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

Volker Roeben†

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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

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\(^3\) 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.


\(^\ast\) See infra notes 20 and 21 with accompanying text; see also Part II.
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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

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\(^5\) 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).


\(^8\) 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.


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

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.\textsuperscript{13} The institutional interplays, pressures, and
constraints become determinants of meaning.\textsuperscript{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: \textit{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 \textit{shared} by
several jurisdictions.

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

\begin{footnotes}
\footnotenum{13} Benvenisti, supra note 8, at 319-20.
\footnotenum{14} Id.
\footnotenum{15} John Finnis, \textit{Subsidiarity’s Roots and History: Some Observations}, 61 Am. J.
JURIS. 133 (2016); Nicholas Aroney, \textit{Subsidiarity in the Writings of Aristotle and
Aquinas, in Global Perspectives on Subsidiarity} 9 (Michelle Evans &
Augusto Zimmermann eds., 2014).
\end{footnotes}
that divides competences between a center and a periphery.\footnote{Paul Craig, \textit{Subsidiarity, a Political and Legal Analysis}, 50 J. COMMON MARKET STUDIES 72 (2012).} 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.\footnote{See Judith Resnik, \textit{Federalism(s)’s Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accomodations}, in \textit{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); \textit{see also} Stephen Weatherill, \textit{Better Competence Monitoring}, 30 EUR L REV 23 (2005) (‘competence anxiety’).} 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.\footnote{See Gallie, \textit{supra} note 7; \textit{ANDREW HALPIN, DEFINITION IN THE CRIMINAL LAW} (2004).}

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-like\footnote{The term is that of Aroney, \textit{see} Nicholas Aroney, \textit{The Formation and Amendment of Federal Constitutions in a Westminster-Derived Context}, 16 INT’L J. OF CONST. L. 17 (2018).} European states.\footnote{Art. 118(1) Constituzione 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.”), \textit{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, \textit{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, BBI 1999 162 5986, SR 101, translation SR 101 - Federal Constitution of 18 April 1999 of the Swiss Confederation (admin.ch)).} Both member states and non-member states of the European Union represent this, although it is a broader trend in Western
democracies with a federal structure. 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. This is
certainly the perspective of the Court of Justice of the EU. 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. EU scholars advance that
codified subsidiarity is a legal principle, concerned with limiting the
exercise by the EU of its competences. 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

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
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-L, Decision on Defence
Motion for Interlocutory Appeal on Jurisdiction, ¶ 43 (Int’l Crim. Trib. Former

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

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, while in Germany the federal government or Federation (Bund) is paired with the non-sovereign Länder. In both systems, the center only has those competences specifically accorded to it, while the periphery holds residual competences. Both obligate the center to comply with a principle of subsidiarity in the exercise of all its non-exclusive competences.

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29 Craig, supra note 16.


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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 matters cases may diverge. Parts II and III separately

\textsuperscript{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.).

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

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

\textsuperscript{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, such a procedure exists post-Treaty of Lisbon for the EU. Under the Basic

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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.\textsuperscript{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.\textsuperscript{42} In the case of the Basic Law, the constituent power is the two chambers of the federal parliament.\textsuperscript{43} In the case of the Treaties, the constituent power is comprised of the Member States as Contracting Parties and the Convention.\textsuperscript{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

\textsuperscript{41} Grundgesetz [GG] [Basic Law] art. 72(4) (Ger.). See infra Part II A.

\textsuperscript{42} See Kumm, supra note 10; Walker, supra note 3; MacCormack, supra note 11 and accompanying text.

\textsuperscript{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).

\textsuperscript{44} TEU art. 48(3).
three iterations, first in 1949\textsuperscript{45} and then through amendments in 1994\textsuperscript{46} and 2006,\textsuperscript{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.\textsuperscript{48} It also provided certain reference grounds for this need.\textsuperscript{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.\textsuperscript{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.\textsuperscript{51} Article 72(2) now required the exercise of these competences to be “necessary.”\textsuperscript{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.\textsuperscript{53} A legislative procedure for repealing federal legislation that is no longer necessary was established.\textsuperscript{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

\textsuperscript{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).
\textsuperscript{46} Bundesgesetzblatt [Federal Gazette], Oct. 27, 1994, BGBl I at 3146 (Ger.).
\textsuperscript{47} Bundesgesetzblatt [Federal Gazette], Aug. 31, 2006, BGBl I at 2034 (Ger.).
\textsuperscript{48} Grundgesetz [GG] [BASIC LAW] art. 72(2) (Ger.) (Bedürfnis).
\textsuperscript{49} See discussion infra Part III.
\textsuperscript{50} Grundgesetz [GG] [BASIC LAW] art. 72(1) (Ger.).
\textsuperscript{51} Bundesgesetzblatt [Federal Gazette], Oct. 27, 1994, BGBl I at 3146 (Ger.).
\textsuperscript{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.).
\textsuperscript{53} Grundgesetz [GG] [BASIC LAW] art. 72(2) (Ger.).
\textsuperscript{54} Grundgesetz [GG] [BASIC LAW] art. 72(3) (Ger.) (now Basic Law 2006 art. 72(4)).
procedure.\textsuperscript{55} Each legislature may also petition the Court to declare that a federal statute is no longer necessary and must be therefore be repealed.\textsuperscript{56}

In 2006, the Basic Law was once again amended.\textsuperscript{57} The subsidiarity clause of Article 72(2) remains unchanged, however now only applies to some of the shared competences of the Federation.\textsuperscript{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.\textsuperscript{59} The amendment also turned several shared competences into exclusive Länder competences.\textsuperscript{60} Finally, the category of framework competences was abolished and the competence heads became shared competences.\textsuperscript{61}

\section*{B. Codifying Subsidiarity in the Founding Treaties of the European Union}

The 1957 Treaty of Rome\textsuperscript{62} 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.

\footnote{\textsc{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.}
\footnote{\textsc{Grundgesetz [GG] [Basic Law]} (1994) art. 93(2) (Ger.).}
\footnote{These matters are enumerated in 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of art. 74; see \textsc{Grundgesetz [GG] [Basic Law]} art. 74 (Ger.).}
\footnote{\textsc{Grundgesetz [GG] [Basic Law]} art. 72(2) e contrario (Ger.).}
\footnote{\textsc{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.}
\footnote{\textsc{Grundgesetz [GG] [Basic Law]} art. 72(2) (Ger.).}
\footnote{Treaty establishing the European Economic Community and connected documents 5-183, 378 (Luxembourg: Publishing Services of the European Communities, [s.d.]).}
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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 Maastricht\(^65\) 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 Treaty\(^69\) 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

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\(^64\) 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.”).


\(^70\) 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.\textsuperscript{71} Article 5(3) provides a revised definition of the principle.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75}


\textsuperscript{72} Compare TFEU 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).


\textsuperscript{74} TFEU arts. 4, 6.

\textsuperscript{75} TFEU art. 2(2)(3). The objective of maintaining the \textit{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 Subsidiarity\footnote{TFEU Protocol (No. 2) On the Application of the Principles of Subsidiarity and Proportionality, 2008 O.J. (C 115/206–209) [hereinafter Subsidiarity Protocol].} (the “Protocol on Subsidiarity” or “Protocol”). The amended protocol removes the illustrative criteria that the protocol contained that was annexed to the Amsterdam Treaty.\footnote{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.} 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.\footnote{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).} 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.\footnote{Defined in Subsidiarity Protocol art. 4.} 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.\footnote{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 880(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.} Standing is not predicated upon concerns which been raised in the legislative procedure.\footnote{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).} Article 8(2) of the Protocol also gives standing to the EU Committee of the
Regions to challenge legislative acts for which it must be consulted.\textsuperscript{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.\textsuperscript{83}

\textbf{C. Instructing the Courts}

As will be explained in Part III, the FCC stated in the \textit{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.\textsuperscript{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.\textsuperscript{85} Pursuant to this mandate, the European Convention recommended effectuating the subsidiarity principle by defining the categories of non-exclusive Union competences\textsuperscript{86} and judicial review of adopted legislative acts (ex-post) and political monitoring of draft legislative acts during the legislative procedure (ex-ante).\textsuperscript{87} That new mechanism

\begin{footnotesize}
\textsuperscript{82} Subsidiarity Protocol art. 8(2).
\textsuperscript{83} See discussion infra Part V.
\textsuperscript{84} Pringle, \textit{supra} note 23, ¶ 135; C-583/11P; Inuit v. EP and Council, 2013 ECLI:EU:C:2013:625, ¶ 32.
\textsuperscript{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.
\textsuperscript{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
\end{footnotesize}
would give parliaments a say about the subsidiarity during the EU legislative procedure. Ex ante judicial control was discussed, but rejected, so as to not interfere with this process. These ideas proved uncontroversial at the 2004 Intergovernmental Conference on the Constitutional Treaty. While that treaty never entered into force, its provision for the subsidiarity of Union action was not only endorsed, but was strengthened by the 2007 Intergovernmental Conference on the Lisbon Treaty. The views of Member State parliaments on the Constitutional and Lisbon Treaties connote similar themes. 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. 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. 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. 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.

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)).
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.\footnote{BVerfG, 2 BvE 2/08, June 30, 2009, ¶ 5, http://www.bverfg.de/e/es20090630_2bve000208en.html.} 

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.\footnote{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_1bv1001114.html.} 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.\footnote{BVerfG, 2 BvL 1/01, Oct. 24, 2002, http://www.bverfg.de/e/fs20021024_2bvf000101.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).} The case concerned a federal statute that standardized the vocational training and qualifications for geriatric Nursing.\footnote{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.} 

The statute partly exceeded the shared competence for admission to the medical profession\footnote{Basic Law art. 74(1) no. 19 (Ger.).} 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.”\footnote{Basic Lawart. 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.”).} The constituent power’s intent for the provision to be justifiable had found expression in the amendment,
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

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.
¹¹⁰ Id.
¹¹¹ Id.
¹¹² Id.
¹¹³ This jurisprudence of the Frist and Second Senates of the Constitutional Court has been welcomed by the majority of observers, see Christian Callies, Kontrolle zentraler Kompetenzausführung, in Deutschland und Europa: Ein
substantial overreach by the Federation into reserved Ländere competence areas. The 2004 Junior-Professorship case\textsuperscript{114} 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 Ländere 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).\textsuperscript{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.\textsuperscript{116} Nor did the legislation meet these criteria objectively. For example, economic unity was not met, for it was not a demonstrable problem. The Ländere had been well capable of attracting high quality international and national researchers, and the competitiveness of the university sector required experimentation rather than uniformity.\textsuperscript{117} Nor was there an intolerable legal fragmentation, as the sector was marked by a high mobility of researchers.\textsuperscript{118}

The 2004 Shop Opening Hours case\textsuperscript{119} 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

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

\textsuperscript{116} \textit{Id.}; cf. \textit{supra} note 102 with accompanying text.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} BVerfG, \textit{1 BvR} 636/02, June 9, 2004, http://www.bverfg.de/e/rs20040609_1bvr063602.html.}
legislator had empowered the Ländler 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 Ländler 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 Ländler 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 Ländler, 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 Ländler 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 equivalent of 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/rkr20011123_1bvr177801en.html).
122 Id.
123 In Shop Opening Hours the competence of the Ländler for local business practices and in Dangerous Dogs the competence of the Ländler for general public security.
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 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. 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. 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. 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.

This jurisprudence then fed into the 2006 amendment of the Basic Law, 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) or become subject to the Länder’s new power to

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127 Id.
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, BGBI. 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. The Court had scrutinized the subsidiarity of federal legislation on economic matters. The 2006 amendment however continues to subject these economic competences to the subsidiarity clause of Article 72(2). 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. Correspondingly, the 2006 amendments remove a range of shared competences on legal matters from the reach of Article 72(2). The same is true for the shared competence of social security, where the Court had recognized a general concern for economic unity and cohesive living conditions already in the Social Security II and III 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. 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). 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. 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

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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].
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 horseshoeing professions is partly void.
142 Id.
Federation, was still subject to the subsidiarity principle of Article 72(2).\textsuperscript{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.\textsuperscript{144} None of these cases implicated a traditional Länder competence. However, the Court ruled differently in the 2009 case \textit{Federal Film Board},\textsuperscript{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.\textsuperscript{146}

The most recent judgment of the Court turning on the subsidiarity principle is the \textit{Benefits} case from 2015.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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


\textsuperscript{146} Id.

\textsuperscript{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)).

\textsuperscript{148} Id.

\textsuperscript{149} Id.
food and feed law.\textsuperscript{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,\textsuperscript{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 \textit{Länder}.

IV. THE REVIEW OF SUBSIDIARY 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.\textsuperscript{152} For example, the 1996 \textit{Working Time} case concerned Directive 93/104 on aspects of working time.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{156} The

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\textsuperscript{150} BVerfG, Mar. 21, 2018, 1 BvF 1/13, http://www.bverfg.de/c/fs20180321_1bvf000113.html

\textsuperscript{151} \textsuperscript{151} para 109, http://www.bverfg.de/c/fs20141217_1bvl002112.html.


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

\textsuperscript{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).

\textsuperscript{155} \textit{Id.} at \textsuperscript{155} at \textsuperscript{155} 47.

\textsuperscript{156} \textit{Id.} at \textsuperscript{156} 50.
\end{footnotesize}
Court finally stated that the requirement to state the reasons comprised subsidiarity.\textsuperscript{157} However, it was enough for recitals of the directive to state relevant, if unspecific considerations. The Court confirmed this in \textit{Deposit Guarantee Schemes}.\textsuperscript{158} Evidently, the \textit{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 \textit{Working Time} and towards justiciable subsidiarity. The 2001 case \textit{Netherlands v. EP and Council}, which dealt with Directive 98/44 and the legal protection of biotechnological inventions, indicates such a development.\textsuperscript{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.\textsuperscript{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.\textsuperscript{161}

In the 2002 case \textit{Ex Parte British American Tobacco (BAT)}, the Court applied the subsidiarity principle codified in Article 5(2) EC by the Treaty of Amsterdam.\textsuperscript{162} The Court first found that the competence to harmonize the internal market\textsuperscript{163} 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.\textsuperscript{164} The Court first opined that the harmonization

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\item \textsuperscript{157} TFEU art. 296.
\item \textsuperscript{158} Case C-233/94, Germany v Parliament and Council (hereinafter \textit{Deposit Guarantee Schemes}), 1997 E.C.R. I-02405. See also Case C-36/87, Kellinghusen, 1998 E.C.R. I-06337.
\item \textsuperscript{159} Case C-377/98, Netherlands v. EP and Council, 2001 E.C.R. I-07079 [hereinafter \textit{Biotechnology Inventions}. Pursuant to its intertemporal jurisprudence, the Court applied Maastricht law.
\item \textsuperscript{160} \textit{Id. at ¶ 30-33}.
\item \textsuperscript{161} \textit{Compare id. at ¶ 32-33 with id. at ¶ 16-17}.
\item \textsuperscript{162} Case C-491/01, \textit{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.
\item \textsuperscript{163} TEC art. 95 (now TFEU art. 114).
\item \textsuperscript{164} BAT, at ¶ 179 (referring to the new Amsterdam Protocol on Subsidiarity); Critical Matthias Kumm, \textit{Constitutionalising Subsidiarity in...}
\end{itemize}
\end{footnotesize}
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. The BAT Court also stated that subsidiarity scrutiny applies to each element of EU legislation, though it referred to its preceding discussion on proportionality.

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 prescriptive national rules had already been shown to create obstacles to intra-Community trade.

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. 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. The subsidiarity played out in a similar manner in the annulment action of Estonia v. Commission in 2009. There the


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-
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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.\footnote{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.} The 2010 infringement action case \textit{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.\footnote{\textit{Id.}}

The 2010 \textit{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.\footnote{Case C-518/07, Comm’n v Germany, 2010 E.C.R. I-885, at 55-56.} 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.\footnote{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.} The Court first held that the concept of uniform roaming charges aimed to ensure the smooth functioning of the internal market.\footnote{\textit{Id.} at ¶ 72-73.} 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

\footnote{\textit{Id.} at ¶ 76. The Court refers to the preceding competence discussion.}
internal situations.\textsuperscript{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.\textsuperscript{177}

The Court consolidated this jurisprudence subsequently in a chamber case from 2011. In \textit{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.\textsuperscript{178} The Court also noted that Luxembourg had not substantiated its claim that it could effectively regulate its airport, a potentially purely internal situation.\textsuperscript{179}

Post the entry into force of the Lisbon Treaty, the Court has continued this line pertaining subsidiarity review. In \textit{Estonia v. Parliament and Council},\textsuperscript{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.\textsuperscript{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.\textsuperscript{182}

In the 2016 judgment in \textit{Philip Morris Brands},\textsuperscript{183} and in the parallel 2018 case, \textit{Swedish Match},\textsuperscript{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

\begin{footnotesize}
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\item\textsuperscript{176} \textit{Id.}
\item\textsuperscript{177} \textit{Id.} at ¶ 77-78. \textit{See} Opinion of Advocate General Poiares Maduro, ECLI:EU:C:2009:596, at ¶¶ 31-34 (evidence that operators set both prices together).
\item\textsuperscript{178} Case C-176/09, Luxembourg v. EP and Council, 2011 E.C.R. I-3727, at ¶ 82.
\item\textsuperscript{179} \textit{Id.}
\item\textsuperscript{180} Case C-508/13, Republic of Estonia v. European Parliament and Council of the European Union, ECLI:EU:C:2015:403.
\item\textsuperscript{181} \textit{Id.}
\item\textsuperscript{182} Case T-263/07, Republic of Estonia v Commission of the European Communities, 2009 E.C.R. II-3463, at ¶¶ 48.
\item\textsuperscript{183} Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health, 2016 ECLI:EU:C:2016:325. \textit{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.
\item\textsuperscript{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.
\end{itemize}
\end{footnotesize}
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.” 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. 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.

In the most recent, the 2019 P.M. case, the chamber refers to the *Philip Morris* test. It then approvingly states that the incriminated legislation had already exempted certain matters, 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. 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.

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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 Ripleys, 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.

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\(^{193}\) 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. 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. Thus, in Junior-Professorship, Tuition Fees, Dangerous Dogs, and Shop Opening Hours and Benefits, 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), 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. 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).

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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.\textsuperscript{201} Scrutiny of the case law does not confirm that the Court has struggled to make the subsidiarity principle justiciable.\textsuperscript{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.\textsuperscript{203} The CJEU’s \textit{Vodafone} test now requires that the incriminated EU act must be necessary to achieve Treaty-objectives.\textsuperscript{204}

Yet, in actual application, the CJEU subsidiarity jurisprudence moves beyond this articulated test.\textsuperscript{205} In actual application, the Court uses the subsidiarity as a second-stage competence check.\textsuperscript{206} In the first stage, the “in vires” competence review asks whether the Union measures 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.\textsuperscript{207} The cases distinguish, for this purpose, the objectives of the incriminated EU legislation.\textsuperscript{208} The objective must relate to a competence that is the primary responsibility of the Union,


\textsuperscript{202} See Florian Sander, \textit{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).

\textsuperscript{203} Christian Calliess, \textit{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.

\textsuperscript{204} Supra note 173 and accompanying text.

\textsuperscript{205} See discussion supra Part IV.

\textsuperscript{206} See Paul Craig, \textit{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).

\textsuperscript{207} Cf. TEU art. 5(3).

\textsuperscript{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.


\(^{214}\) See Thomas von Danwitz, Subsidiaritätskontrolle in der Europäischen Union, in FESTSCHRIFT FÜR DIETER SELNNER 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{218} Although the CJEU has not done so expressly, but the text of the Founding Treaties could be construed similarly.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{222} Subsidiarity-as-necessity, then, is demanding of the courts when dealing with the political space and the central legislature. That is a

\textsuperscript{216} See supra footnotes 200 to 206 and accompanying discussion.
\textsuperscript{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).
\textsuperscript{218} See discussion supra Part III.
\textsuperscript{219} See Biondi, supra note 195, at 213.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{222} Mark Tushnet, Weak Courts, Strong Rights 27 (2008) (strong and weak forms of rights review).
constraint faced by both courts. 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. 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. Courts can handle this formal review without getting into the policy-merits of the legislation. 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. 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.

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

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223 See Benvenisti, supra note 8.
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. 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. 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.

This task has been successfully undertaken by both courts. The FCC has traditionally construed a category of exclusive competences of the Ländere, covering matters such as culture, police and public security and essentially internal situations. 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. 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.

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 Grundesetz [GG] [Basic Law] art. 30 (Ger.); TEU art. 4(1).
231 Cf. Murray Wesson, Disagreement and the Constitutionalisation of Social Rights, 12 HUM. RTS L. REV. 221, 224, 228 (2012).
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 
basis. 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

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235 See discussion supra Part III.
237 See discussion supra Part IV.
238 Case C-114/01, AvestaPolarit Chrome Oy, 2003 E.C.R. I-8725, at 56.
240 But see SHAW, supra note 25, at 112.
241 CHALMERS, supra note 242, at 369.
EU legislation, not with the concepts. 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.

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 Law and Article 5(1), (3) of the TEU. 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.

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. The European Energy Union policy evidences this

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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.").
244 See supra note 52 and accompanying text.
245 See supra note 72 and accompanying text.
246 See Finnis, supra note 15.
247 See Communication from the Commission to the European Parliament, the European Council, the
subsidarity-as-expediency. It is an EU strategic priority, enabled by article 194 of the TFEU. 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.

This rationale of necessity also motivates micro elements, including the legislative implementation of strategic priorities. 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). EU Member States governments are represented in the Council of the EU which is the co-legislature together with the European Parliament. 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

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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).
251 Grundesetz [GG] [Basic Law] art. 74(2) (Ger.).
252 TEU art. 16.
federal legislation adopted under certain shared competences.\textsuperscript{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,\textsuperscript{254} and particularly in the Area of Security, Freedom, and Justice.\textsuperscript{255} To this effect, the amended Subsidiarity Protocol devises the so-called Early Warning Mechanism.\textsuperscript{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.\textsuperscript{257} Importantly, these may concern the concept as


\textsuperscript{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, \textit{Anmerkungen zu Kompetenzabgrenzung und Subsidiarität nach dem Vertrag von Lissabon}, 14 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 389 (2011).


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,

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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 AFSI.

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 subsidiarity 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

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\(^{266}\) 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.


\(^{269}\) 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.\textsuperscript{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.\textsuperscript{272} Such active subsidiarity will entrench the necessity rationale of subsidiarity.\textsuperscript{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.\textsuperscript{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


\textsuperscript{272} Id.

\textsuperscript{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 Utrechtl. Rev. 78 (2012).

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