

University of Dundee

A concept of shared principles and the constitutional homogeneity in Europe

Roeben, Volker

Published in:
Cardozo International & Comparative Law Review

Publication date:
2021

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Roeben, V. (2021). A concept of shared principles and the constitutional homogeneity in Europe: The case of subsidiarity . *Cardozo International & Comparative Law Review* , 4(3), 903-949.
<https://www.cardozociclr.com/current-issue>

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

A CONCEPT OF SHARED PRINCIPLES AND THE
CONSTITUTIONAL HOMOGENEITY IN EUROPE: THE CASE
OF SUBSIDIARITY

Volker Roeben[†]

TABLE OF CONTENTS

I.	INTRODUCTION: HOW DO CONSTITUTIONAL PRINCIPLES GET SHARED?	903
II.	CODIFYING SUBSIDIARITY: THE ROLE OF THE CONSTITUENT POWERS.....	912
	A. Codifying Subsidiarity in the Basic Law.....	912
	B. Codifying Subsidiarity in the Founding Treaties of the European Union.....	914
	C. Instructing the Courts	918
III.	THE REVIEW OF SUBSIDIARITY BY THE FEDERAL CONSTITUTIONAL COURT: THE GERIATRIC NURSING ACT JURISPRUDENCE.....	920
IV.	THE REVIEW OF SUBSIDIARITY BY THE COURT OF JUSTICE OF THE EUROPEAN UNION: FROM WORKING TIME TO VODAFONE	928
V.	CONVERGING SUBSIDIARITY REVIEW: A RATIONALE OF LEGALITY TO CURTAIL THE CENTRE'S OVERREACHING.....	934
VI.	DIVERGENCE IN OUTCOMES.....	940
VII.	THE LEGISLATURES: FASHIONING A RATIONALE OF NECESSITY FOR THE PRINCIPLE OF SUBSIDIARITY	942
VIII.	CONCLUSIONS: SHARED PRINCIPLES AND CONSTITUTIONAL HOMOGENEITY	947

I. INTRODUCTION: HOW DO CONSTITUTIONAL PRINCIPLES
GET SHARED?

One of the great challenges for international constitutional law scholarship is better understanding the tectonic shift towards homogeneity between separate constitutional orders and

heterogeneous polities. Homogeneity is the next step up from compatibility. It means that several polities organize political accountability along similar lines.¹ Such homogeneity is both a precondition for and an expression of political and legal integration of different polities. It serves as the basis of trust.² Increasing homogeneity is a feature of our time, particularly in Europe.³ But how does it come about and what needs to happen with the future of homogeneity?

This article proposes the concept of shared principles, defined with reference to certain principles underpinning an emerging constitutional homogeneity spanning the international and national level throughout Europe. It focuses on the principle of subsidiarity that secures the accountability of central authority in both the European Union and federal member states. Certainly, this, among others, principle has been codified—largely in parallel terms within legal orders.⁴ Yet, as this article holds, the codification alone will not create a sharedness. To that end, this article first recalls the indeterminacy of constitutional law and outlines the institutional determinants of meaning, specifically the rationales for constitutional law generally. This analysis provides the background for an attempt to identify determinants that will create a shared meaning where several jurisdictions have independently enacted similar principles. The premise of this analysis is that these determining factors will have to converge on a common set of rationales. This article further tests whether the evolution of the subsidiarity principle under the EU Founding Treaties, along with the Basic Law of Germany confirms these expectations. It discusses how the practices of the courts, legislatures, and constituent powers in both jurisdictions have been

[†] Professor, University of Dundee, Centre for Energy, Petroleum and Mineral Law & Policy. The author is grateful for discussion and comments on earlier drafts by Jukka Snell, Brian-Christopher Jones, Udo di Fabio, Andrew Halpin, and Pedro Telles.

¹ Or 'a grammar of legitimacy' as pluralism holds, see Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN L. REV. 1 (1993).

² On the role of trust in European integration, see Cases C-354/20 PPU & C-412/20 PPU, L and P, ECLU:EU:C:2020:1033.

³ For a critical view, see Signe Rehling Larsen, *Varieties of Constitutionalism in the European Union*, 64 MODERN L. REV. 1 (2021). See also Neil Walker, *Constitutionalism and Pluralism in Global Context*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 17, 24 (Matej Avbelj & Jan Komárek eds., 2012).

⁴ See *infra* notes 20 and 21 with accompanying text; see also Part II.

converging upon a set of rationales for subsidiarity that imbues the principle with a shared meaning.

It is generally accepted that any formalization—codification or by alternative means—of a constitutional principle, if not generally law, will necessarily produce indeterminate law.⁵ The law's indeterminate principles acquire meaning through the subsequent practices of institutional actors.⁶ That meaning crystallizes within a rationale. The term rationale is used here to communicate a sense of fundamental reasons that cause or justify decision-making under the principle. A rationale in this sense is contestable.⁷ It is judicial practice that selects between contesting propositions, thus truncating the discourse. Yet, there are potentially more institutional determinants than appellate courts, even if the latter are of greater relevance.⁸ Political institutions may also directly determine meaning.⁹ Such institutions—legislatures and governments—are the first addressees and users of constitutional law and can develop a complementary rationale for such principles. The constituent power is a third actor determining meaning.¹⁰ The term constituent power is used here to indicate the institution has the legal power to amend the foundational document and therefore has agency in the process of determining meaning.¹¹ The foundational document is usually a state constitution,¹² but it can also be a constitution-like founding treaty of an international organization. It is true that the amended text may

⁵ This is a lasting contribution of American legal realism, *see* Brian Leiter, *Legal Realism, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 249 (Dennis Patterson ed., 2010).

⁶ Frederick Schauer, *Foreword to WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT XI* (2nd ed., 2014).

⁷ *See* W.B. Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS OF THE ARISTOTELIAN SOC'Y* 167 (1956).

⁸ *See* Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 *L. & CONTEMP. PROBS.* 319, 321 (2005) (describing further authors of constitutional norms beyond the judiciary).

⁹ *Id.*

¹⁰ On the origin and function of the term, *see* CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 1988). *See also* Matthias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 *INT'L J. CONST. L.* 697 (2016); Neil Walker, *The Return of Constituent Power: A Reply to Matthias Kumm*, 14 *INT'L J. CONST. L.* 906, 909 (2016).

¹¹ NEIL MACCORMICK, *INSTITUTIONS OF LAW* 45 (2009) (the constituent power as constitution-giver).

¹² *See* William Partlett, *The American Tradition of Constituent Power*, 15 *INT'L J. OF CONST. L.* 955 (2018).

remain indeterminate. Yet, the amendment will nevertheless have a determining effect on the meaning, albeit indirect. It ultimately lies within the instruction that the institution sends to the constituted powers charged with interpreting the document.

Such interplay between institutional actors can be generalized. For example, Professor Benvenisti explained that because constitutional law serves as a way for restraining actors, it therefore generally reflects the interplay between the actors participating in the decision-making process within a polity, constituent powers, legislatures, and courts.¹³ The institutional interplays, pressures, and constraints become determinants of meaning.¹⁴ They motivate courts in shaping rationales and, therein, the meaning of law.

This literature has focused on the meaning of constitutional law in a single constitutional order. But the question now becomes what can be learned from it from the comparative constitutional law perspective focusing on the question: *how do constitutional principles become shared between jurisdictions?*

To begin, parallel formalization in several jurisdictions, by itself, does not make for a shared principle in any meaningful sense. Shared meaning cannot be found in what are, essentially, indeterminate texts. Shared meaning will only arise from institutional practices. Those practices remain distinct to each jurisdiction. As such, the key condition for 'sharedness' is inherent in these practices demonstrably converging over time on a set of rationales that justify decision-making under a principle in the same way. In short, sharedness manifests itself, primarily, in the convergence over time of distinct jurisprudential practices about a certain rationale. The implication of this argument is that the rationales-based meaning imparted to a principle by adjudication may be isolated and specific to the constitutional law of a polity; but it may also become *shared* by several jurisdictions.

The principle of subsidiarity is as a lens through which to test this premise. Originating in ethics and political philosophy,¹⁵ subsidiarity has the potential to be fashioned into a legal principle in any system

¹³ Benvenisti, *supra* note 8, at 319-20.

¹⁴ *Id.*

¹⁵ John Finnis, *Subsidiarity's Roots and History: Some Observations*, 61 AM. J. JURIS. 133 (2016); Nicholas Aroney, *Subsidiarity in the Writings of Aristotle and Aquinas*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY 9 (Michelle Evans & Augusto Zimmermann eds., 2014).

that divides competences between a center and a periphery.¹⁶ In such systems, the function of the subsidiarity principle is to limit the aggrandizing tendency of the center—by securing accountability of the center in the broad array of non-exclusive competences—so that competences can be exercised by either the center or the periphery.¹⁷ The normative idea of such a subsidiarity principle is that decentral-plural action is preferable over central-uniform action where possible. However, the operational rationales that flow from this function, and this idea, may remain contested.¹⁸

Since the 1990s, the principle of subsidiarity has been codified in broadly parallel terms in primary European Union law, as well as the constitutional law of several federal or federal-like¹⁹ European states.²⁰ Both member states and non-member states of the European Union represent this, although it is a broader trend in Western

¹⁶ Paul Craig, *Subsidiarity, a Political and Legal Analysis*, 50 J. COMMON MARKET STUDIES 72 (2012).

¹⁷ See Judith Resnik, *Federalism(s)'s Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations*, in FEDERALISM AND SUBSIDIARITY 363 (James E. Fleming & Jacob T. Levy eds., 2014) (Every (quasi-)federal system needs a mechanism for resolving competence conflicts between its larger and smaller units); see also Stephen Weatherill, *Better Competence Monitoring*, 30 EUR L REV 23 (2005) ('competence anxiety').

¹⁸ See Gallie, *supra* note 7; ANDREW HALPIN, DEFINITION IN THE CRIMINAL LAW (2004).

¹⁹ The term is that of Aroney, see Nicholas Aroney, *The Formation and Amendment of Federal Constitutions in a Westminster-Derived Context*, 16 INT'L J. OF CONST. L. 17 (2018).

²⁰ Art. 118(1) Costituzione Della Repubblica Italiana [Cost.] (It.) (Special issue Gazzetta Ufficiale della Repubblica, Dec. 27, 1947, as amended Oct. 18, 2001), translation at www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf ("Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation."). See Corte Cost., 1 ottobre 2003, n. 303, Guir. it. 2003 (It.). In Spain, Article 84-3 of the 2006 Statute of Autonomy of Catalonia requires that the internal allocation of administrative responsibilities be based on subsidiarity. The Member States that joined the EU in 2004 recognize local self-government to a various degree, see CONSTITUTIONAL LAW OF 10 EU MEMBER STATES (Constantijn A.J.M. Kortmann et al. eds., 2006). Article 5 of the 1999 Swiss Constitution is alone in stipulating that subsidiarity must be observed both in the allocation and performance of all state tasks (Bundesverfassung der Schweizerischen Eidgenossenschaft, BBl 1999 162 5986, SR 101, translation SR 101 - Federal Constitution of 18 April 1999 of the Swiss Confederation (admin.ch)).

democracies with a federal structure.²¹ The classification of the EU on the spectrum between an international organization and federation remains debated. However, that question need not be addressed in this article. It suffices to say that this is a system which divides competences between the EU and sovereign Member States based on terms that are typically derived from constitutional law.²² This is certainly the perspective of the Court of Justice of the EU.²³ Despite these parallels, scholars have mostly sought to understand the principle of subsidiarity within the confines of each codification. Some have queried whether codified subsidiarity retains its normative quality or becomes merely efficient.²⁴ EU scholars advance that codified subsidiarity is a legal principle, concerned with limiting the exercise by the EU of its competences.²⁵ Parts of such EU literature

21 For the United States, see George Bermann, *Proportionality and Subsidiarity*, in *THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES* 75, 89 (Catherine Barnard & Joanne Scott eds., 2002); for Australia, see Nicholas Aroney, *Subsidiarity: European Lessons for Australia's Federal Balance*, 39 *FED. L. REV.* 213 (2011). For a comparison of Europe, the United States, Canada, Australia, and the Commonwealth, see Josephine van Zeben, *Subsidiarity in European Environmental Law, A Competence Allocation Approach*, 38 *HARV. ENVTL. L. REV.* 415, 415-16 (2014).

22 "System of the division of competences between the Union and the Member States," Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter Treaty of Lisbon]; Declaration (No 18), in Relation to the Delimitation of Competences, at para 1, 2016 O.J. (C 202/344). Not all international organizations fit this bill. In explaining the legality of the UN Security Council's establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), that court noted that "the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions." *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 43 (Int'l Crim. Trib. Former Yugoslavia Oct. 2, 1995).

23 Case C-370/12, *Pringle v. Ir.*, ECLI:EU:C:2012:756 ¶ 135; Opinion of Advocate General Kokott, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council*, ECLI:EU:2013:21 ¶ 32; For the notion that Union and member states constitutional law form a unit, see Ingolf Pernice, *The Treaty of Lisbon. Multilevel Constitutionalism in Action*, 15 *COLUM. J. OF EUR. L.* 349 (2009). For an alternative account, see Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 *INT'L & COMP. L. Q.* 873, 884 (2003).

24 Finnis, *supra* note 15, at 133.

25 Robert Schütze, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, 68 *CAMBRIDGE L. J.* 525 (2009); STEPHEN WEATHERILL, *CASES & MATERIALS ON EU LAW* 559 (12th ed., 2016). *But see* van Zeben, *supra* note 21, at 415. For a comprehensive literature review, see Kate Shaw, *THE COURT OF JUSTICE OF THE EUROPEAN UNION. SUBSIDIARITY AND PROPORTIONALITY* 46 (2018).

then consider subsidiarity as essentially political in nature,²⁶ but most hold it to be justiciable.²⁷ Within that camp, some argue for a more limited procedural judicial review.²⁸ Others propose a substantive review, to test competence-proportionality,²⁹ or to test whether the EU action meets certain treaty objectives.³⁰

This article opens a novel line of inquiry. It seeks to understand whether a subsidiarity has become a principle with a shared meaning for in the Founding Treaties of the European Union and Member State constitutional law. This question requires a comparative methodology and therefore a selection. The article selects the constitutional law of the Federal Republic of Germany (Basic Law). The selection of this comparator accounts primarily for the fact that the treaties and this constitution design two systems of divided competences on the following broadly similar lines. Both pair a center with a periphery. The EU is paired with the Member States,³¹ while in Germany the federal government or Federation (*Bund*) is paired with the non-sovereign *Länder*.³² In both systems, the center only has those competences specifically accorded to it, while the periphery holds residual competences.³³ Both obligate the center to comply with a principle of subsidiarity in the exercise of all its non-exclusive competences.³⁴

²⁶ Armin von Bogdandy & Jürgen Bast, *The Federal Order of Competences*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 275, 303 (von Bogdandy & Bast eds., 2010).

²⁷ Brunessen Bertrand, *Un principe politique saisi par le droit. La justiciabilité du principe de subsidiarité en droit de l'Union européenne*, 48 REVUE TRIMESTRIELLE DE DROIT EUR. 329 (2012); Craig, *supra* note 16, at 72; Davor Jancic, *A Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue*, 52 COMMON MKT. L. REV. 939, 944 (2015); Shaw, *supra* note 25.

²⁸ ALLAN ROASAS & LORNA ARMATI, EU CONSTITUTIONAL LAW, ch. 3 IV (3rd ed., 2018); Federico Fabbrini, *The Principle of Subsidiarity*, in 1 OXFORD PRINCIPLES OF EUROPEAN UNION LAW, Part II 7 (Robert Schütze & Takis Tridimas eds., 2018).

²⁹ Craig, *supra* note 16.

³⁰ Jacob Öberg, *Subsidiarity as a Limit to the Exercise of EU Competences*, 36 Y.B. EUROPEAN L. 391 (2017).

³¹ ROBERT SCHUTZE, EUROPEAN CONSTITUTIONAL LAW 64 (2nd ed., 2018).

³² Grundgesetz [GG] [Basic Law] art. 20 (Ger.) translation at Basic Law for the Federal Republic of Germany (gesetze-im-internet.de); see also CHRISTIAN BUMKE & ANDREAS VOBKUHLE, GERMAN CONSTITUTIONAL LAW: INTRODUCTION, CASES AND PRINCIPLES 19 (2019); Vicki C Jackson, *Comparative Federalism and Transnational Judicial Discourse*, 2 INT'L J CONST L 91, 102 (2004).

³³ TEU art. 4; Grundgesetz [GG] [Basic Law] art. 30 (Ger.).

³⁴ TEU art. 5(1); Grundgesetz [GG] [Basic Law] art. 72(2) (Ger.). For full discussion *infra* Part II A.

Critically, for the purposes of this article, the institutional architecture in both systems is comparable. Both vest their highest (central) courts with jurisdiction over the principle.³⁵ Both also empower the periphery to engage the center in the political control of the subsidiarity principle and to influence the center's legislative process.³⁶ The institutional architecture of both the EU and Germany comprise the central legislatures and the peripheral legislatures—who have capacity to determine the rationale of the principle of subsidiarity. Finally, the constituent powers of both jurisdictions have both forcefully weighed through the iterative codification of subsidiarity.³⁷

The remainder of the article develops this argument in three steps. Part I of the article first turns to the role that the constituent powers of both systems have exerted a powerful influence over the direction over the trajectories of the practices of courts and political institutions. Through iterative codification of the subsidiarity principle in the respective foundational texts, the constituent powers have instructed the courts to treat the principle as justiciable—in turn causing them to abandon deference to the central legislatures. The iterative codification of the principle of subsidiarity has also engaged the periphery in political control of the subsidiarity principle.

In Parts II, III, IV, and V, the article focuses on the comparative analysis of judicial practices on the principle of subsidiarity. The analysis will demonstrate how the Court of Justice of the EU (CJEU) and the Federal Constitutional Court of Germany (FCC) have each developed over twenty-odd years a body of cases with a sufficiently sizeable and stable form of jurisprudence.³⁸ These jurisprudences have been converging around a specific point for the principle of subsidiarity—attributing a rationale of justiciable legality to the principle. This shared rationale demands that the center must not overreach into matters reserved for the periphery, even though outcomes in concrete cases may diverge. Parts II and III separately

³⁵ TEU art. 19(1); Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, art. 8, 2008 O.J. (C 115/206) [hereinafter Subsidiarity Protocol]; Grundgesetz [GG] [Basic Law] art. 93 (Ger.).

³⁶ TEU art. 4 Subsidiarity Protocol; Grundgesetz [GG] [Basic Law] art. 72(4), art. 76 (Ger.).

³⁷ For discussion of the respective amendments of the EU Founding Treaties and the Basic Law *see infra* Part II A. and B. respectively.

³⁸ The term is used here in the first and the most prevalent sense that jurisprudence seeks to analyze, explain, classify, and criticize entire bodies of law, *see* LII Staff, *Jurisprudence*, LII/LEGAL INFORMATION INSTITUTE (Aug. 6, 2007).

trace the iterative codifications of the principle of the subsidiarity principle and the evolution of the jurisprudences of the CJEU and the FCC within that context. Part IV compares and analyzes these jurisprudences for the rationale that justifies the actual judicial review practice. From a starting point of complete deference to the center, both courts have moved to effective judicial review. However, while the articulated tests seemingly require a positive link with a higher constitutional objective, both courts in their actual review practice attribute a rationale of legality to the principle of subsidiarity—which curtails the tendency of the center to overreach. Thereunder, both courts scrutinize whether an act for which the center does have competence, nevertheless impugns upon a primary or reserved competence of the periphery. The actual judicial review of a subsidiarity serves to weed out unlawful excesses, not to determine the positive necessity of the central action. It is only regarding outcomes in concrete cases that the two jurisprudences continue to diverge. For example, the FCC has struck down legislation, while the CJEU has so far saved all incriminated acts by bringing them under the primary EU competence for the internal market. Part IV explains this finding pertaining to convergence and divergence. It focuses on the constraints for actors within systems of divided competence systems. The institutional capacity of courts for positive and negative competence assessments underpins their adopting a rationale of legality. Part V examines how at the same time, the roles of the peripheral legislatures in the central legislative process differ, explaining the diverging outcomes.

In Part VI, the article turns to the political practice on the principle of subsidiarity under the Treaties and the Basic Law. In those practices, the subsidiarity principle acquires a different rationale of necessary action. It finds that the political practices in both systems also broadly converge, imbuing the principle with this complementary rationale of necessity. This rationale takes the objective of the center as a given and focuses on the means of achieving it. It demands evaluating means of central-uniform and decentral-plural action. This rationale is susceptible of political ex-ante control through a legislative procedure in which the periphery may articulate decentral alternatives to the proposed central action. As will be shown,³⁹ such a procedure exists post-Treaty of Lisbon for the EU.⁴⁰ Under the Basic

³⁹ *Infra* Part VI.

⁴⁰ Subsidiarity Protocol, arts. 5-7.

Law, the necessity rationale underpins the power of peripheral legislatures to diverge from federal legislation.⁴¹

II. CODIFYING SUBSIDIARITY: THE ROLE OF THE CONSTITUENT POWERS

This Part focuses on the role of the constituent power that controls the foundational document, codifying the principle of subsidiarity at the highest level of the normative hierarchy.⁴² In the case of the Basic Law, the constituent power is the two chambers of the federal parliament.⁴³ In the case of the Treaties, the constituent power is comprised of the Member States as Contracting Parties and the Convention.⁴⁴ Both have amended in several steps the text of the Basic Law and of the Treaties, respectively, to strengthen subsidiarity as a legal principle. Section A explains the iterative amendment of the Basic Law. Section B traces this for the EU Treaties. Section C discusses how these amendments become an instruction for the courts. The FCCC and the CJEU have both aligned their jurisprudence with that instruction. The section will demonstrate that both courts had initially adopted a stance of complete deference to the respective central legislatures, but following the amendments, they abandoned this deference and have adopted a position that considers subsidiarity to be justiciable and that central legislation is subject to effective judicial review.

A. Codifying Subsidiarity in the Basic Law

While the Basic Law does not use the term subsidiarity, it contains a legal principle to secure the center's accountability in the exercise of its competence. Though the codified text has remained the indeterminate, this principle has been codified in the Basic Law over

⁴¹ GRUNDGESETZ [GG] [BASIC LAW] art. 72(4) (Ger.). See *infra* Part II A.

⁴² See Kumm, *supra* note 10; Walker, *supra* note 3; MacCormack, *supra* note 11 and accompanying text.

⁴³ GRUNDGESETZ [GG] [BASIC LAW] art. 79(2) (Ger.) (providing that constitutional amendments require a two-thirds majority in both chambers of the federal legislature, the *Bundestag* and the *Bundesrat*, the organ representing the *Länder*).

⁴⁴ TEU art. 48(3).

three iterations, first in 1949⁴⁵ and then through amendments in 1994⁴⁶ and 2006,⁴⁷ with the intention of strengthening and refining it.

The original 1949 Basic Law contained Article 72(2), which required the Federation to have a “need” in order to exercise one of its non-exclusive competences.⁴⁸ It also provided certain reference grounds for this need.⁴⁹ The provision applied to the non-exclusive competences of the Federation, which were either shared or were framework competences. Otherwise, the *Länder* remained free to act under these competences.⁵⁰

In 1994, the provision was substantially amended to limit the exercise of non-exclusive competences by the Federation and to protect the autonomy of the *Länder* legislatures.⁵¹ Article 72(2) now required the exercise of these competences to be “necessary.”⁵² Pertaining to the reference grounds, only economic unity, legal unity, and the equivalence of living conditions throughout the federal territory were retained—while additional grounds for the 1949 version were deleted, including that a matter cannot be effectively dealt with by the *Länder* legislatures and that it could affect the interests of others.⁵³ A legislative procedure for repealing federal legislation that is no longer necessary was established.⁵⁴ The Basic Law was also amended so as to introduce a special action before the FCC for the annulment of federal legislation on the grounds of violating Article 72(2). The *Länder* legislatures are privileged applicants in this

45 Grundgesetz für die Bundesrepublik Deutschland (May 23, 1949), [Federal Gazette] BUNDESGESETZBLATT (BGBl), 1 (documentArchiv.de) translation at The Basic Law of the FRG (cvce.eu).

46 BUNDESGESETZBLATT [Federal Gazette], Oct. 27, 1994, BGBl I at 3146 (Ger.).

47 BUNDESGESETZBLATT [Federal Gazette], Aug. 31, 2006, BGBl I at 2034 (Ger.).

48 GRUNDGESETZ [GG] [BASIC LAW] art. 72(2) (Ger.) (Bedürfnis).

49 See discussion *infra* Part III.

50 GRUNDGESETZ [GG] [BASIC LAW] art. 72(1) (Ger.).

51 BUNDESGESETZBLATT [Federal Gazette], Oct. 27, 1994, BGBl I at 3146 (Ger.).

52 The official English translation of art. 72(2) in force from 1994 to 2006 reads, “The Federation shall have the right to legislate on matters falling within . . . Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.” GRUNDGESETZ [GG] [BASIC LAW] art. 72(2) (Ger.).

53 GRUNDGESETZ [GG] [BASIC LAW] art. 72(2) (Ger.).

54 GRUNDGESETZ [GG] [BASIC LAW] art. 72(3) (Ger.) (now Basic Law 2006 art. 72(4)).

procedure.⁵⁵ Each legislature may also petition the Court to declare that a federal statute is no longer necessary and must be therefore be repealed.⁵⁶

In 2006, the Basic Law was once again amended.⁵⁷ The subsidiarity clause of Article 72(2) remains unchanged, however now only applies to some of the shared competences of the Federation.⁵⁸ In a second group of shared competences, each *Land* receives the power to freely diverge from federal legislation (Article 72(3)). In a third group of shared competences, the Federation can act without regard to the subsidiarity principle.⁵⁹ The amendment also turned several shared competences into exclusive *Länder* competences.⁶⁰ Finally, the category of framework competences was abolished and the competence heads became shared competences.⁶¹

B. Codifying Subsidiarity in the Founding Treaties of the European Union

The 1957 Treaty of Rome⁶² established the then European Economic Community. It did not mention the principle of subsidiarity, but similar to the Basic Law, successive treaties, which have amended that Treaty as well as the new Treaty on European Union, later iteratively codified the principle of subsidiarity. The following sets this out, starting from the 1986 Single European Act to the 2007 Treaty of Lisbon.

⁵⁵ GRUNDGESETZ [GG] [BASIC LAW] art. 93(1)(2a) (Ger.). Other applicants are the government of each Land and a fourth of the members of the *Bundesrat*, the second chamber of the Federal Parliament representing the *Länder*.

⁵⁶ GRUNDGESETZ [GG] [BASIC LAW] (1994) art. 93(2) (Ger.).

⁵⁷ GRUNDGESETZ [GG] [BASIC LAW] 2006 (Ger.).

⁵⁸ These matters are enumerated in 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of art. 74; *see* GRUNDGESETZ [GG] [BASIC LAW] art. 74 (Ger.).

⁵⁹ GRUNDGESETZ [GG] [BASIC LAW] art. 72(2) *e contrario* (Ger.).

⁶⁰ GRUNDGESETZ [GG] [BASIC LAW] art. 70(2) (Ger.). These competences are for instance for the prison system, shop closing, restaurant law, amusement arcades, trade fairs, exhibitions, markets, parts of housing, agricultural property, land consolidation, settlement and homestead affairs, sport, leisure, the law of state officials and judges, a large part of university law, university building, general legal relations of the press.

⁶¹ GRUNDGESETZ [GG] [BASIC LAW] art. 72(2) (Ger.).

⁶² Treaty establishing the European Economic Community and connected documents 5-183, 378 (Luxembourg: Publishing Services of the European Communities, [s.d.]).

The 1986 amending treaty, known as the Single European Act,⁶³ inserted the term “subsidiarity” into the EEC Treaty for the first time; however, even in the community environmental policy, there was no definition provided.⁶⁴

The 1992 amending Treaty of Maastricht⁶⁵ paired Article 1 of the new Treaty, regarding the European Union objective of the closer union with the idea of subsidiary action. It also inserted a new Article 3(b)(2) on the principle of subsidiarity, which it defined, into the renamed Treaty establishing the European Community.⁶⁶ The principle was made applicable to all non-exclusive competences of the Community. Those however remained unspecified.⁶⁷

The 1997 Treaty of Amsterdam renumbered the provision (Article 5(2) TEC), but left it unchanged. It also added a Protocol on the Application of the Principle of Subsidiarity, containing guidelines for the application of the principle and the means of its control.⁶⁸

The 2007 Lisbon Treaty⁶⁹ further strengthened the principle of subsidiarity in both Founding Treaties. Article 1(2) of the amended Treaty on European Union now requires that all decisions in the EU be taken by the smallest political unit.⁷⁰ Article 5(1) of that treaty determines that the subsidiarity applies to the exercise by the Union of

⁶³ Single European Act. Official Journal of the European Communities (O.J.) L (169), June 29, 1987.

⁶⁴ EEC Treaty art. 130r(4) (repealed by the Maastricht Treaty).

⁶⁵ TEU, July 29, 1992, 1991 O.J. (C 191/1).

⁶⁶ TEU (Maastricht Treaty) art. 3(b)(2) (“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”).

⁶⁷ See Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community*, 29 COMMON MARKET L. REV. 1107 (1992).

⁶⁸ Protocol on the application of the principles of subsidiarity and proportionality. See Gráinne de Búrca, *Reappraising Subsidiarity’s Significance After Amsterdam*, HARVARD JEAN MONNET WORKING PAPER 7/99, 24; ANTONIO ESTELLA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* 101 (2002).

⁶⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007 O.J. (C 306/1).

⁷⁰ Constitutional Treaty, art. I-1, 2004 OJ (C 310/207). See *id.* (The Member State level comprises central, regional and local sub-levels, as opposed to the ‘Union level.’).

all its non-exclusive shared and supporting competences.⁷¹ Article 5(3) provides a revised definition of the principle.⁷² Henceforth, the EU shall act only if the objectives of the proposed action cannot be sufficiently achieved at Member State level, “but can rather” be achieved at the Union level. This replaces the wording “can therefore” in Article 5(2) EC, that had seemed to place the onus on the Member States.⁷³ The Member States remain competent to exercise these shared and supporting competences and need not comply with the subsidiarity. The Lisbon Treaty has also amended the Treaty on the Functioning of the European Union (TFEU). It now sets out the categories of shared and supporting competences that fall under the principle of subsidiarity.⁷⁴ As such, individual competence heads are allocated to these categories and the subsidiarity principle continues to apply after an act has been adopted under these competences, with the EU having to repeal it later if necessary.⁷⁵

⁷¹ Mandate for the 2007 Lisbon Intergovernmental Conference (IGC) (European Council Doc No. 11218/07, June 2007), para 10, art. 2(2)(1); Treaty on the Functioning of the European Union (TFEU) art. 2, May 9, 2008, O.J. (C 115/47); Protocol (No. 25) On the Exercise of Shared Competences, 2008 O.J. (C 115/307).

⁷² Compare TEU art. 5(3) (“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”) with TEC (Maastricht) art. 5, December 24, 2002, O.J. (C 325/45) (“In areas which do not fall into its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States *and can therefore*, by reason of the scale or effects of the proposed action, be better achieved by the Community.”) (emphasis added).

⁷³ See Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT L. REV. 617, 661 (2008); see also Christian Calliess, *Written Statement to the Public Expert Discussion of the European Law Subcommittee of the Legal Committee of the German Bundestag on the Subject Examination of the Principle of Subsidiarity Under Union Law*, 3 DEUTSCHER BUNDESTAG 20 (June 16, 2010), http://www.bundestag.de/bundestag/ausschuesse17/a06/ua_europarecht/anhoerung/en/01_Subsidaritaet/02_Stellungnahmen/Stellungnahme_Calliess.pdf.

⁷⁴ TFEU arts. 4, 6.

⁷⁵ TFEU art. 2(2)(3). The objective of maintaining the *acquis communautaire* that had been contained in art. 2(1) indent 5 TEC was deleted. For the continual effect of the principle of subsidiarity see Declaration (No 18), in Relation to the Delimitation of Competences, at ¶ 2, 2008 O.J. (C 115/344) (setting forth the procedure for repealing legislation). See Mandate for the 2007 Lisbon IGC, ¶ 19b.

Finally, the Lisbon Treaty has amended Protocol No. 2 on Proportionality and Subsidiarity⁷⁶ (the “Protocol on Subsidiarity” or “Protocol”). The amended protocol removes the illustrative criteria that the protocol contained that was annexed to the Amsterdam Treaty.⁷⁷ Post Lisbon Treaty, the primary law, consequently, became less determinate. To compensate for this indeterminacy, the amended Protocol sets up two control mechanisms for the principle.⁷⁸ The new second subparagraph of Art. 5(3) TEU establishes a direct link between the substantive principle and the protocol’s mechanisms. There is the ex-post judicial review by the CJEU of legislative acts adopted by the Union legislature.⁷⁹ Under Article 8(1) of the Protocol, each Member State’s government and parliament has independent standing in a special annulment action before the Court to challenge the subsidiarity of certain EU acts.⁸⁰ Standing is not predicated upon concerns which been raised in the legislative procedure.⁸¹ Article 8(2) of the Protocol also gives standing to the EU Committee of the

⁷⁶ TFEU Protocol (No. 2) On the Application of the Principles of Subsidiarity and Proportionality, 2008 O.J. (C 115/206–209) [hereinafter Subsidiarity Protocol].

⁷⁷ The Amsterdam version of the Protocol read in relevant part as follows: “following guidelines should be used in examining whether the abovementioned condition is fulfilled: - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; - actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests; - action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.” These guidelines on the meaning and implementation of the subsidiarity principle had already been agreed by the European Council in Edinburgh in 1992, and these were later incorporated into the Interinstitutional Agreement on implementing subsidiarity in 1993, Bull EC 10-1993 1.6.3, 2.2.2.

⁷⁸ By contrast, there had only been the generic link between the Amsterdam Treaty and its Subsidiarity Protocol in TEC art. 311 (now TEU art. 51).

⁷⁹ Defined in Subsidiarity Protocol art. 4.

⁸⁰ Subsidiarity Protocol art. 8(1) in conjunction with TFEU art. 263(2) and Statute of the Court of Justice of the EU art. 51(a). See JEAN-CLAUDE PIRIS, *THE LISBON TREATY* 13 (2010). The Member States have passed implementing legislation, pursuing different models. Art. 88-6(2) of the revised French Constitution (1958 CONST. art 8806(2) (Fr.)) and § 12 of the German implementing statute (Integrationsverantwortungsgesetz, §12 (Ger.)) provide that parliament decides on the action and conducts the case. In Belgium, the government conducts the case.

⁸¹ The plenary of the European Convention rejected the proposal of WG I to make a parliament’s right of action dependent on its having participated in the Early Warning Mechanism (Summary report on the plenary session of 3-4 Oct. 2002, 11 Oct. 2002, CONV 331/02, [hereinafter WG I Report], 7). This was on the ground that the two procedures were independent of each other (Plenary Report, 8/9).

Regions to challenge legislative acts for which it must be consulted.⁸² Additionally, the amended protocol introduces a novel ex-ante procedure which control the subsidiarity politically by including Member State parliaments in the EU legislative procedure. We will return to this much discussed procedure below.⁸³

C. Instructing the Courts

As will be explained in Part III, the FCC stated in the *Geriatric Nursing Act* case, that the 1994 amendment of Article 72(2) of the Basic Law was an instruction to overrule its previous deference and engage in effective subsidiarity review, as this amendment reflected the intention of the constituent power.

The CJEU has not yet made such an express statement. Yet, the Amsterdam and Lisbon Treaties iteratively amending the subsidiarity principle is such an instruction of the constituent power to the Court, that it effectively review EU legislation under it. The Court has acknowledged use of the Lisbon Treaty negotiating history in the interpretation of the amended Treaties.⁸⁴ That intent of the constituent power can be traced back to the Laeken Declaration of the European Council that had called for effectuating the subsidiarity principle.⁸⁵ Pursuant to this mandate, the European Convention recommended effectuating the subsidiarity principle by defining the categories of non-exclusive Union competences,⁸⁶ and judicial review of adopted legislative acts (ex-post) and political monitoring of draft legislative acts during the legislative procedure (ex-ante).⁸⁷ That new mechanism

⁸² Subsidiarity Protocol art. 8(2).

⁸³ See discussion *infra* Part V.

⁸⁴ Pringle, *supra* note 23, ¶ 135; C-583/11P; *Inuit v. EP and Council*, 2013 ECLI:EU:C:2013:625, ¶ 32.

⁸⁵ Laeken Declaration of the European Council, Dec. 2001, Pt II 1, Bulletin of the European Union, 2001, no. 12; Luxembourg Office for Official Publications of the European Communities, *Presidency Conclusions of the Laeken European Council* 19-23 (Dec. 14, 15 2001), https://www.cvce.eu/en/obj/laeken_declaration_on_the_future_of_the_european_union_15_december_2001-en-a76801d5-4bf0-4483-9000-e6df94b07a55.html; See also Declaration (No. 23) on the Future of Europe annexed to the 2001 Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2001 O.J. (C 80/85).

⁸⁶ European Convention, Working Group V on Complementary Competencies, Report, CONV 375/1/02 REV 1, Nov. 6, 2002. That report was approvingly referenced by Working Group I.

⁸⁷ European Convention, Working Group I on the Principle of Subsidiarity, Conclusions, CONV 286/02, 3 pt. I no. 6 and 7, Sept. 23, 2002. The plenary

would give parliaments a say about the subsidiarity during the EU legislative procedure.⁸⁸ *Ex ante* judicial control was discussed, but rejected, so as to not interfere with this process.⁸⁹ These ideas proved uncontroversial at the 2004 Intergovernmental Conference on the Constitutional Treaty.⁹⁰ While that treaty never entered into force, its provision for the subsidiarity of Union action was not only endorsed,⁹¹ but was strengthened by the 2007 Intergovernmental Conference on the Lisbon Treaty.⁹² The views of Member State parliaments on the Constitutional and Lisbon Treaties connote similar themes.⁹³ This intent has found an expression in the text of the Lisbon amendments, namely Art. 5(1), (3) TEU, Art. 2 TFEU, and the Subsidiarity Protocol discussed before.⁹⁴ Indeed, the Lisbon settlement relies on the principle of subsidiarity to safeguard peripheral autonomy, rather than reallocating competences back to the Member States along the lines of the 2006 revision of the Basic Law.⁹⁵ This settlement also makes the Court the guardian of subsidiarity, despite its institutional self-interest towards the Union, rather than establishing a special competence court.⁹⁶ Finally, the FCC has emphasized the Subsidiarity Protocol's

discussion of the WG I report makes apparent that not the subsidiarity principle as such but the novel monitoring mechanism was deemed to be political in nature. WG I Report at 6.

⁸⁸ Report of Convention Working Group IV on National Parliaments, CONV 353/02, at 23, para 23, Oct. 22, 2002.

⁸⁹ WG I Report at 78. See Stephen Weatherill, *Competence Creep and Competence Control*, 23 Y.B. EUROPEAN L. 1 (2004).

⁹⁰ Cf. Weatherill, *supra* note 89, at 30.

⁹¹ Mandate for the 2007 Lisbon LGC at ¶ 19 (retain the substance of the Constitutional Treaty reforms, while abandoning the “constitutional concept.”).

⁹² The Lisbon IGC strengthened judicial review over the Constitutional Treaty by providing for a right of action also of the Committee of the Regions in Subsidiarity Protocol art. 8, a demand already made in the European Convention (CONV 610/03, pt. 1d, e). The IGC also enhanced the political monitoring of national parliaments by extending the period for parliaments to consider draft legislative acts by two weeks (Protocol on the Role of National Parliaments art. 4), and by providing that parliaments' reasoned opinions require a reply in the form of a reasoned opinion of the Commission in the ordinary legislative procedure (Subsidiarity Protocol art. 7(3)).

⁹³ See, e.g., Assemblée Nationale Rapport d'information n. 562 Tome 1, Jan. 8 2008, p. 89 (Fr.); Gesetzes zum Vertrag von Lisabon [Bill on the Treaty of Lisbon], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/8300 (Ger.); Gesetzentwurf der Bundesregierung [Bill on the Constitutional Treaty], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 15/4900 (Ger.); EU Committee, Strengthening National Parliamentary Scrutiny of the EU – the Constitution's Subsidiarity Early Warning Mechanism, 2004–2005, HL Paper 101, ¶¶ 43–44 (UK).

⁹⁴ See discussion *infra* Part IV.

⁹⁵ Declaration No. 18, *supra* note 22, at para 3.

⁹⁶ See Weatherill, *supra* note 89, at 28.

judicial and political procedures in concluding that ratification of the Lisbon Treaty was compatible with the Basic Law.⁹⁷

III. THE REVIEW OF SUBSIDIARITY BY THE FEDERAL CONSTITUTIONAL COURT: THE GERIATRIC NURSING ACT JURISPRUDENCE

The jurisprudence of the FCC has evolved in response to this iterative codification of the principle of subsidiarity in the Basic Law. The FCC had consistently treated the 1949 version of Article 72(2) of the Basic Law as non-justiciable.⁹⁸ No federal statute has ever been found to offend it. Yet, after the 1994 amendment, the Court effectively abandoned this jurisprudence in the 2002 *Geriatric Nursing Act* case.⁹⁹ The case concerned a federal statute that standardized the vocational training and qualifications for geriatric Nursing.¹⁰⁰

The statute partly exceeded the shared competence for admission to the medical profession¹⁰¹ and to that extent it was declared unconstitutional. Yet, the Court nevertheless reviewed the statute under the subsidiarity clause of Article 72(2), interpreting the amended provision. It opined that it was an essential element of the constitutional order of competence. As amended, Article 72(2) only permitted federal legislation under a shared competence to the extent that it was “necessary.”¹⁰² The constituent power’s intent for the provision to be justiciable had found expression in the amendment,

⁹⁷ BVerfG, 2 BvE 2/08, June 30, 2009, ¶ 5, http://www.bverfg.de/e/es20090630_2bve000208en.html.

⁹⁸ BVerfG, 1 BvL 18/52, Apr. 22, 1953, <https://www.servat.unibe.ch/dfr/bv002213.html>. See BVerfG, 1 BvL 11/14, Apr. 10, 2018, para 86, http://www.bverfg.de/e/ls20180410_1bvl001114.html.

⁹⁹ BVerfG, 2 BvF 1/01, Oct. 24, 2002, http://www.bverfg.de/e/fs20021024_2bvff000101.html (*translated in* DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 132-7 (3rd ed., 2012)); *see also* Markus Rau, *Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the “Geriatric Nursing Act” Case*, 4 *GERMAN L.J.* 223-36 (2003).

¹⁰⁰ It was challenged in an action for annulment, Basic Law art. 93(1)(2) (Ger.). The government of each *Land* and a third of the members of the federal parliament have standing in this procedure.

¹⁰¹ Basic Law art. 74(1) no. 19 (Ger.).

¹⁰² Basic Law art. 72(1) (Ger.) (“On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.”).

which supplanted the term necessity for that of mere need. This was an “instruction” to the Court to engage in effective judicial review.

The Court then sought to develop a justiciable standard, or test. It opined that Article 72(2) enumerates criteria of that necessity as economic unity, legal unity, and the equivalence of living conditions across the federal territory.¹⁰³ All of which relate to the objective of political integration. The Court proceeded to define each criteria. Thus, legal unity was at stake only where the differences between the *Länder* constitute serious legal fragmentation or unacceptable legal uncertainty for individuals or where that is likely to be the case in the future. Economic unity was implicated where the federal legislation is primarily economic. Merely diverging economic policies of the several *Länder* or their inadequacy do not suffice. Rather existing or likely future differences between the *Länder* or their inactivity must entail substantial risks for the functioning of the national economy or obstacles to exchanges across the federal territory. Similarly, equivalence of living conditions did not *per se* justify the pursuit of a federal social policy or the general improvement of living conditions. Rather, the living conditions of individuals in comparable situations must diverge considerably between the several *Länder*, calling into question the fundamental social fabric throughout the federal territory.¹⁰⁴

This test has two objects: the concept of the legislation as a whole and each individual provision of the legislation. Even if the legislative concept passes muster, each individual rule can be offensive, if it does not call into question the very workability of the legislative concept.¹⁰⁵

The Court went on to define the standard of review. The review is not limited to the reasonableness of the federal legislature’s interpretation, as it would otherwise self-control the requirements of Article 72(2) of the Basic Law.¹⁰⁶ The legislature’s determinations of facts, both from the past and the present—are subject to review by the Court. It scrutinizes that these are reflected in the legislation and do not show any extraneous considerations. For the prognosis of future facts, the Court accords the federal legislature a context-specific margin of appreciation.¹⁰⁷ The legislature’s prognosis remains subject

¹⁰³ BVerfG, 2 BvF 1/01, Oct. 24, 2002, http://www.bverfg.de/e/fs20021024_2bvf000101.html, 106 BVerfGE 62 (143).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

to control as to methodology and whether the relevant factual considerations are adequately reflected in the legislation. In case of erroneous factual determinations, the federal statute will only be found unconstitutional if correct considerations cannot support it.¹⁰⁸

Applying this test to the incriminated statute, the Court found that it ran afoul. In respect of “equivalent living conditions” that the legislature had based itself on, the Court found no demonstrable substantial divergence in the living conditions of geriatric nursing care facilities across the federal territory. Such findings had neither been made in the legislative process, nor had they been argued in the constitutional court proceedings. The “legal unity” had not been threatened by the existing plurality of existing formation standards for geriatric nursing in the *Länder*. In addition, the *Länder* had agreed to mutually recognize their respective degrees.¹⁰⁹ Importantly, the Court added that the intention of the federal legislature to improve the care of the elderly did not suffice. This was a social policy objective within the purview of the *Länder*.¹¹⁰

It is interesting that, in the actual application of the test, the Court in the *Geriatric Nursing Act* case distinguishes the review of the competence from that of the subsidiarity. The former ensures that the statute falls under a federal competence, but the latter focuses on its overreach into adjacent matters of *Land* competence. The Court indeed states that the statute at issue concerned vocational training, which is generally a matter for the *Länder*.¹¹¹ The incriminated statute would thus have failed the test because of a substantial overreach into *Land* competences. The Court nevertheless saved the statute, on the exceptional ground that the constituent power had expressly decided that federal legislation regarding the formation of nursing would be necessary.¹¹²

The Court subsequently applied this *Geriatric Nursing Act* test, finding subsequent federal legislation to run afoul of the subsidiarity principle in four out of six subsequent cases.¹¹³ These cases all concern

¹⁰⁸ *Id.*

¹⁰⁹ BVerfG, 2 BvF 1/01, Oct. 24, 2002, http://www.bverfg.de/e/fs20021024_2bvff000101.html, 106 BVerfGE 62 (143).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ This jurisprudence of the First and Second Senates of the Constitutional Court has been welcomed by the majority of observers, see Christian Calliess, *Kontrolle zentraler Kompetenzausübung, in Deutschland und Europa: Ein*

substantial overreach by the Federation into reserved *Länder* competence areas. The 2004 *Junior-Professorship* case¹¹⁴ concerned a federal statute that prescribed tenure track career paths for all universities, the so-called Junior-Professorship, essentially abolishing appointment for full professorship that the higher education laws of most *Länder* permitted. The statute was unconstitutional for exceeding the limits of the Federation's framework competence for higher education. But the Court also found it to violate Article 72(2).¹¹⁵ Restating the *Geriatric Nursing Act* test, the Court found that the aim stated in the legislation was to improve the international competitiveness of the higher education sector. That aim was not consistent with any of the criteria of Article 72(2), economic or legal unity or equivalent living conditions.¹¹⁶ Nor did the legislation meet these criteria objectively. For example, economic unity was not met, for it was not a demonstrable problem. The *Länder* had been well capable of attracting high quality international and national researchers, and the competitiveness of the university sector required experimentation rather than uniformity.¹¹⁷ Nor was there an intolerable legal fragmentation, as the sector was marked by a high mobility of researchers.¹¹⁸

The 2004 *Shop Opening Hours* case¹¹⁹ concerned a federal statute about the times that commercial premises could be open for business. This statute fell under the shared federal competence for commerce. The Court in the case found that the legislation was inconsistent with Article 72(2). It did not provide economic or legal unity, as the federal

Lehrstück für die Europäische Verfassung, 17 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 181 (2003), Wolfgang Rüdiger, *Artikel 72(2) GG, in der Rechtsprechung des Bundesverfassungsgerichts*, in STAAT IM WORT: FESTCHRIFT FÜR JOSEF ISENSEE (Otto Depenheuer et al. eds., 2007); Elena Buoso, *L'art. 72, II comma, GG davanti al Bundesverfassungsgericht*, LE REGIONI 959 (2003); but see Hans-Peter Schneider, *Federal Republic of Germany*, in DISTRIBUTION OF POWERS IN FEDERAL COUNTRIES 123, 136 (Akhtar Majeed et al. eds., 2006) (not going far enough).

¹¹⁴ BVerfG, 2 BvF 2/02, July 27, 2004, http://www.bverfg.de/e/fs20040727_2bvf000202.html (translated in THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 99, at 139–43).

¹¹⁵ Cross-referenced in Basic Law art. 75(1)(1) (Ger.) (deleted in 2006) for all framework competences.

¹¹⁶ *Id.*; cf. *supra* note 102 with accompanying text.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ BVerfG, 1 BvR 636/02, June 9, 2004, http://www.bverfg.de/e/rs20040609_1bvr063602.html.

legislator had empowered the *Länder* to grant exceptions to the federal rules in a blanket manner.¹²⁰ The *Dangerous Dogs* case, from 2004, also concerned a federal statute which attached criminal sanctions to *Länder* statutes that prohibited the breeding and keeping of certain dog races.¹²¹ The Court held that the statute could be based on the shared competence for criminal law, but that it ran afoul of Article 72(2). The incriminated federal legislation was not suitable to provide legal unity throughout the federal territory, for the definitions used in the several *Länder* statutes on police powers, which the federal statute criminalized, varied widely.¹²²

The analysis of *Shop Opening Hours* and *Dangerous Dogs* reveals a parallel. In both cases, the Court focuses not so much on the problem of divergence between the *Länder*, but on the suitability of the federal legislative remedy for it. In these instances, the federal statutes were unsuitable because they could not provide for unity in matters that were primarily *Länder* competence.¹²³ They therefore violated subsidiarity. Like *Junior-Professorship*, the 2005 case *Tuition Fees* related to higher education. The case concerned a federal statute that outlawed mandatory tuition fees.¹²⁴ While the Court affirmed the competence of the statute's framework, the statute did not satisfy the demands of Article 72(2). The federal legislature had based its position on the objective of equivalent living conditions, arguing that tuition fees would have a chilling effect, particularly for students from underserved communities. However, the Court considered this a social policy aim rather than meeting the criteria of Article 72(2).¹²⁵ Divergent developments about tuition fees would not have such effects on access to higher education as had been argued, nor were they apparent. Certain differences in the living conditions of students resulting from the introduction of tuition fees by some, but not all

¹²⁰ BVerfG, 1 BvR 636/02, June 9, 2004, http://www.bverfg.de/e/rs20040609_1bvr063602.html. The Court did not strike down the statute because it pre-dated the 1994 amendment and for that reason had to be repealed (Basic Law art. 125(2) (Ger.)).

¹²¹ BVerfG, 1 BvR 1778/01, Mar. 16, 2004 (translated in http://www.bverfg.de/e/rk20011123_1bvr177801en.html).

¹²² *Id.*

¹²³ In *Shop Opening Hours* the competence of the *Länder* for local business practices and in *Dangerous Dogs* the competence of the *Länder* for general public security.

¹²⁴ BVerfG, 2 BvF 1/03, Jan. 26, 2015, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2005/01/fs20050126_2bvfo00103.html.

¹²⁵ *Id.*; see *supra* note 102 with accompanying text.

Länder, had to be accepted as the consequence of their legislative autonomy. The Court did leave open the door to hear the issue in the future as Federal legislation could become necessary if the significant impact on access could not be countered by the action of each *Land*.

The Court adopted a more lenient approach in two 2005 cases concerning social security. In *Social Security I*, several *Länder* challenged a federal statute concerning mutual compensatory regimes for public health care providers.¹²⁶ The Court found a shared competence, in addition to finding the federal legislation necessary under Article 72(2) to ensure the equivalence of living conditions throughout the federal territory.¹²⁷ Legislation was also necessary for economic unity as legal divergences between the *Länder* would seriously hinder the movement of the insured. Interestingly, the Court dealt separately with the provision that covered small providers active in only one *Land*. The Court ruled that the legislation did overreach into a *Länder* competence, in turn saving the legislation as a result of the legislative concept of a nationwide compensatory regime, which had to include such providers. The *Social Security II* case concerned a federal statute that dealt with a uniform methodology for setting the prices that health care providers had to pay for certain medicinal services and goods.¹²⁸ The Court found that a uniform methodology was necessary to ensure a similar level of health care provision and thus met the criteria of equivalent living conditions and economic unity throughout the federal territory.¹²⁹

This jurisprudence then fed into the 2006 amendment of the Basic Law,¹³⁰ which reallocated individual competences to either the *Länder* or the Federation. The Court had taken a hard look at higher education, and the 2006 amendment shifts this matter mostly under the exclusive competence of the *Länder*. The Federation retains certain shared competences in the field, but these remain subject to subsidiarity under Article 72(2)¹³¹ or become subject to the *Länder*'s new power to

¹²⁶ BVerfG, 2 BvF 2/01, July 18, 2005, http://www.bverfg.de/e/fs20050718_2bvf000201.html.

¹²⁷ *Id.*

¹²⁸ BVerfG, 2 BvF 2/03, Sep. 13, 2005, http://www.bverfg.de/e/fs20050913_2bvf000203.html.

¹²⁹ Referring to the *Geriatric Nurses* test, see *supra* note 102 and accompanying text.

¹³⁰ Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], June 28, 2006, BGBl I at 2034 (Ger.).

¹³¹ Grundgesetz [GG] [Basic Law] art. 74(1)(13) (Ger.) (*translated in* http://www.gesetze-im-internet.de/englisch_gg/index.html (on financial support for research)).

deviate.¹³² The Court had scrutinized the subsidiarity of federal legislation on economic matters.¹³³ The 2006 amendment however continues to subject these economic competences to the subsidiarity clause of Article 72(2).¹³⁴ On the other hand, the Court had already noted in the *Geriatric Nursing Act* that certain matters, such as civil status, will generally implicate the objective of legal unity and justify federal legislation.¹³⁵ Correspondingly, the 2006 amendments remove a range of shared competences on legal matters from the reach of Article 72(2).¹³⁶ The same is true for the shared competence of social security,¹³⁷ where the Court had recognized a general concern for economic unity and cohesive living conditions already in the *Social Security I*¹³⁸ and *II*¹³⁹ cases.

After the 2006 amendment of the Basic Law, the FCC has maintained its *Geriatric Nursing Act* jurisprudence on Article 72(2). In the 2007 *Horseshoeing* case, it recognized again that federal legislation on vocational training serves the objective economic unity.¹⁴⁰ In the *Business Tax* case from 2010, the Court held that federal legislation under the shared competences for taxation must be subsidiary within the meaning of Article 72(2).¹⁴¹ The Court concluded that the legislation on a minimum business tax was necessary to preserve legal and economic unity across the federal territory, countering the considerable problem of businesses relocating to local tax havens.¹⁴² In the *Genetic Engineering* case, also from 2010, the Court stated that the new and specific competence over genetic technologies that the 1994 amendment had conferred on the

¹³² See Grundgesetz [GG] [Basic Law] art. 72(3)(6), relating to the competence of art. 74(33) to provide for university entry requirements and degrees.

¹³³ BVerfG, 2 BvF 1/01, Oct. 24, 2002 [hereinafter *Geriatric Nursing*]; BVerfGE, 1 BvR 636/02, June 9, 2004 [hereinafter *Shop opening hours*], BVerfGE, 1 BvR 2186/06, July 3, 2007, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/07/rs20070703_1bvr218606en.html [hereinafter *Horseshoing*].

¹³⁴ Grundgesetz [GG] [Basic Law] art. 74, at 11, 13, 15, 19a, 20, 21, 22, 25 (Ger.).

¹³⁵ *Geriatric Nursing* at ¶ 325.

¹³⁶ Grundgesetz [GG] [Basic Law] art. 74, at 1, 2, 3, 18 (Ger.).

¹³⁷ *Id.* at 12.

¹³⁸ See *supra* note 126 and accompanying text.

¹³⁹ See *supra* note 128 and accompanying text.

¹⁴⁰ BVerfG, 1 BvR 2186/06, July 3, 2007, ¶ 126, *English abstract*, Bundesverfassungsgericht - Decisions - New law governing horseshoing professions is partly void.

¹⁴¹ BVerfG, 2 BvR 2185/04, 27 Jan. 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/01/rs20100127_2bvr218504.html.

¹⁴² *Id.*

Federation, was still subject to the subsidiarity principle of Article 72(2).¹⁴³ The Court then accorded a considerable margin of appreciation to the federal legislature regarding the need to regulate this new technology in the interest of economic unity.¹⁴⁴ None of these cases implicated a traditional *Länder* competence. However, the Court ruled differently in the 2009 case *Federal Film Board*,¹⁴⁵ which concerned federal subsidization of the movie industry under the shared economic competence. The Court emphasized that culture was primarily a matter for the *Länder*, but it concluded that supplementary federal financial support ensured that the film industry was internationally competitive, and hence necessary for economic unity.¹⁴⁶

The most recent judgment of the Court turning on the subsidiarity principle is the *Benefits* case from 2015.¹⁴⁷ It highlights the impetus of the entire jurisprudence to curtail the Federation's overreach into general social policy. There, the Federation had legislated that non-working mothers of young children were to receive certain benefits. The Court stated the competence base for the legislation but ruled that the legislation was not subsidiary.¹⁴⁸ It was not necessary for economic or legal unity, nor for social cohesion. The Court effectively found the legislation to have the objective of incentivizing young mothers to stay at home,¹⁴⁹ which constitutes a general objective of social policy. However, so one has to understand the Court, social policy is a matter for the *Länder* rather than the Federation.

The contrast is clear with a 2018 judgment on a federal statute regulating the information activities of the authorities in the field of

¹⁴³ BVerfG, 1 BvF 2/05, Nov. 24, 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/11/fs20101124_1bvf000205.html (translated in http://www.bverfg.de/e/fs20101124_1bvf000205en.html).

¹⁴⁴ BVerfG, 1 BvF 2/05, Nov. 24, 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/11/fs20101124_1bvf000205en.html#item.

¹⁴⁵ BVerfGE, 2 BvR 1561/12, Jan. 28, 2014, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140128_2bvr156112.html.

¹⁴⁶ *Id.*

¹⁴⁷ BvF 2/13, 1 July 21, 2015, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/07/fs20150721_1bvf000213.html (translated in *Germany: Federal Constitutional Court Declares Child Care Allowance Act Unconstitutional*, GLOBAL LEGAL MONITOR, (loc.gov)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

food and feed law.¹⁵⁰ The Court there succinctly stated that the Federation has the competence for it under Article 74(1) no. 20 in conjunction with Article 72(2) of the Basic Law. The federal regulation of public information was necessary in order to preserve the economic unity within the meaning of Article 72(2) of the Basic Law,¹⁵¹ because it ensures the uniformity and comprehensibility of the information for a nationwide market event. Clearly, this federal legislation stayed within the economic area and did not reach over into social policy or another matter reserved for the *Länder*.

IV. THE REVIEW OF SUBSIDIARITY BY THE COURT OF JUSTICE OF THE EUROPEAN UNION: FROM WORKING TIME TO VODAFONE

The jurisprudence of the CJEU on subsidiarity has evolved in stages that broadly correspond to this iterative codification in the Treaties.

Under the Treaty of Maastricht, the Court had largely subsumed the subsidiarity as enshrined in Article 3b EC in its competence and proportionality review.¹⁵² For example, the 1996 *Working Time* case concerned Directive 93/104 on aspects of working time.¹⁵³ There, the Court only considered the subsidiarity incidentally, within its review of whether the directive fell under the shared competence of Article 118(a) EC.¹⁵⁴ The Court held that the directive was consistent with the competence. The Court also held the Council's objective to improve health and safety levels through common minimum standards "necessarily presupposes Community wide-action."¹⁵⁵ The competence to harmonize thus implied that Community action was also subsidiary. In a similar fashion, having found that the directive was proportionate to the legislative objective, the Court stated that it was also necessary from the standpoint of the subsidiarity.¹⁵⁶ The

¹⁵⁰ BVerfG, Mar. 21, 2018, 1 BvF 1/13, http://www.bverfg.de/e/fs20180321_1bvf000113.html

¹⁵¹ ¶ 23, referencing BVerfG, Dec. 17, 2014, 1 BvL 21/12, para 109, http://www.bverfg.de/e/ls20141217_1bvl002112.html.

¹⁵² See Treaty on European Union, July 29, 1992, 1991 O.J. (C 191/1).

¹⁵³ Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-05755. See Estella, *supra* note 68, at 140 n.5, for a list of further cases where subsidiarity was invoked up to 1998.

¹⁵⁴ Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-05755 (*Working Time*). The current version of TFEC art. 118a is codified in art. 153(1)(a), (2)(b).

¹⁵⁵ *Id.* at ¶ 47.

¹⁵⁶ *Id.* at ¶ 50.

Court finally stated that the requirement to state the reasons comprised subsidiarity.¹⁵⁷ However, it was enough for recitals of the directive to state relevant, if unspecific considerations. The Court confirmed this in *Deposit Guarantee Schemes*.¹⁵⁸ Evidently, the *Working Time Directive* approach denied the subsidiarity a role in controlling the legality of Union legislation.

Under the Treaties of Amsterdam and Lisbon, the Court has been moving away from *Working Time* and towards justiciable subsidiarity. The 2001 case *Netherlands v. EP and Council*, which dealt with Directive 98/44 and the legal protection of biotechnological inventions, indicates such a development.¹⁵⁹ There, the Court, clearly if briefly, considered the subsidiarity separately from the competence. It established smooth intra-Community trade as a criterion that the Community legislation must meet to satisfy Article 3b EC.¹⁶⁰ There remains a strong link with the *in-vires* review though, as the Court takes this criterion from the competence of Article 100a EC (now Article 114 TFEU) and refers back to the preceding competence discussion to establish that the scope of such legal protection affected intra-Community trade, and thus, necessitated uniform action by the Community.¹⁶¹

In the 2002 case *Ex Parte British American Tobacco (BAT)*, the Court applied the subsidiarity principle codified in Article 5(2) EC by the Treaty of Amsterdam.¹⁶² The Court first found that the competence to harmonize the internal market¹⁶³ covered Directive 2001/37, insofar as it set common maximum nicotine content for cigarettes. It then explicitly stated that the subsidiarity ought to be considered separately from the competence.¹⁶⁴ The Court first opined that the harmonization

¹⁵⁷ TFEU art. 296.

¹⁵⁸ Case C-233/94, *Germany v. Parliament and Council* (hereinafter *Deposit Guarantee Schemes*), 1997 E.C.R. I-02405. See also Case C-36/87, *Kellinghusen*, 1998 E.C.R. I-06337.

¹⁵⁹ Case C-377/98, *Netherlands v. EP and Council*, 2001 E.C.R. I-07079 [hereinafter *Biotechnology Inventions*]. Pursuant to its intertemporal jurisprudence, the Court applied Maastricht law.

¹⁶⁰ *Id.* at ¶¶ 30-33.

¹⁶¹ Compare *id.* at ¶¶ 32-33 with *id.* at ¶¶ 16-17.

¹⁶² Case C-491/01, *ex parte British Am. Tobacco (BAT)*, 2002 E.C.R. I-11453; Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising I)*, 2000 E.C.R. I-8419 had proceeded to subsidiarity Directive 98/43/EC having already failed the competence hurdle.

¹⁶³ TEC art. 95 (now TFEU art. 114).

¹⁶⁴ *BAT*, at ¶ 179 (referring to the new Amsterdam Protocol on Subsidiarity); Critical Matthias Kumm, *Constitutionalising Subsidiarity in*

competence was shared between the Community and the Member States, making it subject to the subsidiarity. It then developed the test that action by the community was necessary because it could better achieve the objective of the directive given the divergence of national laws, while the Member States could not have achieved such a legislative objective. However, that test remains linked to competences. For application of the test, the Court simply referred to the competence discussion.¹⁶⁵ The *BAT* Court also stated that subsidiarity scrutiny applies to each element of EU legislation, though it referred to its preceding discussion on proportionality.¹⁶⁶

The Court structured this subsidiarity review more clearly in the 2005 *Alliance for Natural Health* case. Testing Directive 2002/46 on the prohibition of the marketing of certain food additives against Article 5(2) EC, the Court focused on the part of the directive that prohibited the trade in non-complying food additives rather than leaving this matter to the Member States. It concluded that this directive was not drafted too widely, as a divergent development of proscriptive national rules had already been shown to create obstacles to intra-Community trade.¹⁶⁷

Interestingly, the Court used this test to protect the autonomous implementation of Community legislation by the Member States. The 2003 *AvestaPolarit Chrome* case arose due to a preliminary reference for such an interpretation rather than the validity of Directives 75/442 and 91/156 about waste. These directives were adopted under the shared competence for the environment of Article 103s EC.¹⁶⁸ The Court opined that pursuant to the subsidiarity principle, Article 1 of the directive had to be interpreted to allow Member States the choice regarding the implementation, including through existing national legislation.¹⁶⁹ The subsidiarity played out in a similar manner in the annulment action of *Estonia v. Commission* in 2009.¹⁷⁰ There the

Integrated Markets: The Case of Tobacco Regulation in the European Union, 12 E. L. J. 503-33 (2006).

¹⁶⁵ *BAT*, at ¶¶ 181-82.

¹⁶⁶ *Id.* at ¶ 184. See also Case C-210/03, *The Queen*, on the application of *Swedish Match AB and Swedish Match UK Ltd.*, 2004 E.C.R. I-11893.

¹⁶⁷ Case C-154-155/04, *The Queen*, on the application of *Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales*, 2005 E.C.R. I-6451, at ¶¶ 106-07.

¹⁶⁸ TFEU art. 192.

¹⁶⁹ Case C-114/01, *AvestaPolarit Chrome Oy*, 2003 E.C.R. I-8725, at 56.

¹⁷⁰ Case T-263/07, *Estonia v. Comm'n*, 2009 E.C.R. II-3463, at 52; Case T-183/07, *Poland v. Comm'n*, 2009 E.C.R. II-3395. On appeal, the ECJ in Case C-

Court of First Instance (now General Court) emphasized that the Member States implement Community legislation. Under the subsidiarity, the Commission had the burden of proving to what extent the relevant Community legislation, there Article 10, and the criteria set out in Annex III to Directive 2003/87 on carbon trading, restricts the discretion of Member State implementation. The Court annulled the incriminated Commission decision that had denied such discretion.¹⁷¹ The 2010 infringement action case *Commission v. Germany* decided, however, that this presupposes that the Community legislation leaves the Member States the required scope for such implementation. However, that was not the case, as the Member State could not invoke the subsidiarity to defend its existing approach to data protection against the requirement expressed in Directive 95/46 that the authority responsible for monitoring the processing of personal data remain independent.¹⁷²

The 2010 *Vodafone* case of the Grand Chamber of the European Court of Justice is the leading case that deals with the developed subsidiarity review under the Amsterdam and Lisbon Treaties.¹⁷³ It concerns Regulation 717/2007, which establishes a uniform maximum tariff both for wholesale and retail mobile phone roaming services. The Court found the legislation came under the shared harmonization competence of Article 95 EC, as it served the smooth functioning of the internal market. The Court then turned to the subsidiarity. It stated that for Community legislation to comply with the subsidiarity principle of Article 5(2) EC, may only go as far as necessary and must leave as much scope as possible for national regulation. That test has two objects, the legislative concept and the individual elements.¹⁷⁴ The Court first held that the concept of uniform roaming charges aimed to ensure the smooth functioning of the internal market.¹⁷⁵ It then queried the regulation also set retail roaming prices that the national companies charge consumers. The Court accepted impliedly that this element would fall under the Member States' competence for purely

505/09 P, Judgment of 29 March 2012, ECLI:EU:C:2012:179, confirmed the ruling of the General Court, although on grounds of art. 288(3) TFEU rather than subsidiarity.

¹⁷¹ *Id.*

¹⁷² Case C-518/07, *Comm'n v Germany*, 2010 E.C.R. I-885, at 55-56.

¹⁷³ Case C-58/08, *The Queen, on the application of Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, 2010 E.C.R. I-4999.

¹⁷⁴ *Id.* at ¶¶ 72-73.

¹⁷⁵ *Id.* at ¶ 76. The Court refers to the preceding competence discussion.

internal situations.¹⁷⁶ However, it saved this element nevertheless, as it was needed to make the legislative concept work given the interdependence of wholesale and retail prices.¹⁷⁷

The Court consolidated this jurisprudence subsequently in a chamber case from 2011. In *Luxembourg v. Parliament and Council*, the Court tested Directive 2009/12/EC on a uniform scheme for airport charges adopted under Article 80 EC (now Article 100 TFEU) against the subsidiarity principle. The Court concluded that for the legislative concept to work, it was necessary to also set the charges for the main if small airport of each Member State.¹⁷⁸ The Court also noted that Luxemburg had not substantiated its claim that it could effectively regulate its airport, a potentially purely internal situation.¹⁷⁹

Post the entry into force of the Lisbon Treaty, the Court has continued this line pertaining subsidiarity review. In *Estonia v. Parliament and Council*,¹⁸⁰ from 2015, a chamber of the Court found that the incriminated directive 2013/34 aimed to harmonize financial information of the EU-wide operating undertakings and also of small undertakings that might operate solely within a single Member State. The Court acknowledges that this second objective could be better achieved at a Member State level.¹⁸¹ However, it then concluded that the two objectives pursued by the directive were interdependent and therefore the EU legislature could take the view that it had to include a special scheme for the small undertakings.¹⁸²

In the 2016 judgment in *Philip Morris Brands*,¹⁸³ and in the parallel 2018 case, *Swedish Match*,¹⁸⁴ the Grand Chamber of the Court examined the subsidiarity of the amended Tobacco Products Directive 2014/40/EU, which prohibited certain tobacco products from being

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at ¶¶ 77-78. See Opinion of Advocate General Poiares Maduro, ECLI:EU:C:2009:596, at ¶¶ 31-34 (evidence that operators set both prices together).

¹⁷⁸ Case C-176/09, *Luxembourg v. EP and Council*, 2011 E.C.R. I-3727, at ¶ 82.

¹⁷⁹ *Id.*

¹⁸⁰ Case C-508/13, *Republic of Estonia v. European Parliament and Council of the European Union*, ECLI:EU:C:2015:403.

¹⁸¹ *Id.*

¹⁸² Case T-263/07, *Republic of Estonia v Commission of the European Communities*, 2009 E.C.R. II-3463, at ¶¶ 48.

¹⁸³ Case C-547/14, *Philip Morris Brands SARL and Others v. Secretary of State for Health*, 2016 ECLI:EU:C:2016:325. See also the parallel judgments in Case C-358/14, *Poland v. Parliament and Council*, 2016 ECLI:EU:C:2016:323; and Case C-477/14, *Pillbox 38 (UK) Limited, trading as Totally Wicked v. Secretary of State for Health*, ECLI:EU:C:2016:324.

¹⁸⁴ *Philip Morris*, at ¶ 220; Case C-151/17, *Swedish Match AB v Secretary of State for Health*, ECLI:EU:C:2018:938, at ¶ 219.

placed on the Internal Market. The Court there reaffirmed that it had to verify “whether the Union legislator was entitled to consider, based on a detailed statement, that the objective of the proposed action could be better achieved at Union level.”¹⁸⁵ It then found that the directive had two objectives. The first objective was to facilitate the smooth functioning of the internal market for tobacco and related products, so as to be better achieved by the Union. The second objective, to ensure a high level of protection of human health, is accepted by the chamber as possibly being better achieved by the Member states.¹⁸⁶ The chamber hence envisages that this part of the legislation is not consistent with subsidiarity. However, the chamber still saved the legislation because of the overarching internal market objective. It opined that decentral legislation would entrench situations in which some Member States permitted the placing of the market of tobacco products containing certain characterizing flavors or for oral use, whilst others prohibit it. That would counter the first objective of the directive to improve the functioning of the internal market for tobacco and related products.¹⁸⁷

In the most recent, the 2019 *P.M.* case,¹⁸⁸ the chamber refers to the *Philip Morris* test.¹⁸⁹ It then approvingly states that the incriminated legislation had already exempted certain matters,¹⁹⁰ considering that it was for was for national legislatures to determine whether those services should be subject to the public procurement rules of Directive 2014/24/EU.¹⁹¹ Interestingly, the judgment seems to accept that the principle of subsidiarity seeks to prevent competence-overreach.

Although the CJEU has not fully articulated the standard of review, since *Vodafone* throughout these cases the Court has assessed Union legislation primarily against factual determinations reflected in the recitals of legislation. It only occasionally has assessed evidence from the legislative procedure.¹⁹²

¹⁸⁵ *Philip Morris*, at ¶ 219.

¹⁸⁶ *Id.* at ¶ 220; *see also* *Swedish Match AB*, at ¶ 67.

¹⁸⁷ *Philip Morris*, at ¶ 222.

¹⁸⁸ Case C-264/18, *P. M. v Ministerraad*, ECLI:EU:C:2019:472.

¹⁸⁹ *Philip Morris*, at ¶ 20.

¹⁹⁰ Primarily legal services.

¹⁹¹ *Philip Morris*, at ¶ 21.

¹⁹² Andrea Biondi, *Subsidiarity in the Courtroom*, in *EU LAW AFTER LISBON* 227 (Piet Eeckhout and Stefanie Ripley eds., 2012); Dougan, *supra* note 73, at 661; Patricia Popelier & Werner Vandenbruwaene, *The subsidiarity mechanism as a tool*

V. CONVERGING SUBSIDIARITY REVIEW: A RATIONALE OF LEGALITY TO CURTAIL THE CENTRE'S OVERREACHING

The codification of the principle of subsidiarity has produced indeterminate law in both the Treaties and the Basic Law. The key terms “scale and effect” of EU action under Art. 5(3) TEU and “economic and legal unity” under Art. 72(2) Basic Law, remain highly indeterminate legal terms, although the effect of the iterative codification has been to instruct the courts to develop a justiciable test.¹⁹³ It has fallen to the courts to attribute to this indeterminate law a meaning. The preceding two parts have traced the evolution of the jurisprudences of the FCC and the CJEU relating to codified subsidiarity over time. This Part of the article turns to comparative analysis. It analyzes how the courts have devised a shared operational rationale for the principle to justify their decisions that potentially invalidate legislation adopted validly under a competence base.

Rationales are contestable,¹⁹⁴ and post-codification the courts have had a choice between two alternative rationales for subsidiarity. These two alternatives will be called here necessity and legality. Both support substantive review of the incriminated act of the centre but to a varying degree of intensity. A rationale of necessity would have the courts search whether the incriminated central act is necessary to achieve a higher objective. It would require a positive fit between the central act and some higher objective of the system of divided competences. By contrast, a rationale of legality is more restraint. It seeks to curtail overreach by the centre. With a legality rationale, the principle of subsidiarity, courts search for instances of when the incriminated central act negatively impacts adjacent areas. It is not concerned with whether the act is necessary in the sense that it actively helps to achieve a higher objective, nor when it is preferable over decentral-plural action.

for inter-level dialogue in Belgium: on regional blindness and cooperative flaws, 7 EUR. CONST. L. REV. 204, 209 (2011); Derek Wyatt, *Could a 'yellow card' for national parliaments strengthen judicial as well as political policing of subsidiarity?*, 2 CROATIAN YB OF EUR. L. & POL'Y 1, 16 (2006), for the Constitutional Treaty; UK Parliament, House of Lords EU Committee, *Strengthening national parliamentary scrutiny of the EU – the Constitution's subsidiarity early warning mechanism*, HL Paper 101, 14 April 2005, at ¶ 245.

¹⁹³ See discussion *supra* Part II C.

¹⁹⁴ See Halpin, *supra* note 18.

It is true that the tests that the FCC and the CJEU have articulated both seem to favor necessity.¹⁹⁵ In the actual application of the test, however, both courts focus on a narrower question, what may be called a negative fit: Does the central act, in whole or in part, overreach into a subject-matter that is reserved for the peripheral units? Both the FCC and the CJEU review a central act for such overreach into social policy and other matters are reserved for the peripheries. This rationale of legality, rather than necessity, emerges in practice as the ground justifying the courts' decisions on subsidiarity. Their judicial review of central acts for subsidiarity, in practice, complements a positive competence control with a negative competence overreach control, as the cases make apparent.

Since 1994, the jurisprudence of the FCC has engaged in the review of federal legislation under Article 72(2) of the Basic Law. Rather than trying to establish a positive link between constitutional objectives and the incriminated federal legislation as the test that was articulated in the *Geriatric Nursing Act* case might suggest, the Court's actual review practice has found fault with incriminated legislation that overreached into areas reserved to the *Länder*. The cases surveyed above bear this out.¹⁹⁶ Thus, in *Junior-Professorship, Tuition Fees, Dangerous Dogs, and Shop Opening Hours and Benefits*,¹⁹⁷ there existed competence for the incriminated federal statute. It was nevertheless found unconstitutional under Article 72(2) of the Basic Law because it impugned the adjacent areas of primary *Länder* competence, culture, and education (*Tuition Fees* and *Tenure Track*),¹⁹⁸ public order and security (*Dangerous Dogs*), and social policy (*Benefits*). The federal legislation in *Geriatric Nursing Act* impugned social care, another *Länder* competence, and was only saved by the court because of the intent of the constituent power. *Film Board* impugned the core *Länder* competence for culture but was saved because of the foreign policy dimension.¹⁹⁹ By contrast, federal legislation stands that provides for an effective, narrowly tailored uniform economic regime across the federal territory (*Social Security I and II, Horseshoeing, and Genetic Engineering*).²⁰⁰

¹⁹⁵ See discussion *supra* Parts III and IV. The FCC's *Geriatric Nurses* test requires that the central act is necessary to achieve the objectives of economic or legal unity or coherent living conditions.

¹⁹⁶ See discussion *supra* Part III.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

The CJEU has equally engaged in this subsidiarity review, once it had recognized that the very fact that the Union has decided to legislate is not enough.²⁰¹ Scrutiny of the case law does not confirm that the Court has struggled to make the subsidiarity principle justiciable.²⁰² It is true that the test that the CJEU has articulated under the Amsterdam and the Lisbon Treaties more or less restates the wording of Art. 5(3) TEU, under which the subsidiarity requires that Union action is permissible, only if and in so far as the objectives of the proposed action can by reason of the scale or effects of the proposed action be better achieved at Union level and therefore cannot be sufficiently achieved by the Member States.²⁰³ The CJEU's *Vodafone* test now requires that the incriminated EU act must be necessary to achieve Treaty-objectives.²⁰⁴

Yet, in actual application, the CJEU subsidiarity jurisprudence moves beyond this articulated test.²⁰⁵ In actual application, the Court uses the subsidiarity as a second-stage competence check.²⁰⁶ In the first stage, the "in vires" competence review asks whether the Union measure falls under the subject-matter of the Union competence.

In the second stage, the subsidiarity review determines whether the measure overreaches and impugns substantially on a matter falling under the primary or even reserved competence of the Member States. Where the Member States hold primary responsibility, there it may be presumed that they are better equipped to achieve the objectives of the EU legislation.²⁰⁷ The cases distinguish, for this purpose, the objectives of the incriminated EU legislation.²⁰⁸ The objective must relate to a competence that is the primary responsibility of the Union,

²⁰¹ KOEN LENAERTS & PIET VAN NUFFEL, *EUROPEAN UNION LAW* 7-32 (3d ed., 2011).

²⁰² See Florian Sander, *Subsidiarity infringements before the European Court of Justice: Futile interference with politics or a substantial step towards EU federalism?*, 12 COLUMBIA J. EUR. L. 537 (2006).

²⁰³ CHRISTIAN CALLIESS, *SUBSIDIARITÄTS- UND SOLIDARITÄTSPRINZIP, DER EU* 32 (2nd ed., 1999) (developing a test for Art. 5 TEU, by distinguishing negative and positive criteria, with the first applying to Member State and the second to Union action). See Opinion of Advocate General Kokott in Case C-547/14 Philip Morris, ECLI:EU:C:2015:853, at ¶ 275.

²⁰⁴ *Supra* note 173 and accompanying text.

²⁰⁵ See discussion *supra* Part IV.

²⁰⁶ See Paul Craig, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, 48 COMMON MKT. L. REV. 394, 426 (2011). But see Craig, *supra* note 16, 72 (suggesting that the EU courts should review subsidiarity through a form of competence-proportionality control).

²⁰⁷ Cf. TEU art. 5(3).

²⁰⁸ See discussion *supra* Part IV.

such as the internal market. If another objective overreaches into another shared competence where the Member States are primarily competent, such as health, social policy (*Philip Morris Brands and Swedish Match*)²⁰⁹ or the environment (*AvestaPolarit and Estonia v Commission*)²¹⁰ or a purely internal situation (*Luxembourg*)²¹¹ then the Court is prepared to declare this a subsidiary matter falling to the Member States). However, the Court adds a safeguard, and it accepts that any element for which this is the case can only be excised from this legislation if it does not endanger the workability of the legislative concept.

This finding of the two courts converging on this shared, meaning for the principle of subsidiarity that is based on a rationale of preventing competence-overreach is noteworthy and calls for an explanation. The explanation cannot be found in the wording of the respective foundational texts on. In fact, the texts of the Treaties and the Basic Law discussed above,²¹² would seem to require a positive fit between their objectives and the legislation, while in reality the courts have only been searching for a negative fit (no overreach). Alternatively, scholars have pointed to real, mutual observation and discourse between courts to account for observable, converging outcomes.²¹³ It may indeed be that the FCC with the *Geriatric Nursing Act* jurisprudence had intended to influence the CJEU, and has actually done so.²¹⁴ However, this remains a point of speculation. There is no hard evidence for such mutual observation in the cases discussed here, and these make no explicit references to each other.²¹⁵

The search for an explanation rather ought to focus on the institutional constraints on both courts. Both have taken the initial decision to move from a deferential position to effective judicial

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See discussion supra* Part II A and Part II B.

²¹³ Christian Walter, *Decentralised Constitutionalization, in National and International Courts: Reflections on Comparative Law as an Approach to Public Law*, in *THEORISING THE GLOBAL LEGAL ORDER* 253 (Andrew Halpin & Volker Roeben, eds., 2009).

²¹⁴ *See* Thomas von Danwitz, *Subsidiaritätskontrolle in der Europäischen Union*, in *FESTSCHRIFT FÜR DIETER SELLNER* 37 (Klaus-Peter Dolde et al., eds., 2010).

²¹⁵ Recently, the FCC and the CJEU have engaged in an express discourse relating to in vires review of Union acts, in the context of the so-called OMT programme of the European Central Bank. *See* Mehrdad Payandeh, *The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture*, 13 *EUROPEAN CONSTITUTIONAL L. REV.* 400-16 (2017).

review of central action, and that left the courts with two options as to a rationale to make the principle of subsidiarity effectively justiciable. As we saw, both have chosen the rationale of legality over a necessity rationale.²¹⁶ This choice can be explained by reference to institutional capacity. Implementing a rationale of necessity is institutionally very demanding and is evidenced in two steps.

It demands first to identify justiciable meta-objectives, beyond the competences themselves, against which to measure the central action exercising the competence.²¹⁷ Such potential meta-objectives are economic, legal, and involve social unity throughout the territory that underpin the federal or supranational project. The FCC has construed the text of Article 72(2) of the Basic Law in this way.²¹⁸ Although the CJEU has not done so expressly, but the text of the Founding Treaties could be construed similarly.²¹⁹ Article 3(2-3) TEU would then formulate three such meta-objectives, i.e., to ensure economic unity (the internal market and economic and monetary union), legal unity (area of freedom, security and justice), and cohesive living conditions across the Member States.²²⁰

The second step in implementing the rationale of necessity is more far-reaching though. The incriminated central act must be tested as to whether it is positively necessary to achieve one of these meta-objectives.²²¹ This calls for a judicial assessment of the relative effectiveness of alternatives to that act, including decentralized action. Such assessments of counterfactuals are anathema to judicial review in the area of competences, notwithstanding that the courts may have to engage with it when they review fundamental rights.²²² Subsidiarity-as-necessity, then, is demanding of the courts when dealing with the political space and the central legislature. That is a

²¹⁶ See *supra* footnotes 200 to 206 and accompanying discussion.

²¹⁷ Vassilios Skouris, *The role of the principle of subsidiarity in the case law of the European Court of Justice*, EUROPEAN CONFERENCE ON SUBSIDIARITY, KEYNOTE SPEECH (Apr. 19, 2006).

²¹⁸ See discussion *Supra* Part III.

²¹⁹ See Biondi, *supra* note 195, at 213.

²²⁰ See Working Group X "Area of Freedom, Security and Justice," 2002 Eur. Conv. 426/02 at 23 (suggesting for the Area of Freedom, Security and Justice, that Union legislation must address a genuine cross-border dimension of a serious nature).

²²¹ For the new supporting competences that the TFEU confers on the EU in areas such as education and health, 'necessity' of Union action is expressly required. See, e.g., Koen Lenaerts, *Subsidiarity and Community Competence in the Field of Education*, 1 COLUMBIA J. EUR. L. 1 (1994).

²²² MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 27 (2008) (strong and weak forms of rights review).

constraint faced by both courts.²²³ It explains why neither has followed through with this rationale.

Subsidiarity-as-legality in the sense of curtailing competence overreach fits a more traditional model of judicial review in a federal system.²²⁴ This model envisages that the judiciary is to review conferred competences of a centre. To this competence review, subsidiarity adds a competence-overreach review where the center uses legislation for which it has a competence to regulate an adjacent matter for which it does not have a competence.²²⁵ Courts can handle this formal review without getting into the policy-merits of the legislation.²²⁶ It does not involve second-guessing legislative choices between regulatory alternatives. The point of such review is to weed out excesses. It is more deferential to the central legislature. Hence it responds better to the institutional constraints that both courts face.

The subsidiarity then becomes the second in the two stages of competence review. The first assesses the positive match between action and competence of the center.²²⁷ The second stage assesses a negative match with a competence of the periphery. It ensures that central action does not overreach into these reserved competences of the periphery. This judicial review then reinforces the overall scheme of competences. It re-enters the original decision-making of the constituent power to protect the order of competences and hence the autonomy of the peripheral legislatures when devising the competence order.²²⁸

Additionally, subsidiarity-as-legality is straightforward to administer judicially. In both systems of divided competences, the

²²³ See Benvenuti, *supra* note 8.

²²⁴ ROASAS & ARMATI, *supra* note 28, at 30.

²²⁵ See Matthew R. Christiansen & Joshua C. Macey, *Long Live The Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360 (2021) (concept of one jurisdiction 'aiming at' competences of another in a federal system).

²²⁶ The institutional constraints of constitutional adjudication are expounded in ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* (2012) and Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. OF LEGAL STUD. 409, 441 (2008).

²²⁷ See Paul Craig, *Ultra Vires and the foundations of Judicial Review*, 57 CAMBRIDGE L.J. 63, 66 (1998) (explaining ultra vires review).

²²⁸ European Convention, Working Group V 'Complementary Competencies', Report, 4.11.2002, CONV 375/1/02 REV 1, at 13 (staggered intensity of Union competences, ranging from uniform regulation (e.g., common customs tariff), to harmonization (e.g., company law), to minimum harmonization (e.g., public health), to mutual recognition and coordination of the national legal systems (e.g., criminal judgments or social security of migrant workers). That report was cross-referenced by Working Group I.

treaty or constitution expressly states competences that have been attributed to the center.²²⁹ Those which are residually held by the periphery, are not articulated in the text. In order to administer the subsidiarity as competence overreach, the courts then need to develop a complete division of competences that are allocated either to the center or the periphery.²³⁰ The division must also determine whether a shared competence is the primary responsibility either of the center or of the periphery.

Subsidiarity review and the competence order hence become two sides of the same methodological task that is essentially a legally-reconstructive exercise. Such task plays to the institutional capacity of courts.²³¹

This task has been successfully undertaken by both courts. The FCC has traditionally construed a category of exclusive competences of the *Länder*, covering matters such as culture, police and public security and essentially internal situations.²³² Equally, the CJEU subsidiarity scrutiny jurisprudence is predicated on a comprehensive competence scheme, which classifies all shared and supporting competences as falling either under the primary responsibility of the EU or of the Member States.²³³ In several of the cases surveyed, the Court has indeed announced primary responsibility for their exercise to either the Union or the Member States. In others, it has recognized that certain matters remain in the exclusive competence of the Member State, such as purely internal situations and the implementation of EU law.²³⁴

VI. DIVERGENCE IN OUTCOMES

Convergence on a justiciable rationale for the principle of subsidiarity, however, does not mean that outcomes are the same in all

²²⁹ Grundgesetz [GG] [Basic Law] art. 30 (Ger.); TEU art. 4(1).

²³⁰ See Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L. J. 846 (1993); Bruno de Witte, *Exclusive Member State competences. Is there such a thing?*, in MODERN STUDIES IN EUROPEAN LAW (Sacha Garben & Inge Govaere eds., 2017).

²³¹ Cf. Murray Wesson, *Disagreement and the Constitutionalisation of Social Rights*, 12 HUM. RTS L. REV. 221, 224, 228 (2012).

²³² BVerfG, 1 BvR 2795/09, Dec. 18, 2018, ¶ 64, http://www.bverfg.de/e/rs20181218_1bvr279509.html.

²³³ Lenaerts, *supra* note 205.

²³⁴ See *supra* notes 212-15 with accompanying text.

reviews of cases of the FCC and the CEJU. Indeed, there is clear a gap in their outcomes.

The FCC has annulled several pieces of federal legislation for running afoul of the subsidiarity.²³⁵ This review has focused on entire legislative concepts.

The outcomes of the CJEU review remain truncated in comparison. That review has not led to the annulment of any EU legislation in whole or in part.²³⁶ The CJEU has focused on individual elements of EU legislation. The incriminated legislation in *Vodafone, Luxemburg, Philipp Morris/Swedish Match*, did concern the internal market, but it also included an element of infringing upon Member States competences: purely internal situations (*Vodafone* and *Luxemburg*) or health (*Philipp Morris* and *Swedish Match AB*), the environment (*AvestaPolarit*) or implementation (*Estonia v Commission*).²³⁷ Importantly, the Court acknowledges this fact in all of these cases. The Court hence validates a rationale of legality in its review. But in all these cases, the Court proceeded to save the incriminated legislative element on the ground that it is necessary for the workability for the overall legislative concept, which does fall under the internal market competence. The Court has, however, sometimes attached a consequence to the EU legislature's overreach. That consequence has included a restrictive interpretation, so as to leave more space for Member States own implementation (*AvestaPolarit*).²³⁸ It has also struck down Commission decisions limiting that space (*Estonia v Commission*).²³⁹

The key question, then, is what explains this divergence in outcomes. An explanation cannot be found in a specific institutional loyalty of the CJEU to the European Union.²⁴⁰ For the CJEU has not hesitated to strike down EU legislation that lacks a competence base.²⁴¹ An explanation is rather that priorities of the peripheral legislatures as to subsidiarity differ. In the case of the EU, the concern of the Member State legislatures has primarily been with the detail of

²³⁵ See discussion *supra* Part III.

²³⁶ DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 383 (4th ed., 2019).

²³⁷ See discussion *supra* Part IV.

²³⁸ Case C-114/01, *AvestaPolarit Chrome Oy*, 2003 E.C.R. I-8725, at 56.

²³⁹ Case T-263/07, *Republic of Estonia v Commission of the European Communities*, 2009 E.C.R. II-3463, at ¶ 48.

²⁴⁰ *But see* SHAW, *supra* note 25, at 112.

²⁴¹ CHALMERS, *supra* note 242, at 369.

EU legislation, not with the concepts.²⁴² And they now have a voice in the EU legislative procedure, including shaping outcomes and taking ownership. The following Part will return to this procedure. Under the Basic Law, by contrast, no equivalent procedure exists. The resulting weaker position of the *Länder* legislatures in politically shaping subsidiary outcomes at the federal level may drive the FCC to invalidate federal legislation and thereby protect the autonomy of these peripheral legislatures. It may also explain that the FCC has protected the alternative power of each of the *Länder* individually to deviate from uniform federal legislation.²⁴³

VII. THE LEGISLATURES: FASHIONING A RATIONALE OF NECESSITY FOR THE PRINCIPLE OF SUBSIDIARITY

Codified subsidiarity seeks to motivate the course of action of political actors, legislatures, and governments. The textual basis remains the same, it is Article 72(2) of the Basic Law²⁴⁴ and Article 5(1), (3) of the TEU.²⁴⁵ Yet, as this part of the article will demonstrate, the practice of these actors on this basis has shaped a second, if complementary rationale for the codified subsidiarity. It is not concerned with the legality of the envisaged central action. It rather focuses on necessity. A rationale of necessity demands a choice between alternative means, that is if action by the center or the periphery is more expedient.²⁴⁶

In the practice of the EU post-Lisbon, this rationale of necessity has come to apply at a macro and a micro-level. At the macro level of the Union's strategic policy planning, the rationale demands that as much as possible of EU policy is to be constructed bottom-up, rather than top-down.²⁴⁷ The European Energy Union policy evidences this

²⁴² UK House of Commons, European Scrutiny Committee, 33rd Report, Session 2007-08, at ¶¶ 29-31 ("It is very rare for the whole of a proposal to be inconsistent with the principle [of subsidiarity]. It is less rare for one of the provisions not to comply.").

²⁴³ BVerfG, 1 BvL 3/14, Dec. 19, 2017, ¶ 247, http://www.bverfg.de/e/ls20171219_1bvl000314.html (*Länder* legislatures making use of the right to deviate from federal legislation).

²⁴⁴ See *supra* note 52 and accompanying text.

²⁴⁵ See *supra* note 72 and accompanying text.

²⁴⁶ See Finnis, *supra* note 15.

²⁴⁷ A main recommendation is that the EU should use its resources more efficiently and prioritize its actions, rather than transfer Treaty competences or entire policy areas back to the Member States. See *Communication from the Commission to the European Parliament, the European Council, the Council, the*

subsidiarity-as-expediency. It is an EU strategic priority, enabled by article 194 of the TFEU.²⁴⁸ The entire design is informed by the concern for practical implementation of subsidiarity. It designs a strongly decentralized policy that relies on a bottom-up initiative by Member States as much as possible, complemented by a top-down governance mechanism to achieve the EU objectives.²⁴⁹

This rationale of necessity also motivates micro elements, including the legislative implementation of strategic priorities.²⁵⁰ It is predicated on the opportunity to articulate alternative decentral-plural courses of action. The periphery should have a voice in the legislative procedure of the center for this purpose. That has always been the case, as the peripheral executives in both systems are included in the centre's legislative procedure. Thus, the *Länder* governments are represented in the *Bundesrat*, the second chamber of the federal parliament, which is consulted on every federal legislative bill, and it has to assent to the exercise of certain shared competences (Art. 74(2) Basic Law).²⁵¹ EU Member States governments are represented in the Council of the EU which is the co-legislature together with the European Parliament.²⁵² More powerful is a direct involvement of the peripheral legislatures. The 2006 amendment of Article 72(3) of the Basic Law is a radical way of implementing this rationale by empowering the legislature of each *Land* to diverge as it sees fit from

European Economic and Social Committee and the Committee of the Regions, COM (2018) 703 (Oct. 23, 2018), https://ec.europa.eu/commission/priorities/democratic-change/better-regulation/task-force-subsidiarityproportionality-and-doing-less-more-efficiently_en.

²⁴⁸ *The European Green Deal*, COM (2019) 640 final (Dec. 11, 2019).

²⁴⁹ See A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM (2015) 80 (The European Energy Union strategy for the period 2021 to 2030 has five dimensions: Security, solidarity and trust; A fully-integrated internal energy market; Energy efficiency; Climate action – decarbonizing the economy; and Research, innovation and competitiveness). See also VOLKER ROEBEN, *TOWARDS A EUROPEAN ENERGY UNION. EUROPEAN STRATEGY IN INTERNATIONAL LAW* (2018).

²⁵⁰ EU legislation across all policies makes room for provision by the Member States. See, e.g., the preamble in Directive No 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market O.J. L 149/22; and the preamble in Council Regulation (EC) No 1698/2005 of 20 Sept. 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), O.J. L 277/1.

²⁵¹ Grundgesetz [GG] [Basic Law] art. 74(2) (Ger.).

²⁵² TEU art. 16.

federal legislation adopted under certain shared competences.²⁵³ By contrast, the Lisbon Treaty seeks to ensure that Member States parliaments are empowered to input their views on the necessity of proposed Union legislation under all shared competences,²⁵⁴ and particularly in the Area of Security, Freedom, and Justice.²⁵⁵ To this effect, the amended Subsidiarity Protocol devises the so-called Early Warning Mechanism.²⁵⁶ This procedure exists so that Member State parliaments may feed their suggestions about alternative courses of decentral-plural action into the Commission/EP/Council decision-making process.²⁵⁷ Importantly, these may concern the concept as

²⁵³ See Antonio Arroyo Gil, *Exclusive vs. Concurrent Legislative Power in the Federal Republic of Germany*, in *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* 665-77 (Alberto López Basaguren & Leire Escajedo San Epifanio eds., 2013).

²⁵⁴ TEU art. 5(3). See Gareth Davies, *The post-Laeken division of competences*, 28 EUR. L. REV. 686, 691 (2003); Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J. COMMON MKT. STUD. 281 (2006); PHILIPP KIIVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY: CONSTITUTIONAL THEORY AND EMPIRICAL REALITY* (2012); Jean-Victor Louis, *National parliaments and the principle of subsidiarity - legal options and practical limits*, EUR. CONST. L. REV. 428 (2008); Ute Mager, *Die Prozeduralisierung des Subsidiaritätsprinzips im Verfassungsentwurf des Europäischen Konvents*, 6 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 471 (2003); Schütze, *supra* note 25.

²⁵⁵ Criminal Justice and Police Cooperation, Europol and Eurojust; TEU art. 12(c); TFEU arts. 70, 85, 88. See European Convention, Working Group X 'Area of Freedom, Security and Justice,' Report, CONV. 426/02, 2.12.2002, 12, 14, 22. As envisaged by the Report on page 8, competences have been given a sharper definition over the previous third pillar of the Amsterdam Treaty. See also Clemens Ladenburger, *Anmerkungen zu Kompetenzabgrenzung und Subsidiarität nach dem Vertrag von Lissabon*, 14 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 389 (2011).

²⁵⁶ From the rich literature see Gareth Davies, *The post-Laeken division of competences*, 28 EUR. L. REV. 686, 691 (2003); Ute Mager, *Die Prozeduralisierung des Subsidiaritätsprinzips im Verfassungsentwurf des Europäischen Konvents*, 6 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 471 (2003); Schütze, *supra* note 25; Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J. COMMON MKT. STUD. 281 (2006); Jean-Victor Louis, *National parliaments and the principle of subsidiarity - legal options and practical limits*, EUR. CONST. L. REV. 428 (2008); PHILIPP KIIVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY: CONSTITUTIONAL THEORY AND EMPIRICAL REALITY* (2012).

²⁵⁷ See European Commission, 'Subsidiarity and Proportionality' (19th report on Better Lawmaking covering the year 2011), COM(2012) 373, 10. Under the terms of the interinstitutional agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, 2016 O.J. (L 123) (replacing the Agreement of December 2003 and the Interinstitutional Common Approach to Impact Assessment of November

well as the details. Parliaments are to receive full information on a Commission proposal that must include a statement on subsidiarity,²⁵⁸ enabling parliaments to raise informed objections towards the subsidiarity of proposals.²⁵⁹ Each reasoned opinion submitted by a parliament must be considered by the Commission.²⁶⁰ If a majority of parliaments concur, then the Commission must review its proposal.²⁶¹ If the Commission maintains the proposal, it may be defeated either by the Council, which votes by majority,²⁶² or by the European Parliament. It is true that the EU legislature retains the final word and that national parliaments currently do not have a veto.²⁶³ However, the Union legislature must make this decision in full knowledge of the articulated alternatives that it would not have been cognizant to otherwise.

This peripheral political control of subsidiarity-as-necessity has become common practice.²⁶⁴ Clearly, in their reasoned opinions,

2005), the Commission must explain in its explanatory memoranda how the proposed measures are justified in the light of the principle of subsidiarity and must take this into account in its impact assessments.

²⁵⁸ Subsidiarity Protocol, art. 5. The Commission published the first ever integrated guidance on how it would implement better regulation in May 2015. This guidance covers the entire policy cycle, including the assessment of subsidiarity and proportionality. This guidance incorporates the criteria originally contained in the Amsterdam, to demonstrate that the legislative objective can be better achieved by the EU. See Tool #5 on Legal Basis, Subsidiarity and Proportionality, https://ec.europa.eu/info/files/better-regulation-toolbox-5_en. The EP and the Council commit to take full account of the Commission's impact assessment during the legislative procedure, §14 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, Apr. 16, 2016, O.J. (L 123/1).

²⁵⁹ Subsidiarity Protocol art. 6.

²⁶⁰ Subsidiarity Protocol art. 7(1).

²⁶¹ See Subsidiarity Protocol art. 7(3) for legislative proposals under the ordinary legislative procedure (the so-called 'Orange card'). The EP and the Council must consider the proposal in the light of the reasoning of parliaments, Subsidiarity Protocol art 7(3)(2)(a). In special legislative procedures, the threshold is a third of parliaments, Art. 7(2) (the so-called 'Yellow card'). Subsidiarity Protocol art. 7(2)(1) fixes a lower threshold of parliamentary votes for proposal initiatives and proposals under the AFSJ.

²⁶² Rather than by unanimity as normally required for amending a Commission proposal, compare Subsidiarity Protocol art. 7(3)(2)(b) with TFEU art. 293(1).

²⁶³ Subsidiarity Protocol arts. 7(2), (3).

²⁶⁴ See THE ANNUAL REPORTS OF THE COMMISSION ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY, ch. 3 [hereinafter Annual Report]. In 2016, the proposal to review the Directive on posting of workers receiving 14 reasoned opinions had triggered the 'yellow card' procedure. The Commission withdrew the proposal, Annual Report 2016, COM (2017) 600. See also Federico Fabbrini & Katarzyna Granat, *Yellow Card but no Foul: the role of*

parliaments have not confined themselves to the approach to the subsidiarity principle of the CJEU in *Vodafone*. Theirs is not a rationale of legality, but of expediency. Remarkably, in 2017, in light of the macro-subsidiary design of the European Energy Union, parliaments engaged with the Clean Energy Package of the Commission.²⁶⁵ The reasoned opinions were concerned with the proposal overreaching into Member State competences,²⁶⁶ but they also articulated alternatives to the proposed legislation.²⁶⁷ Additionally, in 2017, regarding the proposed regulation on a European Prosecutor (EPPO),²⁶⁸ for the time, the Union legislature adopted a legislative proposal in which a “yellow card” procedure was triggered pursuant to Article 7(2) of the Subsidiarity Protocol.²⁶⁹ The regulation as adopted by the Council differs from the Commission’s initial proposal on a number of substantial concerns expressed by national Parliaments, as such, taking into account the legislative process.²⁷⁰ In 2018, regarding the proposal concerning the revision of

the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike, 50 COMMON MKT L. REV. 115 (2013).

²⁶⁵ The eight legislative acts of the package relate to Energy performance in buildings (Directive 2010/31/EU), Renewable energy (Directive 2018/2001/EU), Energy efficiency (Directive 2018/2002/EU), Governance (Regulation 2018/1999/EU) and Electricity market design. The package implements the Energy Union strategy of 2015, *supra* note 249, and underpins the EU objective of becoming carbon neutral by 2050.

²⁶⁶ Concerns ranged from the proposal negatively affecting Member States’ possibility to ensure a security of electricity supply, or their right to decide their own energy mix, to the additional powers transferred to the Agency for the Cooperation of Energy Regulators, Annual Report 2017, COM (2018) 490.

²⁶⁷ Parliaments were critical towards the proposal’s provisions on the configuration of bidding zones, the establishment of regional operational centers, or the empowerment of the Commission to adopt delegated acts, Annual Report 2017, COM (2018) 490.

²⁶⁸ Council Regulation (EU) 2017/1939 of 12 Oct. 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), O.J. (L 283/1).

²⁶⁹ See *supra* note 258 and accompanying text.

²⁷⁰ The Regulation now provides, in addition to the European Chief Prosecutor, that one European Prosecutor from each participating member state will be present at the central level, forming the College of the European Public Prosecutor’s Office. The Office no longer has an exclusive but a shared competence for the criminal offences defined in Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law. See KATARZYNA GRANAT, THE PRINCIPLE OF SUBSIDIARITY AND ITS ENFORCEMENT IN THE EU LEGAL ORDER: THE ROLE OF NATIONAL PARLIAMENTS IN THE EARLY WARNING SYSTEM ch. 3 (2018); Jancic, *supra* note 27, at 940-42 (suggesting parliaments should rather focus on competence conferral).

the Drinking Water Directive, parliaments doubted both the benefit of the suggested provisions on hazard assessment and information to the public, stating that the proposal unnecessarily limited the scope for national decision-making.²⁷¹ The Commission suggested going further in the direction of an “active subsidiarity” to provide a stronger voice for local and regional authorities and so that national Parliaments could further reduce resort to use of the procedure.²⁷² Such active subsidiarity will entrench the necessity rationale of subsidiarity.²⁷³

VIII. CONCLUSIONS: SHARED PRINCIPLES AND CONSTITUTIONAL HOMOGENEITY

The homogeneity between the EU and the Member States constitutional orders depends on shared principles. Art. 2 TEU enshrines the idea of homogeneity by announcing that the EU and its Member States are founded on common values of constitutional law and policy. Certainly, these values can be formalized into legal standards and principles of EU law that the Member States constitutions can be measured against. Those can be enforced via Art. 7 EUV. For example, this is the scenario of recent EU action regarding Poland and Hungary.²⁷⁴

But that is only a small part of the story of homogeneity. A larger part concerns shared principles. Sharing is a paradoxical concept. It presupposes separateness and autonomy, and at the same time interdependency and reciprocity. Parallel codification in the separate legal orders of the EU and the Member States is not enough. Shared meaning only emerges from the interplay of the key institutional actors. Subsequent judicial and political practices must converge around a set of rationales that will justify decisions under the principle in the EU and the Member States. Such a convergence will be driven by similar constraints on the institutional actors. A principle that is effectively shared with the same meaning in both the EU and the Member States legal orders creates homogeneity between them. It ties

²⁷¹ Annual Report on the Application of the Principles of Subsidiarity and Proportionality and on Relations with National Parliaments, COM (2019) 333 final (Nov. 7, 2019).

²⁷² *Id.*

²⁷³ There is an overlap with the political dialogue under the Barroso Initiative of better regulation, which was motivated by rationales of efficiency, proportionality and expediency. See Davor Jancic, *The Barroso Initiative: Window dressing or democracy boost?*, 8 UTRECHT L. REV. 78 (2012).

²⁷⁴ See Cases C-354/20 PPU and C-412/20 PPU, L and P, *supra* note 2, at ¶¶ 57 and 58.

them together. Homogeneity secures parallel development of these legal orders, even if they remain formally independent.

The principle of subsidiarity demonstrates this well. It has been codified in both the Founding Treaties and a Member State constitution, the Basic Law. More critically, the jurisprudences of the CJEU and the FCC have been converging on the justiciable rationale that the subsidiarity principle secures the legality of acts of the center. Hence, where the center has a competence to act, both courts then review the act under the principle of subsidiarity for whether it nevertheless overreaches into an adjacent area that falls under a primary or reserved competence of the periphery, such as culture, police, social policy, the environment, purely internal situations, or the implementation power. Neither court is, in its actual review practice, concerned with a rationale that the central act was positively necessary to achieve a higher constitutional objective, even though the codified wording of the principle and indeed the articulated tests might suggest so. The interplay with other institutional actors explains this choice that both courts have made. Thus, the constituent powers of the Treaties and the Basic Law have instructed the courts to abandon their initial deferential stance and to accept that the subsidiarity principle is justiciable. Following this instruction, the courts then have settled on the rationale of legality rather than necessity that reflects their competence and restraint vis-à-vis central legislation. Finally, diverging outcomes in the cases correspond to different institutional voice that the peripheral legislatures have in the EU and the German system of divided competences. A rationale of necessity has, by contrast, come to dominate the political practice on the principle of subsidiarity, particularly that of the EU post-Lisbon. It relates to the means of decentral-plural rather than central-uniform action to achieve an objective of the center. Judicial review of that practice is limited to procedure and does not extend to outcomes.

Codified subsidiarity is one—prominent—exemplar of the concept of shared principle that this article proposes. It undoubtedly is a structural constitutional principle of the first order. It directly secures accountability of the center in systems of divided competences. But, and this is the upshot for analysts, the concept of shared principles has broad application. Other principles can also become shared, such as parliamentary democracy, citizenship, judicial protection, a competence order, or the extension of constitutional principles to external action. Analysts seeking to identify the shared meaning will also need to consider a horizontal vector arraying the several Member

States—in addition to the vertical vector linking the EU and the Member States that has been explored here.