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Subsidiarity and the European Community*

By George A. Bermann**

The notion of subsidiarity in European federalism labors from all manner of burdens. It seems elusive by nature, commentators claiming that they do not know what subsidiarity means or, if they do, that they do not see in it anything new. At the same time subsidiarity has been presented at least in some quarters as a panacea for the Community's current malaise. It clearly is not that. Even if subsidiarity has not been oversold, it is almost certainly overexposed, a condition that the present Article is unlikely to cure.

My purpose in this Article is simply to help make some sense of subsidiarity and even to make a case for it as a Community standard. Thus, after offering a basic definition and rationale for subsidiarity (Part I), I attempt to justify subsidiarity first by reference to the legal and political circumstances that gave rise to it (Part II), and then by reference to the specific functions it may usefully perform in the workings of the Community institutions (Part III). On the other hand, precisely because it does risk being oversold, subsidiarity's chief difficulties need to be explored and understood (Part IV). This is not because these difficulties are necessarily easily overcome, but because their acknowledgment should help lower the expectations that continue to be brought to the subject.

I. THE MEANING OF SUBSIDIARITY

Subsidiarity stands for the proposition that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government capable of effectively addressing the problem. Though originally an ecclesiastical precept,¹ subsidiarity has

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1. Pope Pius XI, Quadragesimo Anno, sec. 79 (1931).
been seized upon as a principle of contemporary power-sharing between the institutions of the European Community and those of the constituent Member States. More specifically, it posits that the Council of Ministers and, to the extent that they also enjoy decisional authority, the European Parliament and the Commission as well, should exercise the power constitutionally vested in them by the Community Treaties and by Community legislation only to the extent that the Member States are unable, acting separately or in concert, to achieve satisfactorily the same objectives.

Subsidiarity's affinity to federalism is clear. Like federalism, subsidiarity seeks to ensure that when political entities unite in order to serve better their common ends (be they military, economic, or any other), they nevertheless retain sufficient decisional authority on the relevant subjects so that their subcommunities and populations enjoy in substantial measure the benefits of localism. Not surprisingly, then, proponents of subsidiarity tend to evoke an assortment of virtues similar to the ones that the architects of federalism in the U.S. and elsewhere have promoted. These virtues include self-determination (the right of local communities to select the rules that they deem best for governing their own affairs and their relations with others within the community), flexibility (the opportunity to tailor rules to fit the special characteristics of the community and the facility to modify those rules as local conditions and circumstances happen to change), preservation of local identities (a virtue difficult to define but to all appearances readily appreciated), and diversity (increasingly considered a good in itself, but also traditionally favored as creating opportunities for experimentation and progress). The impulse to safeguard these values drives the rhetoric of subsidiarity much as it has elsewhere driven the decisions to establish federal structures of government and to devise for those systems specific mechanisms for maintaining a decent equilibrium in the exercise of power between the center and the states.

This is not necessarily to equate subsidiarity with federalism. The practical meaning of subsidiarity depends very much on the content that one gives to the notion of achieving objectives "adequately," "satisfactorily," or "effectively" at the state as compared to the Community level. I explore in Part IV of this Article some of the ambiguities lurking behind the subsidiarity formula, and I suggest what their resolution may mean, practically speaking, for subsidiarity as an analytic
device. The task of situating subsidiarity in the theory of federalism is, however, one that I take up fully in another article.  

II. THE LEGAL AND POLITICAL RATIONALE FOR SUBSIDIARITY

In its brief, thirty-five year history, the European Community has experienced a wide variety of political moods, and it has experienced change in accordance with quite different rhythms. These moods and rhythms are of course the subject of a rich political science literature. It is fair to say, however, that by the mid-to-late 1980s, the Europeans had an overwhelming sense of momentum in the Community's legal and political integration; many believed it to be irreversible. This momentum can most visibly be traced to the Commission's 1985 White Paper, which established an ambitious legislative program for completing the internal market ("the 1992 Program") on a scale that the population could appreciate as never before. The White Paper was followed shortly thereafter by adoption of the Single European Act which, apart from its other contributions, introduced important procedural changes that would facilitate adoption of the 1992 Program. Prominent among these was the substitution in many areas of qualified majority voting for unanimous voting in the Council of Ministers. The change clearly strengthened the Community's capacity to act over the objections of a minority of states, and it permitted the institutions to harmonize, on an unprecedented scale, fields of law long thought to be reserved exclusively to the states. The theory was that divergences in Member State rules, even on subjects within Member State jurisdiction and even as applied to strictly local transactions, might represent barriers to interstate commerce and thus to the internal market and that their reduction or elimination by law was a legitimate Community enterprise.

The Single European Act also amended the Community Treaties to bring new, essentially noneconomic matters into the Community's legislative sphere, including environmental protection and worker

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4. Single European Act [SEA].
5. Id. tit. II, ch. II (adding art. 130r-t to THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC Treaty]).
health and safety.\(^6\) In so doing, it also raised the prospects of yet further jurisdictional expansions, such as those that the Maastricht Treaty would later introduce. The Act also formalized the Member States’ program of coordination of foreign policies.\(^7\) The institutions in turn gave every sign of legislating vigorously within the new fields of authority conferred upon them.

There is fairly clear evidence that subsidiarity is a response to such widening in the Community’s sphere of competence. Subsidiarity’s first mention in the Community Treaties in fact came with the Single European Act. There, the inclusion of a new jurisdictional chapter on environmental protection was accompanied by a statement that the Community was only to take action relating to the environment if “the objectives . . . can be attained better at [the] Community level than at the level of the individual Member States.”\(^8\) Later, the 1989 Delors Report,\(^9\) which foreshadowed the creation of an economic and monetary union, called by name for application of the subsidiarity principle. Economic and monetary union (including an eventual central bank and single currency) was of course among the Maastricht Treaty’s most adventurous substantive chapters.

Rather than tag only its most controversial chapters with the subsidiarity label (as the Single European Act had done), the Maastricht Treaty makes subsidiarity a general principle of Community law, and one might even say of Community constitutional law. Thus, the new article 3b, which the Maastricht Treaty specifically adds to the Treaty Establishing the European Economic Community, provides that in areas of concurrent competence “the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore . . . be better achieved by the Community.”\(^10\)

It should not be forgotten that, by this time, the Court of Justice also had established through its case law a number of far-reaching constitutional principles designed to secure the primacy and effectiveness of Community law in the national legal orders, and that the highest Member State judiciaries had largely accepted these principles. These include notably the principles of supremacy, direct applicability,

\(^6\) Id. tit. II, ch. II (adding art. 118a, b to the EEC Treaty).
\(^7\) Id. tit. III.
\(^8\) EEC Treaty art. 130r(4).
\(^9\) BULL. EC 4-1989, points 1.1.1 to 1.1.5.
\(^10\) EEC Treaty art. 3b (as amended 1992). See also Treaty On European Union [MAASTRICHT TREATY] art. G.
and direct effect. As a consequence of these principles, each and every new Community initiative, whether in the internal market arena or in one of the Community's newer competences, stood to enjoy immediate recognition as supreme and, where possible, also directly effective law throughout Community territory.

Besides constructing a powerful federal structure based on the supremacy, direct applicability, and direct effect of Community law, the Court of Justice also developed a jurisprudence of interpretation and a jurisprudence of remedies that further strengthened the Community's position vis-à-vis the Member States. This jurisprudence may be summed up in terms of several different ideas. One such idea was that the grant of legislative powers to the Community by the treaties should not be narrowly construed. This result was achieved in part through expansive readings of the EEC Treaty's jurisdictional language,\textsuperscript{11} in part by generous use of the implied powers clause,\textsuperscript{12} in part by the Court's relative inattention to the notion of enumeration of powers,\textsuperscript{13} and in part by a judicial doctrine of federal legislative preemption.\textsuperscript{14}

A second idea that the Court's jurisprudence conveyed, albeit less directly, was that the political institutions of the Community were free to legislate as fully as they chose within the outer limits of Community competence, provided they observed the procedural conditions set out in the Treaties themselves as well as certain very basic and general unwritten principles—notably equality, proportionality, and the protection of legitimate expectations. These general principles have played a vital role in judicial protection of the individual against substantive unfairness on the part of the Community institutions,\textsuperscript{15} but did not seek directly to protect the Member States themselves from the Community's unwarranted intrusions on their sovereignty.

Third, Court of Justice case law laid great emphasis on the requirement that the administrative and judicial branches of the Member States make fully adequate remedies available to private parties

\footnotesize{11. See generally J.H.H. Weiler, The Transformation of Europe, 100 Yale L.J. 2403 (1991).}
\footnotesize{12. EEC TREATY art. 235. See generally George A. Bermann et al., Cases and Materials on European Community Law 31-36 (1993).}
\footnotesize{13. See generally Weiler, supra note 11.}
\footnotesize{15. See generally Bermann et al., supra note 12, at 129-49.
for vindicating the claims they derived from Community legislation. The states’ essentially procedural obligation to enforce private claims based on Community law is of course a reflection of both the supremacy and direct effects ideas because it serves to ensure the primacy and efficacy of Community law in the national legal orders. But the Court’s jurisprudence of remedies also offered repeated reminders that the Member States’ transfer of legislative powers to the Community and the exercise of those powers by the Community’s legislative institutions is only the beginning of the story. Member State agencies and courts are also bound on a continuing basis to ensure that Community legislation, once made, is given adequate effect. Overall, the combination of treaty-based enlargements of Community competence and the Court’s various doctrinal assertions of federal authority produced an important shift in the equilibrium of power between the states and the Community.

Finally, the transition I have described was, as I have already suggested, accompanied by a steady retreat from unanimous voting by states in the Council of Ministers in favor of qualified majority voting. Departure from the rule of unanimity in the legislative process of course helped the Community to accomplish its legislative goals of the mid-to-late eighties, notably the 1992 internal market program. But from a dissident Member State’s point of view, the loss of power to block or weaken legislative proposals by the Commission represented a significant political change. States might thus find themselves powerless to prevent the Community from adopting legislation to which they were opposed. That legislation, which once enacted stood to be given the fullest possible effect by the Court of Justice, covered ever-widening fields of law, some of them quite controversial. During debate over the Maastricht Treaty, three subject areas acquired particular notoriety from this point of view: expansion of Community competence over social policy, further empowerment of the Community institutions in foreign and security policy, and, above all, the ambitious blueprint for economic and monetary union. The rocky process of national ratification of the Maastricht Treaty—particularly in Denmark, France, Ireland, and the U.K.—is testimony to the mis-

19. Id. art. G (adding tit. VI to the EEC TREATY) and related protocols.
givings with which this latest and greatest step in European legal and political integration was greeted in some Member States.

Subsidiarity, clearly enough, was a doctrinal response to the Community's new critics. Inscribing the principle in the revised EEC Treaty itself seemed a suitably solemn way of affirming that the Community leaders were not about to efface the separate national identities composing the Community population. Although the drafters of the Maastricht Treaty left in doubt the question of subsidiarity's justiciability, the European Council (consisting of the heads of state and government) took up the matter at its December 1992 Edinburgh Summit. It there opined that, while subsidiarity would not have direct effect (in the sense of entitling private parties to invoke the principle in support of their claims or defenses in national litigation), it would form the basis for direct legal challenge of a Community measure in the Court of Justice in a suit by a party having standing to sue in that forum.20

Given the high legal and political stakes of the game into which it was introduced, subsidiarity carried with it quite high, perhaps unrealistic expectations. Proponents hoped, in reliance on subsidiarity, to apply the brakes to the Community engine sufficiently to preserve some necessarily vague sense of localism without compromising the institutions' political capacity and willingness to continue attending to its essential tasks. A particular problem with subsidiarity, however, is that it tends more to describe an abstract goal than a method of achieving it. This perception could only strengthen the hand of those who considered subsidiarity a politically weak and intellectually thin defense against the European Community tide. Designed to help solve a real problem, subsidiarity needed to be conceived of in real, even operational, terms.

III. SUBSIDIARITY AS A WORKING INSTRUMENT

Even though subsidiarity may, as noted, be judicially enforceable in part, it plainly speaks first and foremost to the political institutions of the Community. It bids them to take action to address a problem of legitimate Community concern only if the Member States, acting individually or collectively, are incapable of effectively addressing it on their own. To that extent, subsidiarity expresses a policy of federal legislative self-restraint. The evident assumption is that if the institu-

tions refrain from acting except when they must, Member State and local communities will be left with sufficient freedom of decision to capture the values of localism.

As a political injunction, subsidiarity speaks to a wide variety of actors. It addresses the Commission, one of whose principal tasks is to draft and propose new Community legislation for eventual adoption by the Council of Ministers and, under co-decision, the European Parliament. It addresses the Commission in its other functions as well, namely (1) exercising decisional authority vested in it directly by the Treaty of Rome, (2) exercising lawmaking authority delegated to it from time to time by the Council, and (3) administering Community law on a routine and daily basis as the Community executive. Subsidiarity likewise admonishes the Council of Ministers, faced with legislative proposals by the Commission, to confine the Community's legislative interventions to cases where its objectives cannot otherwise be met. To say that the Council should act legislatively with due regard for the states' own capacity to act is, of course, to say that these states, which, after all, themselves compose the Council, should assess their own capacity to act before acting in the Community's name.

Although the European Parliament has not figured heavily in discussions of subsidiarity, the principle can readily inform its actions as well. In fact, subsidiarity should have special appeal to a body whose very mission is to express the will of the peoples of Europe. Whether in rendering purely advisory opinions, or participating in the Single European Act's parliamentary cooperation procedure, or actually exercising legislative co-decision as provided for in many areas by the Maastricht Treaty, the Parliament has in subsidiarity a yardstick for gauging the wisdom of what is proposed. Conceivably, every advisory body of the Community—the Economic and Social Committee, for example—should have subsidiarity on its mind.

For all these bodies, subsidiarity implies a particular mode of legislative reasoning and analysis. It assumes an objective falling within the outer limits of the Community's concurrent legislative authority. Before advancing a Community measure to achieve this objective—and, depending on the institution in question, advancing a measure may once again mean proposing, commenting favorably on, assenting to, or actually adopting it—the institution will presumably consider

21. If the objective falls within the Community's exclusive legislative authority, the states have no constitutional right to act, even if they could do so more effectively than the Community; if the objective falls outside the Community's legislative sphere, it is off limits to the Community altogether, subsidiarity notwithstanding.
and assess the states' capacity to achieve the objective through means at their own disposal. If those means are in fact adequate, the measure contemplated by the Community should not be supported or adopted.

While trying to understand subsidiarity's message as clearly as possible, we should also recognize that it typically implies both a difficult factual inquiry and a delicate exercise in judgment. On the factual level, subsidiarity entails all the usual inquiries such as whether there is a problem in fact to be addressed and whether the Community has the means to address it. It also entails a factual inquiry that may easily escape consideration in the federal legislative process and that it is precisely subsidiarity's mission to call to mind. The inquiry concerns the capacity (legal, political, financial, technical, or otherwise) of state and local government to deal with the problem at hand. This capacity will be difficult enough to establish, even before having to discount the results to reflect the possibility that state and local governments will not in fact use it, or not use it fully and effectively, or that the performance of state and local government may be adequate in one or more Member States but less than adequate in others. The speculative element, which is necessarily present in all political analyses, is positively central to subsidiarity. Even after the facts are in, so to speak, subsidiarity presents more than the usual measure of political judgment: judgment about the efficacy of state action, judgment about the tolerability of a situation in which the states are relied upon to act and fail to do so adequately, judgment about the costs to Community objectives of variations in levels of performance from state to state, and so on.

These operational aspects of subsidiarity received conspicuous attention from the European Council when it met at Edinburgh in December 1992. The heads of state and government who assembled on that occasion, which happened to fall during the period of national ratification of the Maastricht agreements, were aware that the European public needed reassurance and not just rhetoric about the future of local self-government within the Community. A first operational initiative by the European Council was to develop guidelines by which institutional participants in the Community legislative process might in the future determine whether a proposal before them comported or failed to comport with the principle of subsidiarity and, on that ac-

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count, deserved or did not deserve their support.\textsuperscript{23} I comment on the specific value of these guidelines elsewhere.\textsuperscript{24}

Second, the European Council advised the Commission to consult with the Member States at an early stage in the formulation of legislative proposals, specifically on "the subsidiarity aspects" of those proposals.\textsuperscript{25} The dialogue presumably would acquaint the Commission with the states' own views on the necessity for Community intervention and perhaps even with specific steps that the states might be taking or thinking about taking, singly or in concert, to deal with the subject matter before the Commission. It also called on the Commission to include in every legislative proposal that it might eventually submit to the Council a reasoned statement of its conclusions on the subsidiarity issue.\textsuperscript{26} What the European Council was here envisaging may be in the nature of what we would call, in the parlance of U.S. regulatory practice, a "subsidiarity impact analysis."

Third, the European Council encouraged the Commission to take a second look at all pending legislative proposals, and all proposals still in the initial drafting stage, to see whether they pass muster under subsidiarity. It also invited the Commission to take up the more daunting task of re-examining all Community legislation already in place—and presumably adopted without conscious reference to subsidiarity—to see if it comports with that principle.\textsuperscript{27} In fact the Commission had already partially conducted such a review, and the European Council was therefore able to announce at Edinburgh the Commission's withdrawal or modification of a certain number of still pending proposals. The exercise doubtless reinforces the idea that subsidiarity means something and that it counts.\textsuperscript{28}

Fourth, the European Council directed a number of specific suggestions to the Council of Ministers. Besides the obvious admonitions, it called upon all of the Council of Ministers' working groups, as well as the Committee of Permanent Representatives, to comment specifically on the subsidiarity aspects of any proposal before them for advice.\textsuperscript{29} The European Council also recommended that the Council of Ministers make a separate inquiry and take a separate vote on the

\begin{itemize}
\item \textsuperscript{23} Id. at 7.
\item \textsuperscript{24} Bermann, supra note 2.
\item \textsuperscript{25} European Council, supra note 20, at 10.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 4.
\item \textsuperscript{28} Id. annex 2 to pt. A, at 1-2.
\item \textsuperscript{29} Id. annex 1 to pt. A, at 12.
\end{itemize}
subsidiarity aspects of any measure up for adoption (that is, separate from the inquiry and vote on the merits of the measure), but that the decision on both aspects be taken on the same occasion.\textsuperscript{20}

There remains to be discussed the role that the Court of Justice and the court of first instance should play in enforcement of the subsidiarity principle. Let us take first the situation in which the Community institutions adopt a measure despite doubts over the measure's compliance with subsidiarity. One possibility in these situations would be for the court to enforce subsidiarity rigorously as a procedural principle. By this I mean that the court might readily, in a direct legal challenge to a Community measure, review whether the Council of Ministers at least (and the Parliament where it also has a decisive legislative voice) made a serious inquiry into the measure's conformity with subsidiarity. (An earlier section of this Article detailed what such an inquiry might entail.) This would resemble the "hard look" that some have urged U.S. courts to take in reviewing administrative action.\textsuperscript{31} On the other hand, it seems highly unlikely that the Council will ever fail utterly to conduct a subsidiarity analysis or that it will conduct and present one in such a way as to cause the court to consider it a sham.

That would leave the Court of Justice with only the possibility of reviewing substantively the judgment that the challenged Community measure satisfies the requirements of subsidiarity. Given the profoundly discretionary character of this judgment—which once again entails at a minimum measuring the "adequacy" of state action, assessing the likelihood of such action across the states, and comparing its efficacy with that of the proposed Community measure—the Court will almost invariably consider it deserving of an extremely high level of deference.

In the event the Community institutions decline to adopt a measure, out of consideration for subsidiarity, the opportunities for judicial review are even slimmer. Although the Community system provides a judicial remedy for the institutions' failure to act,\textsuperscript{32} that remedy presupposes a duty to act, and in the case of legislative measures the element of duty is almost always absent. Even if it were not, the institutions' exercise of discretion to refrain from acting in the belief that the states are perfectly capable of doing so effectively will

\textsuperscript{30} \textit{Id.} at 11.


\textsuperscript{32} EEC Treaty art. 175.
certainly receive no less deference, and probably more deference, than their exercise of discretion to intervene. On the other hand, while there is thus virtually no prospect that the courts will review the institutions' decision not to legislate, the political operation of subsidiarity as I have described it above offers some hope that the institutions will be able to correct on their own the errors they make in this direction. A decent subsidiarity analysis by the political branches should leave a fairly clear record of the elements of fact and judgment upon the basis of which they decided not to act. This record may become the yardstick for determining whether the states in fact eventually acted effectively to address the problem at hand, and it may contain a recipe for federal action on a deferred basis should such action prove to be necessary.

Despite the practical limitations of judicial review, it is highly desirable that subsidiarity be considered a justiciable principle. Justiciability should promote subsidiarity's being taken seriously by the political branches. It will also enable the Court to intervene in the truly exceptional case in which those branches in fact egregiously ignore subsidiarity as a procedural or substantive mandate. Overall, however, judicial review cannot be heavily counted on as the mechanism for making subsidiarity work. We thus return to the hope that the political institutions will in fact genuinely ask the questions that subsidiarity raises and that they will genuinely act in the legislative process upon the conclusions to which their inquiries and analyses lead them.

IV. THE LIMITS OF SUBSIDIARITY

Defining, justifying, and operationalizing subsidiarity are all necessary if the principle is to be taken at all seriously by the Community at the present juncture. These measures will not, however, necessarily suffice to dispel the doubts surrounding the notion. Subsidiarity itself has significant limitations as a principle of legislation for a federal state. Subsidiarity's most severe limitations stem from its neglect of other legitimate factors of legislative judgment. Those factors may be, like subsidiarity itself, peculiar to systems based on power-sharing and may help shape such systems' overall federalism balance. Other factors may be of the sort that all political systems, federal and non-federal alike, ought to take seriously. In this section I describe only briefly what seem to me the prime examples of these shortcomings on subsidiarity's part. I develop them much more fully elsewhere.
A. **Subsidiarity and the Internal Market**

As previous sections have shown, subsidiarity presupposes the existence of a regulatory objective over which both the Community and the Member States have a claim to competence. Subsidiarity then guides the institutions in determining whether Community intervention is needed in order to satisfactorily achieve that objective. The newer Community competences—environmental policy, occupational safety and health, consumer protection, economic and monetary policy, to name the more prominent—are ones in which it is relatively easy to imagine the institutions asking subsidiarity questions and acting (to the extent they can tell) as subsidiarity suggests.

Ironically, subsidiarity cannot possibly work this smoothly when the institutions pursue the Community's original and core purpose which was, and probably still is, construction of an internal market in which persons, goods, services, and capital move freely across Member State borders. In legislating aspects of the common market—for example, in harmonizing Member State rules on the packaging of goods or the licensing of professions—the Community's central purpose is not so much the adoption of a specific policy as the creation of an orderly and consistent regulatory environment. If the Community were seeking to maximize the orderliness and consistency of the internal market, it would impose uniform standards and rules.

More often though, especially under its “new approach to harmonization,” the Community only pursues agreement on the essential regulatory requirements and, instead of demanding uniformity on the part of the states, tends to prefer the mutual recognition of different national standards provided they meet those essentials. The point is that the principal legislative questions to be decided in constructing the internal market—whether the rules on a given subject need to be harmonized, to what extent uniformity in those rules is desirable, how much national variation to accept and on what issues, and what the content of the harmonized Community standards themselves should be—are not ones to which subsidiarity, at least as defined up to now, is very responsive. They cannot be answered meaningfully in terms of the states' capacity to deal adequately with a regulatory problem because the regulatory problem is not itself the issue. The issue is whether and to what extent the Community's unquestioned interest in creating and improving the common market justifies restricting the

33. *Id.* arts. 2, 3(a)-(c).
states’ otherwise unfettered right to regulate whatever regulatory problem is at hand.

Judgments about the need for and content of internal market legislation thus turn essentially on whether the gains in the functioning of the common market produced by such legislation are sufficient to justify the resulting curtailment of the policymaking freedom of the states to act in areas basically within their jurisdiction. The analysis, not coincidentally, is very much like the analysis one might expect Congress to make before deciding to use its Interstate Commerce Clause powers to regulate, in the interest of unburdening interstate commerce, a subject otherwise within the legislative competence of the states.

It is consequently unrealistic to expect that the Council or Commission will find subsidiarity to be much help in determining whether the burdens on interstate commerce flowing from the states’ separate regulation of an issue justify the enactment of legislation on that issue at the Community level. Market uniformity is simply not a value that subsidiarity is capable of measuring. Community policymakers will have to approach issues of that sort with a quite different set of analytic tools, and it is to be hoped that subsidiarity will not get in the way.

B. Subsidiarity and other Principles of Legislative Judgment

The preceding section shows that, even if we limit our inquiry to federal systems, the standards for judging the proper scope of federal legislative action may well differ according to how we frame the federalism issue. Subsidiarity states a perfectly intelligible principle for allocating responsibilities between the federal government and the states in the regulation of a subject matter within their concurrent competence. It does not, however, aid us significantly in determining when the states’ freedom to regulate a subject matter within their competence should be curtailed in the interest of unburdening interstate commerce.

Subsidiarity’s limitations become all the more apparent when we consider that the choice between regulating at the federal or the state level may also properly be influenced by considerations that have nothing much to do with federalism at all, but that properly guide legislative judgment in all systems whether federal in structure or not. Legislatures can consult a variety of principles of legislative judgment in determining whether and in what form to intervene. “Proportionality” is the example of a legislative yardstick that comes most readily to
mind because of its prominence both in Court of Justice jurisprudence and in academic literature on the Community generally.

The doctrine of proportionality basically requires that government measures 1) bear a reasonable relation to a legitimate governmental purpose, 2) produce benefits that outweigh the corresponding costs, and most important for our purposes, 3) represent the least burdensome or intrusive alternative among the various governmental means that are available.35 Necessarily general in formulation, proportionality nevertheless expresses the most widely accepted set of guidelines in Europe for the exercise of legislative discretion and for the conduct of judicial review of those exercises of legislative discretion that are made. The doctrine seeks in essence to guarantee that government acts rationally in a plurality of ways.

When we hold subsidiarity and proportionality up to the light together, we see how easily pursuit of the one may actually foil attainment of the other. For example, it might be the case that the purposes for which a federal-level measure is contemplated could also adequately be served by a measure taken at the state or local level. Under these circumstances, the doctrine of subsidiarity would ordinarily point to state or local, and not to federal, action. We may safely assume that, in bowing to subsidiarity, federal authorities would also be heeding the first two requirements of proportionality; unless the state or local measure is rationally related to the purpose to be served, and unless its benefits outweigh its costs, the measure can hardly be described as “adequate” within the meaning of the subsidiarity doctrine. But the third requirement of proportionality is more difficult to meet for the simple reason that the state or local measure may simply not be the least drastic means available for achieving the stated purpose; the federal measure, which subsidiarity normally prefers, may have that particular advantage in its favor.

In other words, the doctrines of subsidiarity and proportionality, taken in their ordinary senses, may easily operate at cross-purposes in the same case. It is of course possible to escape the tension by refusing to consider a state measure as “adequate” for subsidiarity’s purposes unless it is also the least drastic means available, in accordance with proportionality’s final demand. But this would amount to overloading the term “adequate” within the meaning of the subsidiarity principle and, in the process, severely weakening subsidiarity as an instrument of localism.

35. See generally BERMANN et al., supra note 12, at 129-33.
It is not my goal here to navigate a path between subsidiarity and proportionality that will satisfy them both. That is a topic for another day.\textsuperscript{36} But it is my view that, if subsidiarity is allowed to accomplish too fully its relatively narrow purpose of confining Community legislation to matters that the Member States cannot themselves adequately treat, it may leave insufficient scope for other principles of allocation of power between the Community and the states that are equally valid and no less important.

\textbf{V. CONCLUSION}

Subsidiarity is a rhetorically important instrument of federalism in today's European Community. It also conveys a set of messages to the institutions that may help them avoid legislating on occasions when the Member States could do as effective a job of accomplishing the Community's policy goals. It is all the more important that the political branches themselves practice subsidiarity since, although subsidiarity is now widely assumed to be a justiciable principle, the Court of Justice and court of first instance will probably seldom find themselves in a position to enforce it.

Subsidiarity's chief weakness is perhaps its own content. As a general matter, it addresses the problem of federalism as if the latter required no more than keeping federal intervention to an absolute minimum. However, even within the Community's own legal tradition, not to mention other federalism traditions, we encounter competing principles that on occasion will dictate different results. I cite in this Article the Community's commitment to an integrated internal market and the Court's doctrine of proportionality as criteria that may point in different power-allocating directions than subsidiarity would if it alone were taken into consideration. This suggests that maintaining the proper balance between Community and Member State governance for all occasions is a bigger and more important task than any single criterion, including subsidiarity, can itself perform.

\textsuperscript{36} See Bermann, \textit{supra} note 2.