JUSTIFYING POWER: FEDERALISM, IMMIGRATION, AND 'FOREIGN AFFAIRS'

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INTRODUCTION

Immigration federalism is all the rage. In countries such as the United States, Canada, Germany, Switzerland, and Spain,[1] academics and politicians are engaged in heated debates over the best ways to create and implement immigration and integration policies across the many levels of a federal system.[2] But these policy debates are constructed and constrained by the background constitutional rules that allocate powers in a given federation. In the United States, in particular, the allocation to the federal government of power over immigration has dramatic implications for how states may, or may not,

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1. *See, e.g.*, Joanna Drozdz, Spanish Leadership in Developing a 'Common' European Immigration Policy: Intergovernmentalist Supranationalization Approach (2011) (unpublished Masters thesis, DePaul University), http://via.library.depaul.edu/etd/92. *See generally* Graeme Boushey & Adam Luedtke, *Fiscal Federalism and the Politics of Immigration: Centralized and Decentralized Immigration Policies in Canada and the United States*, 8 J. COMP. POL'Y ANALYSIS 207 (2006); Dagmar Soennecken, *Germany and the Janus Face of Immigration Federalism: Devolution vs. Centralization*, *in* IMMIGRATION REGULATION IN FEDERAL STATES: CHALLENGES AND RESPONSES IN COMPARATIVE PERSPECTIVE (Sasha Baglay & Delphine Nakache eds., forthcoming).

2. Integration policies—which are not explored in this Article—refer to the processes by which immigrants are incorporated into society, particularly into labor markets. Immigration policy, on the other hand, focuses on questions of entry and exit. *See generally* MARTIN A. SCHAIN, THE POLITICS OF IMMIGRATION IN FRANCE, BRITAIN, AND THE UNITED STATES: A COMPARATIVE STUDY (2008); Noah Lewin-Epstein et al., *Institutional Structure and Immigrant Integration: A Comparative Study of Immigrants' Labor Market Attainment in Canada and Israel*, 37 INT'L MIGRATION REV. 389 (2003); Anja Wiesbrock, *The Integration of Immigrants in Sweden: a Model for the European Union?*, 49 INT'L MIGRATION 48 (2011).

take part in the politics of immigration.[3] There is, therefore, a particular importance to identifying and understanding the constitutional contexts in which these debates occur—the structural foundations of immigration federalism.

In most Western federations, particularly those considered countries of immigration, the ex ante constitutional allocations of power are set (though, as in the United States, there is certainly contestation at the margins). In the quasi-federal European Union, however, the current debate is over first principles: Which level of government—the Member States or the supranational EU institutions—should have the power to regulate immigration, and under what rationale? These questions take on a certain immediacy due to provisions in the newly ratified Lisbon Treaty that purport to structure European immigration federalism. Under Lisbon, individual Member States and the supranational European Union now share power over immigration regulation, conditioned on a requirement that the supranational-level institutions provide reasons justifying their efforts to regulate. But what will be considered an acceptable justification to preempt or condition Member State action? The answer will set the constitutional contours of the EU federalism dynamic in immigration, perhaps with implications far into the future.

To inform the EU debate, this Article looks to the United States to provide some comparative insights on first-order federalism issues. Although little work has been done in the specific context of immigration federalism, comparisons between the European Union and the United States are widely accepted, as the European Union is understood by many to display elements of a federal system sufficient to allow for useful and meaningful comparative analysis.[4] As a threshold matter, any comparison must identify the correct historical

3. *See* Arizona v. United States, 132 S. Ct. 2492, 2497, 2510 (2012) (invalidating parts of Arizona law S.B. 1070 designed to "discourage and deter the unlawful entry and presence of aliens" as preempted by federal law); Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011) (finding no federal preemption of Arizona law imposing sanctions on businesses employing undocumented immigrants).

4. *See, e.g.*, MICHAEL BURGESS, FEDERALISM AND EUROPEAN UNION: THE BUILDING OF EUROPE, 1950-2000 (2000); LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT (2001); INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1986); THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypos Nicolaidis & Robert Howse eds., 2001). *See generally Dividing and Sharing Power: Lessons for the European Union*, 15 REGIONAL & FED. STUD. (SPECIAL ISSUE) (2005).

period in the United States in which to situate the analysis.[5] In this case, it was during the late nineteenth and early twentieth centuries when the power over immigration was finally (and firmly) allocated to the federal government.[6] The result—a plenary federal power over immigration—and the subsequent historical experience of the United States suggest something of a cautionary tale to European Member States wary of losing national control over immigration issues. Given the differences between the two systems, the European Union is unlikely to conform to the American experience in every respect; nevertheless, lessons from the United States should encourage Member States to interrogate closely the rationales provided by supranational institutions to justify their actions.

This Article proceeds in three parts. Part I opens with a brief history outlining the evolution of power over immigration in the European Union, from a jealously guarded competence exclusive to the Member States to one shared by the Member States and the supranational institutions. It then lays out the legal framework provided by the Lisbon Treaty, reviews a recent legislative proposal made at the supranational level seeking to regulate seasonal workers (the "Seasonal Workers Directive"), and analyzes the associated set of arguments for supranational action, including a "foreign policy" justification. In assessing the claims for and against supranational power in this particular European context, certain rationales emerge that once were used in American debates.

Part II begins by demonstrating the relevance of the American experience to that of Europe. In the United States, as in Europe under the Lisbon Treaty, the locus of immigration power was not clearly defined by the Constitution, and broad action by the federal government still required justification as late as the 1880s. The U.S. Supreme Court ultimately filled this reason-giving role, and Part II analyzes the arguments the Court developed, particularly the "foreign affairs" rationale for plenary federal power. Part II concludes by

5. *See generally* GOLDSTEIN, *supra* note 4 (antebellum United States); Erin Delaney, *Managing in a Federal System Without an 'Ultimate Arbiter': Kompetenz-Kompetenz in the EU and the Ante-bellum United States*, 15 REGIONAL & FED. STUD. 225 (2005); Erin Delaney & Luca Barani, *The Promotion of 'Symmetrical' European Citizenship: A Federal Perspective*, 25 J. EUR. INTEGRATION 95 (2003) (United States in the 1790s); Robert A. Garson, *The Euro? So What's New? Federalism, Nationalism and the Adoption of the United States Dollar, 1776-1792*, *in* FEDERALISM, CITIZENSHIP AND COLLECTIVE IDENTITIES IN U.S. HISTORY 9 (Cornelis A. van Minnen & Sylvia L. Hilton eds., 2000).

6. *See infra* Part II.B.

identifying the downstream effects of this rationale in Supreme Court doctrine and its broader implications for the relationship between the states and the federal government in the United States.

Building on the American experience, Part III returns to the European Union and draws a parallel between the "foreign policy" justification and the "foreign affairs" rationale. Reviewing the force of the foreign affairs rationale in the U.S. context, this Part contends that the American experience should concern those Member States reluctant to cede power to the European Union. Although power over immigration may be shared, the boundaries of action are uncertain, and some Member States might prefer to maintain more control at the state level, either as a matter of immigration policy or as a matter of principle.[7] Comparative evidence from the American experience suggests these Member States should be particularly attentive to the use of the foreign policy justification by the supranational institutions. Part III concludes by suggesting a procedural mechanism to limit the reach of an all-encompassing European foreign policy, or "foreign affairs," rationale.

I. CONTESTED POWER: IMMIGRATION IN THE EUROPEAN UNION

From its earliest incarnation as the European Coal and Steel Community, the European integration project has pooled sovereignty among European countries in order to achieve shared goals.[8] What began as a narrow agreement among six countries to create a common market in coal and steel has led to a Union of twenty-eight nations with an expansive common internal market, open internal borders,[9] and a shared currency.[10] The powerful logic of integration in a single European market has resulted in many areas of supranational power, and the willingness of Member States to limit their sovereignty

7. *See infra* Part I.B (discussing the problem of "creeping competence").

8. Speaking before the Bundestag on July 12, 1951, Konrad Adenauer described the European Coal and Steel Community as "the first time in history [that] nations were voluntarily giving up 'a portion of their sovereignty' to a supranational institution—'an event which signifies the end of nationalism . . . which has been the cancer of Europe.'" HENRY L. MASON, THE EUROPEAN COAL AND STEEL COMMUNITY: EXPERIMENT IN SUPRANATIONALISM 13 (1955) (citation omitted).

9. Twenty-two Member States of the European Union are members of the border-free Schengen Zone. *See Member Countries of the European Union*, EUROPEAN UNION, http://europa.eu/about-eu/countries/member-countries/ (last visited May 28, 2013). On the Schengen Zone, see *infra* notes 28–30 and accompanying text.

10. The Euro is shared among seventeen Member States. *See Member Countries of the European Union*, EUROPEAN UNION, http://europa.eu/about-eu/countries/member-countries/ (last visited May 28, 2013).

and act in concert has been remarkable.[11] Nevertheless, and notwithstanding the many areas of power already delegated to "Europe," the debate over the allocation of powers between the supranational EU institutions and the Member States is a perennial issue in European political life. Immigration, or "migration," as it is referred to in Europe, has long been in the crosshairs of these larger structural debates.

Migration operates against the background principle of the free movement of persons, one of the four fundamental freedoms at the core of the European integration project.[12] The initial understanding of this freedom and its reach was tightly connected to the development of the common market: There was to be free movement of *workers* who also were nationals of the Member States.[13] The free movement principle eventually expanded to include all *citizens* of EU Member States, providing them the right to live and work in any EU Member State.[14] Member States are severely limited in their ability to burden this intra-EU movement,[15] but they are not similarly constrained in relation to third-country nationals (TCNs), who do not have free movement rights under European law.[16]

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11. Much effort has been spent explicating the dynamics behind European integration, and there are a number of competing theories. Classic works on the subject include: ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (1992) (intergovernmentalism); ANDY MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MASSTRICHT (1998) (intergovernmentalism); ERNST HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950-1957 (1958) (functionalism); and Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993) (neofunctionalism).

12. The other freedoms are the free movement of goods, services, and capital. Treaty Establishing the European Economic Community arts. 3(a), (c), Mar. 25, 1957, 298 U.N.T.S. 11, 15 [hereinafter EEC Treaty], *available at* http://www.proyectos.cchs.csic.es/euroconstitution/library/historic%20documents/Rome/TRAITES_1957_CEE.pdf.

13. Michelle Everson, *The Legacy of the Market Citizen*, *in* NEW LEGAL DYNAMICS OF EUROPEAN UNION 73 (Jo Shaw & Gillian More eds., 1996).

14. Consolidated Version of the Treaty on the Functioning of the European Union art. 20(2)(a), Oct. 26, 2012, 2012 O.J. (C 326) 47, 56 [hereinafter TFEU], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0047:0200:EN:PDF.

15. This statement has some qualifications: During negotiations over enlargement, certain Member States, fearful of an influx of new workers from Eastern Europe, sought limitations on free movement for these new EU citizens. *See, e.g.*, *EU-25: Member States Grapple with the Free Labour Market*, EURACTIV (May 5, 2004), http://www.euractiv.com/enlargement/eu-25-member-states-grapple-free-labour-market/article-117775.

16. The concept of TCNs does not include the stateless, including Europe's Roma people. A discussion of the role of the stateless in immigration federalism is beyond the scope of this Article. For more information on this aspect of the immigration debate, see generally Claude Cahn & Peter Vermeersch, *The Group Expulsion of Slovak Roma by the Beglian Government: A Case Study of the Treatment of Romani Refugees in Western Countries*, 13 CAMBRIDGE REV. INT'L AFF. 71 (2000). On statelessness and human rights, see generally David Weissbrodt &

Third-country migration implicates many areas of traditional Member State interest—membership and citizenship, language, culture, and a nation's internal labor market—and these concerns have largely trumped any competing pressures for Union-wide action. For much of the EU's history, regulating migration from third-countries was considered a purely national prerogative.[17] It was not until the late 1990s that the EU's supranational institutions were given power to engage in migration control; since then, supranational legislation has primarily engaged with asylum issues and irregular migration, only very recently shifting to work-related migration and the labor market, the focus of this Article.

This Part opens with a brief review of the historical development toward shared power in migration matters, implemented by the Lisbon Treaty in 2009. It then turns to the details of the Lisbon Treaty itself: Lisbon provides a legal basis for supranational action on migration and requires the European institutions to justify such action under the principle of subsidiarity, by explaining why the relevant issue cannot be resolved appropriately at the Member State level. Finally, this Part looks in detail at a recently proposed piece of legislation regulating the conditions of entry and residence of TCNs for the purposes of seasonal employment—the Seasonal Workers Directive. Promulgated under the new Lisbon rules, this proposed Directive provided the first opportunity for the European institutions and the Member States to debate the supranational role in regulating labor-related immigration in the context of shared power.

A. The Road to Lisbon: A Brief Historical Note

Shared power over third-country migration would have been unthinkable thirty years ago. In fact, "most member-states believed that they were completely free regarding immigration law *vis-à-vis* non-[European Community] nationals,"[18] and they preferred to maintain control at the nation-state level. From a competence exclusive to the Member States to one shared between the Member States and the supranational institutions, the regulation of migration is an example of both the powerful logic of integration and the continued importance to the Member States of national culture and

Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245 (2006).

17. ANDREW GEDDES, THE POLITICS OF MIGRATION AND IMMIGRATION IN EUROPE 131 (2003).

18. GALLYA LAHAV, IMMIGRATION AND POLITICS IN THE NEW EUROPE 40 (2004).

national power.

For many years, Member States not only refused to delegate sovereignty to European institutions over third-country migration issues but also aggressively guarded Member State power through litigation. In 1985, when the European Commission (the Commission) proposed an information-sharing procedure related to migration policies,[19] five of the then ten Member States took the institution to court.[20] The Member States argued that the Commission lacked competence to adopt the measure, as migration was a field within the "exclusive jurisdiction" of the Member States. The French Republic made the additional argument that "matters relating to the conditions of entry, residence and employment of nationals of non-member countries affect[ed] the Member States' security,"[21] another area of critical national interest.

The Commission had proposed similar information-sharing "communication and consultation" procedures in other substantive areas, yet the Member States neither "raised [their] voices [nor their] eyebrows" in response.[22] But as Advocate General Mancini noted in his opinion in support of the Commission, "the Member States are . . . vitally . . . interested in preserving full control over the admission to their territory of workers from non-member countries, *inter alia* because of its obvious political and public-policy ramifications."[23] The European Court of Justice (ECJ) produced a delicately constructed opinion, invalidating much of the procedure while saving some of the consultation mechanisms.[24] But no consultations ever occurred.[25]

Contemporaneous to this litigation, the Member States were negotiating an expansive new treaty arrangement under the Single European Act (SEA). The SEA promised the completion of the common market, describing it as "an area without internal frontiers in

19. The European Commission is the supranational body responsible for proposing European legislation. See *infra* note 35 for a discussion of the legislative process in the European Union.

20. Joined Cases 281, 283–85, & 287/85, Germany v. Comm'n, 1987 E.C.R. 3203. In addition to Germany, the suing states included the Netherlands, France, the United Kingdom, and Denmark.

21. *Id*. ¶ 9. Article 118 of the EEC Treaty gave the Commission "the task of promoting closer cooperation between Member States in the social field." EEC Treaty, *supra* note 12, art. 118, at 96.

22. Opinion of Advocate General Mancini, Germany v. Comm'n, 1987 E.C.R. 3219, 3223.

23. *Id*. at 3229.

24. Germany v. Comm'n, 1987 E.C.R. 3203, 3252–53, ¶¶ 23, 27.

25. GEDDES, *supra* note 17, at 131.

which the free movement of goods, persons, services and capital is ensured."[26] The Member States were careful in negotiations to maintain exclusive power over immigration,[27] but the logic of the internal market and freedom of movement would eventually "stimulate[] a tendency towards greater cooperation and coordination" in the field.[28]

Rather than using the European Union (then Community) institutions to pass legislation, Member States chose to work together in transnational groupings, often completely outside the Union framework. Negotiating among themselves, Member States created the Schengen Agreement on removing internal borders[29] and adopted the Dublin Convention on streamlining asylum claims.[30] The creation of the Schengen Area (or Zone) in 1985 facilitated the free movement of those already permitted to live and work in the signatory states and changed the nature of travel in much of Europe. Note, however, that the existence of open internal borders between certain EU Member States did not in itself provide any general right to free movement; TCNs continue to be admitted to a single Member State and may not transfer that admission right to gain entry to another Member State. That TCNs must seek admission seriatim has particular salience in the context of asylum—a fact that led some Member States to negotiate the Dublin Convention (ratified in 1990).[31] Member States were concerned about perceived forum-shopping by asylees seeking the most advantageous welfare benefits, frustrated by the possibility that an applicant, after being denied by one Member State, could keep reapplying for asylum in other Member States, and solicitous of those countries facing increased migration due to their location on the

26. Single European Act art. 13, Feb. 17, 1986, 1987 O.J. (L 169) 1, 7 [hereinafter SEA] (amending the EEC Treaty), *available at* http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleuropeanact.pdf.

27. *See id*. arts. 13, 19, at 9, 12; Single European Act, Political Declaration by the Governments of the Member-States on the Free Movement of Persons, Feb. 17, 1986, 1987 O.J. (L 169) 1, 26; *see also* Opinion of Advocate General Mancini, Germany v. Comm'n, 1987 E.C.R. 3219, 3229 (discussing Member State actions in negotiations over the SEA).

28. GRETE BROCHMANN, EUROPEAN INTEGRATION AND IMMIGRATION FROM THIRD COUNTRIES 77 (1996).

29. Schengen Acquis, 2000 O.J. (L 239) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF.

30. Council Regulation 343/2003, on Asylum Applications by Third-Country Nationals, 2003 O.J. (L 50) 1 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF; *see also* LAHAV, *supra* note 18, at 44.

31. *See generally* Agnès Hurwitz, *The 1990 Dublin Convention: A Comprehensive Assessment*, 11 INT'L J. REFUGEE L. 646 (1999).

borders of the Union. Created outside the EU framework, the Schengen Area and the Dublin Convention were not initially part of the European *acquis*, thus Member States were not required to join and some Member States chose to opt-out.[32]

By the early 1990s, Member States recognized the need for a more comprehensive approach, committing themselves through the Maastricht Treaty to collective action in asylum and migration matters.[33] But again, cooperation was to come through strictly intergovernmental, rather than communitarian, means.[34] Maastricht, or the Treaty on European Union, created an unusual system that divided subject matters into three groupings, or pillars. The internal market was placed in the First Pillar and was subject to what has become known as the "Community method" of lawmaking. This method makes use of the communitarian institutions: The Commission proposes a law, which is then debated, amended, and voted on by both the Council of Ministers (Council) and the European Parliament.[35] Voting in the Council is by qualified majority

32. In general, European Union law is valid in all Member States without reservation. However, a handful of Member States have negotiated "opt-outs" that entitle them to choose not to participate in certain policy areas, such as the Schengen Area or the eurozone. Ireland and the United Kingdom are the only Member States that have opted-out from Schengen, and not without controversy. Julian J.E. Schutte, *UK v. EU: A Continuous Test Match*, 34 FORDHAM INT'L L.J. 1346, 1355 (2011); *see also* Daniel Mason, *Schengen Opt-Out Damaging UK Economy*, PUBLIC SERVICE EUROPE (July 29, 2011), http://www.publicserviceeurope.com/article/680/schengen-opt-out-damaging-uk-economy. For a general discussion of this system of opt-outs—referred to as a "multispeed" or "two-speed" European Union—see generally JEAN-CLAUDE PIRIS, THE FUTURE OF EUROPE: TOWARDS A TWO-SPEED EU? (2012).

33. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1 [hereinafter Maastricht TEU], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1992:224:0001:0130:EN:PDF.

34. All institutions of the European Union are considered supranational; they lie on a spectrum between *communitarian* and *intergovernmental*. The key institutions considered communitarian are the Commission, the European Parliament, and the ECJ, all thought to have strong commitments to continuing the European integration project and to European Union norms, separate and distinct from the interests, or aggregated interests, of the Member States. In contrast, the Council of Ministers, in which Member States have equal representation, functions as an intergovernmental institution, particularly when operating under unanimity rules. For a description of the law-making process, see *infra* note 35. The European Council is a distinct body of Member State heads of government that sets the EU's political agenda but has no power to pass legislation.

35. This method, formerly known as the "co-decision procedure," was renamed the "ordinary legislative procedure" by the Lisbon Treaty. The lawmaking procedure vests equal authority in the Council and the Parliament and is the main method by which EU laws are promulgated. First, the Commission drafts the text of a proposed piece of legislation, which the Parliament reviews and suggests changes to in a so-called "first reading." After the Commission considers the Parliament's suggestions and revises the text, the Council makes its own first reading and adopts a common position on the text. The common position is then sent to the

voting (QMV), rather than unanimity, so no one Member State can serve as a veto point. Furthermore, the ECJ is given jurisdiction to interpret the law. In contrast, the Second and Third Pillars were designed to be intergovernmental. In intergovernmental issues, the Member States, represented in the Council and acting under the principle of unanimity, make collective decisions about possible action without formal input from the Commission or Parliament, and without threat of judicial review. The Maastricht Treaty placed Justice and Home Affairs, which included asylum and immigration, in the intergovernmental Third Pillar. Thus, border crossing by TCNs remained "one of the last strongholds of [Member State] sovereignty."[36]

In the late 1990s, the Amsterdam Treaty cracked the exclusive jurisdiction of the Member States over immigration by authorizing a major shift: Five years after ratification, asylum and immigration issues would move from the intergovernmental Third Pillar to the communitarian First Pillar of the Union system. At that time, the Commission would have competence to introduce legislation on some migration issues, subject to a unanimity requirement in the Council.[37] Notwithstanding this apparent shift, the Member States also created, through the Council, an intergovernmental working group on asylum and migration issues designed to complement (at best) or undermine (at worst) the Commission's nascent role.[38]

Parliament along with a statement of reasons. Parliament then conducts its second reading within three months of receiving the Council's common position, at which point it can accept it, reject it, or propose amendments. If the Parliament approves the text or simply takes no action at all, the Council must adopt that version of the law. If the Parliament rejects the text, the act is vetoed; if it amends the text, the Council can agree to the changes (and thus adopt the act) or reject them. If the Council rejects the changes, the proposed legislation is brought before a Conciliation Committee, composed of an equal number of representatives from the Council and the Parliament, which has six weeks to approve a joint text before the act is deemed dead. If the Committee does manage to come to an agreement, the text of the law is sent to the Parliament and the Council for their respective third reading. Both institutions must approve the text within six weeks, at which point it finally becomes law. If either institution fails to do so, the act lapses. TFEU, *supra* note 14, art. 294, at 173–75.

36. Emek M. Uçarer, *Guarding the Borders of the European Union: Paths, Portals, and Prerogatives*, *in* MIGRATION AND THE EXTERNALITIES OF EUROPEAN INTEGRATION 15, 28 (Sandra Lavenex & Emek M. Uçarer eds., 2002).

37. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts arts. 63–64, Oct. 2, 1997, 1997 O.J. (C 340) 1, 29–30 [hereinafter Treaty of Amsterdam], *available at* http://www.lexnet.dk/law/download/treaties/Ams-1997.pdf.

38. The High Level Working Group on Asylum and Migration was designed to take action in those areas scheduled to be transferred to the First Pillar. *See* Joanne van Selm, *Immigration and Asylum or Foreign Policy: The EU's Approach to Migrants and their Countries of Origin*, *in*

The Janus-like nature of the Member States' approach to migration issues continued into the new millennium. At the Tampere European Council in 1999, in a statement that would have been inconceivable fifteen years earlier, Member States agreed that the Union needed to develop "common policies on asylum and immigration,"[39] including partnerships with countries of origin, a common European asylum system, fair treatment of TCNs, and management of migration flows.[40] Once again, however, the rhetoric did not match Member State action. In negotiations over the Treaty of Nice in 2001, Member States decided to modify the Amsterdam approach: Any permanent move to QMV on issues of migration and asylum would be contingent on a unanimous vote in the Council.[41]

The reluctance of the Member States to allow for communitarian lawmaking power over regular migration was instantiated in the debates over this requirement of unanimity. The challenges presented by unanimity are well known—the threat of holdouts "makes the probability of cooperation fall with the number of actors who must cooperate."[42] And there was a general recognition by 2002 that the constraints of unanimity had limited "progress even in realizing the short term objectives set in Tampere," and that there was little chance "the ambitious long-term vision agreed to in Tampere could be achieved by unanimity voting among [what would soon be twenty-five] Member States."[43] Within this modified Amsterdam approach, it has taken "years of negotiations" to achieve directives on family reunification, asylum, and the status of long-term resident TCNs.[44]

MIGRATION AND THE EXTERNALITIES OF EUROPEAN INTEGRATION 143, 151 (Sandra Lavenex & Emek M. Uçarer eds., 2002) ("A cross-pillar body made up of member state officials, dealing with the foreign policy aspects of asylum and migration would clearly not take on First Pillar characteristics.").

39. Presidency Conclusions, Tampere European Council, (Oct. 15-16, 1999) ¶ 3 [hereinafter Presidency Conclusions].

40. *See generally* Presidency Conclusions, *supra* note 39.

41. LAHAV, *supra* note 18, at 47.

42. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 140 (2010); *see also id.* at 139–42 (explaining why unanimity rule paralyzes organizations and majority rule can serve to "increase[] the optimal number of governments in a federal system").

43. European Convention Working Group X, Final Report of Working Group X, 'Freedom, Security and Justice,' at 4, CONV 426/02 (Dec. 2, 2002).

44. Simon Green, *Divergent Traditions, Converging Responses: Immigration and Integration Policy in the UK and Germany*, 16 GER. POL. 95, 103 (2007). On family reunification rights for TCNs, see generally Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War between States and their Supra-National Associations*, 25 GEO. IMM. L.J. 807 (2011).

Only recently has any effort been made at the supranational level to regulate legal work-related migration.[45]

The ongoing tension between the communitarization of immigration and asylum policy and the desire of some Member States to maintain national control has resulted in "immigration harmonization lag[ging] behind other EU policy areas."[46] But in October 2008, under the leadership of the French Presidency of the European Union, the Member States agreed to a European Pact on Immigration and Asylum (EPIA). In the EPIA, they recognized the need for collective action, as "decisions taken by a Member State will have repercussions for all other Member States."[47] Of course, such collective action could have continued through primarily intergovernmental negotiation, but in 2009, the Lisbon Treaty finally gave the communitarian institutions a role.

B. Lisbon and Subsidiarity

In contrast to migration issues, in which Member States were able to maintain their control, in other areas of regulation the European-level institutions seemed to accrue increasing power even in the absence of specific grants from the Member States.[48] The Lisbon

45. *See* Council Directive 2009/50, 2009 O.J. (L 155) 17 (EC) (discussing the Commission proposals on highly qualified workers (EU Blue Card), which were presented in 2007 and approved in 2009). *But see* Petra Bendel, *Everything Under Control? The European Union's Policies and Politics of Immigration*, *in* THE EUROPEANIZATION OF NATIONAL POLICIES AND POLITICS OF IMMIGRATION 32, 34 (Thomas Faist & Andreas Ette eds., 2007) ("[I]n legal migration . . . some member states have insisted on preserving their domestic competencies and have refused to transmit them towards supranational authorities. In particular Germany and its *Länder* have been the most rigid defenders of maintaining domestic discretion with respect to labour migration issues . . . .").

46. Terri Givens & Adam Luedtke, *The Politics of European Union Immigration Policy: Institutions, Salience, and Harmonization*, 32 POL'Y STUD. J. 145, 146 (2004); *see also* Adam Luedtke et al., *Introduction: Regulating the New Face of Europe*, *in* MIGRANTS AND MINORITIES: THE EUROPEAN RESPONSE 1, 6 (Adam Luedtke ed., 2010) ("Another key difference between immigration policy and most other areas of EU policy was that until 2004 the European Commission did not have the sole right of initiative to propose a policy . . . [thus] until 2005 harmonisation proceeded in a more bottom-up manner, in line with national interests.").

47. THE FRENCH PRESIDENCY, THE EUROPEAN PACT ON IMMIGRATION AND ASYLUM (2008), *available at* http://www.immigration.interieur.gouv.fr/content/download/34482/258636/file/19_Plaquette_EN.edf.

48. *See* Mark Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. PUB. POL'Y 95, 98 (1994); Mark Pollack, *The End of Creeping Competence? E.U. Policy-Making Since Maastricht*, 38 J. COMMON MKT. STUD. 519, 527 (2000); *see also* Philippe Schmitter, *Imagining the Future of Euro-Polity with the Help of New Concepts*, *in* GOVERNANCE IN THE EUROPEAN UNION 121, 124 (Gary Marks et al. eds., 1996) ("[T]here is no issue area that was the exclusive domain of national policy in 1950 that has not somehow and

Treaty was designed in part to address a growing fear among Member States of "creeping competence"—a phenomenon in which supranational institutions claim power over an increasing number of policy areas due to ongoing and possibly self-perpetuating "task expansion."[49] To provide more Member State control, Lisbon established a general rule of enumerated, or conferred powers, at the European level.[50] Through a delineation of competences, it sought to make clear which powers were conferred on the Union and which were retained by the Member States. But not all powers could be neatly divided, and some, such as the power over immigration, are now shared.

In detailing the shared power over third-country migration, the Lisbon Treaty contains an "eye-catching paradox."[51] Articles 67(2) and 79(2) provide clear grants of power to the EU to "frame a common policy on asylum, immigration and external border control," including "conditions of entry and residence" for immigrants.[52] These articles demonstrate an embrace of the Community method, complete with Commission-driven initiative, co-decision with Parliament, QMV in

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to some degree been incorporated within the authoritative purview of the EC/EU.").

49. *See* Pollack, *supra* note 48, at 98. The Lisbon Treaty emerged out of the wreckage of the Draft Treaty Establishing a Constitution for Europe, a document created after an extensive constitutional convention and series of intergovernmental conferences. *See* Draft Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1 (never ratified). The draft constitution failed to be ratified by the Member States, and the Lisbon Treaty was a later effort to update the institutions of the European Union in light of the EU's eastward expansion. The need for a draft constitution was in large part justified by the concerns about creeping competence and desire for clearly demarcated powers. *See* Angelika Hable, *Reflections on the Reform of Competences in the Treaty Establishing a Constitution for Europe*, 15 REGIONAL & FED. STUD. 145, 145 (2005); *see also* Ingeborg Tömmel, *The European Union—A Federation Sui Generis?*, *in* THE EU AND FEDERALISM 41, 48 (Finn Laursen ed., 2011) ("[W]ith more and more political tasks moving to the European level—either by deliberate transfer or as a matter of fact—governmental actors increasingly perceived the need for a clear distribution of competences between the levels.").

50. *See* Consolidated Version of the Treaty on European Union arts. 1, 4–5, Feb. 7, 1992, 2012 O.J. (C 326) 1, 18 [hereinafter TEU post-Lisbon], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF ("By this Treaty, the High Contracting Parties establish among themselves a European Union . . . on which the Member States confer competences to attain objectives they have in common . . . . Competences not conferred upon the Union in the Treaties remain with the Member States."); *accord* Armin von Bogdandy & Jürgen Bast, *The Federal Order of Competences*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 275 (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2009).

51. Sara Iglesias Sánchez, *European Immigration and the Path Towards Federalism: A New Model for the New EU as an Area of Freedom, Security and Justice?*, *in* EUROPEAN MIGRATION AND ASYLUM POLICIES: COHERENCE OR CONTRADICTION? 227, 232 (Cristina Gortázar et al. eds., 2012).

52. TFEU, *supra* note 14, arts. 67(2), 79(2), at 73, 77.

the Council, and jurisdiction in the ECJ. Yet according to Article 79(5), the Member States are to retain power to determine the volume of admitted TCNs and, concomitantly, control over their national labor markets.[53] Given the unwieldy manner in which power is divided over migration issues, and the lack of an overarching purpose behind the competence,[54] determining how to allocate this shared competence is difficult.

The Lisbon Treaty provided a theory and a process for making this allocation, through a renewed focus on subsidiarity. Subsidiarity, a concept rooted in Catholic theory, is tied to the republican ideal of self-government, where actions are taken at the level closest to the people affected.[55] In addition, the doctrine is often thought "to promote higher efficiency and transparency of political decisions and respond to demands for accommodation of historically developed traditions."[56] But the concept is most often explained in terms similar to those describing collective action federalism in the United States: Subsidiarity limits supranational action to those issues that cannot be resolved appropriately at the Member State level.[57]

Subsidiary was first introduced as a general principle of EU law in the Maastricht Treaty.[58] In both Maastricht and later in the Lisbon Treaty, attention to subsidiarity was driven by a desire to protect a "clearly defined and legally enforceable area of autonomy" for the Member States.[59] The Lisbon Treaty rearticulated the key test, which states: "[T]he Union shall act only if and insofar as the objectives of the proposed action cannot be *sufficiently achieved* by the Member States, but can rather, by reason of the *scale* or *effects* of the proposed

53. *Id.* art. 79(5), at 78.

54. *See* Anna Kocharov, *Subsidiarity After Lisbon: Federalism Without a Purpose?*, *in* DECONSTRUCTING EU FEDERALISM THROUGH COMPETENCES 7, 12 (Loïc Azoulai et al. eds., 2011), *available at* http://www.iadb.org/intal/intalcdi/PE/2012/10631.pdf ("[T]he divide between Union and Member State competences is not set in the Treaties directly (by [an] express limit on competences) nor indirectly (by directing the exercise of powers towards any specific *finalité*).").

55. *See* George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 339–40 (1994).

56. Christoph Ritzer et al., *How to Sharpen a Dull Sword—The Principle of Subsidiarity and its Control*, 7 GER. L. J. 733, 736 (2006).

57. On collective action federalism, see generally Cooter & Siegel, *supra* note 42.

58. *See* Maastricht TEU, *supra* note 33, art. 3(b), at 8 (introducing principle of subsidiarity); *see also* ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM 247–49 (2009) (identifying Maastricht as the treaty in which subsidiarity became a "general constitutional principle").

59. Neville March Hunnings, *Rival Constitutional Courts: A Comment on Case 106/77*, 15 COMMON MKT. L. REV. 483, 485 (1978).

action, be *better achieved* at the Union level."[60] Although application of the principle is designed to assist in determining whether the Union or the Member States should exercise competence over a particular issue,[61] subsidiarity had little bite prior to Lisbon. The ECJ was the sole institution with authority to enforce the principle, and it chose not to do so.[62]

Under the Lisbon Treaty, the ECJ retains jurisdiction over questions of subsidiarity,[63] but the primary institutional responsibility for monitoring subsidiarity has shifted. Recognizing the ECJ's reluctance to intercede with the Union institutions, the Treaty enlists the national parliaments of the Member States—the new "'watchdogs' of subsidiarity"—to police the boundaries of shared powers.[64] The process is straightforward: All "draft legislative acts" must be forwarded by the proposing supranational institution (usually the Commission) to the national parliaments,[65] along with a statement justifying the legislation as appropriate under the subsidiarity principle,[66] and including support "by qualitative and, wherever possible, quantitative indicators."[67] After receiving the draft legislation, a national parliament has eight weeks to formulate its response.[68] If a national parliament, or a chamber therein,[69] determines that the proposed legislation does not comply with the principle of subsidiarity, it may submit a reasoned opinion to that effect to the Presidents of the European Parliament, Council, and Commission.[70]

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60. TEU post-Lisbon, *supra* note 50, art. 5(3), at 9 (emphasis added).

61. Thomas Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 J. COMMON MKT. STUD. 267, 268 (2012).

62. *See* SCHÜTZE, *supra* note 58, at 253–56.

63. Consolidated Version of the Treaty on European Union, Protocol on the Application of the Principles of Subsidiarity and Proportionality art. 7(2), Feb. 7, 1992, 2012 O.J. (C 326) 1, 208 [hereinafter TEU Subsidiarity Protocol], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

64. Horsley, *supra* note 61, at 270.

65. TEU Subsidiarity Protocol, *supra* note 63, arts. 1–2, at 206. Draft legislative acts are usually proposals from the Commission, but can include initiatives from a group of Member States, or from the Parliament, the ECJ, the European Central Bank, or the European Investment Bank. *See id.* art. 3, at 206.

66. *Id.* art 5, at 207.

67. *Id.*

68. *Id.* art. 6, at 207.

69. *Id.*

70. Consolidated Version of the Treaty on European Union, Protocol on the Role of National Parliaments in the European Union art. 3, Feb. 7, 1992, 2012 O.J. (C 326) 1, 204 [hereinafter TEU National Parliaments Protocol], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

The power of the mechanism is in the numbers: In order for their reasoned opinions to have any effect, national parliaments must act in concert. If they do so, they activate what is known as the "Early Warning System" (EWS). Each national parliament in the European Union receives two votes (for bicameral institutions, one vote is allocated to each composite body). If reasoned opinions contesting the exercise of EU competence on subsidiarity grounds represent one-third of all possible votes, then the draft legislation must be reviewed by the Union institutions.[71] If reasoned opinions represent a simple majority of possible votes, the Commission must review its proposal, and if it chooses to continue with the proposed legislation, it must also forward its justification (along with the opinions from the national parliaments) to the Council and the Parliament. At this point, a fifty-five percent majority of the Council or a simple majority of the Parliament may force the abandonment of the proposal.[72]

The combination of these two aspects of the Lisbon Treaty—shared competence over migration and the related subsidiarity review—provides new insight into how the immigration power is conceptualized and its use at the supranational level justified.[73] Shortly after the Lisbon Treaty came into force, the Commission proposed a directive on work-force migration issues—the 2010 Seasonal Workers Directive. The proposed Directive's lukewarm reception by the national parliaments sheds light on the contours of the underlying federalism debate and on the contested meaning of subsidiarity.

71. TEU Subsidiarity Protocol, *supra* note 63, art. 7(2), at 208.

72. *Id.*

73. The Commission has had the right to initiate legislation since 2004 and thus the opportunity to present immigration-related policies to the Council for review. Unanimity voting in the Council was considered an appropriate substitute for robust subsidiarity review, as Member State interests were thought, perhaps incorrectly, to be protected through Council representation. Therefore, although the Commission provided some subsidiarity-based justifications for its actions, those reasons were not scrutinized through any mechanism of review. *See* Case C-465/07, Elgafaji v. Staatssecretaris van Justitie, 2009 E.C.R. I-921 (interpreting the Qualification Directive without subsidiarity analysis). The advent of the EWS should present opportunities for more robust reason-giving.

C. Justifying Power and the Seasonal Workers Directive

In 2010, the European Commission prepared a "Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of TCNs for the purposes of seasonal employment."[74] The proposal, as described by the Commission, "establishes a fast-track procedure for the admission of third-country seasonal workers, based on a common definition and common criteria, in particular the existence of a work contract or a binding job offer that specified a salary equal to or above a minimum level."[75] The proposed Directive concerned "conditions of entry and residence, and standards [of issuing] residence permits [by Member States,] and the definition of rights of TCNs residing legally in a Member State."[76] Limited by enumerated powers, the Commission first identified the provisions of the Treaty on the Functioning of the European Union (TFEU) that supported its action—Article 79(2)(a) and (b)[77]—and then, given the shared power over migration, conducted a subsidiarity review, providing reasons justifying Union action.

The Commission identified four rationales supporting its proposal. First, it argued that the Member States shared a common need for seasonal workers, and that due to variation among Member States on the national rights granted to TCNs, there could be problematic distortions of migratory flows (presumably the danger of oversubscription—too many TCNs seeking to enter a particular Member State). Second, the Commission drew upon the existence of open borders in the Schengen Area to argue for common rules on entry to reduce the risk of overstaying and irregular (illegal) migration. Third, it provided a rights-based rationale, identifying a

74. *E.g.*, *Commission Proposal for a Directive of the European Parliament and of the Council on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Seasonal Employment*, COM (2010) 379 final (July 13, 2010) [hereinafter *Commission Proposal*].

75. *Id.* at 5.

76. *Id.* at 6.

77. TFEU, *supra* note 14, art. 79(2)(a)–(b), at 77.

> For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States[.]

Id.

need to prevent exploitation and sub-standard working conditions for TCNs in individual Member States by taking action at the Union level. And fourth, it argued that a Union-level approach was necessary for effective cooperation with third-countries on migration issues, providing a "foreign policy" justification for supranational action.[78]

The proposed Seasonal Workers Directive generated more responses from national parliaments than any other proposal in 2010, engendering widespread discussion on both sides. Nine reasoned opinions rejected the Commission's professed competence to propose such a directive on grounds of subsidiarity.[79] These nine constituted more than twenty-five percent of all reasoned opinions raising subsidiarity concerns on all proposed legislation filed that year.[80] Other opinions supported the subsidiarity analysis, though some nevertheless recommended amendments,[81] and two opinions concluded that the proposal should fail on different grounds.[82] The number of reasoned opinions critical of the proposal fell well below that needed to engage the EWS mechanisms,[83] but the attention nevertheless caused the Commission to issue a written response.[84]

78. *See Commission Proposal*, *supra* note 74, at 6.

79. The European Commission refers to the report from the House of Commons of the United Kingdom as a "reasoned opinion" in its Annex to its Subsidiary Report 2010. *Report from the Commission on Subsidiarity and Proportionality*, at 4, COM (2011) 344 final (June 10, 2011) (covering the year 2010) [hereinafter *Subsidiarity Report 2010*]. It is, however, referred to as "other communication" by the House of Commons of the United Kingdom on its official website. *Subsidiarity: Reasoned Opinions*, U.K. PARLIAMENT, http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/.

80. *Subsidiary Report 2010*, *supra* note 79, at 4.

81. *See, e.g.*, BUNDESRAT DRUCKSACHEN [BR] 442/10 (Ger.), *available at* http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/germany/2010_en.htm.

82. *Subsidiarity Report 2010*, *supra* note 79, at 7 (citing Latvian *Saeima* and Lithuanian *Seimas* arguing the proposed Directive should fail on grounds of proportionality).

83. To have triggered automatic review in 2010, eighteen votes (eighteen reasoned opinions in opposition to the proposal) would have been necessary.

84. *Commission Reply to Opinions Concerning Subsidiarity Received from National Parliaments on the Proposal for a Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Seasonal Employment*, COM (2010) 379 (Jan. 21, 2011) [hereinafter *Commission Reply*], *available at* http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2010/com20100379/com20100379_commons_reply_en.pdf. The Commission submitted one comprehensive answer in response to all the various reasoned opinions.

In general terms, the national parliaments opposing the proposed Directive highlighted the shared power of the Member States in migration issues, noting in particular Article 79(5), which reserves to each Member State the power to determine the number of TCNs to admit to its jurisdiction.[85] The functional effects of this power, unacknowledged in the Commission's initial subsidiarity analysis,[86] drove many of the arguments against Union-level regulation. Specific objections focused in large part on the Commission's first three justifications: smoothing migratory flows, reducing the risk of irregular migration, and protecting the rights of TCNs.

In its critique of the Commission's first justification—smoothing migratory flows—the House of Commons of the United Kingdom questioned the Commission's analysis of the nature of the competition distorting the migratory flow. It found "competition between Member States to improve the conditions of employment for temporary seasonal workers [to be] a sign of a healthy labour market, not one that requires further regulatory intervention."[87] The Senate of the Czech Republic argued that adequate regulation was possible on the national level, and several opinions queried how the proposed Directive would change the current competitive dynamic, given the Member States' individual control over numbers admitted.[88] As the House of Lords of the United Kingdom noted:

> We can see that if one Member State grants seasonal workers better minimum working conditions, this may make migration to that State more attractive. This however would also happen under the Directive, since (a) the rights granted under it . . . are simply the minimal rights granted . . . and (b) the Member States remain in control of admissions to their territory.[89]

85. TFEU, *supra* note 14, art. 79(5), at 78.

86. *Commission Proposal*, *supra* note 74.

87. EUROPEAN SCRUTINY COMMITTEE, THE COMMITTEE'S CONCLUSION ON THE SEASONAL WORKERS' DIRECTIVE, 2010, H.C. 12208, at 2 (U.K.) [hereinafter U.K. HOUSE OF COMMONS CONCLUSIONS], *available at* http://www.parliament.uk/documents/commons-committees/european-scrutiny/13October2010.pdf.

88. Zákon č. 562/2010 Sb. (Czech), *available at* http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/czech_republic/2010/com20100379/com20100379_senate_opinion_en.pdf.

89. EUROPEAN UNION COMMITTEE, SUBSIDIARITY ASSESSMENT: ADMISSION OF THIRD-COUNTRY NATIONALS AS SEASONAL WORKERS, 2010-2011, H.L. 35, at 4 (U.K.) [hereinafter U.K. HOUSE OF LORDS SUBSIDIARITY ASSESSMENT], *available at* http://www.statewatch.org/news/2010/oct/eu-uk-hol-cttee-seasonal-workers.pdf.

The Commission's second justification—reducing the risk of irregular migration—was met with similar derision by the national parliaments. They acknowledged that any TCN who crossed an internal border from one Member State into another could fall into illegal status by remaining in that second Member State.[90] But national parliaments saw little evidence as to how harmonizing the *conditions of entry* between Member States would discourage irregular migration.[91] Rather, national parliaments argued that the absolute number of TCNs admitted to each Member State was the more pertinent issue. If a Member State failed to calibrate the needs of its labor market and admitted too many workers, the error might result in irregular migration (TCNs seeking to move without permission to other Member States). But as Member States retained the ability to set those admission numbers under Article 79(5), the issue of irregular migration could not be resolved by harmonized regulations on entry.[92]

Protecting the rights of TCNs—the Commission's third rationale—has important normative and rhetorical power in the European Union. Calls for rights uniformity have encouraged a centralizing tendency, even in the face of the renewed focus on enumeration and categorization of Union powers. As Loïc Azoulai has written, "[t]he centrality of the language of rights has superseded the language of the division of powers in the realm of EU law. EU rights . . . are functionally broad in their scope and not sector-specific."[93] The principle of subsidiarity does not deny the relevance of rights or their uniform application, but the analysis does require a determination that rights protection is *better* done at the central level. Building on this prong of the analysis, the British Parliament and the Austrian Bundesrat seriously questioned the Commission's conclusion that EU action was needed. The House of Commons of the

90. Reasoned Opinion from the Senate of the Republic of Poland on the Proposal for a Directive of the European Parliament and of the Council on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Seasonal Employment, PARL. EUR. DOC. CM 835429 (2010), *available at* http://www.europarl.eruopa.eu/meetdocs/2009_2014/documents/juri/cm/835/835429/835429en.pdf ("In a situation where EU regulations do not envisage the free movement of employees from third countries between Member States, and permits are issued by national authorities and have no more than national scope, there is no need to harmonise the regulations affecting the issue of permits for seasonal employment.").

91. *See, e.g.*, U.K. HOUSE OF COMMONS CONCLUSIONS, *supra* note 87, at 3.

92. *See* TFEU, *supra* note 14, art. 79(5), at 78.

93. Loïc Azoulai, *Introduction* to DECONSTRUCTING EU FEDERALISM THROUGH COMPETENCES 1, 2 (Loïc Azoulai et al. eds., 2011), *available at* http://www.iadb.org/intal/intalcdi/PE/2012/10631.pdf.

United Kingdom, citing the Commission's impact assessment, argued that poor working conditions derive from national "deficiencies" such as "lax enforcement," an issue that would be difficult to solve by EU action and that went unaddressed by the proposed Directive.[94]

In its written response, the European Commission, without contributing much new information or argumentation, reiterated its concern about migratory flows and the possibility that they would be distorted due to varying rules in the Member States. But it strongly denied the argument that the Article 79(5) power was of greater importance than conditions of entry. The fact that Member States set the numbers of admitted TCNs "in no way annul[led] the validity of the argument about distortion of migratory flows. Indeed, quotas have to be viewed as only one element impacting migratory flows. Another, equally important aspect is the attractiveness of the national schemes."[95]

The one rationale that the national parliaments did not meaningfully consider was the Commission's final justification for Union action: more effective cooperation with third countries. The argument was described as "unpersuasive,"[96] "inadequate,"[97] unacceptable,[98] and offering "no added value."[99] But the Commission's rationale was both serious and embedded in a political context well-known to the Member States. The connection between immigration policy and foreign policy had been made explicit in a series of earlier efforts by the Commission to advocate for a "Comprehensive" or "Global Approach" to immigration.[100] This approach seeks to

94. U.K. HOUSE OF COMMONS CONCLUSIONS, *supra* note 87, at 3; *see also* U.K. HOUSE OF LORDS SUBSIDIARITY ASSESSMENT, *supra* note 89, at 5 ("Measures of national law are of course binding and enforceable, and are at least as effective as EU measures in overcoming exploitation."); *see also* Bundesrat [BR] [Federal Council], ¶ 5 (Austria) [hereinafter Austrian Bundesrat Opinion], *available at* http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/austria/2010/com20100379/com20100379_bundesrat_opinion_en.pdf ("Although protection against social dumping is an important aim that should be given increased attention in all European Union measures, in this specific case there is once again no transborder problem.").

95. *Commission Reply*, *supra* note 84, at 2.

96. U.K. HOUSE OF LORDS SUBSIDIARITY ASSESSMENT, *supra* note 89, at 5.

97. Austrian Bundesrat Opinion, *supra* note 94, ¶ 8.

98. *See* U.K. HOUSE OF COMMONS CONCLUSIONS, *supra* note 87, at 3.

99. Statement from the Eerste Kamer and the Tweede Kamer [Senate and House of Representatives], *Subsidiarity Test of the Proposal for a Directive Concerning the Conditions for Access to and Residence in the EU of Subjects of Third Countries, with a View to Seasonal Employment*, Oct. 14, 2010 (Neth.), *available at* http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/netherlands/2010_en.htm.

100. *See* Carole Vogel, *The Migration-Development Nexus: Is the Migration Policy of the*

determine immigration policy in light of its "foreign policy implications and the implications which foreign policy has for it."[101] In making this connection in the context of the Seasonal Workers Directive, the Commission found "an undeniable link between migration and development. A common European Union legal regime on third-country seasonal workers has been long awaited by some third-countries and it is viewed as an important element of the European Union migration policy with a potential significant impact on the development policy."[102]

Although more national parliaments challenged the Seasonal Workers Directive than they did any other Commission proposal in 2010 or 2011, the EWS was not activated.[103] The proposed Directive therefore progressed to the next stage of the legislative process and is still being reviewed by the European Parliament and the Council of Ministers. Without action from the national parliaments, the only remaining institution able to slow or stop the Directive on subsidiarity grounds is the ECJ.

As previously discussed, the ECJ has not approached the subsidiarity analysis with any rigor, but it nevertheless provides the background legal norms against which to make an assessment of the Commission's reasoning. In two recent opinions, the ECJ confirmed that in examining compliance with the subsidiarity principle, it would look to the Commission's report to determine the rationales provided for supranational action.[104] The ECJ will not rank the Commission's justifications nor does it require a justification directed to each legislative choice.[105] Thus, in the shadow of ECJ review, the

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European Union Coherent with its Development Policy?, *in* EUROPEAN MIGRATION AND ASYLUM POLICIES: COHERENCE OR CONTRADICTION? 273, 277 (Cristina Gortázar et al. eds., 2012) ("The commission has always seen itself as the 'motor' behind the Global Approach."); Sandra Lavenex, *Shifting Up and Out: The Foreign Policy of European Immigration Control*, 29 W. EUR. POL. 329, 333 (2006) (using the term "Comprehensive Approach").

101. van Selm, *supra* note 38, at 143–44.

102. *See Commission Reply*, *supra* note 84, at 3.

103. *See generally Report from the Commission on Subsidiarity and Proportionality*, at 7, COM (2012) 373 final (July 10, 2012) [hereinafter *Subsidiarity Report 2011*], *available at* http://ec.europa.eu/governance/better_regulation/documents/com_2012_0373_en.pdf; *Subsidiarity Report 2010*, *supra* note 79.

104. *Subsidiarity Report 2011*, *supra* note 103. *See generally* Case C-176/09, Grand Duchy of Lux. v. Parliament and Council, 2009 E.C.R. I-3727; Case C-58/08, The Queen v. Sec'y of State for Bus., Enter. & Regulatory Reform, 2008 E.C.R. I-4999.

105. TFEU, *supra* note 14, art. 296, at 175–76 requires that "[l]egal acts shall state the reasons on which they are based." Yet, the Commission need not even make express reference to the principle of subsidiarity to satisfy that requirement; instead, according to the ECJ, it is enough for the Commission to give reasons that simply *imply* conformity with the principle of

Commission needs only one generally applicable rationale to justify its power.

In the context of the Seasonal Workers Directive, the Commission's first three grounds, while plausible, are hardly incontrovertible arguments for supranational action. The Member States have a strong retort: The number of admitted TCNs is the driving factor behind both migratory flow and the possibility of negative externalities between or among Member States, and without addressing that issue—which the Union cannot do under the Treaty—Union-wide action on conditions of entry would be of little value. But even accepting these Member-State counterarguments, only one persuasive rationale is necessary to make the case for supranational power. And the Commission's final rationale, the foreign policy justification, went mostly uncontested by the national parliaments.

Whether the foreign policy rationale will continue to be used by the Commission is uncertain but not unlikely—at least one European scholar contends that it is "the strongest argument" in favor of Union action over immigration, as the need to ensure a unified voice in foreign policy matters can give support to supranational action "even in situations purely internal to one Member State."[106] As the reasoned opinions on the Seasonal Workers Directive demonstrate, there is a decided lack of attention by the national parliaments to this line of reasoning. But the expansive potential of the reasoning is clear from the commentary and, as will be shown, from the experiences of the United States—an argument that can reach even the "purely internal" affairs of a Member State is powerful indeed.

II. THE FEDERAL PLENARY POWER OVER IMMIGRATION IN THE UNITED STATES

As in today's European Union, the locus of immigration power was not clearly defined in the early United States. Notwithstanding modern acceptance of immigration as a federal power, American history demonstrates that, prior to 1875, both the states and the federal government enacted laws that regulated the entry and conditions of entry for immigrants. The result was a "complex hybrid of state and federal policy,"[107] which shares important parallels with

subsidiarity. *See* Case C-233/94, Germany v. Parliament and Council, 1997 E.C.R. I-2405, ¶ 28. *Cf.* Case C-377/98, Netherlands v. Parliament and Council, 2001 E.C.R. 1-07079, ¶ 33.

106. Kocharov, *supra* note 54, at 20.

107. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93

the EU dynamic outlined in Part I.[108] When the U.S. federal government finally took a more active approach to regulating immigration, it too needed to provide a persuasive rationale to justify federal action. The Supreme Court drew on a number of different justifications for the recognition of federal immigration power, including arguments based on the Constitution. Some of this reasoning is naturally quite distinct from that provided by the European Commission, but one of the Court's key justifications, and the one on which it relied heavily in the early years of federal regulation, was the link between immigration and "foreign affairs." This persuasive justification took on great doctrinal significance in the decades after its articulation, structuring what are now entrenched federal-state relations in the immigration area.

This Part begins by providing an overview of immigration policy in the early (pre-1875) United States to demonstrate the historical praxis of immigration regulation and the questions surrounding the scope of federal power. It then outlines and assesses the rationales adopted by the Supreme Court to justify federal action, with a particular focus on the foreign affairs justification. The Part concludes by discussing how American federalism has been affected by the Court's reliance on the nexus between immigration and foreign affairs.

A. A Hybrid Beginning

As is the Treaty of Lisbon, the U.S. Constitution is a document of delegated, or enumerated, powers. The Constitution does not provide a specific grant of power to regulate *immigration*. It does, however, state: "The Congress shall have power . . . [t]o establish a uniform rule of naturalization"[109] and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing power[]."[110] The delegation of the naturalization power to Congress stemmed from the perceived inadequacies of the system of government under the Articles of Confederation. The Articles guaranteed open borders and free movement between states, and entitled free *inhabitants* of any one state "to the privileges and immunities of *citizens* of the several

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COLUM. L. REV. 1833, 1896 (1993). *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

108. *See supra* Part I.

109. U.S. CONST. art. 1, § 8, cl. 4.

110. *Id.* at cl. 18.

states."[111] This dynamic created tension, as the state with the most lenient standard of residency would set citizenship qualifications for the entire confederation.[112] Allocating naturalization power to the federal level eliminated an individual state's ability to serve as national gatekeeper,[113] as the federal government would be able to impose a uniform rule of naturalization on all states.[114] Notwithstanding this federal allocation, states continued to promulgate their own naturalization laws well into the 1790s—an indication of the slow acceptance of national power.[115]

Aside from naturalization, the Constitution provided only "nonexistent or vague" references to citizenship and immigration,[116] and Congress's power to regulate immigration was at issue in debates over bills throughout the 1790s and early 1800s. The Alien Act of 1798 gave the President power to "order to depart" those aliens he determined to be "dangerous to the peace and safety of the United States."[117] Opponents argued "that Congress had been delegated no power to control the admission of aliens,"[118] and that "the power of admitting foreigners . . . remained with the states."[119] In other contexts,

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111. *See* ARTICLES OF CONFEDERATION of 1781 art. 4.

> [T]he free *inhabitants* of each of these States, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free *citizens* in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . .

Id. (emphasis added).

112. THE FEDERALIST NO. 42, at 237 (James Madison) (E.H. Scott ed., 1898).

113. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 11 (1981) (noting debate in the House of Representatives promoting a national rule of naturalization, and in particular a comment by Senator Robert Sherman of Connecticut, in which he advocated for such a rule "'in order to prevent particular states receiving citizens, and forcing them upon others who would not have received them'" (citation omitted)).

114. Congress passed the first national naturalization legislation in 1790, requiring three years of residency before an individual was eligible to naturalize. It changed the requirement to five years in 1795, and then to fourteen years in 1798 (as part of the legislation surrounding the infamous Alien and Sedition Acts), but returned to five years in 1802. *See id.* at 11–17.

115. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 219 (1978).

116. MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR 20 (1987).

117. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798) (expired 1800).

118. Neuman, *supra* note 107, at 1881.

119. Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Forgiveness*, 45 CONN. L. REV. 743, 762 & n.97 (2013) [hereinafter Lindsay, *Constitution of Forgiveness*] (quoting 9 ANNALS OF CONG. 1986 (1799) (statement of Rep. Otis)); *see id.* at 762 (discussing the contemporary presumption that "the individual states had 'reserved to themselves the power of regulating what relates to emigrants'" (citation omitted)). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins*

debate focused on whether the commerce clause, giving Congress power to regulate commerce among the several states, might allow Congress to pass immigration-related laws.[120] But commerce was a more circumscribed concept then. For example, constitutional justification for a federal quarantine law failed, as quarantines were considered to fall under the state police powers and were thus outside congressional reach.[121]

Congress passed the first bill regulating immigration, or more accurately, the conditions of immigration, in 1819.[122] The Passenger Act limited the number of passengers that could be transported on ships, required that ships leaving the United States bound for Europe provide passengers certain amounts of food and water, and created a reporting system for passenger data.[123] These new minimum standards for steerage class resulted in increased ticket prices for the cheapest accommodations, which had a disparate impact on immigrants.[124] But there is no evidence in the congressional debates that Congress's purpose was to restrict immigration;[125] rather the legislative history demonstrates Congress was concerned about the high mortality rates on Atlantic crossings.[126]

During this time period and until the Civil War, states legislated on various aspects of immigration policy; beyond public health regulation (such as the quarantine provisions mentioned above), states regulated "the movement of the poor"[127] and sought both to encourage and to manage immigration flows. The poor had few friends in nineteenth-century America: Many states passed anti-pauper laws,[128] and, like TCNs in today's European Union, the

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of Plenary Power over Foreign Relations, 81 TEX. L. REV. 1, 88–98 (2002) (discussing debates over the Alien Act).

120. Neuman, *supra* note 107, at 1864.

121. *Id.*

122. HUTCHINSON, *supra* note 113, at 22.

123. *Id.* (citation omitted).

124. *Id.* at 22 n.40.

125. Martin Schain suggests the law was designed to "discourage the immigration of paupers." SCHAIN, *supra* note 2, at 190. Yet, Hutchinson found no evidence of that purpose in the debates. *See* HUTCHINSON, *supra* note 113, at 22. In fact, in 1855, an attempt to prevent the immigration of criminals and the poor "triggered states' rights objections in the Senate and rejection by the House of Representatives." Neuman, *supra* note 107, at 1859.

126. *See* Neuman, s*upra* note 107, at 21 ("In urging the need for such legislation, it was reported that during the preceding year 1,000 out of 5,000 persons who had sailed from Antwerp died on the voyage.").

127. *Id.* at 1841 (mentioning, in addition, "regulation of the movement of criminals, regulation of slavery, and other policies of racial subordination").

128. SCHAIN, *supra* note 2, at 190.

nineteenth-century poor could not move freely.[129] This limitation made poor laws a useful tool against unwanted immigrants: "Unnaturalized immigrants remained permanently subject to deportation under the provisions of the poor laws empowering local officials to seek an order causing paupers without settlement to be sent back where they 'belonged' at public expense."[130] Not all state efforts were restrictive or discriminatory, however. In 1845, Michigan and other states encouraged immigration by opening offices of foreign emigration;[131] the State of New York's Commissioners of Emigration were responsible not only for "passenger reporting and bonding, [but also for] the protection of immigrants from fraud and abuse."[132] The states were also responsible for processing the thousands of incoming people. In 1855, New York opened the Castle Garden Emigrant Landing Depot,[133] which received eight million immigrants by 1892, when the federal government opened Ellis Island.[134]

The immigration system prior to 1875 "evolved informally from concurrent policies" enacted at both levels of government, and there is some indication that this historical fact reflects the contemporary understanding of the constitutional powers. As Gerald Neuman has argued, "a truly exclusive federal power over interstate and international migration would have been highly threatening under antebellum conditions."[135] The threat of free movement of persons, in particular that of freed slaves or free blacks, gave strong impetus to

129. *See* Neuman, *supra* note 107, at 1846–47, 1867 n.72 ("The right of the poor to travel was not vindicated until *Edwards v. California*, 314 U.S. 160 (1941)."); *cf.* Prigg v. Pennsylvania, 41 U.S. 539, 625 (1842) (holding that states retained their police power to restrict the movement of a specific class of people—slaves).

130. Neuman, *supra* note 107, at 1852.

131. A BRIEF HISTORY OF MICHIGAN 14–15, *available at* http://www.legislature.mi.gov/documents/publications/manual/2001-2002/2001-mm-0003-0026-History.pdf; *see also* LEMAY, *supra* note 116, at 34 ("By the 1870s, twenty-five of the then thirty-eight states took some sort of official action designed to promote immigration. South Carolina went so far as to grant a five-year tax exemption on all real estate bought by immigrants.").

132. Neuman, *supra* note 107, at 1855.

133. LEMAY, *supra* note 116, at 17.

134. Maryellen Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 10 WASH. U. GLOBAL STUD. L. REV. 87, 91 n.8 (2011) (citing *Castle Clinton National Monument, History & Culture*, NATIONAL PARK SERVICE, http://www.nps.gov/cacl/historyculture/index.htm (last visited May 6, 2013)).

135. Neuman, *supra* note 107, at 1889; *see also* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 612 (2008) ("A strong statement regarding the federal government's control over the migration of people among the states would have suggested federal authority to regulate (and perhaps prohibit) the domestic slave trade.").

the slave states to maintain control over the rights of entry into their communities.[136] Some have linked this slave power, and its constitutional protections, to the existence of concurrent state and federal competence over immigration.[137] Of course, this historical argument is not dispositive: Congress may have decided not to act in the area, even with a credible claim to exclusive authority, due to "the strong and rising state rights sentiment" in the antebellum years.[138] Nevertheless, and for whatever reason, the shared efforts in the sphere of immigration were an ongoing aspect of early American history and led to critical tensions between the federal and state governments in the late nineteenth-century.

B. Federal Exclusivity and Foreign Affairs

In Europe, the Commission proposed supranational legislation to address a question of immigration, and its action required persuasive justification under the Lisbon Treaty. In contrast, in the United States, direct tension between federal and state governments brought the issue of power over immigration to the forefront. By the mid-1870s, certain receiving-states, such as New York and California, sought to profit from migration, while still limiting that migration for both economic and racist reasons. Their policies stood in tension with the national need for immigrants to power the western expansion and rise of industry. This societal conflict would eventually find its way to the Supreme Court.[139] The initial skirmishes were over state laws and actions that threatened the national project; only later were federal laws, and the power to enact them, at issue. The Supreme Court identified a positive federal power over immigration that would serve both to preempt state action as a constitutional matter (preventing state action even in the absence of federal law) and to justify federal regulatory action itself.

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136. Neuman, *supra* note 107, at 1866–67.

137. *See* Arizona v. United States, 132 S. Ct. 2492, 2511–22 (2012) (Scalia, J., dissenting) (finding "an acknowledgment of [federal immigration] power (as well as of the States' similar power, subject to federal abridgment) . . . in Art. I, § 9, which provided that '[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited'" by Congress prior to 1808); *see also* Rodríguez, *supra* note 135, at 612 (linking the existence of the slave trade to notions of concurrent power).

138. HUTCHINSON, *supra* note 113, at 45.

139. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 353 (2008) ("Power struggles between the national government and immigrant-receiving states like New York and California are part of what gave rise to the plenary power doctrine in the nineteenth century.").

Between 1875 and 1895, the Supreme Court articulated a number of theories under which it concluded that the federal government had exclusive power to regulate immigration. Purely textual arguments were limited; there was a marked failure to engage with or rely on the Naturalization Clause.[140] Instead, the three main theories discussed were tied explicitly to foreign affairs: First, regulating immigration, or immigrants more specifically, could be understood as part of Congress's power to regulate foreign commerce; second, a type of collective action federalism argument rooted in the nature of foreign affairs could require national action over immigration; and third, immigration power could be seen as an incident of national sovereignty. The final two justifications were carried forward into twentieth-century jurisprudence. Critical to both of these foreign affairs arguments is the fact that all immigrants, by virtue of being immigrants, must be citizens, nationals, or subjects of a foreign country, thus creating an indelible link between immigration and foreign relations.[141]

Early cases seemed to locate the federal immigration power in the federal government's power to regulate foreign commerce,[142] but they left unspecified the exact connection between commerce and the internal labor market. In 1875, the Supreme Court heard a series of cases challenging state statutes that compelled "owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore."[143] In *Henderson v. Mayor of New York*,[144] Justice Miller concluded that New York's bond system was the functional equivalent of a tax and thus unconstitutional.[145] He described the "transportation of passengers from European ports to those of the United States" as "a part of our commerce with foreign nations," due to the immigrants'

140. Modern cases, however, frequently cite the Naturalization Clause as contributing to the federal power over immigration. *See, e.g., Arizona*, 132 S. Ct. at 2498 (finding federal authority to rest "in part" on the Naturalization Clause).

141. As noted, *supra* note 16, a small number of people are stateless.

142. These cases reflected antebellum attitudes that "federal authority over immigration, whatever its extent, derived from Congress's constitutionally enumerated commerce power." Lindsay, *Constitution of Forgiveness*, *supra* note 119, at 778 (citing City of New York v. Miln, 36 U.S. 102 (1837), and The Passenger Cases, 48 U.S. 283 (1849)).

143. Henderson v. Mayor of New York, 92 U.S. 259, 268 (1875).

144. 92 U.S. 259 (1875). The case was joined with *Commissioners of Immigration v. North German Lloyd* (the second case concerned an identical statute in Louisiana).

145. *Id.* at 274–75. A direct tax would have been unlawful as an impermissible regulation of commerce, under *The Passenger Cases*, decided in 1849. *See* The Passenger Cases, 48 U.S. 283 (1849).

connection to the labor market.[146]

In *Chy Lung v. Freeman*,[147] Miller considered a California statute that required payments from ship owners for certain passengers but went beyond New York's terms by giving unlimited discretion to a state official to determine who should be required to pay. Having been selected as one who needed a bond paid on her behalf, a Chinese woman was not permitted to land as the ship owner refused to pay; she was detained on the ship and filed a writ of habeas corpus challenging the statute. Miller concluded that the power to pass "laws which concern the admission of citizens and subjects of foreign nations" belongs to Congress, by virtue of its power to regulate foreign commerce, and not to the states.[148] The woman in this case, however, was not evidently in the class of laborers described in *Henderson*, and Miller provided no further explanation of the specific connection to foreign commerce. As late as 1884, in *Edye v. Robertson*,[149] Miller described immigration as the "business of bringing foreigners to this country,"[150] thus incorporating it as a "branch of commerce."[151] Given the efforts of the Court in the 1920s and 1930s to insulate labor as an area of traditional state concern in the domestic commerce clause project,[152] these types of foreign commerce clause arguments (standing on their own and unconnected to a more general foreign affairs power) were not favored in later cases.[153]

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146. *Henderson*, 92 U.S. at 270–71.

> [Immigrants] bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch of commerce?

Id. Justice Miller believed the federal power over commerce was exclusive and did not agree that states had concurrent power to regulate where Congress had not done so. But, he added, even under a theory of concurrent powers, the New York regulation must fail as the system which it attempted to regulate was "*international*," belonging "to that class of laws which concern the exterior relation of this whole nation with other nations and governments." *Id.* at 273.

147. 92 U.S. 275 (1875).

148. *Id.* at 280.

149. (*The Head Money Cases*), 112 U.S. 580 (1884).

150. *Id.* at 595.

151. Lindsay, *Constitution of Forgiveness*, *supra* note 119, at 792.

152. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 309–10 (1936) (holding that the state retains the power to regulate hours and wages in the coal industry); Hammer v. Dagenhart, 247 U.S. 251, 275–76 (1918) (holding that it is incumbent on the states to regulate the employment of children).

153. Matthew Lindsay suggests that in 1889, the Supreme Court "precipitous[ly]

Justice Miller also introduced a second theory in *Chy Lung*—a justification for federal power over immigration reflecting a subsidiarity or collective action-type federalism analysis.[154] By virtue of its regulation of aliens, as citizens or subjects of a foreign country, California's action was seen as necessarily tied to foreign affairs. Using the logic of federalism and this connection between immigration and foreign affairs, Miller argued that the power over entry should rest with the federal government. Focusing on the implications of unilateral action by a state in a federal system, he highlighted the likelihood of externalities caused by this regulation negatively affecting the other states. He presented a hypothetical: What if California had prevented the entry of British, rather than Chinese, subjects? Such a powerful country might make a claim for redress, and in so doing, would make it upon the United States as a whole, not merely on California. If war ensued, "would California alone suffer, or all the Union?"[155] Miller determined that the Constitution, which clearly recognizes the dangers of unilateral state action by giving certain powers to the federal government, would not do "so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer."[156] His argument gains additional force from the knowledge that, in 1789, foreign affairs powers themselves were granted to the federal government precisely because of the interstate conflicts they threatened.[157] Because the type of

abandon[ed]" the otherwise "long-standing Commerce Clause framework." Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 5 (2010) [hereinafter Lindsay, *Immigration as Invasion*]. *See also* Cleveland, *supra* note 119, at 133–34 (discussing abandonment of foreign commerce clause approach). Lindsay is certainly correct that the Court no longer uses the foreign commerce clause as a stand-alone justification for power over immigration; it is nevertheless often included in the list of reasons undergirding federal authority over immigration. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs." (citations omitted)).

154. Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875).

155. *Id.* at 279.

156. *Id.* at 280.

157. *See, e.g.*, THE FEDERALIST NO. 3, at 21 (John Jay) (E.H. Scott ed., 1898) (arguing in favor of a national government because "[u]nder the National Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner; whereas adjudications on the same points and questions, in thirteen States . . . will not always accord or be consistent"); THE FEDERALIST NO. 5, at 30 (John Jay) (E.H. Scott ed., 1898) (arguing against multiple states or confederacies because they "would neither love nor trust one another; but, on the contrary, would be a prey to discord, jealousy, and mutual

tensions that immigration regulation would cause were thought to be foreign relations tensions, the two areas meshed perfectly together. The theory behind this foreign affairs justification for federal immigration power is thus the closest to that presented by the Commission in its view of "foreign policy."

In part because of the Court's determination that the states could not take action in this manner,[158] Congress passed its first Immigration Act in 1875, which prevented criminals from entering the country and which prohibited the importation of Chinese women for immoral purposes.[159] A series of immigration and naturalization acts followed in 1882, 1891, and 1906.[160] Also in the 1880s, Congress passed a series of acts that directly focused on immigration from China. The Chinese Exclusion Act of 1882, amended and extended by acts in 1884 and 1888, prevented Chinese laborers from entering the United States and required those present to obtain a certificate for reentry before leaving the country.[161] Eventually, the amendments of 1888 prohibited reentry completely.[162] In *Chae Chan Ping v. United States*,[163] the Court considered whether Congress had the power to pass the 1888 Act. After concluding that the terms of various treaties with China did not limit congressional action in the area, the Court sought to identify the positive authority of the federal government to pass the legislation.

Like the Court in *Chy Lung*, the Court in *Chae Chan Ping* grounded Congress's immigration power in the federal government's power over foreign affairs. Unlike Justice Miller, who seemed to justify federal power by reasoning that the admission of immigrants is a matter better addressed at the federal level, Justice Field introduced the third type of foreign affairs justification: Because the United States is a sovereign nation, it must have the powers incidental to sovereignty, including "the power of exclusion of foreigners."[164] This

injuries; in short, that they would place us exactly in the situations in which some nations doubtless wish to see us, in which we should be, *formidable only to each other*").

158. HUTCHINSON, *supra* note 113, at 66 ("Almost by default the regulation of immigration was falling to the federal government, and the representatives of the states that had formerly opposed federal intervention were now asking for it.").

159. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

160. *E.g.,* Act of June 29, 1906, ch. 3592, 34 Stat. 596; Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

161. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

162. *See* Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504. For a discussion of the various Chinese Exclusion Acts and their evolution, see generally MARTIN B. GOLD, FORBIDDEN CITIZENS: CHINESE EXCLUSION AND THE U.S. CONGRESS (2012).

163. (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

164. *Id.* at 609.

"incident of sovereignty" should be considered part of the sovereign powers delegated to the United States by the Constitution, including the powers "to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship."[165] Justice Field linked the power to exclude most closely with the power to conduct war: "It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us."[166] And no actual war was required to give Congress this power: If foreign persons are "dangerous to . . . peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects."[167] Thus Justice Field, by tying immigration to foreign affairs and then to sovereignty, created a powerful argument for federal plenary power over immigration.[168] A sovereign must have the power to exclude and, as would be made clear in subsequent cases, expel unwanted persons.[169]

C. The Plenary Power and Federalism in the United States

The Court's link between foreign affairs and immigration has had a sweeping effect. The Court has determined that the federal government has a plenary power over foreign affairs, or in other words, a "comprehensive power to conduct foreign relations without interference or limitation by the states."[170] By incorporating immigration into this context—whether for reasons of inherent sovereignty or collective action federalism—the federal government now has "plenary power" over immigration. This "sovereign nonenumerated Congressional power" has created a number of problematic knock-on effects.[171] The effects on the federal dynamic in

165. *Id.* at 604.

166. *Id.* at 606.

167. *Id.*

168. This inherent sovereignty argument was further elaborated by Justice Gray in *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (finding as "an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe").

169. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1892).

170. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620 (1997).

171. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 274 (1984).

the United States are the most relevant for the comparison with Europe and will be addressed first and in more depth. As a matter of constitutional and political tension in immigration matters, federalism is only now reemerging as an issue. The implications of the federal plenary power over immigration for judicial review and separation of powers are considered more important in the American context but, for purposes of this comparative project, will be touched on only briefly.

Notwithstanding its articulation of a broad federal power over immigration, the Court has attempted to retain some areas of state regulation by distinguishing between those regulations, exclusive to federal power, that affect the conditions of entry and selection of immigrants, and others, regulating aliens more generally, that states may pass.[172] But this dividing line has been hard to maintain. As soon as it was formulated, it came under pressure.[173] In the 1915 case *Traux v. Raich*,[174] the Court found unconstitutional an Arizona state law regulating the employment of aliens.[175] It concluded that "[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."[176] But what about "housing, education, or health care—the denial of which threatens an immigrant's ability to survive as a new resident"?[177] Where do the conditions of entry end? As Adam Cox has persuasively

172. Cox, *supra* note 139, at 346 ("[T]he plenary power doctrine is important because it is widely understood to draw a sharp constitutional distinction between rules that select immigrants and rules that otherwise regulate them.").

173. This is not surprising. As Ernie Young has written, "exclusive spheres of authority simply cannot be defined and maintained in a principled way." Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, NOMOS LIV: LIBERTY (forthcoming) (manuscript at 42), *available at* http://scholarship.law.duke.edu/faculty_scholarship/2689. Young discusses the pressures of dual federalism, and notes:

> Dual federalism died . . . because the Court found itself unable to draw determinate lines to define the exclusive sphere of state authority into which national power might not enter. That problem applies equally, however, to attempts to define and police an exclusive sphere of *National* authority; it thus plagues the contemporary cases in which courts have sought to keep states out of 'uniquely federal' fields like foreign affairs . . . or immigration.

Id. at 3.

174. 239 U.S. 33 (1915).

175. *Id.* at 42–43.

176. *Id.* at 42.

177. Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1845 (2007).

argued, most of these rules regulating aliens can impact "where and how noncitizens live."[178]

Apart from its internal weakness, the Court's attempt to maintain a sphere of state power looks even less persuasive given the foreign affairs rationale, which is capacious, especially in light of increasing globalization.[179] Due to the fact that most every immigrant is from a foreign country, most any state regulation that affects aliens (regardless of its substance) can be seen to have a connection to foreign affairs,[180] thus threatening the national interest and justifying constitutional preemption even in the absence of federal action.[181] The application of this reasoning reached its zenith (or nadir) in *Zschernig v. Miller*,[182] a case challenging an Oregon law that required personal property of a decedent in Oregon to escheat to the State, rather than go to a nonresident alien, unless reciprocal rights to inherit were provided for American citizen-heirs in foreign countries.[183] The Court found it "inescapable that the type of probate law that Oregon enforce[d] affect[ed] international relations in a persistent and subtle way[,] . . . impair[ing] the effective exercise of the Nation's foreign policy."[184] It is of some question what actual effect probate laws in Oregon would have had or did have on foreign affairs, and the case is seen as an exemplar of the sweeping reach of the foreign affairs rationale behind the federal plenary power over immigration.[185]

The Rehnquist Court's federalism revolution did little to affect immigration; given immigration's connection to foreign affairs, an area in which "the states do not exist,"[186] it is hardly surprising that

178. Cox, *supra* note 139, at 389.

179. Young, *supra* note 173, at 35 ("In our increasingly globalized world, no governmental actor—including states and even localities—can avoid interacting with the rest of the world in a way that implicates national foreign policy.").

180. *See* Kerry Abrams, *Plenary Power Preemption*, 9 VA. L. REV. 601, 626 (2013) ("If the Court characterized the statute in question as involving 'foreign affairs,' it would fall; if not, it would stand. But almost any regulation of immigrants could in theory affect 'foreign affairs,' so the scope of this use of plenary power was constantly shifting.").

181. Legomsky, *supra* note 171, at 262 ("The connection between immigration and foreign policy derives ultimately from the fact that an immigration decision operates on the subject of a foreign state. Because a foreign state may intervene diplomatically on behalf of its nationals, an adverse decision carries the potential for international tension.").

182. 389 U.S. 429 (1968).

183. *Id.* at 430–31.

184. *Id*. at 440.

185. *See* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 836 (1989) ("No one of [the Court's] conclusions is effectively supported by the facts in the *Zschernig* case.").

186. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149–50

there was little effort to impose on the immigration power the type of federalism constraints seen in the evolution of the commerce clause doctrine.[187] The constitutional limitations have not prevented scholars from making policy-based arguments, encouraging Congress to empower the states to take action, or arguing that states may be better placed to address immigration related issues, such as promoting integration[188] or identifying labor needs.[189]

Although not as relevant to the European Union, it is important to note that the plenary power doctrine has also put pressure on the relationship between Congress and the Executive: If the general power over immigration is grounded in the sovereignty of the federal government, can it be confined to Congress? How should executive power be analyzed?[190] And finally, the link between foreign affairs and the political question doctrine has allowed and perhaps encouraged the federal courts to give Congress tremendous leeway in its actions in the immigration sphere.[191] The doctrine's influence on judicial review has rightly caused considerable outrage among scholars and others in the United States, as congressional action has been insulated

(2d ed. 1997).

187. *E.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

188. Rodríguez, *supra* note 135, at 581.

189. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 833 (2008). Identifying labor needs—particularly in terms of numbers—is a responsibility often exercised at the subnational level of federations. In addition to the EU, Germany and Canada have decentralized labor structures. *See* Jeffrey Sack, *U.S. and Canadian Labour Law: Significant Distinctions*, 25 ABA J. LAB. & EMP. L. 241, 242 (2010) ("In Canada, labour relations is mainly a provincial responsibility, with only 8.4% of the work force under federal jurisdiction."); Conny Wunsch, *Labour Market Policy in Germany: Institutions, Instruments and Reforms Since Unification* (University of St. Gallen Dept. of Economics Discussion Paper No. 2005-06, 2005) at 14, *available at* http://www1.vwa.unisg.ch/RePEc/usg/dp2005/DP-06_Wu.pdf (describing how a 2002 reform of German labor market policy placed more power in the hands of subnational labor offices to set needs according to local market conditions).

190. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009) (explaining how the President can implement "remarkable change" in immigration policy even in the absence of congressional action); Christopher N. Lasch, *How the Court's Upholding of Federal Immigration Enforcement Authority in* Arizona v. United States *Casts Doubt on the Validity of Federal Immigration Detainers*, 46 LOYOLA L.A. L. REV. (forthcoming 2013) (manuscript at 58–60), *available at* http://ssrn.com/abstract=2178524 (discussing how implications of *Arizona* (and plenary congressional power) might affect executive program of immigration detainers); Neuman, *supra* note 107, at 1840 (discussing uncertainty about the distribution of immigration power between Congress and the President).

191. *See* Legomsky, *supra* note 171, at 262 ("[I]t ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations.").

from meaningful rights review.[192]

* * *

The federal plenary power over immigration is largely rooted in the connection between immigration and foreign affairs. The early rationales for federal power have shaped the current constitutional understanding of the immigration power and the way in which it has constructed federal-state relations. The link between immigrants, necessarily from foreign countries, and foreign relations is a powerful justification for exclusive federal action—whether under a theory of collective action federalism (or subsidiarity), or due to the federal government's inherent sovereignty. Because both theories are tied up in the evolution of the doctrine, it is difficult to identify the weights accorded to each.[193] Nevertheless, given that a theory of subsidiarity contributed in some way to locating immigration power in the United States, there are possible lessons for the European Union as it faces a similar question.

III. FOREIGN AFFAIRS AND THE FUTURE OF EU IMMIGRATION REGULATION

Because the European Union and the United States are systems of enumerated powers, the Commission in the European Union and the Supreme Court in the United States have needed to provide reasons for allocating power over immigration at the federal (or supranational) level. As demonstrated in Part II, the choice of rationales can have significant effects in constructing the ongoing relationship between the central level and the states in the immigration policy area, creating a path dependency that may be hard

192. *See, e.g.*, Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1615 (2000) ("[The plenary power] doctrine, which has effectively insulated federal immigration statutes from constitutional review, has long fascinated academic commentators."); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 703 (2002) ("Pronouncements from the Court in the field of immigration law are replete with statements that would shock the sensibilities of the domestic constitutional lawyer."); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 987–88 (1998).

193. It is certainly true that current immigration scholars pay less attention to the subsidiarity or collective action federalism rationale. *See generally* Lindsay, *Immigration as Invasion*, *supra* note 153 (focusing on the transition from the commerce clause rationale to the inherent sovereignty rationale, and describing the inherent sovereignty rational as one of "national security"). *But cf.* Abrams, *supra* note 180, at 611–18 (discussing the differences between what she describes as structural preemption—the federal interest in immigration—and the plenary power—focused on the political interests in foreign affairs).

to escape.[194] In Europe, the Commission and the national parliaments are at a critical juncture: What types of justifications for central action over immigration will be found persuasive? The nature of the United States experience is historically contingent and raises some issues, such as sovereignty of the national federal state, that are unmatched in the European context. Nevertheless, the role that the foreign affairs justification has played in the United States can serve as a cautionary tale to Member States of the European Union. This section outlines some of the possible lessons for the European Union from the United States and makes a preliminary assessment of the likelihood of the emergence of a European "plenary power" over immigration.

* * *

The underlying foreign affairs rationale for federal plenary power over immigration in the United States in part rested on a theory of federalism akin to that of subsidiarity. The Supreme Court used the logic of federalism and the threats of hold-outs and collective action problems to reinforce the argument that the federal government should have power over immigration. This parallelism alone should encourage Member States to assess whether the expansive nature of the foreign affairs construct might be replicated in the EU. But there are additional reasons specific to the European Union that reinforce a linkage between foreign policy and immigration regulation.

The Commission has long advocated a connection between international development policy and migration,[195] and thus, as a political matter, foreign policy is seen by some as tightly connected to immigration regulation. As discussed in Part I, in the European Union, the Commission reflects the "Comprehensive" or "Global Approach" to immigration.[196] This approach categorizes asylum and immigration policy as a foreign policy issue, rather than as a matter of

194. There are, of course, differences between judicial reasons and legislative reasons. The flexibility inherent in legislative reasoning, without the constraints of stare decisis, weakens the path-dependent nature of the Commission's constructs. There remains power (and potential threat) in the Commission's determinations, however, both in terms of structuring the dialogue on subsidiarity and because the ECJ has stated that when reviewing subsidiarity issues, it will look to the Commission's rationales (as provided in its impact statement). *See supra* note 104 and accompanying text.

195. As early as 1994, the Commission argued that "if migration pressures are not adequately managed through a careful cooperation with the countries concerned, it is easy to predict the risk of friction to the detriment of international relations and the immigrant population itself." *Communication from the Commission to the Council and European Parliament on Immigration and Asylum Policies*, at 6, COM (94) 23 final (Feb. 23, 1994).

196. *See supra* notes 100–02 and accompanying text.

domestic policy, even a European-wide domestic policy. Scholars have indicated some confusion about how exactly the Comprehensive Approach is developing at the EU level. As Joanne van Selm has asked: "Is asylum and immigration *becoming* a foreign policy matter? Or is foreign policy *being used* for asylum and immigration policy ends? Or are asylum, immigration, and foreign policies becoming one single entity?"[197] To the extent it is the foreign policy rationale that gives the Commission power to promote its approach to immigration, the answer to van Selm's question is irrelevant. Under any view, power could accrue to the supranational level.

The politics of international development and its relation to migration further complicate the first-order question of allocating power. The danger of subsidiarity analysis is that it can "collapse the constitutional question ('What [is permitted]?') into a policy question ('What [is desirable]?')."[198] Those states that wish for integrated asylum, migration, and development policies may well prefer that action be taken by the Commission. If the Commission has support among Member States for its policy position, Member State parliaments are unlikely to push back based on subsidiarity concerns.[199] Of course, this assumes a unified policy position in a given Member State, and as scholars have shown, the interests in a disaggregated state can be in opposition (the interests of a Member State's executive power represented in the Council could conflict with those of that Member State's parliament reviewing decisions on subsidiarity grounds).[200] Nevertheless, the influence that policy preferences will have on subsidiarity determinations may be sizable.[201]

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197. van Selm, *supra* note 38, at 143, 145.

198. Young, *supra* note 173, at 17.

199. *See* Ritzer et al., *supra* note 56, at 757–58 ("[I]n parliamentary democracies such as the German, the government's parliamentary majority will rarely oppose legal acts of the Community that have been endorsed by the government, even in terms of subsidiarity.").

200. *See* Lavenex, *supra* note 100, at 331 ("The 'escape to Europe' rather results from a 'new raison d'Etat[,]' which consists in the strengthening of particular governmental actors and their preferred policy agenda over other parts of the domestic consistency, including other sections of the public bureaucracies, but also parliament, political parties[,] or courts." (citation omitted)); *see also* Andreas Ette & Thomas Faist, *The Europeanization of National Policies and Politics of Immigration: Research, Questions and Concepts*, *in* THE EUROPEANIZATION OF NATIONAL POLICIES AND POLITICS OF IMMIGRATION 3, 8 (Thomas Faist & Andreas Ette eds., 2007) (identifying "opportunity afforded to national bureaucrats to circumvent political constraints on the national level by shifting to the new venue the European level offered").

201. In the United States, immigration politics do not necessarily overlap with the debate over allocation of power. While some states seek more immigration power in order to institute restrictive policy—such as Arizona's SB 1070—certain states promote federalism in order to enact more permissive legislation, as in Maryland's recent DREAM Act. Nick Anderson & Luz

The expansive logic of foreign policy as an appropriate arena for central-level control and the possibility that Member State immigration policy preferences might be more easily achieved at the European level will combine to exert a tremendous pressure for Union-level competence over an expanding portfolio of immigration issues. But it is safe to assume that some level of Member State involvement in immigration-related regulation is both necessary, given that few federal systems are able to operate immigration systems without local involvement, and desired, due to the Member States' historic reluctance to cede power over immigration to Brussels. What might serve as a countervailing force?

The drafters of the Early Warning System hoped this mechanism would serve to protect the interests of the Member States. Thus far, however, subsidiarity review by the national parliaments has been tepid. As the Commission reported in 2012, in "none of the 2011 cases were the thresholds for triggering the yellow or orange cards met . . . . [T]he vast majority of the 28 legislative proposals on which national Parliaments issued reasoned opinions in 2011 elicited at most three reasoned opinions."[202] The attention by national parliaments to subsidiarity issues had increased by seventy-five percent over that in 2010 (the time of the Seasonal Workers Directive)—but the actual numbers of reasoned opinions remain low.[203] An additional concern lies in the inattention of the national parliaments to the foreign policy rationale used by the Commission.

As noted in Part I, the reasoned opinions against the Seasonal Workers Directive did little to contradict the arguments advanced by the Commission on the grounds of foreign policy.[204] One way of limiting the power of the rationale would be for the national parliaments to demand that the Commission provide a specific nexus between the immigration regulation and a particular foreign policy proposal that it supports.[205] In the case of the proposed Directive, the

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Lazo, *Md. Voters Approve 'Dream Act' Law*, WASH. POST (Nov. 6, 2012), http://articles.washingtonpost.com/2012-11-06/local/35506258_1_tuition-discount-college-students-neil-c-parrott; *see also* Delaney, *supra* note 177, at 1824–25 (recognizing the indeterminacy of the question of which level of government—state or federal—is more likely to enact discriminatory legislation).

202. *Subsidiarity Report 2011*, *supra* note 103, at 4.

203. *Id.* at 9 (identifying only "[sixty-four] opinions were reasoned opinions within the meaning of Protocol No 2, notifying a breach of the principle of subsidiarity").

204. See *supra* notes 96–99 and accompanying text.

205. In the American context, Peter Spiro effectively does just this in his challenge to the foreign affairs justifications of amici in the Arizona case. *See* Peter Spiro, *Why "One Voice"*

Commission argued that foreign policy considerations require supranational action, in part because third countries have been waiting for this type of uniformity in the area of seasonal employment.[206] Presumably, therefore, with the Seasonal Workers Directive in place, the Commission would be better able to negotiate migration issues with those non-EU states and could do so more efficiently than the Member States acting individually. The problem, which Anna Kocharov has noted, is that the proposed Directive regulates TCNs in general terms, undifferentiated by nationality. Third countries are most likely to negotiate in order to seek benefits that accrue to their own nationals; it is far from clear how the proposed Directive will advance any of the Commission's plans for improving relations with (or conditions in) specific third countries.[207] Furthermore, in its reasoned opinion responding to the proposed Directive, the Dutch Legislature argued that the Commission's proposal offered "no added value for making joint agreements with countries of origin regarding seasonal employment."[208] The implication, though not stated, was that individual Member State action *had* been taken and was effective in that regard.[209]

The American experience should be viewed as a cautionary tale, and national parliaments concerned about protecting Member State power over immigration should pay more attention to the arguments presented by the Commission. The Commission's foreign policy

Shouldn't Trump Arizona's, OPINO JURIS, http://opiniojuris.org/2012/04/23/why-one-voice-shouldnt-trump-arizonas-or-why-madeleine-albright-is-wrong-about-sb-1070/ (last visited Mar. 27, 2013) (arguing Arizona's SB 1070 does not hurt national foreign policy and thus finding little justification for an assertion of implied federal preemption).

206. *See supra* note 102 and accompanying text.

207. Anna Kocharov, *Subsidiarity After Lisbon: Federalism Without a Purpose?*, *in* DECONSTRUCTING EU FEDERALISM THROUGH COMPETENCES, EUI WORKSHOP PROCEEDINGS 7, 18–19 (June, 14 2011), *available at* http://www.iadb.org/intal/intalcdi/PE/2012/10631.pdf.

208. Statement from the Eerste Kamer and the Tweede Kamer [Senate and House of Representatives], *Subsidiarity Test of the Proposal for a Directive Concerning the Conditions for Access to and Residence in the EU of Subjects of Third Countries, with a View to Seasonal Employment*, Oct. 14, 2010 (Neth.), *available at* http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/netherlands/2010_en.htm.

209. It is unclear whether individual Member State action has been taken. There is certainly a willingness on the part of other countries to negotiate such agreements. *See, e.g.*, Ministry of Economic Development, Arab Republic of Egypt, *Prospects of Deeper Integration with the European Union Through the Movement of Natural Persons* (2010), *available at* http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1239120299171/5998577-1254498644362/6461208-1300395860273/Egypt_Rep.53733.pdf (outlining possible negotiation positions for the Government in Egypt that would facilitate the creation of temporary labor migration agreements with individual EU countries).

justification may serve to encourage further creeping competence in the immigration realm. But the extreme result of the American system—the ouster of state action in many spheres of immigration-related regulation—is an unlikely end point for the European Union. For one reason, the Lisbon Treaty provides a textual limit on the Union institutions' power, by giving the Member States the authority to decide on volumes of admissions in Article 79(5). The logic of subsidiarity and foreign policy cannot override the express provision of retained power in the Treaty. Even if creeping competence and central level power expansion shift much of the power, the Member States will have more flexibility for action than do the states in the United States.

Finally, to the extent that the national sovereignty aspect of the justification plays a significant role in driving the American doctrine, the Commission has few European powers to rely on in parallel and the Member States retain key national foreign policy powers. Although the Lisbon Treaty has conferred legal personality onto the Union,[210] allowing it to take action as an entity on the world stage, and further empowered a High Representative for Foreign Affairs and Security Policy,[211] the European Union does not share the inherent sovereign powers in the United States identified by Justice Miller.[212] The EU does not have war powers or the machinery to conduct war,[213] and European-wide decisions tied to these aspects of sovereignty are concluded intergovernmentally, by agreement among the Member States in the Council. Most high-level decisions on major questions of sovereign power are still taken by each individual Member State, acting alone.

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210. TEU post-Lisbon, *supra* note 50, art. 47, at 41 ("The Union shall have legal personality.").

211. The Treaty of Amsterdam first created the High Representative for Foreign Affairs and Security Policy (then named the High Representative for Common Foreign and Security Policy), Treaty of Amsterdam, *supra* note 37, art. J.8, at 13, and the Lisbon Treaty expanded the reach of the post, TFEU, *supra* note 14, tit. V, at 28 ("General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy.").

212. See *supra* notes 164–69 and accompanying text.

213. Despite its lack of war powers, the EU cooperates closely with NATO in military actions and crisis management. *NATO-EU: A Strategic Partnership*, NORTH ATLANTIC TREATY ORGANIZATION, http://www.nato.int/cps/en/natolive/topics_49217.htm (last visited Mar. 27, 2013). In addition, the European Union has been working since 1999 to develop a European Rapid Reaction Force to act as a single EU military body. *See* Boyka Stefanova, *The European Union as a Security Actor: Security Provision Through Enlargement*, 168 WORLD AFF. 51, 59 (2005) ("[I]nstability in the [Balkans] brought about efforts to streamline the security posture of the union by a capacity to address difficult security issues. In December 1999, the European Council decided to create an EU Rapid Reaction Force . . . .").

CONCLUSION

The European Union is at a critical juncture in the development of its particular brand of constitutional federalism in the immigration arena. The Lisbon Treaty made immigration a shared competence between the Member States and the supranational level, with the principle of subsidiarity designed to structure the allocation of specific regulatory power. In justifying its decision to take regulatory action, the Commission alluded to the implications immigration had for foreign policy concerns. This rationale for supranational power echoes that provided by the United States Supreme Court in the late 1890s to support federal power over immigration. The Supreme Court's decisions had doctrinal and practical implications for American federalism, leading to a situation in which states have no constitutionally protected role in the immigration system. To the extent Member States in the European Union are concerned about maintaining their role in immigration, they should be alert to the types of arguments the Commission is making to justify its power and should insist on a specific nexus between a proposed regulation and the Union's foreign policy interests.

At bottom, the European Union is unlikely to progress entirely in the American direction—individual Member States retain far more sovereign power than individual American states do, and perhaps than they ever did, notwithstanding Justice Scalia's efforts to revive arguments about inherent state sovereignty.[214] But just because the Union will not slide to the bottom of the American slippery slope does not mean that national parliaments, and Member States, should not be wary. Creeping competence has been a longstanding concern—one explicitly addressed in the Lisbon Treaty—and the immigration power looks likely to accrue to Brussels. As a matter of policy preference, perhaps this is a good idea. As a matter of the future of Europe and the end goal of European union, perhaps this is a good idea. But for those Member States who think otherwise, the American experience sounds a warning.

214. *See* Arizona v. United States, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., dissenting) ("In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so.").