SUBSIDIARITY: EUROPEAN LESSONS FOR AUSTRALIA'S FEDERAL BALANCE

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ABSTRACT

The principle of subsidiarity was adopted as part of the law of the European Union as a response to perceptions of excessive centralisation and bureaucratisation within the European system of government. *If* subsidiarity is a solution to these problems in Europe, it might be asked: could it also be a solution to similar problems that arise in other federal systems, such as those of the United States and Australia? However, posing the question in this way is misleading because it is not at all clear that subsidiarity has been a solution in Europe, and in any case it cannot be assumed that a solution in one context will necessarily operate effectively in another.

This article closely examines the nature and operation of the principle of subsidiarity in Europe and asks what lessons might be learned from it. To do this, the article begins by identifying the carefully defined operation of the principle in EU law and then closely examining the application of the principle, firstly as a political decision-making procedure that involves the Member State parliaments in the European policy-making process, and secondly as a juridical principle enforceable by the European Court of Justice. The possible adoption of the principle in other federations is then discussed, but limitations on its effectiveness in Europe, as well as the different institutional and political circumstances of the Australian federal system, are shown to undermine its likely usefulness, unless other more fundamental issues about the way in which the federal system is understood, organised and operated are addressed.

The final part of the article suggests that these more fundamental issues are best understood and addressed in the light of a broader, more substantial, 'social' conception of subsidiarity: a conception not unrelated to the Roman Catholic social theory from which the idea of subsidiarity originally derived. A more substantial, social conception of subsidiarity, it is argued, can help us to understand why the

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application of the principle in Europe has had only limited effect and also why its application in other federal systems is unlikely to remedy problems of centralisation and bureaucratisation. This is because the European version of subsidiarity is focussed on the question of how the functionalist objectives of the EU can most appropriately be achieved, with only tangential consideration being given to the proper functions, purposes and responsibilities of the constituent Member States themselves. Focussing simply on the scope and reach of the competences of the central organs of government is not enough. Nor is it sufficient, as in Australia, to focus only upon the immunities that the constituent states ought to enjoy as self-governing political communities. Rather, the key task is to identify the proper functions and purposes (*munera*) of the various political (and social) communities and associations that make up the wider political community of which they are an integral part. The proper *immunities* that a particular community should enjoy cannot be identified apart from and identification of the appropriate *munus* of that community. Although an admittedly difficult and highly controversial task, unless the issue of the *munera* is addressed, 'subsidiarity' as a principle is not going to have much effect, for its fundamental lesson about the nature and integrity of the *munus* of each community — social and political — will not have been learned.

I INTRODUCTION

According to at least one influential account, the principle of subsidiarity rose to prominence in the law of the European Union as a response to Member State perceptions of undue centralisation and bureaucratisation within the European system of government.[1] Concerns about centralisation within federal systems of government are common, and Australia certainly is no exception.[2] So the deceptively simple question addressed in this article is this: if subsidiarity is a solution to centralisation in Europe, might it also be a solution to centralisation in Australia?[3]

To put it this way is deceptively simple for two basic reasons. The first is that it is not at all clear that subsidiarity *has* proven to be a solution to centralisation in Europe. The second is that the constitutional conditions of Europe and Australia are in several important respects significantly different, and solutions in one context are not necessarily solutions in another. Nonetheless, there are analogies between the two

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1 George Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *Columbia Law Review* 331, 348–66. Concerns about centralisation became especially prominent after the Single European Act of 1986 introduced decisions by qualified majority rather than unanimity. On the balance of decision-making rules in the EU, see Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205.

2 For an example, see James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

3 Several reports have argued that, subject to certain qualifications, the principle of subsidiarity ought to guide the reform of the Australian federal system. See, eg, Productivity Commission, *Productive Reform in a Federal System,* Roundtable Proceedings (2006); Neil Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements: Final Report* (New South Wales Government, 2006); Business Council of Australia, *Reshaping Australia's Federation — A New Contract for Federal-State Relations* (2006).

systems that make some level of comparison possible,[4] and the prospect of learning from each other a legitimate undertaking.[5]

What, then, is subsidiarity? The difficulty in finding an answer to this question is part of the problem. There are several ideas about subsidiarity embedded in the relevant European treaties. The *Treaty of Maastricht* (1992) put it most simply when it recited at the outset the intention of the Member States 'to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.[6] However, this apparently straight forward statement of principle disclosed a fundamental tension: the union between the peoples of Europe was becoming ever closer (implying greater centralisation), but decisions were to be taken as closely as possible to the citizen (implying decentralisation).

The substantive provisions introduced by the *Maastricht Treaty* put the matter somewhat differently. Article 5 provided:

1. The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
2. In areas which 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.
3. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.[7]

Formulated in this way, the principle of subsidiarity does not apply to the identification of the limited objectives and powers assigned to and conferred upon the Community (clause 1), but rather to decisions whether or not to take action in relation to objectives that fall within the Community's acknowledged powers (clause 2).[8] And once a decision to legislate is made by the Community, the question as to how

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4 These analogies are explored in Nicholas Aroney, 'Federal Constitutionalism/European Constitutionalism in Comparative Perspective', *European Essay No 45* (The Federal Trust, 2009), first published in Gert-Jan Leenknegt (ed), *Getuigend Staatsrecht: Liber Amicorum A K Koekkoek* (Wolf Legal Publishing, 2005) 229.

5 For a qualified defence of comparative constitutional law, see Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 *University of Queensland Law Journal* 317.

6 *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) ('*TEU*') preamble. See, likewise, *TEU* art A. Earlier expressions of the principle of subsidiarity within Community treaties and other instruments are traced in Deborah 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.

7 *TEU* art G, inserting art 3b into the then *Treaty Establishing the European Economic Community*.

8 Indeed, the principle of subsidiarity applies only to the Community's concurrent powers, and not in relation to areas in which it has exclusive competence. On the disputed distinction between the Community's exclusive and concurrent powers, compare A G Toth, 'A Legal Analysis of Subsidiarity' and J Steiner, 'Subsidiarity under the Maastricht Treaty', in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994) chs 3–4.

legislation should be framed is separately addressed by the principle of proportionality (clause 3). All three paragraphs purport to place limits on the exercise of power by the Community, but they do so in different ways and in different respects.

The *Lisbon Treaty* (2007), which came into force in late 2009, further complicates the matter, by using different words to express roughly the same ideas in a revised version of Article 5 of the *Treaty on European Union*:

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
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> The institutions of the Union shall apply the principle of subsidiarity as laid down in the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*.[9]

There are some significant additions to and variations in the wording here, several of which will be discussed later,[10] but it is first important to note that the distinctions between the principles of conferral, subsidiarity and proportionality remain essentially the same. The principle of conferral is concerned with the powers or competences conferred upon the European Union; the principle of subsidiarity is concerned with decisions whether to act so as to achieve objectives that fall within the Union's acknowledged competences; and the principle of proportionality is concerned with the manner in which Union action is undertaken once a decision to act has been made. Within this framework, the meaning and operation of the subsidiarity principle is closely defined and sharply distinguished from the principles of conferral and proportionality.

But this is not the only way in which subsidiarity can be understood. More broadly conceived, the principle of subsidiarity encompasses both the constitutional distribution of powers and the legislative exercise of those powers, and is not

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9 *TEU* (Consolidated Version, [2010] OJ C 83/13) art 5.

10 Note, in particular, the substitution of 'Union' for 'Community', on which, see *TEU* (Consolidated Version, 2010) art 1. In this article, I will continue to refer to the European 'Community' (as distinct from the European 'Union') when discussing matters pertaining specifically to the Community and its governing institutions prior to the entry into force of the *Lisbon Treaty* in 2009. Since 1 December 2009, the Union has entirely replaced and succeeded the Community.

unrelated to the principle of proportionality as well.[11] Certainly, it is in relation to the distribution of powers that the principle has generally been understood in Australia, in both legal and economic analyses of Australian federalism.[12] Anne Twomey, for example, suggests that the principle of subsidiarity means that 'functions should, where practical, be vested in the lowest level of government to ensure that their exercise is as close to the people as possible and reflects community preferences and local conditions.'[13] Neil Warren similarly defines the principle as requiring that '[s]ubnational governments should, subject to efficiency considerations, be responsible for those services whose benefits are confined primarily to their geographic area and for which residents should have a choice over both the quantity and quality of service.'[14] Indeed, while the term 'subsidiarity' itself was not known to the framers of the *Australian Constitution*, when determining what powers should be attributed to the Commonwealth Parliament, they applied the principle that only those functions that the states could not effectively do themselves should be granted by the people of the states to the Commonwealth.[15] The affirmation in the recitals to the *Maastricht Treaty* that decisions are to be taken as closely as possible to the citizen also seems to reflect this wider understanding of the principle.[16] But as technically defined in the substantive provisions of the *Treaty on European Union*, the principle of subsidiarity applies only to the making of legislative decisions within the admitted scope of the Community's concurrent powers; it does not apply to the anterior constitutional question of what those powers are. As George Berman puts it, subsidiarity 'starts off precisely where the conventional tools of constitutional federalism leave off and where legislative politics is ordinarily thought to begin'.[17] This makes for some intriguing complexities of analysis for, while the subsidiarity requirement is primarily a matter for political assessment, it is also amenable to judicial review by the European Court of Justice,[18] which makes it a kind of constitutional condition on the legally valid exercise

11 Cf Theodor Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle' (1994) 14 *Yearbook of European Law* 203.

12 See, eg, Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57, 59–60; Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31 *University of New South Wales Law Journal* 395, 399. See also the reports cited in footnote 3 above. Somewhat wider ranging discussions of the principle's possible application in Australia include Alan Fenna, 'The Division of Powers in Australian Federalism: Subsidiarity and the Single Market' (2007) 2 *Public Policy* 175 and Brian Head, 'Taking Subsidiarity Seriously: What Role for the States?' in A J Brown and J A Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANU E Press, 2007) 155.

13 Twomey, above n 12, 59.

14 Warren, above n 3, 31.

15 *Official Report of the National Australasian Convention Debates, Sydney* (Acting Government Printer, 1891) 31–2. For a discussion, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) ch 10.

16 Gráinne de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' (Harvard Jean Monnet Working Paper No 7/99, Harvard Law School, 2000) 13.

17 See Bermann, 'Taking Subsidiarity Seriously', above n 1, 366.

18 Alan Dashwood, 'The Relationship between the Member States and the European Union/European Community' (2004) 41(2) *Common Market Law Review* 355, 368. See also A G Toth, 'Is Subsidiarity Justiciable?' (1994) 19 *European Law Review* 268.

of power, in this particular respect no different from the competence and proportionality requirements.

Accordingly, we have to be careful about how we understand the European law relating to subsidiarity. In this instance, as in others, the legal framework of the EU breaks with conventional categories of constitutional analysis.[19] Unravelling the three requirements set out in the two versions of *TEU* Article 5 is not a straight-forward exercise for, as one distinguished commentator has pointed out, all three paragraphs (of the earlier version of Article 5) are defined by reference to the Community's objectives, but the line between objectives and means is a variable one: it depends on the generality or specificity with which an objective and its corresponding means are defined.[20] For these and other reasons, therefore, we will have to be cautious before drawing any lessons for Australian federalism from the European experience.

II SUBSIDIARY AS A POLITICAL PRINCIPLE

At least one preliminary conclusion seems clear: the European principle of subsidiarity is largely concerned with political decisions to legislate rather than with constitutional demarcations of power — which is something very different from the case in Australia, where the focus so often is on the constitutional demarcation.[21] The orientation in Europe to the political question of whether to exercise power[22] has especially been confirmed since the promulgation of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, initially introduced in connection with the *Treaty of Amsterdam* of 1997. As worded at the time, the Protocol stated emphatically that '[t]he principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice', but is concerned rather with the way in which the Community institutions exercise their powers.[23] The Protocol required Community legislation to be accompanied by a reasoned statement justifying its compliance with the principle of subsidiarity. In particular, it was necessary to explain why Community objectives could not be

19 On the *sui generis* character of the Community system of law, compare Neil Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 581; Bruno de Witte, 'Rules of Change in International Law: How Special Is the European Community?' (1994) 25 *Netherlands Yearbook of International Law* 299.

20 De Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 23.

21 There is only a very limited literature in Australia discussing the question of the 'political' and 'legal' safeguards of federalism, to use the terms in which the question has been discussed in the United States. For references to the American and Australian literature, see Allan and Aroney, above n 2, nn 9, 75. See also Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162; Nicholas Aroney, 'The Idea of a Federal Commonwealth' in John Stone (ed), *Upholding the Australian Constitution, Volume 20: Proceedings of the Twentieth Conference of the Samuel Griffith Society* (The Samuel Griffith Society, 2008) 1.

22 See Ian Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the European Union' (2006) 44 *Journal of Common Market Studies* 281, 290.

23 *Protocol on the Application of the Principles of Subsidiarity and Proportionality* [1997] OJ C 340/150, art 3. The Protocol built on earlier documents, such as the guidelines formulated by the European Council at Edinburgh in 1992 and the Inter-Institutional Agreement on Procedures for Implementing the Principle of Subsidiarity (1993). See Bermann, 'Taking Subsidiarity Seriously', above n 1, 368–71.

sufficiently achieved by the Member States and to explain how they could be better achieved by the Community — the latter claim to be substantiated by qualitative and, wherever possible, quantitative indicators.[24] And to this end, the European Commission was required by the Protocol to 'consult widely before proposing legislation'.[25]

These obligations were subsequently intensified and extended by the revised *Protocol on the Application of the Principles of Subsidiarity and Proportionality* introduced in connection with the *Treaty of Lisbon*. In addition to underscoring the need for 'constant respect' to be given to the principle of subsidiarity by EU institutions,[26] the revised Protocol now requires the European Commission in its consultations to 'take into account the regional and local dimension of the action envisaged'[27] and for all proposed laws to be 'justif[ied]' in 'detailed statement[s]' containing 'substantiated' reasons why the principle of subsidiarity will be complied with.[28] Moreover, revisions to the *Treaty on European Union* introduced by the *Lisbon Treaty* have formally endorsed (but not prescribed)[29] a special role for national parliaments in 'seeing to it that the principle of subsidiarity is respected',[30] and the new Protocol lays down a set of reporting requirements which give the national parliaments a formal opportunity to respond to legislative proposals with their own 'reasoned opinions' should they consider such proposals to infringe the principle of subsidiarity.[31] The intended result is a process whereby EU institutions and national parliaments engage in a kind of 'reasoned' dialogue in which proposed European laws are rationally examined for their conformity to the subsidiarity principle,[32] and this at progressively intensifying degrees of scrutiny, depending on the extensiveness of national parliamentary concern.[33]

How effective have these procedures been? Even before the changes introduced at Lisbon it had been argued that the Amsterdam form of the Protocol had created the conditions for a kind of 'public reason' requirement that was not merely procedural but

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24 Ibid arts 4, 5.

25 Ibid art 9.

26 *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206, art 1.

27 Ibid art 2.

28 Ibid art 5.

29 Jean-Victor Louis, 'The *Lisbon Treaty*: National Parliaments and the Principle of Subsidiarity' (2008) 4 *European Constitutional Law Review* 429, 431.

30 *Consolidated Version of the Treaty on the European Union* [2010] OJ C 83/13, art 12(b). See also *Protocol (No 1) on the Role of National Parliaments in the European Union* [2010] OJ C 83/203.

31 *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* art 6.

32 Ibid arts 4–7. The new Protocol also confirms that the European Court of Justice has jurisdiction where it is alleged that the principle of subsidiarity has been infringed, but adds that the Member States can initiate such challenges: art 8, referring to the *Consolidated Version of the Treaty on the Functioning of the European Union* [2010] OJ C 83/47 ('*TFEU*'), art 263 (ex *Treaty establishing the European Community* ['*TEC*'], art 230). See Louis, above n 29, 440–41.

33 At so-called 'yellow light' or 'orange light' levels of intervention, depending on the strength of national parliamentary concern. See George Bermann, 'The Lisbon Treaty: The Irish "No". National Parliaments and Subsidiarity: An Outsider's View' (2008) 4 *European Constitutional Law Review* 453, 456.

substantive.[34] And indeed, some inside observers early on claimed that there had been a marked change in legislative culture.[35] However, others have said quite the opposite. As Stephen Weatherill has pointed out, Article 5 expresses no preference in principle for Member State action over Community action — it all depends on political assessments of what kinds of measures are needed to achieve particular policy objectives. Moreover, Member State governments are not necessarily averse to agreeing to European action, noting that it is the governments themselves that are making the final political decisions within the European Council, either by unanimity or, increasing, by qualified majority vote.[36] As Weatherill puts it, '[i]f there is political will to act, then subsidiarity appears to serve as an ineffective antidote to the toxin of insufficiently vigorously restrained or, at least, questioned, centralisation'.[37]

Will the new requirements of the revised Protocol, which explicitly call for the extensive involvement of the national parliaments, be expected to strengthen and deepen the level of scrutiny on subsidiarity grounds? Although the jury is still out on the question, there is reason to expect that the involvement of the parliaments could indeed make a difference — provided that the parliaments represent diverse bodies of electoral opinion that are substantially distinguishable from those represented by their respective governments.[38] As such, it seems, the fate of subsidiarity in Europe will largely depend on the political interaction and the quality of the deliberation between the political institutions of the EU and the corresponding institutions of the Member States.[39]

Does 'political' subsidiarity have a potential role in Australia? Negotiation between the various levels of government certainly happens here, particularly through the increasingly formalised institutions of the Council of Australian Governments (COAG).[40] Moreover, recent changes to the way in which COAG operates seem to have increased the capacity of state and territory governments to engage significantly in intergovernmental negotiations.[41] However, unlike the situation in Europe, the vast bulk of these negotiations occur only in fields over which the Commonwealth does not have power to act unilaterally. In those fields where the Commonwealth does have

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34 De Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 8.

35 Giuseppe Ciavarini Azzi, 'Better Lawmaking: The Experience and the View of the European Commission' (1998) 4 *Columbia Journal of European Law* 617, 620–22; Christian Timmermans, 'Subsidiarity and Transparency' (1999) 22 *Fordham International Law Journal* S106, S109–S110.

36 Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 *Yearbook of European Law* 1, 9–12.

37 Ibid 12.

38 Compare Cooper, above n 22; Louis, above n 29; Bermann, above n 33.

39 Gareth Davies observed in 2006 that the Commission guidelines for applying subsidiarity leave the substantive consideration of national autonomy and national goals to nothing more than 'political judgement': see Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, and the Wrong Time' (2006) 43 *Common Market Law Review* 63, 76–7. Compare the early discussion in Bermann, 'Taking Subsidiarity Seriously', above n 1, 368–90.

40 See Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31 *University of New South Wales Law Journal* 493.

41 Paul McClintock, 'The COAG Reform Council's Role within the New Commonwealth-State Financial Architecture' (Paper presented at the Committee for Economic Development of Australia, Melbourne, 23 September 2008).

undoubted competence, it almost always acts without consultation with the states. And even where absence of formal power means that negotiation is necessary, the Commonwealth's overbearing financial capacity means that federal government policy preferences usually — although not always — have the upper hand.[42] As a consequence, the scope for subsidiarity to function as an operating principle in federal-state negotiations in Australia, though real, is significantly limited. It has no application to fields of exclusive federal power, virtually none in relation to concurrent heads of power, and in areas beyond this its application is distorted by the Commonwealth's disproportionate financial powers. By contrast, the European model gives Member State governments and parliaments a much more active role in the formation of European policies, over a much wider range of policy areas. Such an approach is perhaps especially appropriate (and necessary) for the European Union, given that it is, by definition, a treaty-based union among a highly diverse collection of nation-states operating on a cultural, numerical and financial scale much larger and more diverse than Australia.[43] The European approach to subsidiarity is also shaped by the particular traditions of German federalism, where the *Länder* governments similarly have a direct and formal role in both the enactment and implementation of federal legislation.[44] Whether giving the state governments in Australia a similar role in the formation of federal policy would be appropriate or achievable is a complex question, turning in part on its compatibility with Australia's existing institutions, traditions and expectations, but it is not something that should be lightly overlooked.

III SUBSIDIARY AS A JURIDICAL PRINCIPLE

A Community purposes

What, then, of the juridical aspect of the subsidiarity principle, as applied by the European Court of Justice? After all, the principle of subsidiarity is not only a political and procedural doctrine — it is also justiciable before the Court. Here the picture is less encouraging. In the few cases in which the validity of European laws have been challenged specifically on the basis of their infringement of the principle of subsidiarity, the subsidiarity challenge has invariably been rejected, usually in what appears to be very perfunctory terms. In the *Working Time Directive Case*,[45] for example, the United Kingdom and Ireland brought an action for the annulment of a Council directive which established minimum rest periods and annual leave entitlements for employees. The directive was adopted on the basis of an Article of the European Community Treaty that authorised the Council to lay down minimum requirements in order to harmonise conditions regulating the health and safety of workers. The

42 Anne Twomey, 'Commonwealth Coercion and Cooperation' in John Stone (ed), *Upholding the Australian Constitution, Volume 20: Proceedings of the Twentieth Conference of the Samuel Griffith Society* (The Samuel Griffith Society, 2008) 64, 72; Kenneth Wiltshire, 'Chariot Wheels Federalism' in John Stone (ed), *Upholding the Australian Constitution, Volume 20: Proceedings of the Twentieth Conference of the Samuel Griffith Society* (The Samuel Griffith Society, 2008) 74, 86. See also Nicholas Aroney, 'Reinvigorating Australian Federalism' [2009] *Supreme Court History Program Yearbook* 75.

43 See Fenna, above n 12, 188.

44 Arthur Gunlicks, 'Reforming German Federalism', in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism* (Cambridge University Press, forthcoming).

45 *UK v Council* (C-84/94) [1996] ECR I-5755.

Member States argued that the Article ought to be interpreted in the light of the principle of subsidiarity and that the Community had: (1) failed to demonstrate that there were 'transnational' aspects which could not be satisfactorily regulated by national measures, (2) failed to show that action at a Community level would provide clear benefits compared with action at a national level, and (3) neglected to consider whether the working time directive would significantly damage the interests of the Member States.[46] In dispensing with these arguments, however, the Court merely pointed out that it was the responsibility of the Council to adopt minimum requirements so as to contribute, through harmonisation, to achieving the objective of improving the health and safety of workers, and simply concluded that once the Council finds it necessary to adopt a harmonisation measure, the imposition of minimum requirements 'necessarily presupposes Community-wide action'.[47] The entire issue was thus dealt with in two short paragraphs, with no further comment.

Several subsequent decisions, such as the *Deposit-guarantee Case* and the *Biotechnology Case*,[48] show the Court similarly doing very little more than repeating the Community's own stated reasons for enacting its laws and accepting those statements as fully answering the Member States' arguments. In the first of these cases, the German government argued that the Parliament and the Council had failed to state the grounds which substantiated the compatibility of the directive with the subsidiarity principle. When dealing with this submission, the Court began by recounting the recital in the directive that the measure was 'indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community', and the Court simply inferred from this that the Community legislature had considered that securing this objective across all the Member States could be best achieved at Community level.[49] Similarly, the Court noted the recital that action taken by the Member States had not fully achieved the desired result, and inferred that the Community had formed the view that its objectives could not be achieved sufficiently by the Member States.[50] With these recitals forming the basis of its decision, the Court then concluded that the Parliament and the Council had effectively explained why the measure was in conformity with the principle of subsidiarity and that 'an express reference' to the principle was not required.[51] The argument raised by Germany was thus dispensed with, again in a few short paragraphs, typical of the Court's terse literary style.[52]

In the *Biotechnology Case*, the Netherlands argued that the relevant directive breached the principle of subsidiarity and did not state sufficient reasons to establish that this requirement had been taken into account.[53] In relation to the first argument,

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46 Ibid I-5808 [46].
47 Ibid I-5808 [47].
48 *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405; *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079.
49 *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405, I-2452 [26].
50 Ibid I-2453 [27].
51 Ibid.
52 Joseph Weiler aptly characterises the style as 'cryptic' 'Cartesian' and 'authoritarian', with a 'pretence of logical legal reasoning and inevitability of results': J H H Weiler, 'Epilogue: The Judicial Après Nice' in Gráinne de Búrca and J H H Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001) 215, 225.
53 *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079, I-7159 [30].

the Court again simply asserted that the objective pursued by the directive (which was to ensure smooth operation of the internal market by preventing or eliminating differences in the way in which Member States provide for the protection of biotechnological inventions) 'could not be achieved by action taken by the Member States alone'. The protection of biotechnological inventions, the Court reasoned, obviously has 'immediate' effects on trade, and it is therefore 'clear' that, given the scale and effects of the directive, the objective in question could be better achieved by the Community in terms of the subsidiarity requirement.[54] The Court also stated, as if the matter were obvious, that in reciting that without action at a Community level 'the development of the laws and practices of the different Member States impedes the proper functioning of the internal market', the directive had provided sufficient information to show that it had taken the principle of subsidiarity into account.[55]

These and other cases have shown the Court very ready to accept the Community side of the argument without any apparent hesitation at all.[56] Why have the Court's decisions so consistently upheld the European laws in the face of subsidiarity challenges? One possible explanation is that the Court has been reluctant to enter into substantial consideration of a question that is so intensely political; the Court lacks the expertise, resources and tools to ask whether an objective can be better achieved by Community or Member State action.[57] A related explanation is that the political safeguards and elaborate legislative procedures that exist in Europe — even before Maastricht raised subsidiarity to such prominence — mean that Community measures have already passed an exacting regimen, making the Court more than likely to accept, and not second-guess, the reasoning that led to the decision to legislate.[58] A further explanation is that the objectives of the Community are so flexible and accommodating that just about any measure can be shown in some sense to be better addressed at a

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54 Ibid I-7159 [32].

55 Ibid I-7159 [33].

56 See also *The Queen and Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco* (C-491/01) [2002] ECR I-11453, I-11605–6 [177]–[185] (where several Member State governments submitted that the directive complied with subsidiarity); *Belgium v Commission* (C-110/03) [2005] ECR I-2801, I-2853 [56]–[58]; *Van den Bergh Foods v Commission* (T-65/98) [2003] ECR II-4653, II-4735–6 [197]–[199]; *Ayadi v Council* (T-253/02) [2006] ECR II-2139, II-2183–5 [105]–[114]. Notably, the Court has frequently held, often against submissions by the Community institutions, that the Article in question does not confer an exclusive power and therefore the Community measure must comply with the principle of subsidiarity. In the *Tobacco Advertising Case*, the Court did not have to consider the subsidiarity argument because it found that the directive was not supported by a proper legal basis: *Germany v Parliament and Council* (C-376/98) [2000] ECR I-8419, I-8506 [9], I-8532 [118].

57 Dashwood, above n 18, 368; Weatherill, above n 36, 15–17. See also Bermann, 'Taking Subsidiarity Seriously', above n 1, 391, who argues that the Court ought to adopt a procedural, rather than a substantive, approach to its subsidiarity determinations.

58 Reimer von Borries and Malte Hauschild, 'Implementing the Subsidiarity Principle' (1999) 5 *Columbia Journal of European Law* 369, 374 ('The passing of a legal act by the Community legislator implies that the majority of the Council agrees that the act conforms to the subsidiarity principle, and the Court will have difficulty in overturning such an assessment'). For a less sanguine view of the Council, see Bermann, 'Taking Subsidiarity Seriously', above n 1, 395–400, 453–4 ('a democratic deficit necessarily implies a federalism deficit as well').

Community level.[59] Yet another, more cynical explanation, is that subsidiarity as a legal constraint simply runs counter to the integrationist and centralist spirit of the Court as a Community institution.[60]

All of these explanations help to account for the case law on subsidiarity, but the heart of the problem is that the subsidiarity principle takes Community objectives as a given and merely asks at what levels of government they can most effectively be achieved. As Gareth Davies has argued, this creates a structural bias in favour of the Community and its functionalist objectives.[61] The diverse cultures, goals and values of the Member States as 'autonomous self-governing communities'[62] simply do not come into the equation. Whenever a subsidiarity challenge is brought before the Court the question is always whether Community objectives can be better achieved by Community measures or through Member State action. As another commentator has put it, this is 'subsidiarity from above', and not 'from the bottom up'.[63] The Member States typically come to the argument from the point of view that a particular European law regulates a field that is properly a municipal competence and with the view that appropriate regulatory objectives in that field can be satisfactorily achieved by municipal laws. However, such lines of argument — to the extent that they are presented — can be readily dismissed by the Court because they are addressed to the wrong question: for the real issue, as framed by the European provisions relating to subsidiarity, concern the Community's functionalist objectives of securing a common market and removing obstacles to competition, and the harmonisation of laws across the European Union can only be achieved effectively by Community action. As Davies puts it:

> [O]nce the Community announces that it wishes to pursue one of the objectives that comprise the functional competence, since these competences are defined in terms of creating uniformity, and Member States clearly cannot achieve this alone, subsidiarity no longer applies.[64]

B EU competences

This recurring pattern in the subsidiarity cases that have come before the European Court of Justice reflects a wider and more general disposition of the Court to read Community competences just about as widely as the language used can possibly sustain — a problem that has characterised the Australian High Court's interpretation of the *Australian Constitution* as well.[65] As Gráinne de Búrca has pointed out,[66]

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59 De Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 24–30.

60 Ernest Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 *New York University Law Review* 1612, 1679. See, further, Joseph Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) ch 5: 'The Least Dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration'.

61 Davies, above n 39, 67–72.

62 Cf Bermann, 'Taking Subsidiarity Seriously', above n 1, 339–444.

63 Nicholas Emiliou, 'Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition"?' (1992) 17 *European Law Review* 383, 384, 401.

64 Davies, above n 39, 75. Davies later concludes, cynically, that subsidiarity 'serves primarily as a masking principle, presenting a centralizing polity in a decentralizing light': at 77.

65 Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case*, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1.

66 De Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 36.

although the subsidiarity requirement of Article 5 *TEU* is framed widely enough to apply to all Community institutions in the exercise of their powers — including the adjudicative powers of the Court — the Protocol seems directed primarily to the Community's 'political' institutions, especially the Commission and the Council. Indeed, under the Amsterdam Protocol, the Court's interpretations of the Community's competences under the Treaty were explicitly exempted from consideration,[67] an important qualification of the language of Article 5, which otherwise refers broadly to Community action and is not specific about which Community institutions are in view.[68] Writing a decade ago, de Búrca argued that there nonetheless remained good reason to consider the application of the principle of subsidiarity to the Court's interpretation of the founding treaties, if not technically in relation to the Community's positive competences, then at least in relation to the interpretation of the treaties themselves. What she particularly had in mind, it seems, were those provisions of the treaties that give rise to so-called 'negative integration', itself a highly significant way in which the constitutional law of the Community has expanded at the expense of the Member States, particularly in the field of market liberalisation[69] — not unlike the effect of section 92 of the *Australian Constitution*.[70] But her arguments are in principle also applicable to the interpretation of positive Community competences, not least because the Lisbon version of the Protocol no longer explicitly excludes the Court's interpretation of EU competences from the principle of subsidiarity.[71] After Lisbon, de Búrca's argument that the principle of subsidiarity offers a profound and important ground of criticism of the Court's expansive interpretations of Treaty requirements and EU competences is of sharpened relevance.[72]

De Búrca argues that the Court's expansionist interpretations of Treaty provisions and Community competences have been characterised by a kind of 'inexorable' logic and 'textual inevitability', largely determined by the way in which the Court has framed the interpretive question. While Member States have brought cases premised in part on claims that certain fields (eg, education policy, demographic policy, national culture and so on) are matters of municipal competence, the Court has usually rejected any suggestion that the scope and reach of Community laws must be read down so as to leave room for Member State autonomy over those fields. Thus, in *Casagrande*, she argues, the proposition that education policy fell within the competence of the German *Länder* did not entail the consequence that Community competences were 'in some way limited' in relation to that field.[73] Likewise in *Reina*,[74] specifically national, cultural and

67 Protocol on the Application of the Principles of Subsidiarity and Proportionality (1997) art 3.

68 Ibid.

69 De Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 37. See Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999) ch 2 ('Negative and Positive Integration').

70 See especially, the High Court's recent decision in *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418.

71 It is difficult to account for this change solely by reference to the fact that the Protocol envisages the subsidiarity-protecting proceedures as applying to legislative measures proposed, inter alia, by the Court: see Protocol on the Application of the Principles of Subsidiarity and Proportionality (2010) arts 3, 4, 6 and 7.

72 See de Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 37–41.

73 *Casagrande v Landeshauptstadt München* (C-9/74) [1974] ECR 773, 779 [11]–[12] ('*Casagrande*').

74 *Reina v Landeskredit Bank Baden-Württemberg* (C-65/81) [1982] ECR 33 ('*Reina*').

demographic concerns — which were the motivating reasons for a German interest-free loan scheme calculated to encourage childbirth among German nationals — were sidelined by the Court. The Community's interest in free movement of workers, the Court held, must transform the German law into a non-discriminatory one that is applicable to non-German Community workers within the country. Although, as the Court acknowledged, a Member State is permitted to pursue a specific demographic policy, this 'does not mean ... that the Community exceeds the limits of its jurisdiction solely because the exercise of its jurisdiction affects measures adopted in pursuance of that policy'.[75] Similarly, in *Bosman*, although when legislating under then Article 128(1) *TEC* (now Article 167 *TFEU*) the Community is required to respect the national and regional diversity of the cultures of the Member States, this requirement was held to have no application to the application of the freedom of movement of workers (Article 48 *TEC*, now Article 45 *TFEU*), one of the Treaty's economic norms.[76] As de Búrca concludes, '[t]here is apparently no contemplation of the possibility that the Community norms in provisions such as Article 48, and their interpretation by the Court, may themselves be subject to certain "subsidiarity-inspired" limits of the kind that were openly expressed in [Article 128]'.[77]

C Residual state competences

This expansion of Community competence at the expense of Member State autonomy is a well-worn theme. Numerous commentators have pointed out that European constitutional law gives primary attention to EU objectives and competences, and leaves to the Member States only an undefined residue once full effect has been given to the Community and its purposes.[78] According to Joseph Weiler, one of the important elements of the transformation of Europe's treaty system into a kind of 'supranational constitution' was that 'the principle of enumerated powers' as a constraint on the jurisdiction of the Community 'substantially eroded and in practice virtually disappeared' during the 1970s and early 1980s, with the result, as he put it, that '[c]onstitutionally, no core of sovereign state powers was left beyond the reach of the Community.'[79] As a distinguished judge of the European Court of Justice, Koen Lenaerts, similarly put it:

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75 *Reina* (C-65/81) [1982] ECR 33, 44–5 [14]–[15].

76 *Union Royale Belge des Sociétés de Football Association and others v Bosman* (C-415/93) [1995] ECR I-4921, I-5603 [72]–[73].

77 De Búrca, 'Reappraising Subsidiarity's Significance', above n 16, 43. See further, the cases analysed in Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 *Journal of Common Market Studies* 217. For a similarly incisive assessment in relation to Irish abortion policy, see Gabriel Moens, 'The Subsidiarity Principle in European Community Law and the Irish Abortion Issue' (2003) 9 *Ius Gentium* 35.

78 For example, John Temple Lang, 'The Development of European Community Constitutional Law' (1991) 25 *International Lawyer* 455, 460: 'There is *no* residue of powers reserved to Member States' (emphasis in original).

79 Joseph Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2434–5. As Weiler explained, the Court's 'truly radical and "creative" reading' of the Community's 'necessary and proper clause' (then art 235 *TEC*, now art 352 *TFEU*) soon meant that it was 'virtually impossible to find an activity which could not be brought within the "objectives of the Treaty"', so that 'no core activity' of the Member States could be regarded as 'constitutionally immune' from Community action: at 2445–6.

> The residual powers of the Member States have no reserved status. The Community may indeed exercise its specific, implied or non-specific powers in the fullest way possible, without running into any inherent limitation set to these powers as a result of the sovereignty which the Member States retain as subjects of international law. There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.[80]

It is true that the Treaties specify the existence of certain residual competences for the Member States. Article 114 *TFEU* (ex 95 *TEC*), for example, enables Member States, in response to harmonisation measures adopted to secure the internal market objectives of Article 26 *TFEU* (ex 14 *TEC*), to notify the Commission of national provisions deemed necessary to maintain 'major needs' set out in Article 36 *TFEU* (ex 30 *TEC*). Under the provision, such needs include public morality, public policy and public security, the protection of national treasures possessing artistic, historic or archaeological value, and so on. However, the Treaty also says that such national measures must not constitute a means of arbitrary discrimination or a disguised restriction on trade', and the Commission is empowered simply to approve or reject the national provisions on these grounds within six months of receiving the notification.[81]

Cases in which Community powers have been interpreted narrowly and Community laws have in fact been struck down are very rare indeed. The Court's decision that the Community did not have competence to accede to the *European Convention on Human Rights* ('*ECHR*') was exceptional.[82] Most of the cases in which the limits of Community competence have been articulated have involved disputes over the specific Treaty article pursuant to which a measure ought to have been enacted, and have thus involved disputes *between* Community institutions as to the precise decision-making process that should have been adopted. The *Tobacco Advertising Case* is generally seen as the first and only case so far in which the Court has annulled an entire Community measure simply on the ground of a lack of competence, but even this decision turned technically on a finding that the Tobacco Advertising directive could not validly be adopted by the institutions under the particular articles said to be its basis; it is just that the Court's reasoning seemed to rule out any alternative legal grounds for the measure as well.[83] Moreover, as Lenaerts points out, when faced with choices whether to characterise Community measures as falling under articles that require more or less restrictive legislative decision-making rules to be followed (ie, unanimity or qualified majority in the Council), the Court has frequently refused to engage in a comparison of different Treaty provisions in order to give weight to the

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80 Lenaerts, above n 1, 220.

81 See ibid 221; Moens, above n 77, 53–4.

82 *Opinion Pursuant to Article 228 of the EC Treaty* [1996] ECR I-01759, discussed in de Búrca, 'The Principle of Subsidiarity', above n 77, 225–6. Finland argued that the principle of subsidiarity restricted the scope of the implied power in art 235 (now art 352 *TFEU*) to prevent accession by the Community. The Court held that a decision of such constitutional significance as accession to the *ECHR* must be decided by the Member States by way of formal amendment to the Treaty.

83 Gráinne de Búrca, 'The Tobacco Advertising Saga: Political Aspirations and Constitutional Constraints' in *The ECJ's Tobacco Advertising Judgment* (Centre for European Legal Studies Occasional Paper No 5, University of Cambridge, 2001) 7–9.

provisions that are more protective of Member State autonomy.[84] Although the Court's willingness to scrutinise European measures seems to have increased somewhat since Lenaerts undertook this analysis, the principle in the *Tobacco Advertising Case* has provided no succour to applicants seeking the annulment of other European measures.[85]

Within this context are to be understood the line of cases beginning with *Schmidberger*,[86] which acknowledged justifiable limitations on principles of freedom of movement of goods, services and persons on the basis of the countervailing need to protect human rights and human dignity. *Schmidberger* considered a decision of Austrian authorities to permit a major public demonstration to occur which obstructed commercial traffic on the Brenner motorway for nearly 30 hours. The decision to permit the demonstration was held to be justified specifically on the basis of the European Union's commitment to respect human rights, particularly as guaranteed by the *ECHR*. While this involved a significant limitation on the scope of the fundamental market freedoms enshrined in the Treaties,[87] the *ECHR* was held to be relevant on the ground that it is an international agreement to which the Member States are themselves signatories and reflects the 'constitutional traditions common to the Member States'.[88] While the Austrian authorities were motivated to adhere to the human rights standards enshrined in the Member State Constitution,[89] it was the *ECHR* and the standards common to the Member States that was critical to the reasoning. The case was thus *not* an example of a cultural tradition unique to a particular Member State being the basis of an exception to the application of general Community norms.

Admittedly, the Court went further in the *Omega* case,[90] which involved a decision of German authorities to prohibit the playing of laser games involving the targeting of human beings. Again, the issue was whether a local law which placed a restriction on freedom of movement of goods and services could be justified by reference to human rights standards. As in *Schmidberger*, the possibility of the justification of the local law arose due to the derogation provisions of the Treaty and the constitutional traditions and human rights commitments common to the Member States.[91] However, the case

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84 Lenaerts, above n 1, 221, quoting *Commission of the European Communities v Federal Republic of Germany* (C-153/78) [1979] ECR 2555, 2564 [5]:

> the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the article.

85 See Weatherill, above n 36, 14.

86 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (C-112/00) [2003] ECR I–5659 ('*Schmidberger*').

87 The Court said that the freedoms can be restricted for the kinds of reasons laid down in what was then art 36 *TEC* (now art 36 *TFEU*) or for other reasons relating to the 'public interest': ibid I-5719 [78].

88 Ibid I-5717 [71].

89 Ibid I-5718 [76]. The Austrian authorities were also given a generous margin of appreciation in deciding at precisely what point to draw the line: at I-5720 [82].

90 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (C-36/02) [2004] ECR I-9609 ('*Omega*').

91 Ibid I-9652 [33].

involved a specific practice that was fully lawful in other Member States (in this instance, the United Kingdom) and the local authorities in Germany sought to prohibit the playing of the games on the basis of the distinct understanding of human dignity enshrined in the German Basic Law.[92] In upholding the German policy as a legitimate derogation from freedom of movement, the Court held that it was sufficient that the Community as a whole was committed to the principle of human dignity in general terms.[93] It did not matter that Germany's conception of 'the precise way in which the fundamental right or legitimate interest in question is to be protected' did not 'correspond to a conception shared by all Member States'.[94]

In these specific and narrowly-defined ways, there are exceptional circumstances where the full force of Treaty provisions is qualified to allow room for Member State policymaking. In these instances, the Court has been prepared to say on occasion that there are limits to the scope of Community competences. But, as in Australia, these cases are the exceptions that prove the rule. In later cases, the reach of the *Schmidberger* and *Omega* principles were curtailed,[95] and nothing in the cases disturbs the underlying tendency of the Court to read Community competences as widely as the language used can possibly sustain. It thus remains the case that the Community is able to exercise its powers in the fullest way possible, without running into any inherent limitation set to these powers as a result of certain sovereign powers 'reserved' to the Member States.[96] The new Article 5(2) *TEU* may well state that '[c]ompetences not conferred upon the Union in the Treaties remain with the Member States', but these 'remaining' competences are not specified, and so the effect of the 'reservation' is not likely to be very significant at all. This is because the new provision does not change the fact that from the point of view of European law, as administered by the European Court of Justice, the municipal competences of the Member States are entirely 'residuary'; the Member States do not even possess a full set of immunities against Community commandeering of their facilities and resources.[97] The principle of subsidiarity in Article 5 *TEU* does nothing to address *these* issues, let alone the foundational constitutional doctrines that have been developed by the Court in favour of Community competence, such as direct effect, supremacy and pre-emption.[98]

VI SUBSIDIARITY AS A SOCIAL PRINCIPLE

But what if the principle of subsidiarity were understood and applied more broadly? As Alan Dashwood has argued, there remains a real sense in which the proposition that there are limits to the Community's powers is indeed pivotal to the relationship between the Union and the Member States.[99] In his view, the principle of attribution or

92 Ibid.
93 Ibid I-9653 [34].
94 Ibid I-9654 [37].
95 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* (C-438/05) [2007] ECR I-10779; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet avd 1, Byggettan, Svenska Elektrikerförbundet* (C-341/05) [2007] ECR I-11767.
96 Lenaerts, above n 1, 220.
97 Bermann, 'Taking Subsidiarity Seriously', above n 1, 454–5.
98 Ibid 365–6.
99 Dashwood, above n 18, 356.

conferral of powers, like the principles of subsidiarity and proportionality,[100] is meant to be fundamental to the constitutional structure of the European Union. Despite the constitutionalising transformation that has occurred,[101] as the simple fact that the Constitutional Treaty had to be abandoned reminds us, the system is still founded upon a series of international treaties among the Member States and the constitutional future of Europe remains in their hands.[102]

If the European Court of Justice has read Community competences first and given only very little thought to the scope of Member State power that is left over, a former Justice of the German Constitutional Court, Paul Kirchhof, has asserted quite the contrary: 'Member State competence is the rule', he has said, 'Community competence [is] the exception'.[103] At the least, to view the competences of the Member States and the Community in a more balanced way requires a perspective that is wider than the positive terms in which Community competences are framed within the Treaties. For Kirchhof, the proper perspective to take is, as one might expect, nothing other than the position adopted by he and his colleagues in the German Constitutional Court's famous *Maastricht* decision.[104] In Kirchhof's words:

> The Union owes its existence to a founding act, treaty-based and parliamentary, by Member States, is democratically legitimated in the person of the Member State peoples and their parliaments, its institutions are given life, both in personal and material terms, by the Member States, and the dynamics of the development of integration is dependent on continual impulses from them. Accordingly, the European Union is to be seen as an association of states, for the emergence, content and development of which the Member States are responsible. They are the masters of the treaties, able to decide on their content, the accession of new states and ultimately even the suspension of the treaties.[105]

On this view, if the Treaties themselves are silent about the original competences of the Member States it is because the Treaties presuppose those powers and depend upon them for their legal force within the Member States. But to see the point, one must hold both the Treaties and the Member State Constitutions steadily and simultaneously in mind. It is only when one does this that the possibility of a real 'balance' of competences begins to come into view.[106]

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100 Recall the prominent place each of these principles is accorded in both versions of art 5 *TEU*: above nn 7, 9.

101 Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; Lenaerts, above n 1; Weiler, above n 79. See also the analysis in Aroney, 'Federal Constitutionalism/European Constitutionalism', above n 4.

102 De Witte, above n 19.

103 Paul Kirchhof, 'The Balance of Powers between National and European Institutions' (1999) 5 *European Law Journal* 225, 234.

104 *Maastrict Decision,* Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2159/92, 12 October 1993 reported in (1993) 89 BVerfGE 155. See also, more recently, the German Constitutional Court's decision in the *Lisbon Treaty Case,* 2 BvE 2/08 30 June 2009 reported in (2009) 123 BVerfGE 267, discussed in Cornelia Koch, '"*Bis hierher sollst du kommen und nicht weiter*": The German Constitutional Court and the Boundaries of the European Integration Process', in Appleby, Aroney and John, above n 44.

105 Kirchhof, above n 103, 230, citing Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2159/92, 12 October 1993 reported in (1993) 89 BVerfGE 155, 190 (Kirchhof's paraphrase).

106 See Nicholas Aroney, 'Towards Fundamental Change of the Australian Federal System: Popular Ratification of the State Constitutions' in Paul Kildea, Andrew Lynch and George

It is precisely here that the original idea of subsidiarity might be of some real assistance in at least explaining the problem, if not also suggesting a way out of it. It is well-known that the European idea of subsidiarity traces its origins to Roman Catholic social theory,[107] and in particular to key philosophical influences such as Aristotle, Aquinas and Althusius, with echoes of the idea repeated in the writings of Montesquieu, de Tocqueville, Proudhon and others.[108] The classic text is an encyclical issued by Pope Pius XI in 1931, which stated:

> As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help [*subsidium*] to the members of the body social, and never destroy and absorb them.
>
> The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function', the stronger social authority and effectiveness will be [and] the happier and more prosperous the condition of the State.[109]

As this passage suggests, the Roman Catholic conception of subsidiarity is 'social' and not just narrowly 'political' in scope. It envisages the capacity and freedom of 'small associations' such as families, neighbourhoods, corporations and trade unions to fulfil functions in society which, by their nature, cannot be replicated or absorbed by larger associations, but ought rather to be acknowledged and supported through the provision of 'aid' or 'help' (*subsidium*) to enable them to perform their unique functions effectively and adequately. This fuller conception of subsidiarity rests on a complex

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Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, forthcoming).

107 On Jacques Delors' support for subsidiarity and his roots in Catholicism, see Michael Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (Routledge, 2000) 230–2. In addition to Christian Democratic interest in subsidiarity as an important element of Catholic social teaching, other forces for subsidiarity included British Conservative politicians concerned about national sovereignty and German regions concerned to protect the competences of the *Länder*. See Kees Van Kersbergen and Bertjan Verbeek, 'The Politics of Subsidiarity in the European Union' (1994) 32 *Journal of Common Market Studies* 215.

108 See Chantal Millon-Delsol, *L'État Subsidiaire: Ingérence et Non-ingérence de l'État* (Presses Universitaires de France, 1992); Nicholas Aroney, 'Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire' (2007) 26 *Law and Philosophy* 161.

109 Pius XI, *Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order* (15 May 1931) [79]–[80].

social ontology that is much richer, and probably also more controversial,[110] than the thinner, more 'political' version of subsidiarity that has been made part of the positive law of Europe and is proposed as a possible solution to centralism, confusion of responsibilities, vertical fiscal imbalance and blame-shifting in Australia. But the Roman Catholic conception nonetheless has something important to remind us about subsidiarity, even when applied solely to relationships between political institutions, as in the European Union and the Australian federation.[111]

Russell Hittinger, who has written one of the most insightful explanations of the sources and grounds of the Roman Catholic conception of subsidiarity, points out something of the very greatest importance for our understanding of the idea.[112] As a conception of social ordering, the Catholic idea of subsidiarity rests on a social ontology in which each kind of association has a unique and important function to perform, captured according to Hittinger in the old Latin word *munus*, a term which carries the sense of 'function', 'role', 'service' or 'gift', and is the (now obsolete) root from which are derived several important words in our current federalism lexicon, including 'community', 'municipality' and 'immunity'. Hittinger's point is that at the heart of a self-governing community — or any other of the 'smaller associations' referred to in the papal encyclical — is a unique *munus* (function or role) which that community both embodies in itself and offers to others as its unique gift and service. As Hittinger argues, it is only when we give thought to the specific *munus* of a particular 'community' or 'municipality' that we can begin to think coherently about the 'immunities' which that community should enjoy from undue interference or absorption by other, larger or more powerful institutions.

Hittinger's analysis helps us to realise that to draw sensibly on subsidiarity as a principle of social or political ordering, we need to think not only about immunities and limits on power, as if merely demarcating boundaries was enough; we need to think about the core *munera* which give us reason to conclude that small associations, local municipalities and self-governing political communities ought to enjoy a sphere of immunity from interference and absorption by larger political associations and institutions. Indeed, Hittinger helps us to understand why the European Union and the Australian federation have experienced the centralisation that they have. The foundational treaties of the European Union, like the *Constitution* of the Australian Commonwealth, deal almost entirely with the purposes and objectives (*munus*) of the central governments, while constitutionally-speaking the corresponding functions (*munera*) of the constituent states are no more than the 'residue' that is left over. Likewise, the European principle of subsidiarity as defined in Article 5 *TEU* is solely concerned with the achievement of the objectives of the Community; there is no room for reflection on the corresponding *munera* of the Member States as a counter-balancing consideration. And in Australia, whenever there has been an attempt to identify the scope of the 'structurally' implied immunities that are to be enjoyed by the states and

110 Despite the evidence that Catholic social philosophy was one of the prime inspirations of the European doctrine, there is resistance to the invocation of Catholic principles: von Borries and Hauschild, above n 58, 369–70; Davies, above n 39, 78–9.

111 For a sympathetic discussion of Catholic ideas in the context of the European principle of subsidiarity, see N W Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 *European Law Journal* 308.

112 Russell Hittinger, 'Social Pluralism and Subsidiarity in Catholic Social Doctrine' (2002) 16 *Annales Theologici* 385.

the Commonwealth from interference from each other, the High Court has not been able to avoid trying to identify the *munera* of each.[113] However, the absence of anything specific about the functions and purposes of the states in the text of the *Constitution*, and the unwillingness of the Court — ever since the fateful *Engineers* case[114] — to take seriously the idea that it was the states' plenary and original powers that were to 'continue' under the *Constitution*,[115] has contributed to great uncertainty and confusion about the nature and scope of the doctrine.[116]

Subsidiarity is not going to be any substantial help in Europe or in Australia unless this is realised. In countries like Canada, where there is a constitutionally explicit statement not only of the powers of the central institutions of government but also of the competences reserved to the constituent states or provinces,[117] it becomes much easier, conceptually, for the Supreme Court to make determinations that give weight to the constitutionally prescribed functions of both the central and the regional institutions of government.[118] Thought needs to be given, both in Europe and Australia, about how such a statement of reserved or continuing competences might be achieved,[119] despite the obvious difficulties and controversies that will very predictably arise in any such undertaking.

In the meantime, there is already at least some room in the law of the European Union, as well as in the law of Australia, for the Courts to find in the constitutions of the constituent states a set of *munera* that provide good reason for interpreting the powers of the central institutions of government in a relatively limited way. What is needed is a willingness to take the constitutions of the constituent states just as seriously as the *Constitution* of the central government. Doing this will not provide bright lines of demarcation, especially since the state constitutions, especially in Australia, offer only very broad and general statements of guiding principle (ie, a responsibility to legislate for the peace, order and good government of the state).[120] But when faced with interpretive choices about the scope of central powers, reflecting seriously on the continuing existence of the states as self-governing communities gives

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113 For example, *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 232 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

114 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

115 *Australian Constitution* ss 106, 107. See, generally, Nicholas Aroney, 'The Griffith Doctrine: Reservation and Immunity' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 219.

116 Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another' (2003) 31 *Federal Law Review* 507.

117 *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, ss 91, 92.

118 See Nicholas Aroney, 'Formation, Representation and Amendment in Federal Constitutions' (2006) 54 *American Journal of Comparative Law* 277, 291–8.

119 This has been recognised by several commentators. See, eg, Twomey, 'Reforming Australia's Federal System', above n 12, 59–62.

120 I say this conscious of the way in which this phrase has been interpreted in such cases as *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; and *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

us good reason to adopt constructions that leave room for the *munera* of the constituent states to survive and, one might even hope, to thrive and to flourish.[121]

Writing recently about the new Protocol on subsidiarity introduced in connection with the *Lisbon Treaty*, George Bermann observed:

> We do not in the United States have even a working definition of federalism, much less a working definition of a federalism-driven proposition such as subsidiarity. However rudimentary European observers may find the Treaty's definition of subsidiarity to be, it offers a good deal more than US decision-makers have at their disposal. It posits a requirement that the necessity for EU-level action be demonstrated, and does so in terms of efficacy and relative efficiency. By contrast, it is safe to say that we in the United States have merely a generalized sense — even an intuition — as to the matters that are somehow, by their nature, inherently 'local' and those that are not. In place of what Europeans can present as a 'subsidiarity analysis', we have only a 'federalism impulse' to offer.[122]

It may be hoped that the new European procedures will give the Member State parliaments a real opportunity to influence the future direction of the EU's system of law, even if the subsidiarity principle remains focussed on the EU's purposes and objectives. However, Bermann's observation about our doubts about what is inherently 'local' is exactly to the point. Unless we retrieve an understanding about the *munera* of governments and communities at all levels, the principle of subsidiarity is only going to do so much.

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121 See Aroney, 'Constitutional Choices in the *Work Choices Case*', above n 65. I have further argued that this could be made even more likely in Australia if, in addition, steps were taken by the states to have their constitutions popularly approved by their respective peoples, as this would give the state constitutions a normative legitimacy that they have not yet enjoyed, especially in the face of the more popular foundations of the federal *Constitution*. See Aroney, 'Reinvigorating Australian Federalism', above n 42; Aroney, 'Towards Fundamental Change', above n 106.

122 Bermann, 'National Parliaments and Subsidiarity', above n 33, 454.