WHAT KIND OF LAW DOES EUROPE NEED?
THE ROLE OF LAW, LAWYERS AND JUDGES IN CONTEMPORARY EUROPEAN INTEGRATION

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In August 1870, James Bryce, aged 32 and newly appointed Professor of Civil Law at Oxford, set off with his friend Albert Venn Dicey to visit the United States. In 1886 Dicey published *The Law of the Constitution*, a work that has guided—some would say stultified—British constitutional thought for more than a century. Two years and two visits to America later, Bryce published *The American Commonwealth* which Woodrow Wilson called "a noble work possessing in high perfection almost every element that should make students of comparative politics esteem it invaluable."

Nowadays, the description "a noble work," especially from the pen of Woodrow Wilson, may be somewhat off-putting. Do not be put off. Bryce's book, like Dicey's, is still highly readable. He introduces his subject in this way:

"What do you think of our institutions?" is the question addressed to the European traveler in the United States by every chance acquaintance. The traveller finds the question natural, for if he be an observant man his own mind is full of those institutions. But he asks himself why it should be in America only that he is so interrogated. In England one does not inquire from foreigners, nor even from Americans, their views on the English laws and government; nor does the Englishman on the Continent find Frenchmen or Germans or Italians anxious to have his judgment on their politics. Presently the reason of the difference appears.

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* Judge of the Court of Justice of the European Communities. This is a revised version of an address delivered at the opening of the European Legal Studies Center at Columbia Law School on April 20, 1998. The views expressed here are those of the author.

The institutions of the United States are deemed by inhabitants and admitted by strangers to be a matter of more general interest than those of the not less famous nations of the Old World. They are, or are supposed to be, institutions of a new type. They form, or are supposed to form, a symmetrical whole, capable of being studied and judged all together more profitably than the less perfectly harmonized institutions of older countries. They represent an experiment in the rule of the multitude, tried on a scale unprecedentedly vast, and the results of which every one is concerned to watch.

And yet they are something more than an experiment, for they are believed to disclose and display the type of institutions towards which, as by a law of fate, the rest of civilized mankind are forced to move, some with swifter, others with slower, but all with unresting feet.2

I think Bryce (though perhaps not Dicey) would have been happy that in Europe we have created some new institutions for you to study here at Columbia. Yet the time has not yet come when the American traveler in Europe will be asked by every chance acquaintance “What do you think of our institutions?” The sad truth is that, except perhaps in modern Germany, the average European remains largely uninterested in the processes of government and even more uninterested in the theory of government.

Consequently, the institutional debate tends to be dominated by those who continue to believe that the institutions of the United States are a sort of paradigm towards which, in Bryce’s phrase, the rest of civilized mankind are forced to move with unresting feet.3 As you will soon gather, I am not one of them. I prefer the empirical approach of Bryce, as described by Woodrow Wilson:

Mr Bryce does not treat the institutions of the United States as experiments in the application of theory, but as quite normal historical phenomena to be looked at, whether for the purposes of criticism or merely for purposes of description, in the practical every-day light of comparative politics. He seeks to put American institutions in their only instructive setting—that, namely, of comparative institutional history and life. . . De Tocqueville came to America to observe the operation of a principle of government, to seek a well-founded answer to the question: How does democracy work? Mr Bryce, on the other hand, came . . . to observe the concrete phenomena of an institutional development, into which, as he early perceived, abstract political theory can scarcely be said to have entered as a formative force.4

The empirical approach to American institutions did not begin with Bryce and Woodrow Wilson. Writing 50 years earlier, James Madison said of his own creation:

The more the political system of the United States is fairly examined, the more necessary it will be found to abandon the abstract and technical modes of expounding and designating its character and to view it as laid down in the charter which constitutes it, as a system hitherto without a model; as neither a simple or a consolidated Government nor a Government altogether confederate; and therefore not to be explained so as to make it either, but to be explained and designated according

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3 Id.
4 Wilson, supra note 1, at 62.
to the actual division and distribution of political power on the face of the instrument.\(^5\)

What appears on the face of the instrument is not even a safe guide. As George Bermann has written very recently:

It is no exaggeration to say that the United States constitutional text, as it reads, is a poor guide to the political and even to the legal realities of federalism.\(^6\)

Armed with these authorities, I urge you not to spend time in your new Center debating whether the European institutions do or do not correspond to some hypothetical American model of federalism. They do not, and they are not intended to do so. On the other hand, it is essential that Americans should have a better understanding of what has happened in Europe and why. And, looking to the future, it is important for us in Europe that the scholars of great universities like Columbia should help us to examine in an objective way whether the European institutions are an adequate response to the problems with which we are faced. In this respect, a comparative study of American experience will be of great value.

Nevertheless, as Bryce said to his readers:

The reader . . . must not expect the problems America has solved, or those which still perplex her, to reappear in Europe in the same forms. Such facts, to mention only two out of many, as the abundance of land and the absence of menace from other Powers show how dissimilar are the conditions in which popular government works in the Eastern and in the Western hemisphere. Nothing can be more instructive than American experience if it be discreetly used, nothing will be more misleading to one who tries to apply it without allowing for the differences of economic and social environment.\(^7\)

Nowadays, it is not the availability of land or the menace of other powers that differentiates your position from ours, but rather the nature of our recent historical experience and its consequences.

It is attractive to draw an analogy between the historic development of the United States and the evolution of the modern nation states of Europe. The political map of the United States assumed its present form as development moved westward, beginning with the original thirteen states in the east and ending with Hawaii and Alaska in the west. Correspondingly, in Europe the pattern of nation states has progressively become more stable as political development has moved eastward, beginning with the "old" nation states such as England and France in the west, adding more during the nineteenth century and yet more during the twentieth, especially during the last decade.

The analogy is tempting but nevertheless thoroughly misleading. The United States moved westward into land which, if not wholly unoccupied, was not, in

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\(^6\) George Bermann, Regulatory Federalism: European Union and the United States in 263 Recueil des Cours 48 (Academy of International Law 1997).

\(^7\) James Bryce, 2 The American Commonwealth 662 (3d ed. 1900).
Western legal terms, territorially or politically defined. The new states of the Union, and the citizens of those states, were defined by the geographical frontiers of the territory they occupied within the pre-existing framework of a federal system. The European nation states, by contrast, have progressively been carved out of old empires, most recently the Soviet Empire. They have established themselves as independent states outside any wider federal framework and are defined as separate entities not so much by geographical frontiers as by a variety of less tangible criteria which go to build a sense of "nationhood"—a sense of national identity implying a difference from others and especially from one's neighbors. These include language, religion, culture and "ethnicity"—the perception people have of their ethnic origin.

The dismemberment of the old multilingual, multicultural and multi-ethnic Empires involved vast movements of population with a view to creating self-contained nation states—monolingual, mono-cultural and mono-ethnic. Under this process of "self-determination," the geographical definition of territory takes second place to the identification of those who wish (or are deemed to wish) to occupy and control a territory of their own. The nation state becomes a focus of unity, but only for those who belong. It may equally become the pretext for excluding those who do not want to belong or are judged by the majority not to qualify.

Politically, self-determination for the majority may entail exclusion of the minority from rights of citizenship, or at least from participation in government, giving rise to civil unrest and then, as a supposed remedy for the unrest, to ethnic cleansing. Economically, the division of territory may lead to inefficient use of resources, leading in turn, as in the case of Alsace-Lorraine, to conflict over the ownership and control of those resources. The dismemberment of the former Yugoslavia is both an example and a warning of what may happen in an old continent, even today.

Most of Europe has, we hope, now left those dangers behind. The Council of Europe (an intergovernmental organization set up in 1948 and now comprising forty European states, including Russia) has done much to establish minimum standards of human rights and to secure political and judicial protection for the rights of minorities. The European Convention on Human Rights (ECHR), drawn up by the Council of Europe, entered into force in 1953 and established the European Commission and Court of Human Rights. The Commission of Human Rights has now (November, 1998) been abolished and its functions have

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8 It is not generally realized that more than ten million Germans were forcibly removed westwards after the end of World War II.

9 Rather surprisingly, Lady Thatcher is quoted as saying:

Self-determination is a principle wholly malign for the peace of the world. States cannot be made to coincide with nations. It is Woodrow Wilson, of course, who is ultimately responsible for the damaging myth of the single-nation state. Such states cannot work. He is the one to put in the dock of history.

George Urban, Diplomacy and Disillusion in the Court of Mrs. Thatcher 201 (1996).

10 The European Court of Human Rights (ECHR) must not be confused with the Court of Justice of the European Communities (commonly referred to as the "European Court of Justice" or "ECJ").
been merged with those of the Court of Human Rights, which was itself reorganized on a permanent basis to take account of the fact that all forty member states have now ratified the Convention. Individuals now have direct access to the Court.

The European Community (EC), and now the European Union (EU), seek to solve problems of a different kind. Rules that go hand in hand with the sovereignty of the nation state, such as rules of nationality, may restrict access to employment and the professions, to education and to social security. Moreover, the growing apart of nation states has led to differences in the substance, the methods and, even more profoundly, the culture of the law.

The law is, after all, as much a part of national culture as art or music. As Sybil Bedford puts it:

The law, the working of the law, the daily application of the law to people and situations, is an essential element in a country’s life. It runs through everything; it is part of the pattern like the architecture and the art and the look of the cultivated countryside. It shapes and expresses a country’s mode of thought, its political concepts and realities, its conduct. One smells it in the corridors of public offices, one sees it in the faces of the men who do the customs. It all hangs together, whether people wish it or not, and the whole is a piece of the world we live in.¹¹

National culture affects both the substance and the methods of the law. To take the most obvious example, although we share common standards enshrined in the European Convention on Human Rights, there are wide differences in criminal law and criminal procedure. This is so because we differ, no only in our assessment of what constitutes criminal behavior and how it should be dealt with, but also in our view of what judges do, how they ought to do it and what should be the role of laymen, if any. The Dutch, for example, do not have juries and do not feel the need to have them.

In economic terms, differences in the law can become technical barriers to trade. At a relatively simple level, trade in goods is subject to rules about the labeling of prepacked food or the authorization of pharmaceuticals. These may differ from country to country and therefore present a practical problem for the manufacturer or distributor. At a deeper level, freedom to trade across frontiers will be affected by differences of approach to the legal character of trade marks, how they should be registered, what protection they should have, and the legal processes by which protection should be sought, or again by differences about the nature of copyright or the structure of companies. Correspondingly, differences in the way professions are structured, in the qualifications for entry and in the conditions of practice may make it difficult, if not impossible, for a person qualified in one country to practice in another.

Language in itself is a potent source of barriers to free movement. It is legitimate to require that food be labeled in a language consumers can understand. But how is a producer to label his goods for consumption in fifteen countries with more than ten languages in regular use? What languages must he

It has become fashionable to claim that the market benefits from competition between regulatory regimes, but *some* degree of uniformity of rules and rule-making is necessary to allow an open market between nation-states to work at all. From the point of view of the economic operator, competition in rule-making can easily become jurisdictional chaos. These problems are compounded by the fact that some of the EU Member States are highly centralized while others are decentralized. In Spain, Catalonia and the Basque Country, both of which have their own language, enjoy a *higher* degree of autonomy than other regions, while Belgium has a complicated allocation of functions between the States, the Regions (Flanders and Wallonia) and the linguistic Communities (Dutch, French and German). In such a context, it is difficult for the “consumer” to make the comparisons necessary for any genuine and transparent competition between regulatory regimes.

A much more fundamental problem faces us in the context of enlargement of the European Union to the East. In many (though not all) of the new states of Central and Eastern Europe, the transition from Communism has left a legal deficit. There is not even a folk memory of life in a free market economy, nor any books in the national language about the substance and procedure of law in a free society, far less any law reports. It is all very well to send teams of Harvard economists to instruct governments in the art of running a market economy, but there cannot be an effective market economy if the law of contract does not work. That requires lawyers trained to draw up contracts and judges trained to judge contractual disputes. These lawyers must be taught, and teaching calls for teachers and books. Yet the university libraries of Central and Eastern Europe are still starved of essential tools for teaching.

The problems I have described are problems which, by and large, you do not have in the United States. The process of European integration (our federative process, if you will) is necessarily more complicated than yours and is doubly complicated in the context of enlargement. Your debate about the proper limits of states’ rights and the debates in the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) about the removal of technical barriers to trade are only part of the story for us. We have to go further and strike an acceptable balance between, on the one hand, respect for the rights of internationally sovereign nation states, their cultures, their traditions and their self-respect and, on the other, the degree of central decisionmaking and uniform application of law and policy that is needed to overcome the social, political and economic downside of self-determination in late twentieth-century Europe.

Law is an essential tool in what we are trying to achieve. But European integration calls for a new approach to the law and a new form of legal logic. Purely rule-based adversarial law with winners and losers cannot cope. This can

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12 There was an aversion to providing reports of judgements to any central body.
be illustrated by reference to two fields of law: economic law, including the law of the internal market, and constitutional law, including fundamental rights.

Economic law is a broad term covering several ideas. For present purposes, I mean the law of economic regulation. More specifically in the European context, I mean the regulation of economic activity for a political purpose, since the economic integration of what is now the EU has always had a political purpose. By constitutional law, I mean the law that establishes the institutions of government, assigns their competencies, defines how they relate to each other and determines the relationship between them and the individual, whether citizen or non-citizen.

The European treaty-makers have always been explicit in emphasizing their political purpose. The aim of the European Coal and Steel Community was, by pooling the production of the raw materials of war, to “make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.” Similarly, the first aim of the European Economic Community (EEC) Treaty (now the EC Treaty) was, as stated in the preamble, “to lay the foundations of an ever-closer union between the peoples of Europe.”

The success of the enterprise, as far as it has gone, is perhaps sufficiently demonstrated by the fact that Columbia has opened this Center for European Legal Studies. But the success has always been masked by the dissatisfaction of those who claim that it has not gone far enough or that it has already gone too far. The barrier to understanding, so it seems to me, is that the Internal Market—the kernel of the European Union—is essentially a technocratic achievement, created and operated primarily by lawyers, economists and administrators to fill a gap of political will.

There are those who claim that the technocratic EC Treaty should be replaced by a “simple” text like the American Constitution. They include, on the one hand, those who still yearn for a United States of Europe and, on the other, the new enthusiasts for a “Peoples’ Europe.” To some extent, they have Bryce on their side:

The theory of democracy assumes that the multitude are both competent and interested; competent to understand the structure of their government and their own functions and duties as ultimately sovereign in it, interested as valuing those functions, and alive to the responsibility of those duties. A Constitution set out in black and white, contained in a concise document which can be expounded and remembered more easily than a Constitution growing out of a long series of controversies and compromises, seems specially fitted for a country where the multitude is called to rule. Only memory and common sense are needed to master it. It can lay down general principles in a series of broad, plain, authoritative propositions, while in the case of the ‘historical constitution’ they have to be gathered from various sources, and expressed, if they are to be expressed correctly, in a guarded and qualified form. Now the average man, if intelligent enough to comprehend politics at all, likes general principles. Even if, as some think, he overvalues them, yet his capacity for absorbing them gives him a sort of

14 Treaty Establishing the European Economic Community [EEC Treaty], preamble.
comprehension of his government and attachment to it which are advantages in a large democracy.\textsuperscript{15}

The Treaties of Maastricht and Amsterdam were originally intended to be steps towards the goal of giving the European citizen, if not a constitution, at least a set of basic documents that he or she can readily understand. While they have resolved some problems, they have in other respects only made the constitutional arrangements more obscure and difficult to explain, even for the expert. This reflects the underlying reality that the peoples of Europe and the politicians who represent them have not yet made up their minds what they want.

So, what kind of law does Europe need?

My answer is that we must first understand and value the law we already have. The kernel is the Internal Market, defined as “an area without internal frontiers in which the free movement of goods persons, services and capital is ensured in accordance with the provisions of this Treaty.”\textsuperscript{16} Put shortly, the task of those who wrote the EEC Treaty was to create an enforceable Commerce Clause without the rest of the Constitution.\textsuperscript{17} Their achievement was, as I have said, essentially technocratic, but it was none the worse for that.

The first step was to remove the overtly protectionist barriers, such as tariffs and quotas, and the more obvious barriers to personal mobility, such as visa restrictions, residence permits and nationality requirements. The next and far more complicated step was to overcome the myriad technical barriers to free movement which were the natural consequence of historical, social, legal and cultural differences.

The legal technique adopted by the treaty-makers was to set out a hierarchy of rules: first, the “Principles,” notably the general prohibition of discrimination on grounds of nationality; second, the “Foundations,”\textsuperscript{18} the rules guaranteeing free movement of goods, persons, services and capital, all subject to strictly limited derogations; and, third, the complementary “Common Rules” on competition (antitrust), state aids and taxation. In addition, the Treaty created autonomous institutions to monitor, to enforce and, where necessary, to legislate.

Thus, the Treaty has some of the characteristics of a federal constitution, in the sense that it establishes an autonomous institutional framework, and some of the characteristics of a bill of rights, in the sense that it guarantees individual economic rights: the right to trade, the right to work, the right to move and the right to invest. For the average citizen in a Western democracy, who is more likely to lose his job than his liberty, enforceable economic rights are every bit as important as the rights guaranteed by a conventional bill of rights.

\textsuperscript{15} James Bryce, Flexible and Rigid Constitutions, \textit{in} Studies in History & Jurisprudence 201-02 (1901).

\textsuperscript{16} Treaty Establishing the European Community [EEC Treaty], article 7a, as amended by the Treaty on European Union [TEU].

\textsuperscript{17} The attempt to establish a European Political Community had been abandoned when France rejected the European Defense Community in 1955.

\textsuperscript{18} Mistakenly, in my view, the title “Foundations” was removed by the Maastricht Treaty.
As regards the balance between "federal power" and "state power," some provisions of the Treaty envisage a gradual preemption of national competencies, while others embody the principle now known as "subsidiarity"—the idea that the Community should trench upon national powers only to the extent necessary to achieve its aims. So, on the one hand, the Treaty envisages an evolving Common Commercial Policy and a progressive legislative program to achieve free movement of persons and capital. On the other hand, legislation to complete the Common Market should take the form of directives, "binding as to the result to be achieved, but [leaving] to the national authorities the choice of form and methods." The aim of such directives is to "approximate" or "harmonize" national laws rather than to impose a single uniform law.

Similarly, as regards the judicial structure, Article 177 of the Treaty envisages that the national courts of the Member States will be the Community courts of general jurisdiction. EC law is to be as much part of the law they apply as is the national law enacted by the national Parliament. There is no right of appeal from national courts to the Court of Justice, which rules only when a national court asks it to do so.

The legal structure and methods of the Treaty, with its hierarchy of rules balancing pre-emption and subsidiarity, are now taken so much for granted as to be seriously undervalued. By the end of 1969, the right of free movement for wage and salary earners and their families was firmly established, and the Customs Union, with a Common Customs Tariff, was complete. In addition, the Court had fashioned two essential constitutional tools of an integrated economy with the principles of primacy and direct effect: Community law, where it applies, takes precedence over national law and, where it creates a clear and unambiguous obligation, national courts must enforce it.

Nevertheless, the integrated market was not completed within the time scale envisaged in the Treaty and it is not fully complete even today. The magnitude of the task has always been underestimated. The more complex barriers to freedom of movement must first be identified. Once they have been identified, an acceptable solution must be found, enshrined in EC legislation, implemented by the Member States and thereafter enforced. To achieve this, there must be the continuing political will to make the necessary resources available, to find acceptable compromises and to live with the consequences when they prove to be unpopular. The institutional machinery created by the Treaty (understandably and rightly) puts a premium on the willingness of national governments to identify and promote the common interest, but that willingness, however ardently professed, may be affected by a variety of domestic political pressures and is never easy in times of economic recession.

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20 Id., at art. 189.
21 See id., at arts. 100 & 189.
22 The original jurisdiction of the European Court of Justice is very limited.
23 Costa v. ENEL, Case 6/64, 1964 E.C.R. 585.
The entry of new Member States with different traditions and cultures and different political and economic priorities has brought further complications since it would certainly have been easier to achieve agreement amongst six than amongst fifteen. In addition, the legislators have been faced with new political pressures, hardly thought of when the original EEC Treaty was written in the 1950's. These include, for example, consumer and environmental protection and, in the field of financial and professional services, the need for closer supervision and control of a rapidly expanding market.

Add to this the introduction of new international norms and the redefinition of existing norms. In Europe, the scope of fundamental rights has been defined and enlarged by the case law of the European Court of Human Rights and the Constitutional Courts of the Member States. We are now moving, albeit slowly, towards the definition and enforcement of such standards on a global level. The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) have progressively brought new dimensions and rigor to the law of international trade, now extending it to the field of services. Technical norms and standards have to be agreed upon at a supranational level if there is to be a rational development of telecommunications and information technologies. Almost daily, there are calls for new norms to solve problems of Third World Debt, the collapse of financial markets, pollution, destruction of the environment, biodiversity and genetic manipulation.

The consequence is that, in parallel with interpreting and enforcing existing Treaty law and national law, European judge and lawyers (like judges and lawyers everywhere) are faced with the task of adapting the existing rules to a new environment, refining old concepts and devising new ones. The satisfying legal logic of a hierarchy of norms, where the superior norm pre-empts the application of inferior norms, has had to give way to a "fuzzy logic" that seeks to balance the claims of simultaneous but conflicting imperatives, frequently expressed in terms that are imprecise or at least leave a wide margin for their interpretation and application to particular cases.25

Thus, in the field of free movement of goods, the basic rule laid down in the Treaty consisted in a prohibition of "quantitative restrictions on imports and exports and all measures having equivalent effect."26 The rigor of this prohibition in relation to imports was emphasized by the Court of Justice in Dassonville:27

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

26 E.C. Treaty, arts. 30 and 34.
In terms of the EC Treaty, this rule is open to derogation only on strictly
limited grounds ("public morality, public policy or public security; the
protection of health and life of humans, animals or plants; the protection of
national treasures; or the protection of industrial and commercial property") and
even then only if the measures adopted do not "constitute a means of
arbitrary discrimination or a disguised restriction on trade between Member
States."29

However, as has been mentioned already, the Treaty did not take account of
more recent political considerations such as consumer and environmental
protection. Nor did it allow for the fact that, if the standards of State A are
different from those of State B, there may be a hindrance to trade between those
two states without either of them being guilty of arbitrary discrimination or a
disguised restriction on trade. In the Cassis de Dijon case30 the Court of Justice
had to devise a technique for dealing with both aspects of that problem.

On the one hand, the Court held that Member States must, in principle, accept
the standards set by the others—the principles of mutual recognition and
equivalence. On the other hand, the Court held that Member States are entitled
to give effect to overriding considerations of public interest, even if the
measures they take affect the trade in goods from other states. But those
measures must be objectively necessary to achieve the public interest aim and
must not go beyond what is necessary for that purpose—the principle of
proportionality.

A parallel approach was followed in the field of personal mobility. In
Reyners31 and Van Binsbergen32, the Court held that the basic Treaty provisions
on the freedom to set up in business or provide services in other Member States
had become directly enforceable with the expiry of the transitional period. Then
in Thieffry33 it held that Member States were bound, on the one hand, to take
account of qualifications obtained in another state but were entitled, on the
other, to apply national professional rules conceived in the public interest.

This approach broke the legislative log-jam and formed the basis of the "1992
Program" for completion of the Internal Market. As a technique for achieving
economic ends through legal means, it has proved so successful that, in the field
of professional mobility, Europe is at least as liberal, if not more so, than the
United States. Nevertheless, there comes a point at which the desire to eliminate
all barriers to trade and personal mobility comes into collision with the equal
and opposite desire to leave states free to make choices, even silly choices.

28 E.C. Treaty, art. 36.
29 Id.
30 Rewe-Zentrale v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon), Case 120/78,
32 Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Case 33/74,
33 Thieffry v. Conseil de l'Ordre des Avocats a la Cour de Paris, Case 71/76, 1977 E.C.R. 765,
[1977] 2 C.M.L.R. 373. See also Commission v. Germany (Insurance and Co-insurance), Case 205/
This was illustrated by the *Sunday Trading* cases\(^\text{34}\) which mainly involved an English law regulating the opening of shops on Sunday. Whatever may have been the original reasons for the law, the results were, to say the least, curious since it seems to have been possible to sell soft pornographic magazines but not a hard-bound copy of the Bible on Sunday. A chain of do-it-yourself shops claimed that the limitation of opening hours restricted the volume of sales of imported goods and was therefore contrary to the Treaty. On one view of the European Court's caselaw, the Treaty applied and the only question was whether the restriction on Sunday trading was proportionate to the aim of the legislation—an inquiry which Mr. Justice Hoffman (now Lord Hoffman) declared himself unable to carry out.\(^\text{35}\) The alternative approach, eventually adopted by the Court of Justice reversing some previous case law, was to say that the Treaty prohibition is concerned only with measures that hinder, directly or indirectly, the cross-frontier trade in goods as opposed to measures that affect only the volume of sales of goods whether imported or not.\(^\text{36}\)

The formula used by the Court in reaching this decision was imperfect and will certainly have to be clarified and refined. The significance of the episode for present purposes is to illustrate that, in the field of economic law, words are imperfect tools. Traders, administrators and their lawyers look for certainty in the law, but judges can provide it only up to a certain point.

The legal logic has, as I say, become "fuzzy." International norms, Community norms, national norms and sometimes (with the trend towards devolved government) regional norms compete for precedence, without always having a clearly defined hierarchy between them. The advocates of each invoke, in support of their cause, the principles of effectiveness, of mutual recognition, of proportionality or of subsidiarity, as the case may be. Someone must then determine what are to be the criteria for identifying the applicable norm and for applying it to the case in hand. In the absence of legislative texts defining which norm is to be applied, that task falls to the judge.

So the Community judge is increasingly called upon to operate, not an on/off switch which produces the "right" answer, so that one party wins and the other loses, but a synthesizer which adjusts the relative strength of conflicting normative claims and produces an acceptable balance between them.

The same trend is observable in other rapidly developing fields of law, such as human rights, sex discrimination and labor law, and, in the European context, constitutional law. The Treaties of Maastricht and Amsterdam, together with the Community Treaties, are a "constitutional charter" but not a constitution as such. They create institutions and define their spheres of competence and their

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powers, but the institutional structure is fuzzy since it includes the Member States which are both within the system and outside it.

The Member States are within the system as law-makers in the Council of Ministers and, in the absence of federal agencies, as law-appliers and law-enforcers. They are outside the system in the sense that the Member States are the ultimate treaty-makers, whose governments appoint the members of the institutions charged with interpreting and enforcing the law: the Commission, the Court of Justice and the Court of Auditors. The Council as such is unelected, but the ministers who take part are democratically accountable in their own countries. In proceedings before the Court of Justice, the Member States may intervene collectively as the Council of Ministers, asserting a single point of view, or individually, asserting conflicting points of view. Sometimes they do both.

This structure does not fit well with conventional theories of separation of powers or of federal structures. This seems to create difficulties for some of the editorial writers of the Wall Street Journal, but it shares them with most of the European press, some of whom do not even make the effort to understand. Nevertheless, within limits, the system has worked and all attempts to produce a more traditional structure have failed. In Madison’s words, it is a system only to be “explained and designated according to the actual division and distribution of political power on the face of the instrument.”

The problem, for constitutional lawyers, is to find acceptable criteria by which to define the new balance of power. This leads, for want of better, to the use of imprecise phraseology (such as “the margin of appreciation” enjoyed by the Member States or the institutions) which risks carrying fuzziness to the point of being arbitrary. The task has not been made easier by the ambiguous—some would say sloppy—draftsmanship of the Maastricht and Amsterdam Treaties.

A profusion of imprecise norms from a variety of sources without any clear hierarchical ranking between them, must inevitably increase the political role of judges in choosing which norm to apply and how to interpret it. The role is “political” in the sense that the choice is a policy choice. How is this to be reconciled with the belief that the Rule of Law means that we live under known rules impartially administered? There are, I think, three answers to that question.

First, it is ultimately the choice of the legislator (in our case, primarily the Member States as treaty-makers) that judges should play this role. If judges are not to make policy choices, then the law must be codified, so that judges have only to implement the choices the legislator has made. But that, I think, is a mirage and one that common lawyers should, least of all, encourage us to pursue. Legislators cannot avoid leaving some policy choices to judges.

Second, it is only within limits that any judge can pursue his or her own agenda or play wild cards. Limits are set to the enthusiasm of the judge by the facts and issues in the case to be decided, by the possibility of appeal (or, where there is no appeal, inviting the court to reconsider) and by the corrective effect

37 Madison, supra note 5.
of informed criticism which has a greater effect on judges than is commonly supposed.

Third, the objectivity, and therefore the acceptability, of the judge’s decision depends to a great extent on the objectivity, candor and thoroughness of those who prepare and present the material for decision. It depends, in other words, on the work of legal practitioners, whether they advise private clients, institutions or governments. Respect for the law and the legal process depends, not only on judges, but also on lawyers who are prepared to give candid advice, whether the hearer finds it agreeable or not, and to insist that the law be applied impartially, whether politicians find it convenient or not.

That, ultimately, is the kind of law we need. Fuzzy as the logic may have to be, we should not cease to strive for the objectivity of known rules impartially administered. That, for me, is the key to the Internal Market and therefore to the success of the European experiment. It is also an essential guarantee for the countries of Central and Eastern Europe which have not escaped from one form of arbitrary government to fall into another.

I look forward very much to the help that you at Columbia can give us in keeping our eyes on the target, and I know that my colleagues on the Court of Justice would join me in wishing you well.