be the ceiling.

It still ought to be troubling to members of the European Union that a system as analogous to theirs, traditionally less concerned with social rights, has moved so far from where it began. What ought to be even more troubling is the fact that the EU's jurisprudence in economic regulation so closely mimics that of the United States, and yet the ECJ is poised to follow in stride with the Supreme Court Commerce Clause jurisprudence even though the Community was founded on neoliberal principles. The Member States need not only examine the Supreme Court's facilitation of broad commerce power in order to cast doubt on the unchecked power of the ECJ–they just have to look at their own recent case law. The European Union's equivalent to the United States Commerce Clause, as some scholars suggest, is codified in the four freedoms of the movement of people, goods, services, and capital.[164] Recent cases illustrate the ECJ's current tendency to place social concerns on equal, if not greater, footing as the four freedoms.

While human rights issues typically fell within the purview of the European Court of Human Rights, the ECJ has recently become more involved in enforcing Community social rights against state actors. For instance, in *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, the ECJ balanced the four freedoms against objectives pursued by social policy, which included improved living and working conditions, proper social protection, and dialogue between management and labor.[165] Another example is the ECJ's decision in *Mangold v. Helm*, where the Court struck down a German law that made an exception to short-term employment contracts for citizens over the age of 52.[166] The ECJ held that Germany's law, grounded solely on the basis of age, threatened to disproportionally deprive the members of the age group with stable employment.[167] Very recently the ECJ struck down a Belgian law made pursuant to an exception to an EU Directive that allowed insurance companies to treat men and women differently in calculating insurance premiums in *Association Belge des Consommateurs Test-Achats ASBL*.[168] The ECJ stated, "[I]t is the

164. Wilets, *supra* note 3, at 791.

165. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767, ¶ 105.

166. Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-10013.

167. *Id.* at ¶¶ 64-65.

168. Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL, 2010

EU legislature which, in the light of the task conferred on the European Union by the second subparagraph of Article 3(3) TEU and Article 8 TFEU, determines when it will take action, having regard to the development of economic and social conditions within the European Union."[169] Even though insurance companies had legitimate purposes for the discrepancies in premiums, the use of actuarial factors based on gender was inconsistent with the equal treatment of men and women, and thus, the exemption violated Articles 21 and 23 of the Charter.[170] The ECJ's stance in the *Lanval*, *Mangold*, and *Test-Achats* cases indicates the Court's willingness to favor social concerns over economic concerns when the two conflict.

Like the United States Supreme Court, the ECJ has begun to expand acceptance of social legislation after a period in which the Court took a highly interventionist approach towards facilitating market integration. While it does not appear that the Community relied directly on the four freedoms in promulgating the laws at issue in the preceding cases, the ECJ nonetheless gave deference to social policy over the establishment of the common market, a move which the United States Supreme Court mirrored in *Darby* when it overruled *Hammer v. Dagenhart*.[171] When the United States Dormant Commerce Clause and Commerce Clause jurisprudence are placed side by side with the ECJ Article 34 jurisprudence and stance on the four freedoms, the speed with which the ECJ caught up with the Supreme Court indicates that the European Union is quickly headed towards a jurisprudence in which economic concerns are secondary to social concerns. While the Supreme Court struck down economically discriminatory laws passed by the states prior to *Wickard*, the Supreme Court has since developed the *Pike* balancing test, which is essentially a strict scrutiny standard. When one looks at the ECJ's jurisprudence and puts it in historical context, much of the aggressive stance that the Court took was due to political stagnation and the desire to establish the common market. While the court receded from this stance somewhat in *Keck*, the court nonetheless established broad and unchecked power to interpret what the Member States could and could not regulate. This deserves pause because given the similar federal systems on which the United States and EU are based, it appears that the EU did what the United States did in this area–but the EU did this in about fifty years and with no Supremacy

EUR-Lex CELEX LEXIS (Sept. 30, 2010).

169. *Id.* at ¶ 20.

170. *Id.* at ¶ 32.

171. United States v. Darby, 312 U.S. 100 (1941) (overruling *Hammer* and reaffirming the doctrine of substantial effect).

Clause or Constitution to cite as support. If Member States wish to slow this progression, I suggest the codification of a Directive to define commerce fairly narrowly in text, so as to preserve the Court's ability to construct a common market without giving the ECJ peripheral powers over national economic or social policy.

V. SUGGESTED DIRECTIVE

Member States that wish to maintain policy-making capabilities and concurrently prevent Community law from adversely affecting the market though social directives might attempt to codify something that constricts Community capabilities in economic regulation. As the Supreme Court's interpretation of the Commerce Clause indicates, an originally narrowly understood construction of what the supranational entity may regulate failed to prevent an expansion of centralized regulatory power. However, since the Union seems to favor social rights, the answer may be to codify what the Lochner Era court attempted to do. This might be creating a substantive right in the freedom of trade and competition. Such a right could be codified as the Freedom of Trade and Competition (FTC):

> *The Community shall make no law abridging the freedom of trade or competition, unless necessary to the establishment of the common market.*
>
> *Review of Member State laws that directly impede on the freedom of trade and competition is impermissible unless promulgated pursuant to a valid public purpose. A valid public purpose must be justified on grounds of public morality, public policy, or public security; the protection life of humans, animals, or plants; the protection of national treasures possessing artistic, historic, or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*
>
> *Upon an initial showing of a discriminatory or protectionist purpose beyond a preponderance of the evidence, the Member State shall have the burden of proving by clear and convincing evidence that no such purpose existed.*

The FTC would serve dual purposes. First, it would maintain Community competence to strike down protectionist or discriminatory laws promulgated by Member States. Second, it would prevent the Community from passing Directives outside of its competency and act counter to the establishment of the common market, the original goal of EEC Treaty. Further, my suggestion would allow Member States to retain the residual power to promulgate laws based on their own policy choices as long as they met the requirements of Articles 34, 35, and 36. This does not imply that Member States ought not retain the capability to promulgate laws pursuant to valid public policy concerns. On the contrary, it places the same obligation on the supranational level as on the State level to narrowly tailor laws that would impede free trade.

The Member States' retention of power to legislate pursuant to public policy concerns is also justified due to democratic shortfalls at the supranational level under the Treaty of Lisbon. The German Constitutional Court outlined the shortfalls of the Treaty:

> As a consequence of the transfer of sovereign powers . . . decisions which directly affect the citizen are moved to the European level. Against the background of the principle of democracy, which is made a possible subject of a challenge . . . as an individual right under public law, it can, however, not be insignificant, where sovereign powers are transferred to the European Union, whether the public authority exercised at European level is democratically legitimised. Because the Federal Republic of Germany may . . . only participate in a European Union which is committed to democratic principles, a legitimising connection must exist in particular between those entitled to vote and European public authority, a connection to which the citizen has a claim according to the original constitutional concept . . . .[172]

Germany's opposition retained the possibility of future review, but the concerns it espoused support the reason it is important to allow the states to retain the power to promulgate laws pursuant to valid public policy purposes. As previously stated, one justification for the Dormant Commerce Clause is that protectionist laws are inherently unfair because they deprive out-of-state participants in the market the right to vote on the subject. However, when the supranational entity passes laws and the electorate does

172. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, ¶177, 2 BvE 2/08, (Ger.).

not know whom to hold politically accountable, a democratic deficit is present.

A problem still exists with the approach that the ECJ could take evaluating State laws under the FTC. The FTC as worded would alter greatly the current approach of the ECJ. If the current test remained, issues of predictability and consistency would also remain. The FTC, however, would place the initial burden on the opponent of the Member State law, which would show respect for the Member State while holding it accountable should the burden shift. Further, the evidentiary standard would prevent the ECJ from substituting its own value choices through a balancing test, which are outside the competency of the judiciary and lack predictability. Only after an opponent establishes that 1) a direct impediment on the freedom of trade and competition exists; 2) the purported public policy justification for the Member State law is overshadowed by protectionist or discriminatory purposes; and 3) those purposes are shown to exist will the Court be able to first determine whether the Member State has met its burden. While this process may be costly for a challenger, it would deter Member States from passing discriminatory or protectionist laws while stripping the ECJ of the vast discretion it currently enjoys.

CONCLUSION

Close analysis of the governmental structures of the United States and the European Union coupled with the shift of economic regulatory power from the state to the central government reveals trends that may help to inform the direction of both systems. This direction ought to give pause to the Member States within the European Union should they desire to retain their sovereign right to make policy decisions regarding issues close to home. Codification of the Freedom of Trade and Competition would allow Member States to retain such control while placing a limit on the conferred powers of the Union.