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Author(s): Robert Schütze

Source: *The Cambridge Law Journal*, Nov., 2009, Vol. 68, No. 3 (Nov., 2009), pp. 525-536

Published by: Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal

Stable URL: <https://www.jstor.org/stable/40388833>

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SHORTER ARTICLE

SUBSIDIARITY AFTER LISBON: REINFORCING THE SAFEGUARDS OF FEDERALISM?

ROBERT SCHÜTZE*

I. INTRODUCTION

“[T]HREE correcting words of the legislator and entire libraries are turned into maculature.”¹ Worse: three additional words and entire libraries will be filled again! Libraries have literally been filled since the introduction of the “principle of subsidiarity” into the European legal order.²

Subsidiarity – the quality of being “subsidiary” – derives from *subsidium*. The Latin concept evolved in the military context. It represented an “assistance” or “aid” that stayed in the background. Figuratively, an entity is subsidiary where it provides a “subsidy” – an assistance of subordinate or secondary importance. In political philosophy, the principle of subsidiarity came to represent the idea “that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level”.³ The principle was invoked in 1891 by the Catholic Church and received its celebrated form forty years later in the Encyclical *Quadragesimo Anno*.⁴ When did the subsidiarity principle become a *constitutional* principle? The legal principle of subsidiarity emerged as a – contested – principle of German constitutional law.⁵

* Durham Law School.

¹ J.H. von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (Berlin 1848), 23.

² For an overview of the – abundant – literature, see R. Schütze, *Form Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford 2009, forthcoming), chapter 5.

³ Oxford English Dictionary: “subsidiary” and “subsidiarity”.

⁴ The principle that responsibility should be gradually organised into ever larger social groupings had not been invented by the Catholic Church (cf. K. Endo, *Subsidiarity and its Enemies: To what Extent is Sovereignty contested in the Mixed Commonwealth of Europe*, EUI RCS Working Paper 2001/24 at 9). However, the idea of subsidiary social organisations re-emerged with the Encyclical “*Rerum Novarum*” (Of New Things, 1891) and – forty years later – in *Quadragesimo Anno: Encyclical of the Pope Pius XI on Reconstruction of the Social Order*, especially: paras.79–80. For an analysis of the application of the subsidiarity principle *inside* the Church, see J. Komonchak, “Subsidiarity in the Church: The State of the Question” (1988) 48 *The Jurist* 298.

⁵ On the German *constitutional* principle of subsidiarity, see J. Issensee, *Subsidiaritätsprinzip und Verfassungsrecht* (Berlin 2001).

And, it is through the medium of German constitutionalism that the principle of subsidiarity enters into the European legal order.⁶

The *Community* principle of subsidiarity surfaces in 1975,⁷ but would only find official expression in the text of the EC Treaty after the Single European Act (1986). The (then) newly inserted Article 130 r (4) EEC restricted Community environmental legislation to those actions whose objectives could “be attained better at Community level than at the level of the individual Member States”. The Treaty on European Union (1992) finally lifted the subsidiarity principle beyond its environmental confines. It became a general constitutional principle of the European Union. Article 5 (2) EC states: “In areas that do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”. This formulation was ambiguous, and subsequent constitutional clarifications culminated in a special Protocol on the Application of the Principles of Subsidiarity and Proportionality added by the Amsterdam Treaty (1997).⁸

Despite its literary presence, the principle of subsidiarity has remained a subsidiary principle of European constitutionalism. Why? The reason for its shadowy existence lies in the continued absence of clear conceptual contours. While the principle’s ambiguity may have “save[d] Maastricht”,⁹ its protean character defied concrete application as a new safeguard against European centralisation. If subsidiarity was everything to everyone, how should the Community institutions apply it? Furthermore, the assessment of subsidiarity has, in the past, been largely left to the Community *legislator*. This constitutional arrangement meant that subsidiarity was not taken very seriously by European constitutionalism.¹⁰ In the light of this failure, various reforms were proposed to strengthen the subsidiarity principle as a “safeguard of federalism”.¹¹ Two reform options crystallised in the last decade. The first option concentrates on the procedural nature of the principle and attempts to reinforce subsidiarity as a *political*

⁶ *Ibid.*, 333.

⁷ For a detailed textual genealogy of the subsidiarity principle in the European legal order, see R. Schütze, above n.2.

⁸ Protocol 30 on the Application of the Principles of Subsidiarity and Proportionality (1997).

⁹ D.Z. Cass, “The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community” (1992) 29 *Common Market Law Review* 1107.

¹⁰ G. Berman, “Proportionality and Subsidiarity” in C. Barnard & J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises* (Oxford 2002), 75 at 86.

¹¹ The idea of “political safeguards of federalism” was developed in the US American federal context, see H. Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government” (1954) 54 *Columbia Law Review* 543. On the federal nature of the European Union, see Schütze, above n.2, chapter 1.

safeguard of federalism. The second option tries to “substantiate” the principle by strengthening subsidiarity as a *judicial* safeguard of federalism. In what ways would the Lisbon Treaty – if it enters into force – take up these proposals? Would the subsidiarity principle emerge strengthened? This is the question this (short) article will try to answer.

II. STRENGTHENING THE POLITICAL SAFEGUARDS OF FEDERALISM

The Amsterdam Protocol confirmed the “procedural” nature of the subsidiarity enquiry. Each institution was called upon to ensure that it complies with the principles of subsidiarity and proportionality.¹² “For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.”¹³ These procedural obligations are subsequently specified for each institution. The Commission must “justify the relevance of its proposals with regard to the principle of subsidiarity; whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect”.¹⁴ The Council and the Parliament “shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 5 of the Treaty”.¹⁵ The Protocol was infused, through and through, with the philosophy of process federalism. Subsidiarity was – predominantly – a “political question”.¹⁶

How could this procedural dimension be reinforced? The beloved proposal in the last decade has been to integrate national parliaments into the decision-making process of the European Union.¹⁷ It was hoped that this idea would kill two birds with one stone. The procedural involvement of national parliaments promised to strengthen the federal *and* the democratic safeguards within Europe. This could be done in two ways. First, one could create a new European institution – a Senate – that would assemble national parliamentarians. Second,

¹² Amsterdam Protocol, Article 1.

¹³ *Ibid.*, Article 4.

¹⁴ *Ibid.*, Article 9.

¹⁵ *Ibid.*, Article 11.

¹⁶ This view has had wide support from the academic side, see only: G. Berman, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States” (1994) 94 *Columbia Law Review* 331 at 336: “My basic view is that the Community should respond to this challenge by recasting subsidiarity from a jurisdictional principle (that is, a principle describing the allocation of substantive authority between the Community and the Member states) into an essentially procedural one (that is, a principle directing the legislative institutions of the Community to engage in a particular inquiry before concluding that action at the Community rather than Member State level is warranted.)”

¹⁷ Cf. (Amsterdam) Protocol No 9 on the Role of National Parliaments in the EU.

national parliaments *as such* could be integrated in the European legislative process.

In the past, the idea to create a European Senate as a second parliamentary chamber had high political support.¹⁸ “At the root of all of the proposals for a second chamber there seems to lie a perception that there is a problem with the democratic legitimacy of the EU and its institutions.”¹⁹ National parliaments were not directly involved in the European legislative process and they lacked control over national ministers voting in the Council. But is the creation of a European Senate the best constitutional medicine for the alleged democratic malaise? Would its involvement add a *third* source of democratic legitimacy to the European Union?²⁰ Serious doubts are in order. The Senate idea would simply not solve the practical problems which it seeks to address.²¹ And from a theoretical point of view, it makes little sense. “[I]f the Council makes the law, and if Ministers in the Council represent their national parliaments, how can their parliaments be given a separate, valid legislative role?”²² Why should there be *two* European institutions representing the national peoples? If the reason for this functional doubling is the increased independence of *national* governments from their *national* parliaments, why not strengthen the *national* safeguards of democracy? A European Senate would thus not add much democratic legitimacy to the European Union. The better view has therefore concentrated on its potential function as a political safeguard of federalism.²³ Yet, the idea of a European Senate was soon discarded on the road to reform.²⁴

¹⁸ It had been suggested by various French political luminaries, but also by former Prime Minister Tony Blair and the former President of the Czech Republic, Vaclav Havel. For an overview of the various proposals for a second chamber, see House of Lords, Select Committee on European Union, Seventh Report (2001–02) (<http://www.publications.parliament.uk/pa/ld200102/ldselect/ldselect/48/4801.htm>), paras.7–21.

¹⁹ *Ibid.*, para.26.

²⁰ For an affirmative answer, see G. van der Schyff & G-J. Leenknecht, “The Case for a European Senate: a Model for the Representation of National Parliaments in the European Union” (2007) 62 *Zeitschrift für öffentliches Recht* 237 at 243 and 251.

²¹ For an analysis of this point, see House of Lords, *above* n.18, paras.40 et seq. The House of Lords suggested that the Council should operate in a more transparent way. “Achieving greater accountability would significantly help reconnection of citizens with the institutions of Europe and provide important reassurance to the public about the working of their institutions.” “Our recommendation is accordingly that member States’ governments should make every effort to ensure that they are fully accountable to their national parliaments both in being scrutinised on Council meetings in advance, and in reporting the outcome of Council meetings after the event.” (*Ibid.*, para.62).

²² Andrew Duff (MEP) as quoted in *ibid.*, para.59.

²³ This has been the theme of reform proposals by the French Senate, cf. *Rapport d’information au nom de la délégation du Sénat pour l’Union européenne sur une deuxième chambre européenne* No. 381 (<http://www.senat.fr/rap/r00-381/r00-381.html>).

²⁴ The European Convention had ruled out the creation of a new institution to monitor the application of the principle of subsidiarity; cf. *Conclusions of the Working Group IV on the Role of National Parliaments*, CONV 353/02, 11: “The majority of the members of the Group recommended a “process based approach” for monitoring subsidiarity and proportionality by national parliaments and rejected the idea of creating new permanent or ad hoc bodies or institutions for this purpose.”

The idea of involving national parliaments in the European legislative procedure was – not unsurprisingly – celebrated as the best solution by the European Convention.²⁵ “Such a mechanism would enable national parliaments to ensure the correct application of the principle of subsidiarity by the institutions taking part in the legislative process through a direct relationship with the Community institutions.”²⁶ This procedural vision of subsidiarity would find its way into the (failed) Constitutional Treaty and now the (suspended) Lisbon Treaty. National Parliaments are to be accorded an active role in the functioning of the European Union “by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality.”²⁷

What would the Lisbon Protocol change?²⁸ Did it offer the national parliaments a veto right (hard constitutional solution) or only a monitoring right (soft constitutional solution)? In addition to reaffirming the procedural hurdles of the Amsterdam Protocol,²⁹ the new Protocol will strengthen the political safeguards of federalism by involving the national parliaments as “watchdogs of subsidiarity.”³⁰ According to Article 6, each national parliament may, within eight weeks, produce a reasoned opinion stating why it considers that a European legislative draft does not comply with the principle of subsidiarity. Each national Parliament will thereby have two votes;³¹ and

²⁵ “That a consensus in favour of empowering national parliaments emerged in the Convention is not altogether surprising given that a majority of its full members, 56 out of 105, were representatives of national parliaments.” (Cf. I. Cooper, “The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU” (2006) 44 *Journal of Common Market Studies* 281 at 288).

²⁶ *Conclusions of the Working Group I on the Principle of Subsidiarity*, CONV 286/02, 5. For a critical eye on the report, see the excellent analysis by S. Weatherill, “Using National Parliaments to improve Scrutiny of the limits of EU Action” (2003) 28 *European Law Review* 909–10: “The Working Group Report largely promoted an impression that the proper corrective to perceived problems in today’s European Union is enhanced national “control” over the European institutions. This is troublingly backward-looking. ‘Nationalising’ the context in which EU decisions are taken may produce selfish State-centric outcomes which fail to pay heed to the need to adjust political decision-making in line with the growth of economic and social activities undertaken in the transnational domain. So greater involvement of national parliaments is not necessarily a virtue.”

²⁷ Article 12 (b) of the (Lisbon) TEU.

²⁸ Lisbon Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality.

²⁹ Article 5 of the new Protocol states: “Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.”

³⁰ I. Cooper, “The Watchdogs of Subsidiarity”, above n.25, at 281.

³¹ Article 7(1) of the Lisbon Protocol on the Application of the Principles of Subsidiarity and Proportionality.

where the negative votes amount to one third of all the votes allocated to the national parliaments, the European Union draft “must be reviewed”. This is called the “yellow card” mechanism, since the Union legislator “may decide to maintain, amend or withdraw the draft”.³² The mechanism is strengthened in relation to legislative proposals under the co-decision procedure; albeit, here, only a majority of the votes allocated to the national parliaments will trigger it.³³ Under this “orange card” mechanism, the Commission’s justification for maintaining the proposal as well as the reasoned opinions of the national parliaments will be submitted to the Union legislator. The latter will have to consider whether the proposal is compatible with the principle of subsidiarity. Where *one* of its chambers finds that the proposal violates the principle of subsidiarity, the proposal is rejected.³⁴ While this arrangement makes it – slightly – easier for the European Parliament to reject a legislative proposal on subsidiarity grounds, it makes it – ironically – more *difficult* for the Council to block a proposal on the basis of subsidiarity than on the basis of a proposal’s lack of substantive merit.³⁵

The Lisbon Protocol rejects the idea of a “red card” mechanism. The rejection of a hard procedural solution is bemoaned by some as the chosen procedural safeguards would “add very little” to the federal control of the Union legislator.³⁶ Others have – rightly – greeted the fact that the envisaged mechanism will leave the political decision on subsidiarity ultimately to the European legislator. “[T]o give national parliaments what would amount to a veto over proposals would be incompatible with the Commission’s constitutionally protected independence”.³⁷ Indeed, “a veto power vested in national Parliaments would distort the proper distribution of power and responsibility in the EU’s complex but remarkably successful system of transnational governance by conceding too much to State control.”³⁸ To have made national parliaments “co-legislators” in the making of European law

³² *Ibid.*, Article 7 (2). The threshold is lowered to a quarter for European laws in the area of freedom, security and justice.

³³ *Ibid.*, Article 7(3).

³⁴ *Ibid.*, Article 7 (3) (b): “if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration”.

³⁵ For an analysis of this point, see G. Barrett, “‘The King is Dead, Long live the King’: the Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty concerning National Parliaments” (2008) 33 *European Law Review* 66 at 80–1. In the light of the voting threshold, “it seems fair to predict that blockade of legislative proposals under Article 7(2) is likely to be a highly exceptional and unusual situation”.

³⁶ *Thirty-third Report of House of Commons European Scrutiny Committee: Subsidiarity, National Parliaments and the Lisbon Treaty* (<http://www.parliament.the-stationery-office.com/pa/cm200708/cmselect/cmselect/563/563.pdf>), para.35.

³⁷ A. Dashwood, “The Relationship between the Member states and the European Union/Community” (2004) 41 *Common Market Law Review* 355 at 369.

³⁸ S. Weatherill, above n.26 at 912.

would have aggravated the “political interweaving” of the European and the national level and thereby further deepened joint-decision traps.³⁹ Lisbon will thus continue to “proceduralise” subsidiarity without turning the principle into a hard and fatally efficient political safeguard of federalism. The soft constitutional solution will thereby channel national parliaments’ scrutiny to where it can be most useful and effective: on their respective national governments.

III. STRENGTHENING THE JUDICIAL SAFEGUARDS OF FEDERALISM

Past constitutional practice has concentrated on the procedural dimension of the subsidiarity principle. Has European constitutionalism thus rejected the judicial dimension and fully embraced the philosophy of “process federalism”? The Amsterdam Protocol had expressly acknowledged the possibility of judicial review in the Community legal order: “Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty”.⁴⁰ This had called on the European Court of Justice. Yet, the Court would only listen with one ear and leave the substantive subsidiarity analysis in the hands of the Community legislator.⁴¹ However, the parallel application of political and judicial safeguards of federalism will be confirmed by the Lisbon Protocol.⁴² But more than that: the European Convention had raised the argument that “judicial review carried out by the Court of Justice concerning compliance with the principle of subsidiarity *could be reinforced*”.⁴³

How could the judicial safeguards of federalism be reinforced? One idea has proposed an *ex ante* judicial review on subsidiarity grounds.⁴⁴ Modelled on the *ex ante* jurisdiction of the Court for international

³⁹ On the concept and shortfalls of *Politikverflechtung*, see F. W. Scharpf, “The Joint-Decision Trap: Lessons from German Federalism and European Integration” (1988) 66 *Public Administration* 239.

⁴⁰ *Ibid.*, Article 13. See also *Edinburgh European Council Conclusions, Annex 1: Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union*, Bulletin of the European Communities, 12-1992, 12 at 14: “The principle of subsidiarity cannot be regarded as having direct effect: however, interpretation of this principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned.”

⁴¹ For an analysis of the jurisprudence of the European Court, see R. Schütze, above n.2.

⁴² Article 8 of the Lisbon Protocol on Subsidiarity and Proportionality: “The Court of Justice shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 163 of the Treaty on the Functioning of the European Union by Member states, or notified by them in accordance with their legal order on behalf of their national Parliaments or a chamber thereof.”

⁴³ *Conclusions of the Working Group 1 on the Principle of Subsidiarity*, CONV 286/02 at 7 (emphasis added).

⁴⁴ J.P. Jacqué & J.H.H. Weiler, “On the Road to European Union – A new judicial Architecture: An Agenda for the Intergovernmental Conference” (1990) 27 *Common Market Law Review* 185 at 204-6.

agreements,⁴⁵ this would allow the Court to subject a European bill to a subsidiarity review prior to its entry into force. A second proposal reified this idea by suggesting an independent new Court specialised in questions of competence and subsidiarity.⁴⁶ The Convention discarded both suggestions on the ground “that the introduction of a judicial review in the legislative phrase would be tantamount to the monitoring of subsidiarity losing its primarily political nature”.⁴⁷ But then, how could *ex post* judicial review of subsidiarity be reinforced? In order to answer this question, we need to take a step back and ask – again – what the subsidiarity principle *is* and what we want it to *do*.

The Court, and much of the academic literature,⁴⁸ makes a distinction between “whether” the Community should exercise its competence and “how” it does it. The former is conceptualised as subsidiarity the latter is viewed as proportionality. This distinction is misleading. Subsidiarity must be understood in terms of federal proportionality. Why? There are two reasons – one theoretical and one conceptual. Theoretically, a subsidiarity principle that concentrates on the “whether” of Community action operates within a philosophy of dual federalism. It is based on the either-or logic in which certain objectives should not involve the European Community or the Member States at all. By excluding the Community from the scene, subsidiarity *sensu stricto* protects a sphere in which the Member States can *exclusively* exercise their competences. And by insisting that certain objectives are “Community objectives” as they can only be achieved by the Community, the Court equally constructs a sphere in which *only* the European Union can operate.

But more importantly: on a conceptual level, it is impossible to reduce subsidiarity to “whether” the Community should exercise one of its competences. This follows from the constitutional structure of Article 5 EC, which distinguishes three constitutional principles: enumeration, subsidiarity, and proportionality. Where the Union enjoys a competence it is entitled to generally act within an area. The general “whether” of Union action is thus already answered for that policy area. The distinction between “competence” and “subsidiarity” – between Article 5(1) and 5(2) EC – will thus only make sense if the subsidiarity principle concentrates on the “whether” of *the specific act*

⁴⁵ Article 300(6) EC: “The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.”

⁴⁶ J.H.H. Weiler, *The Constitution of Europe* (Cambridge 1999), 322.

⁴⁷ *Conclusions of the Working Group I on the Principle of Subsidiarity*, CONV 286/02 at 9.

⁴⁸ For an exception to the rule, see G. de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, Harvard Jean Monnet Working Paper 1999/07.

at issue. But the “whether” and the “how” of the specific action are inherently tied together. The principle of subsidiarity will thus ask *whether* the European legislator has *unnecessarily* restricted national autonomy. A subsidiarity analysis that will not question the *federal* proportionality of a European law is bound to remain an empty formalism. Subsidiarity properly understood *is* federal proportionality.

What, then, is the difference between subsidiarity in Article 5(2) and proportionality in Article 5(3) EC? The answer is that both principles share a family resemblance.⁴⁹ The proportionality principle was historically designed to safeguard *liberal* values. Proportionality would protect *private* rights against excessive public interference.⁵⁰ The idea of excessive government interference can be extended into a federal context. But here it is not the individual autonomy of a person, but the *collective* autonomy of a people that is protected. In addition to its liberal dimension, the principle of proportionality may thus receive a federal dimension.⁵¹ But this federal proportionality *is* the principle of subsidiarity; and to draw a line between proportionality and subsidiarity, the best solution would be to restrict the principle of proportionality in Article 5(3) EC to its liberal dimension. The constitutional triumvirate of Article 5 EC could thus be explained as follows: the enumeration principle will tell us whether the Community *can* act within a policy field. The subsidiarity principle would examine whether the European law *disproportionally restricts national autonomy*; and the principle of proportionality would, finally, tell us whether the European law *unnecessarily interfered with liberal values*.

But even if the Court comes to embrace subsidiarity as federal proportionality, what principles could assist it in *reinforcing* judicial review of subsidiarity? American federalism has never expressly recognised the existence of a principle of subsidiarity in theory or practice.⁵² However, two indirect inspirations may still be distilled from the jurisprudence of the American Supreme Court. They are the “clear statement rule” and the “presumption against pre-emption”. The former is a judicial safeguard to maintain the political safeguards of federalism. Congress must state its intention to pre-empt State law clearly; for “to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for

⁴⁹ On the concept of “family resemblance”, see L. Wittgenstein, *Philosophical Investigations* (Oxford 2001), §65–71.

⁵⁰ On the origin of the concept, see J. Schwarze, *European Administrative Law* (London 2006), 678–9.

⁵¹ The principle of subsidiarity may also have a liberal dimension in the sense of protecting individuals or *private* groups from unnecessary public intervention. However, this liberal dimension of subsidiarity is *not* codified in Article 5 (2) EC.

⁵² G. Berman, *Taking Subsidiarity Seriously*, *above* n.16 at 403: “not only would the European not have found subsidiarity in the lexicon of US constitutional law, but they would not have found it to be a central feature of US constitutional practice”.

lawmaking”.⁵³ The presumption against pre-emption goes slightly further than this.⁵⁴ It adds a substantive value in favour of State legislation and forms part of a “normative canon designed to protect federalism values”. “As such, the presumption against preemption is much like a number of other rules of construction derived from constitutional values, such as the rule of lenity in criminal law[.]”⁵⁵

These two American devices can, without much effort, be translated into European safeguards of federalism. The Court could insist on express pre-emption before concluding that a European law occupied the field. It could equally develop a *judicial* presumption against pre-emption in certain policy areas. Indeed, it has been argued that the subsidiarity principle as such should function as the textual foundation of a presumption in favour of national responsibility.⁵⁶ Yet, these two devices would only provide for a soft constitutional solution: the subsidiarity-inspired *interpretation* of European legislation. What about situations in which the European legislator spoke clearly and expressly field-pre-empted national legislators in violation of the subsidiarity principle? Then, the European Court would face a choice. It could conceive the judicial safeguards of federalism as mere “resistance norms”, that is “constitutional rules that make governmental action more difficult, but do not categorically exclude it”.⁵⁷ This is the present American solution.⁵⁸ Alternatively, it could – and should – outlaw disproportionate interferences into national legislative autonomy. However, this hard constitutional solution will imply that the Court abandons its manifest-error standard in relation to the question of subsidiarity. The Court would need to develop a stricter standard for the *federal* proportionality review. The fact that the latter may depart from the laxer standard for the liberal proportionality principle is no constitutional anomaly.⁵⁹ However, the hard constitutional solution would mean that the Court of Justice gets involved in fundamental

⁵³ *Gregory v. Ashcroft*, 501 US 452 (1991), 464 (quoting L. H. Tribe).

⁵⁴ The Supreme Court has found a presumption against pre-emption in areas of traditional State police powers. For an analysis of this case law, see R. Schütze, above n.2, chapter 2.

⁵⁵ E.A. Young, “Two Cheers for Process Federalism” (2001) 46 *Villanova Law Review* 1349 at 1387–8.

⁵⁶ E.A. Young, “Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism” (2002) 77 *New York University Law Review* 1612 at 1717: “[T]he introduction of the principle of subsidiarity into the EU treaties at Maastricht provides substantial support for a shift in interpretive principles. If anything, the underlying legal texts offer firmer support for an interpretative ‘presumption against preemption’ in the EU than exists in the United States.”

⁵⁷ *Ibid.*, 1652.

⁵⁸ Above n.54.

⁵⁹ The co-existence of *two* or more judicial review standards is well-established in American constitutional law, see *United States v. Caroline Products*, 304 US 144 (1938), 152 fn.4 (1938). This is perhaps the most famous footnote in American constitutional law.

political and social questions. But this is – after all – what *constitutional* courts do.

IV. CONCLUSION

The constitutionalisation of the principle of subsidiarity came at a time, when the European Community resolutely continued its path away from decisional intergovernmentalism. With the political safeguards of federalism in the Council loosened, a new constitutional principle was searched for to protect the Member States from the dangers of over-centralisation. As a constitutional principle, subsidiarity was designed to safeguard legislative space for the Member States by restricting European legislation to situations, where “the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”.⁶⁰

In the past, the procedural dimension of subsidiarity has been the dominant perspective. Recent reform proposals have, consequently, aimed to strengthen this dimension by involving the national parliaments as watchdogs of subsidiarity. The Lisbon Protocol on the Application of the Principle of Subsidiary and Proportionality would create a “yellow” and an “orange” card mechanism. The rejection of the “red card” option is to be welcomed. The hard constitutional solution would *not* have offered a third source of legitimacy and the soft constitutional solution will channel the energy of national parliaments to where it primarily belongs: the control of their national governments. Lisbon would add an additional monitoring task, but this European task should only supplement their *national* responsibility.

The Lisbon arrangements may also call upon the Court to reinforce the judicial control of subsidiarity. The Court, too, would have a choice between a soft and a hard constitutional solution. The European Court could – like the American Supreme Court – essentially view the subsidiarity principle as a *presumption* against pre-emption. (While the Court has not pronounced on the issue, past judicial practice may be seen as a manifestation of its implicit acceptance.) However, presumptions can be overturned; and for that reason this article has argued in favour of a hard constitutional solution. In federal contexts, exclusively process-based theories of judicial review are misplaced as there are *two* democratic processes that claim authority.⁶¹ A strengthened judicial commitment towards substantive subsidiarity will not

⁶⁰ Article 5 (2) EC.

⁶¹ On this point, see R. Schütze, “On ‘Federal Ground’: The European Union as an (Inter)national Phenomenon” (2009) 46 *Common Market Law Review* 1069 at 1099–1102.

mean revolutionary change. European constitutionalism has already made a commitment in that direction. Instead of leaving the federal philosophy to the *political* safeguards of federalism alone, the European legal order has already accepted *substantive* limits on the European legislator in the form of complementary competences.⁶²

⁶² On the nature of these competences in the European legal order, see R. Schütze, above n.2.