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# A COMPARISON OF ENVIRONMENTAL FEDERALISM IN THE UNITED STATES AND THE EUROPEAN UNION

CLÍONA J. M. KIMBER\*

## INTRODUCTION

The United States (U.S.) and the European Union (E.U.) are two vast, industrialised, and socially developed entities where protection of the environment is high on the political agenda.<sup>1</sup> Yet the size of their territories and the huge physical and geographical differences between regions creates particular problems for both entities as to how best to protect the environment. Additionally, the nature of the political and administrative structures in both entities sometimes results in power struggles between central and regional authorities regarding environmental protection. This Article will compare these legal structures in the U.S. and the E.U. in order to establish a set of conclusions concerning the problems of environmental federalism. Part I will outline the general advantages and disadvantages common to a central approach to environmental problems in any regional entity. In Part II the historical origin and basic structure of the E.U. will be contrasted with that of the U.S. in order to illuminate the background against which both systems may be examined. The direct comparison of both entities will commence in Part III with an examination of the legislative competencies of the respective central institutions. The comparison will continue in Parts IV and V with an examination of legislative instruments and enforcement respectively. In Part VI this Article will draw final conclusions as to the nature of environmental federalism in both systems.<sup>2</sup>

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1. The E.U. is made up of 15 countries with a combined population of 372 million. In 1994, the combined Gross Domestic Product (GDP) of the E.U. was \$7 trillion. Frank Viviano, *Borders Without Patrols*, S.F. CHRON., Feb. 19, 1995, at 1. The GDP of the U.S. is about \$6 trillion. William Flannery, *Whatever Happened to 'Huge Sucking Sound'*, ST. LOUIS POST-DISPATCH, Apr. 25, 1994, at 3. .

2. It is important at the outset to recognise that there is no acceptance among legal and political scholars as to the precise meaning of a "federation." The term can be used to describe either a union of provinces where sovereignty has been ceded to a central body or a loose alliance of independent countries similar to a confederation. For a discussion of the differing aspects of federalism, see Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Communities*, 34 AM. J. COMP. L. 229 (1986); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

## I. ENVIRONMENTAL FEDERALISM—GENERAL ADVANTAGES AND DISADVANTAGES

In any large region, questions will arise as to whether measures to protect the environment should be adopted at a central or regional level, and what the relative advantages and disadvantages of each approach might be. The advantages and disadvantages to central regulation for environmental protection are common to all systems and are present in both the U.S. and the E.U. These general considerations will be discussed in order to create a framework against which the specific problems of environmental federalism in the E.U. and the U.S. may be assessed. For the purpose of this discussion it will be convenient to consider these advantages and disadvantages of centralised regulation under three headings: environmental, economic, and political.<sup>3</sup>

### A. *Advantages of Centralised Regulation*

There are certain situations in which the environment is better protected with one set of measures taken by a central regulator than through a proliferation of measures by a number of regional actors. Where there are multi-jurisdictional problems—where rivers flow through a number of countries or states, or hazardous waste is transported through a number of regions—a transnational or trans-state solution is preferable. A central authority is more capable of negotiating solutions between bordering entities and imposing a remedy where agreement is not forthcoming. The nature of other problems, such as the destruction of the ozone layer or the conservation of large habitats or the protection of highly migratory species, often highlight the limitations of isolated and patchwork regional measures which may not be able to provide real solutions. The opportunity to take a centralised overview and create solutions on a broader canvas can be of clear benefit for the protection of the environment. For these types of global problems, the greater the number of entities acting in concert, the greater the likelihood that the environment can be protected.

An additional advantage of centralised environmental measures is that often more stringent measures are possible. This may be attrib-

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3. The following discussion relies on ECKHARD REHBINDER & RICHARD STEWART, 2 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE ch. 1 (1985) (Environmental Protection Policy); Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); W.P.J. Wils, *Subsidiarity and EC Environmental Policy: Taking People's Concerns Seriously*, 6 J. ENVTL. L. 85 (1994).

utable to a number of factors such as the relative insulation of central actors from local and short-term political accountability, and the possibility of persuading less aware regions to agree to stricter measures by promising gain in other areas.

Economic considerations also have a large role to play in favoring a central approach to regulation of the environment. An important part of any system seeking to protect the environment is the regulation of industrial and other economic activity. This may be achieved by setting limits on the emissions from industrial plants, mandating the use of particular types of technology or processes which generate less pollution, and setting standards for the types of goods produced, for example requiring that glass containers be recyclable or prohibiting the use of styrofoam packaging. If the regions in a large entity each take their own approach to such matters, several types of problems may arise. Non-uniform regulation of products in different regions may lead states or countries with high national environmental standards to exclude products which do not conform to these standards. Such barriers to trade can be damaging for consumer and industrial welfare. Similarly, regions which set high and costly standards for the operation of industrial processes in order to protect the environment may find themselves at a competitive disadvantage. Industry may exert pressure on state or national governments to exclude products from competitor regions which do not have to bear these costs. Alternatively, industry may seek to ease the burden of regulation in their home region at the expense of protecting the environment. If, however, environmental measures are harmonised at a central level, trade barriers caused by the exclusion of products which do not conform to high environmental standards will no longer be necessary, and, therefore, competitive distortions caused by differing regulation of industrial processes can be eliminated.<sup>4</sup>

The economies of scale which accrue from centralised environmental regulation can result in financial advantages for both central and regional governments. It is more efficient if research and development is undertaken by one large, well equipped agency which is staffed with trained persons rather than many small agencies which may duplicate each other's efforts. As a result, projects which might be too costly to finance if undertaken by one region may be possible if undertaken in association with a number of regional actors. Similar advantages result where one central agency is responsible for certain

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4. See ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 166-68 (1994).

types of activities, such as product regulation. The existence of multiple regulatory regimes can lead to considerable diseconomies of scale in terms of administrative burdens, training of personnel, and acquisition of technology and know-how.<sup>5</sup>

Political factors may also make it more likely that action will be taken at the centre. The most obvious of these is simply the desire of the centre to assume more power to itself. This does not necessarily benefit the environment. However, regions may also find that one of the political advantages of centralised regulation is that a common position can be presented in international negotiations concerning the adoption of environmental treaties or policies. Regions acting in concert can often achieve a greater bargaining power than would be possible were the regions acting independently. For example, a collective unit may extract greater commitments from other nations to take measures to protect the global environment, such as the reduction of fish catches or the prevention of traffic in endangered species. Moreover, centralised enforcement of environmental regulation may be more successful because it can be more disinterested. There is a danger that regional entities are more sympathetic to the demands of developers and industrialists for concessions or lenience in enforcement, particularly where a choice arises between continuing economic growth and protection of the environment.<sup>6</sup>

### *B. Disadvantages of Centralised Regulation*

Sound environmental policy strikes a careful balance between economic growth and the protection of the environment.<sup>7</sup> In a large region there are often vast differences in geographical, ecological, and industrial conditions. As a result, pollution assimilates at different rates and environmental quality may vary greatly. Because of their knowledge of the local environment, regions may be in a better position to assess local environmental needs, local environmental consequences of certain levels of pollution, and locally appropriate remedies. This may result in a more contextually appropriate balance between protection of the environment and development. Uniform standards set at a central level may lead to excessive control in some areas and insufficient control in others. For these reasons, land use

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5. *Id.* at 179.

6. *Id.* at 94.

7. Such a balance is embodied in the concept of sustainable development, *see* OUR COMMON FUTURE, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1987) (Brundtland Report).

and planning are better regulated by regions rather than from the centre.

Regions may also be more aware of the unique problems and needs of their locality than a central authority might be. Regions may be quicker to discover and perhaps more concerned about the protection of a particular habitat or the abatement of pollution at a given site. If environmental protection takes place purely at the centre, there is a danger that such specific local problems might be overlooked completely or not be considered until the damage already has been done.

Although there are potential economies of scale in centralised environmental regulation, economic factors can cut both ways, and in some cases, they may lead to inefficiencies. The most obvious economic disadvantage is the cost of bureaucracy. A centralised administration may lead to a bloated and costly over-accumulation of bureaucracy. In addition, centralised protection of the environment of a large number of regions requires substantial information transfer from the regions to the centre, which may result in duplication of effort, and failures of communication which may prove costly and inefficient.

Finally, the problems caused by a number of political and structural factors may lead to central regulation being disadvantageous for the protection of the environment. Regional resentment of centralised control may produce substantial political difficulties, particularly if the regions are highly independent. The ceding of power to the centre may be seen as a diminution of the region's sovereignty and independence. If centralised standards are imposed upon reluctant regional actors, local implementation and enforcement may be possible, and the goals of the centre will be undermined.<sup>8</sup> Harmonising measures where legal and administrative systems vary considerably from region to region can be extremely difficult. Given these regional differences, the successful adoption of uniform central standards may be difficult to achieve.<sup>9</sup> Finally, real differences may exist between localities in preferences regarding levels of environmental protection and the means of achieving environmental goals. As a consequence, it may be difficult for the central government to create a body of legislation which adequately reflects these preferences, and the result may be that the regions' support for central environmental regulation is

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8. See *infra* note 20 and accompanying text.

9. For a description of the effect of such difficulties on the process of harmonisation in Europe, see PAUL BEAUMONT & STEPHEN WEATHERILL, *EUROPEAN COMMUNITY LAW* ch. 17 (1993).

reduced. There is a danger that this would have a significant negative impact on the effectiveness of central environmental legislation.

## II. COMPARISON OF THE POLITICAL STRUCTURES OF THE E.U. AND THE U.S.

Having considered the advantages and disadvantages of central regulation in federal systems in general, this Article will now consider the political structures in the E.U. and the U.S. in more detail. To understand and compare environmental federalism in the E.U. and the U.S., there must be some understanding of the political structures of both entities. Even at first glance it is clear that the dissimilarities between both entities are as great as the similarities. The E.U. is not a nation-state in any accepted sense of the word. Rather, it is an association of sovereign independent states which have agreed to act collectively in a number of selected areas with a central authority which formulates law by which member states agree to be bound. Each member state of the E.U. has a strong national identity; a strong sense of national pride; its own sovereign parliament; its own legal, administrative, and judicial system; and its own currency and central bank. Each member state of the E.U. exhibits differing levels of commitment to the E.U., and differing levels of development, industrialisation, wealth, and infrastructure. Some countries are highly developed and industrialised, while others are relatively poor and will require substantial growth to equal the prosperity of the richer countries. Many nation-states view their membership in the Union largely in terms of the benefits that can be derived for the country itself. Professor Weiler points out that

the Community is conceived in this way of thinking not as a redefinition of the national self but as an arrangement, elaborate and sophisticated, of achieving long-term maximisation of the national interest in an interdependent world. Its value is measured ultimately and exclusively with the coin of national utility and not community solidarity.<sup>10</sup>

The status of the E.U. itself as a political and legal entity is still evolving and is still uncertain in many respects. While the European Community (EC) Treaty recognises the Community as a separate entity with a legal personality and treaty making powers,<sup>11</sup> each state retains

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10. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2481 (1990). The United Kingdom is a classic example of a state which takes this view.

11. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY [EC TREATY] arts. 113, 114, 131, 228, 237, 238 (incorporating changes made by TEU, *infra* note 12).

its status as a subject of international law. The EC Treaty expressly provides that "the Union shall respect the national identities of its Member States."<sup>12</sup> Attempts to give the institutions of the E.U. more powers, or to move further along the road to a federal Europe are continually resisted by some member states. At best, the member states live in an uneasy tension between their view of themselves as autonomous and independent countries and a conception of themselves as part of a larger union. Professor Weiler has described this tension as resulting from "each state actor's need to reconcile the reflexes and ethos of the "sovereign" national state with new modes of discourse and a new discipline of solidarity."<sup>13</sup> Such tensions can only increase with the proposed enlargement of the E.U. to include countries in Eastern Europe.

These tensions and perceptions help to explain why the voting procedure for the adoption of central measures of any kind, and environmental measures in particular, is such a large obstacle to central action. Prior to the adoption of the Treaty on European Union (TEU), all environmental legislation had to be adopted by the unanimous vote of all member states. A parallel situation in the U.S. would require the agreement of each state governor for the enactment of federal environmental legislation. The requirement of unanimity is quite clearly a substantial constraint on both the type and the stringency of environmental measures which can be adopted by the Community. The European Council, which adopts environmental measures, is composed of representatives of the governments of member states who often act in the interests of their own countries. If an environmental measure is one for which unanimity is required, a single member state may veto the measure. Even if only a qualified majority is required to adopt a measure, member states can operate in concert to block a measure that they do not feel is in their interest. It is therefore far more difficult for the Community to adopt a measure against the will of a member state than it is for the U.S. government to act with less than unanimous support among the states. In addition, E.U. institutions enacting environmental legislation must always bear in mind member state reluctance to agree to any measures which involve too great a diminution of their sovereignty. As one commentator has remarked, "in order to have some valid comparison, American[s] . . . should imagine having environmental standards set

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12. See TREATY ON EUROPEAN UNION [TEU] art. F(1) (amending TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [EEC TREATY]).

13. Weiler, *supra* note 10, at 2480.



by the Organisation of American States against the United States."<sup>14</sup> While this provision of the EEC Treaty has been amended by the TEU so that the majority of environmental legislation is now adopted by qualified majority voting,<sup>15</sup> measures in several areas still require unanimity. These include provisions of a fiscal nature; measures concerning town and country planning and land use—with the exception of waste management and measures of a general nature; management of water resources; member state choice of energy sources and supply.<sup>16</sup> The range of environmental matters that could potentially come within the ambit of these exceptions is clearly quite large. Central action in these important areas is therefore constrained by the need to obtain the approval of every member state of the E.U., a requirement which has important consequences for environmental federalism in Europe. Such approval will only become less easy to obtain as the E.U. expands.

This state of affairs would be even more difficult were it not for the presence of a number of factors which tend to secure agreement from member states which might be initially reluctant to agree to environmental measures.<sup>17</sup> First, member states may reach agreement through a process of reciprocal concessions at a political level over a period of time. States for which environmental protection is a lower priority may agree to relatively stringent environmental measures in order to secure goodwill which may be transferred to measures of another nature in the future. States are reluctant to acquire a reputation for being uncooperative in a political structure which requires considerable horse-trading to arrive at a final position. As a consequence, it may be difficult to oppose Commission proposals unless they would clearly cause substantial economic or domestic political difficulty. Second, member states have differing influences on EC policy-making through the voting procedure. The decision-making procedure for many environmental measures now requires a qualified majority, so unanimity is not required in all circumstances.<sup>18</sup> Third, it is to the advantage of multinational firms which have facilities in more than one member state to have standards harmonised throughout the E.U. so that they are operating under the same conditions in all countries. Other firms operating in countries with high environmental

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14. See Ludwig Kramer, *The European Economic Community, in U.S. AND EUROPEAN ENVIRONMENTAL LAW*, *supra* note 38, at 4-5.

15. EC TREATY art. 130S(1).

16. *Id.* arts. 100A, 130S(2).

17. REHBINDER & STEWART, *supra* note 3, at 12-13.

18. EC TREATY art. 130S(1); see YVONNE SCANNELL, *ENVIRONMENTAL AND PLANNING LAW* 8 (1995).

standards would wish to have standards harmonised at that level, if only to ensure that their competitors are put at an equal disadvantage. Therefore, industry may exert pressure on governments to agree to particular environmental measures. Fourth, political leaders may find it convenient to use the fiction of being bound by their membership in the Community to adopt environmental controls which they wish to adopt but believe would not command the support of voters at home. The lack of domestic political accountability for decisions taken at Community level substantially enhances the freedom of member states. As Rehbinder and Stewart put it: "By acquiescing in Commission initiatives, they can secure their objectives through the back door."<sup>19</sup> Finally, substantial non-compliance with environmental measures by member states paradoxically works in favour of the agreement of states to environmental measures. States may agree to Commission proposals for the purpose of securing the goodwill of other member states, safe in the knowledge that implementation of these measures can be delayed and minimised.<sup>20</sup>

Quite apart from the looseness of the political structure, a crucial factor in understanding environmental federalism in Europe is the historic origin of the E.U. as an economic entity. The origin of the current Union is the European Coal and Steel Community (ECSC) which was established in 1951.<sup>21</sup> The objective of the ECSC was the organisation of the production of coal and steel under a single authority in order to ensure that peace was maintained between some of the larger European States.<sup>22</sup> The ECSC was deepened in 1957 with the Treaty of Rome<sup>23</sup> establishing the European Economic Community and Euratom.<sup>24</sup> Although the aspirations of some of the founders of the Community extended beyond the establishment of a common market,<sup>25</sup> the Treaty of Rome in 1957 quite clearly established a purely economic community, which was essentially an extended customs union, rather than a Federation of Europe. The Treaty of Rome and thus the European Community has since been successively modi-

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19. REHBINDER & STEWART, *supra* note 3, at 13.

20. *Id.* at 316.

21. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY].

22. *Id.* pmb1.

23. See EEC TREATY, *supra* note 12.

24. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY].

25. In 1955, at the meeting of the foreign ministers of the member states of the Coal and Steel Community, the ministers declared their intention to pursue the development of a United Europe. See D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 12 (D. Lasok & K.P.E. Lasok eds., 6th ed. 1994).

fied and deepened, first with the Merger Treaty in 1965,<sup>26</sup> then by the Single European Act in 1986 (SEA)<sup>27</sup> and most recently by the Treaty on European Union in 1992 (TEU),<sup>28</sup> otherwise known as the Maastricht Treaty.<sup>29</sup> The Union has also widened with the accession of nine new members to bring the total membership up to fifteen.

The Community's objectives and competencies have developed beyond the purely economic on an incremental basis with each successive modification of the Treaty of Rome. This development has taken place in a piecemeal and patchwork fashion, based in part on an expansive and imaginative interpretation of the treaties by the Court of Justice of the European Communities. For example, the Union only gained an explicit competence to regulate the environment with the adoption of the Single European Act in 1986.<sup>30</sup> Prior to this, environmental regulation was only justified as part of measures to promote "an harmonious development of economic activities"<sup>31</sup> or for the attainment of the operation of the common market. While the TEU considerably extended the explicit competencies of the Union beyond purely economic matters, it is probably fair to say that the chief objectives of the Union and indeed its *raison d'être* continue to be the furthering of economic and social progress.<sup>32</sup> As a result,

26. Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965, 4 I.L.M. (1965) (amending EEC TREATY).

27. Single European Act, 1987 O.J. (L 169) 1 [hereinafter SEA].

28. See *supra* note 12.

29. There are three legally definable treaty-based Communities: the European Coal and Steel Community, Euratom, and the European Community. These three Communities operate under the umbrella concept of the European Union. Article A of the TEU provides: "[B]y this treaty, the High Contracting Parties establish among themselves a European Union, hereafter called 'The Union.'" TEU art. A. These three Communities constitute one of the three pillars of the E.U.; the other two are the Common Foreign and Security Policy, and Co-operation in Justice and Home Affairs. These latter two pillars supplement the existing treaties through the establishment of a detailed framework for co-operation on an intergovernmental basis. These three pillars are topped by a common edifice, the European Union. Martin Hession & Richard Macrory, *Maastricht and the Environmental Policy of the Community: Legal Issues of a New Environment Policy*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 151 (David O'Keefe & Patrick Twomey eds., 1994).

The Union, therefore, refers to the physical territory of all of the member states, or to the member states acting other than under the EC Treaty. The Community refers to member states acting under the EC Treaty. The Court of Justice of the European Communities has jurisdiction over the European Communities, not the Union, as many matters in the TEU are not justiciable. See generally ANDREW CHARLESWORTH & HOLLY CULLEN, EUROPEAN COMMUNITY LAW 8-10 (1994); LASOK & BRIDGE, *supra* note 25, ch. 2.

30. See *supra* note 27.

31. Declaration of the Council of Ministers of the European Communities and of the Representatives of the Governments of the Member States Meeting in Council, 1973 O.J. (C 113) 1.

32. See TEU art. B.

there is a danger that the protection of the environment can be subordinated to the furtherance of the economic principles and objectives central to the Union.<sup>33</sup> This understanding is crucial to any consideration of environmental federalism in the E.U.

The U.S., in contrast, has a much longer history of both political and economic union. Since the adoption of the Constitution of the United States in 1789, the states have integrated to an extent unforeseen by the founders. Indeed, it is arguable whether the U.S. is even correctly classed as a federation; it now seems more appropriately described as a nation-state.<sup>34</sup> The legal identity of the U.S. at the international level has subsumed that of the individual states. At a political level, the federal institutions are long established, powerful, and relatively certain of their position. Indeed, at an institutional level, there is little comparison between the strength of the U.S. federal institutions and government and the embryonic development of the central institutions of the E.U. In the U.S., the boundaries of the competencies of the federal and state governments have been litigated for almost two centuries, and while the questions cannot be said to be settled,<sup>35</sup> the E.U. has only begun to examine questions of the competency of the Community institutions *vis a vis* the sovereignty of member states. In the U.S., the unilateral secession of a state from the Union is impossible as a matter of constitutional law.<sup>36</sup> In the E.U., however, it is a possibility, although an unlikely one, for some states which resent any diminution of their sovereignty resulting from membership of the E.U. In the U.S., citizens have a strong sense of identity as citizens of the nation, whereas in the E.U. the identity of citizens is derived from citizenship of the member states in which they live.

It is clear from the above comparison that there are widely differing levels of political integration in both systems. It is also clear that such a situation must have an effect on the shaping of environmental federalism. Considerable political and legal integration had taken place in the U.S. prior to the advent of extensive environmental regu-

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33. This argument has also been made as regards the social policy of the Community and, in particular, the provision relating to sex discrimination. See TAMARA K. HARVEY, *JUSTIFICATIONS FOR SEX DISCRIMINATION IN EMPLOYMENT* (1995).

34. ERNEST C. GRIFFITH, *THE AMERICAN SYSTEM OF GOVERNMENT* 21 (1976).

35. See Peter M. Manus, *Federalism Under Siege at the Rocky Mountain Arsenal: Pre-emption and CERCLA after United States v. Colorado*, 19 COLUM. J. ENVTL. L. 327 (1994) (discussing the federal power of preemption).

36. See *Texas v. White*, 74 U.S. 700 (1 Wall.) 726 (1868) ("Consideration therefore as transactions under the Constitution, the ordinance of succession, adopted by the convention and ratified by a majority of citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null.").

lation. As a result, federal institutions in the U.S. responsible for regulating the environment are, for the most part, interacting with relatively similar legal and administrative systems in each state. It is easier, therefore, for the U.S. to engage in central regulation than it is for the E.U. In Europe, member states had begun to regulate for the protection of the environment before the moves towards European integration took place. In Britain, for example, atmospheric pollution had been regulated by a series of Alkali Acts since 1863.<sup>37</sup> As a result, European states developed distinctive national styles of regulation influenced by their differing legal, administrative, and political traditions.<sup>38</sup> One can see, then, why there is more extensive central regulation of the environment in the U.S. than in the E.U. The federal government in the U.S. is in a stronger political and institutional position to enact environmental legislation than the E.U. As a result, there is less central regulation of the environment in the E.U. than in the U.S., and the legislative measures that are in place in Europe are less extensive and less systematic. This conclusion will become more apparent as this Article examines other facets of both systems.

### III. LEGISLATIVE COMPETENCIES

The Treaty of Rome which founded the European Economic Community contained no explicit legal basis for Community environmental policy. Nevertheless, the European Court, by expansively interpreting the provisions of the original Treaty, established a legal basis for Community action in this area. Until the adoption of the SEA in 1986, Community environmental policy was based on only two competencies: First, the power under Article 100 to approximate or harmonise laws in the member states which affect the functioning of the common market.<sup>39</sup> Second, under Article 235, the power to take appropriate measures to attain, in the course of operation of the com-

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37. See Lakshman Guruswamy, *Integrating Thoughtways: Re-Opening of the Environmental Mind?*, 1989 Wis. L. Rev. 463, 501 n.176 (discussing the recycling of hydrogen chloride pollutants into useful commercial bleach in Britain at the time of the first Alkali Act in 1863).

38. See DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES (1986); *Contrasting Constitutional, Institutional and Administrative Frameworks—The Implications for Environmental Policy-making*, panel discussion in UNDERSTANDING U.S. AND EUROPEAN ENVIRONMENTAL LAW: A PRACTITIONER'S GUIDE 59 (Turner T. Smith & Pascale Kromarek eds., 1989) [hereinafter U.S. AND EUROPEAN ENVIRONMENTAL LAW].

39. EC TREATY art. 100. Article 100 provides:

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Community and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administra-

mon market, one of the objectives of the Community where the Treaty had not provided the necessary powers.<sup>40</sup> However, these Articles limited the ability of the E.U. to take environmental action because these types of measures had to be linked to the functioning of the common market and related economic activities. Within the SEA and the subsequent TEU, the Community was given explicit legal competence in environmental matters.<sup>41</sup> The Community's capacity to take such action was further strengthened by the inclusion of the promotion of sustainable growth respecting the environment as a principal objective.<sup>42</sup>

The E.U., therefore, has explicit competence to take legislative measures for the regulation of the environment under explicit authority in addition to its power to harmonise laws in member states and to promote the efficient functioning of the common market. It does not have exclusive competence in this area, however, as it exercises these powers concurrently with the member states.<sup>43</sup> Under this system of shared authority, the member states retain the power to regulate the environment within the limits set by the EC Treaty until such time as the Community acts. Once the Community acts, it then assumes exclusive competence in the field it has occupied.<sup>44</sup> Concurrent Community and member state competence is thus transformed into

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tive provision of the Member States as directly affect the establishment or functioning of the Common Market.

*Id.*

40. *Id.* art. 235. Article 235 states:

If action by the community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

*Id.*

41. *Id.* arts. 130R-T (setting forth community environmental policy).

42. *Id.* art. 2. Article 2 provides: "The Community shall have as its task . . . to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment . . ." *Id.*

43. This general rule is subject to some minor exceptions. The Court of Justice of the European Communities has declared from time to time that certain matters are within the exclusive competence of the Community. As far as the environment is concerned, measures taken under the common commercial policy or regarding marine fisheries conservation are probably within the exclusive competence of the Community. The matter has not yet been finally decided. See Case 104/81, Mainz v. Kupferberg, [1982] E.C.R. 3641; Case 804/79, Commission v. United Kingdom, [1980] E.C.R. 1045; see also Hession & Macrory, *supra* note 29, at 160-61.

44. The extent of this power depends, of course, on the scope of the field. See Case 237/82, Jongeneel Kaas, [1984] E.C.R. 483.

exclusive Community competence; member state action is preempted by Community action.<sup>45</sup>

With regard to environmental measures, there are at least two exceptions to the doctrine relating to preemption. The EC Treaty expressly provides for member state action notwithstanding concurrent Community action in certain circumstances. First, Article 100A allows member states to maintain, but not to introduce, measures in derogation of community harmonisation measures under Article 100, provided they do not constitute arbitrary discrimination or a disguised restraint on trade between member states.<sup>46</sup> Second, Article 130T expressly provides for the maintenance or introduction of more stringent measures for the protection of the environment by member states to the extent that they are not incompatible with the Treaty.<sup>47</sup>

The type and scope of environmental measures a member state may maintain or introduce under these exceptions remain unclear, however. The shape of these exceptions will ultimately turn on the interpretation of the phrases "arbitrary discrimination," "a disguised restraint on trade," and "incompatible with the Treaty." One must ask then, how could environmental measures have these effects? It is possible that member state adoption of product standards; legislation regulating industrial processes; or policies providing state aids, financial incentives, or subsidies to help protect the environment could be incompatible with Treaty provisions prohibiting measures restraining the free movement of goods,<sup>48</sup> and provisions establishing rules on competition and curtailment of state aids to industry.<sup>49</sup> We can only say, however, that national environmental measures *could be* incompatible with these Treaty provisions because a closer examination of these same provisions reveals further exceptions.<sup>50</sup> For example, although national measures which have the effect of restricting the free movement of goods between member states are prohibited by the Treaty, such restrictions are permissible on certain specified grounds, including the protection of health and life of humans, animals, or plants.<sup>51</sup>

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45. See Stephen Weatherill, *Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community*, in LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 29, at 14. However, Weatherill notes that *in practice* harmonising directives often include safeguard procedures permitting member states to take action in accordance with "defined procedures in the directive where a threat to health not covered by the terms of the directive is revealed." *Id.* at 19-21.

46. EC TREATY art. 100A.

47. *Id.* art. 130T.

48. *Id.* arts. 30-36.

49. *Id.* arts. 85-94.

50. *Id.* arts. 30-36.

51. See LUDWIG KRAMER, EC TREATY AND ENVIRONMENTAL LAW 112 (1995).

This exception has been somewhat clarified by case law which has interpreted the Treaty to permit measures taken for the protection of the environment which had the effect of restricting the free movement of goods. These measures were held not to violate the Treaty because they were non-discriminatory and proportional to the objective to be achieved.<sup>52</sup> The unarguable conclusion is that a member state cannot tell at a glance when it has competence to maintain or introduce environmental measures which are at variance with Community measures. It is also apparent that, in many cases, Community environmental legislation provides minimum standards leaving member states to adopt more stringent measures notwithstanding the attendant consequences for a homogenous central body of environmental legislation.

The principle of subsidiarity is a further restraint on the competence of Community institutions to take environmental measures, particularly where there is concurrent competency. This somewhat vague and ambiguous principle was introduced into the EC Treaty by the Maastricht Treaty and is now contained in Article 3B of the EC Treaty.<sup>53</sup> It has been the subject of much discussion and debate both by academics<sup>54</sup> and by Community institutions.<sup>55</sup> While it lacks precision at the margins, the core of the principle requires that the Community act only if the objectives of a proposed action cannot be sufficiently achieved by the member states, and are, because of the scale or effects of the proposed action, better achieved by the Community. The potential of the principle of subsidiarity to limit Community action are yet to be determined. Much will depend on the extent to which the principle is justiciable and available to member states challenging Community action in a particular field.<sup>56</sup> The principle is important in this context because it permits the best interests of the

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52. See Case 302/86, *Commission v. Kingdom of Denmark*, [1988] E.C.R. 4607 (Danish bottles case); Case 120/78, *Rewe-Zentral A.G. v. Bundesmonopolverwaltung*, [1979] E.C.R. 649.

53. EC TREATY art. 3B.

54. See A.G. Toth, *A Legal Analysis of Subsidiarity*, Josephine Steiner, *Subsidiarity Under the Maastricht Treaty*, Nicholas Emiliou, *Subsidiarity: Panacea or Fig Leaf?*, in LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 29, at 37, 49, 65; Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992); A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992).

55. See Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM(93)545 final. Subsidiarity was also one of the key areas of discussion of the European Council in its Edinburgh Summit meeting in December 1992. EUROPEAN COUNCIL IN EDINBURGH, CONCLUSIONS OF THE PRESIDENCY, Bull. EC 12-1992 (annex to part A., at 11-12).

56. Emiliou, *supra* note 54, at 77-81.



environment to be considered in determining the appropriate level of action and the division of powers between the Community and the member states. Unfortunately, it provides only limited guidance as to how these questions are to be resolved.

Yet another restraint on Community competence to regulate the environment is the explicit recognition that member states are competent to negotiate in international bodies and conclude international agreements. Article 130R(4) provides that "within their respective spheres of competence, the Community and the Member States shall co-operate with third countries and with the competent international organisations."<sup>57</sup> Again the extent of this restraint is unclear because there is no express delimitation of these respective spheres in the Treaty.

The U.S. government, in contrast, is not subject to the same restrictions on its legislative capacity. Although the Constitution does not provide express competence to legislate for the protection of the environment, it does grant Congress various law-making powers, which have been expansively interpreted by the United States Supreme Court to create a wide federal competence in the environmental sphere. This broad competence is rooted primarily in the Commerce Clause, which grants Congress the power to regulate commerce with foreign nations and among the several states.<sup>58</sup> As one commentator has remarked, "any theoretical limit on the potential range of federal power has been rendered virtually completely academic in the environmental sphere by the sweeping construction of federal power under the interstate commerce clause."<sup>59</sup> A parallel can be profitably drawn here with the initial legal basis for E.U. environmental policy, namely the authority necessary to ensure the proper functioning of the common market. The U.S. power is more extensive, however, as it has been interpreted to authorise Congress to regulate any commercial or industrial activity which has a "substantial economic affect on interstate commerce."<sup>60</sup>

There is no parallel in the E.U. to the other competencies of the U.S. government in the field of environmental law. Congress has the power to make regulations concerning federal lands.<sup>61</sup> The E.U. as an

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57. EC TREATY art. 130R(4).

58. U.S. CONST. art. I, § 8, cl. 3.

59. Manus, *supra* note 35, at 378.

60. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (upholding Congress's power to regulate home grown and home consumed wheat on the theory that the activity has a cumulative affect on interstate prices).

61. U.S. CONST. art. I, § 8, cl. 17.

entity is not an owner of land. Congress has the power to levy taxes and spend the proceeds.<sup>62</sup> The power of taxation is jealously guarded by the member states of the E.U. In the U.S., the President has the authority to enter into treaties<sup>63</sup> and Congress has the power to pass implementing legislation.<sup>64</sup> As has already been discussed above, the E.U. has only limited competency in this area. In summary, with regard to the legislative competence of the U.S. in environmental matters, it is hard to disagree with the conclusion that "Congress as a practical matter has virtually unlimited authority to enact measures regulating, taxing, or subsidising the use and development of environmental and natural resources within the United States."<sup>65</sup> Finally, there is no parallel to the "takings clause" in the Fifth Amendment<sup>66</sup> which can inhibit both state and federal environmental regulation if the measure diminishes the value of private property and the property owner must be compensated for lost value.<sup>67</sup>

#### IV. LEGISLATIVE INSTRUMENTS

Having considered the legislative competency of the E.U. and the U.S., this Article now considers the legislative instruments in both systems. Arriving at binding environmental legislation in the E.U. is a two tiered process. The first legislative instrument of environmental policy is the action programme which identifies broad policy objectives. To date, five environmental action programmes have been implemented, with each covering a period between four and five years. The most recent covers the period from 1992 to 1997. These highly general, non-binding action programmes are typically adopted through a council resolution by which the member states agree to implement the measures described. The objective of these programmes is to set out, in the broadest terms, the future direction of Community environmental policy.

Following the adoption of an action programme, the Community then has a choice of legislative instruments to implement the policy. Article 189 of the EC Treaty provides for three types of binding legisla-

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62. *Id.* cl. 1.

63. *Id.* art. II, § 2, cl. 2.

64. *Id.* art. I, § 8, cl. 18.

65. REHBINDER & STEWART, *supra* note 3, at 44.

66. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

67. There is a possibility, however, that compensation for interference with rights to property could be inferred through invoking Article 1 of Protocol 1 to the European Convention on Human Rights. See Case 44/79, *Hauer v. Land Rheinland-Pfalz*, [1979] E.C.R. 3727.

tive instruments: the regulation, the directive, and the decision.<sup>68</sup> Regulations and directives have been used to implement environmental policy. A regulation is a more binding form of legislative instrument than a directive, as it is "binding in its entirety and directly applicable in all member states."<sup>69</sup> A directive, on the other hand, is binding only as to the result to be achieved, with the choice of methods left to each member state. Furthermore, it is binding only on member states as opposed to private actors.

For a number of reasons, the primary method of implementing environmental policy has been by way of directives, although regulations have also been used occasionally.<sup>70</sup> Because of their flexibility, directives are particularly well suited to the implementation of environmental policy. They also have the advantage of providing a degree of discretion in implementation to member states which may be critical to achieving agreement to the directives. For example, Article 3 of the Council Directive on the Freedom of Access to Information on the Environment<sup>71</sup> requires member states to ensure that public authorities make information relating to the environment available to any natural or legal person.<sup>72</sup> The exact arrangements for making this information available are not specified by the Directive. Instead, Article 3 provides that "Member States shall define the practical arrange-

68. In addition to regulations and directives, there are informal methods of action such as recommendations and opinions, which are used to make policy declarations, initiate research programmes, or set up special funds. See EC TREATY art. 189.

69. Article 189 of the Treaty provides:

In order to carry out their task and in accordance with the provisions of this treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, make decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

*Id.*

70. Regulations have been promulgated to implement obligations stemming from international agreements. See, e.g., Council Regulation 348/81 on Common Rules for Imports of Whales and other Cetacean Products, 1981 O.J. (L 39) 1; Council Regulation 3626/82 on the Implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1982 O.J. (L 384) 1; see also CHARLESWORTH & CULLEN, *supra* note 29, at 444.

71. Council Directive 90/313 on the Freedom of Access to Information on the Environment, art. 3, 1990 O.J. (L 158) 56, 57.

72. *Id.*

ments under which such information is effectively made available."<sup>73</sup> Flexibility of this sort introduces the possibility that environmental policy will not be uniform across the member states of the E.U. Significant departures may be made from measures as originally designed because of national legislation which does not faithfully implement the Community directives, or because of differing legal and administrative structures. The increasing numbers of directives and the increasing workload of Community institutions has resulted in relatively lax monitoring of enforcement, leading to further variation in the implementation of Community directives in the member states. Thus, federal power to regulate the environment is weakened because of the requirement to transpose measures into national legislation.<sup>74</sup>

These problems are diminished to some degree by the increasing specificity of directives. As envisaged by Article 189(3) of the EC Treaty, directives are not meant to be instruments of uniformity, but rather they should set out frameworks, objectives, and goals, leaving the method of achieving the intended objectives to the member states.<sup>75</sup> As the Community's legal system evolves, it appears that directives are increasingly drafted with great particularity, leaving little discretion to the member states. Reh binder and Stewart have identified three types of directives with varying degrees of specificity and legal effect on member states: first, typical directives that closely follow the model set forth in Article 189 of the EEC Treaty; second, regulation-type directives, which contain detailed substantive provisions; and third, framework directives, which set out broad objectives and basic principles, later amplified with a number of more specific directives.<sup>76</sup> Thus, the system has evolved towards favoring greater use of specific directives as an instrument of achieving uniformity, creating a corresponding increase in centralized powers.

Another significant difference between the legislative competencies of the two systems is that, in the E.U., unlike the U.S., environmental legislation typically is not directly binding on individuals. As previously noted, the main instrument of environmental policy in the E.U. is the directive. Article 189(3) of the EC Treaty provides that a directive is binding only upon member states, which are then required to implement that directive in their national laws. Thus, Community law is enforced directly against the member states, with the individual

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73. *Id.*

74. The specific difficulties of implementation and enforcement are discussed in Part IV, *infra*.

75. EC TREATY art. 189.

76. REHBINDER & STEWART, *supra* note 3, at 35.

having little or no role to play. However, the doctrine of direct effect of directives has modified this scheme to bring the E.U. system closer to that of the U.S. The doctrine of direct effect, as it has evolved through the jurisprudence of the European Court of Justice, provides that if a directive is unconditional and sufficiently precise, and if the time limitation for its implementation by a member state has expired, then an individual can rely directly on a directive in an action against a public body before the court of a member state.<sup>77</sup> Under this doctrine, individuals can invoke Community law before their national courts, even if Community law is in conflict with national law. In addition, the European Court established in *Francovich and Others v. Italy*<sup>78</sup> that an individual, in certain circumstances, is entitled to damages against a state for non-implementation of a directive.<sup>79</sup> These developments considerably extend the reach of directives that satisfy the necessary criteria, and as a result, central institutions are further strengthened.

In contrast, the U.S. government enjoys a much more extensive range of legislative strategies by which it can regulate the environment in all fifty states. For purposes of comparison, these strategies can be divided into four categories: federal standards with federal implementation and enforcement; federal standards with state implementation and enforcement; federal management of federally owned lands and resources; and federal requirements or incentives for state adoption and enforcement of environmental protection measures.<sup>80</sup> The incentives in the latter category include innovative strategies such as marketable permit systems and the distribution of clean-up grants.

As discussed previously, there is no E.U. equivalent to the U.S. federal capacity to manage public resources. The amount of land directly owned by the E.U., and therefore subject to its direct management, is negligible. Similarly, there is no equivalent in the E.U. to

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77. The doctrine of direct effect is discussed in Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983). The doctrine has been applied by the Court of Justice of the European Communities in Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, [1982] E.C.R. 53; Case 148/78, *Pubblico Ministero v. Tullio Ratti*, [1979] E.C.R. 1629; Case 41/74, *van Duyn v. Home Office*, [1974] E.C.R. 1337. 78. Joined Cases C-6/90, C-9/90, [1991] E.C.R. I-5357.

79. The Court identified three criteria to be satisfied in order to collect damages: First, the result established by the directive must involve the attribution of rights to individuals; secondly, the content of those rights must be capable of being identified from the provision of the directive; and thirdly, there must be a causal link between the failure by the member state to fulfil its obligations and the damage suffered by individuals. See *BEAUMONT & WEATHERILL*, *supra* note 9, at 303.

80. The four basic strategies of U.S. federal legislation are identified in *REHBINDER & STEWART*, *supra* note 3, at 46-55.

federal standards which are federally implemented and enforced. The political structure of the E.U. is such that member states retain sovereignty, and therefore, the Community has no power directly to implement and enforce its legislation in the member states. The power of the central institutions in the U.S. and the E.U. is co-extensive only with the second and fourth strategies, namely federal standards with state implementation and enforcement and federal requirements or incentives for state adoption and enforcement of environmental provisions. E.U. directives correspond to both of these categories. Some directives establish extremely specific Community standards which must be adopted by member states,<sup>81</sup> while others require the adoption of provisions to protect the environment.<sup>82</sup>

A comparison of direct legislative powers demonstrates that the U.S. government possesses much more extensive regulatory power than do the federal institutions of the E.U. Particularly important from the point of view of balance of power is the capacity of the U.S. government directly to implement and enforce standards regulating private conduct in the individual states, a power presently unthinkable in the E.U. Additionally, as discussed below, the U.S. government has much more extensive powers of enforcement.

## V. METHODS OF IMPLEMENTATION AND ENFORCEMENT

The *de facto* power of central institutions can be seen clearly in their capacity to enforce legislative measures. The weak enforcement powers of EC institutions is a serious deficiency in European Community law. E.U. enforcement methods are extremely limited when compared to those available in the U.S., and the considerable reluctance of many member states to implement E.U. policy causes significant problems. This section will consider the powers of central institutions to ensure that central legislation is enforced.<sup>83</sup>

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81. See, e.g., Council Directive 75/440 Concerning the Quality Required of Surface Water Intended for the Abstraction of Drinking Water in the Member States, 1975 O.J. (L 194) 26.

82. See, e.g., Council Directive on Hazardous Waste, 1991 O.J. (L 377) 20. This directive requires member states, among other things, to "take the necessary measures to ensure that, in the course of collection, transport and temporary storage, waste is properly packaged and labelled in accordance with the international and Community standards in force." *Id.* art. 5. Furthermore, it requires "competent authorities [to] draw up . . . plans for the management of hazardous waste and [to] make these plans public." *Id.* art. 6.

83. For a consideration of the problems of implementation and enforcement in the E.U., see KRAMER, *supra* note 51, chs. 5, 6; Tamara R. Crockett & Cynthia B. Schultz, *The Integration of Environmental Policy and the European Community, Recent Problems of Implementation and Enforcement*, 29 COLUM. J. TRANSNAT'L L. 170 (1991); Richard Macrory, *The Enforcement of Community Environmental Laws: Some Critical Issues*, 29 COMMON MKT. L. REV. 347

There is at present a considerable body of Community environmental legislation, most of which is in the form of directives. As discussed above, these directives are not directly binding on member states but must be transposed into national law.<sup>84</sup> Thus we speak of the requirement that directives be both implemented and enforced. Implementation is the process by which a member state's legal obligations under Community law are fulfilled either by the enactment of national law or the adoption of policies and practices which satisfy the legal obligations. Enforcement is the process by which the Community ensures implementation takes place.<sup>85</sup>

Failure of implementation can be divided into three categories based on the member state's obligations: first, failure by a member state to communicate to the Commission the national laws and measures that it has taken to implement a particular community measure;<sup>86</sup> second, incomplete or incorrect transposition of Community obligations into national law; and third, failure of practical compliance by member states with the requirements of the directives.<sup>87</sup> The Commission has the role of ensuring that there is effective application of Community law in the member states.<sup>88</sup>

The enforcement of Community law by the Commission is a three-stage process governed by Article 169 of the EC Treaty.<sup>89</sup> If the Commission learns that a member state has not fulfilled one of its obligations under the Treaty, it first sends a formal letter to the member state informing it of the breach of its obligation. The Commission then sends a reasoned opinion to the member state concerned.<sup>90</sup> Fi-

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(1992); Mogens Moe, *Implementation and Enforcement in a Federal System*, 20 *ECOLOGY L.Q.* 151 (1993).

84. See *supra* notes 70-76 and accompanying text.

85. This distinction between implementation and enforcement is made by Macrory, *supra* note 83, at 348.

86. Directives usually specify a date by which a member state must enact measures to comply with a directive and require that the Commission be notified of a member state's implementing measures. For example, Council Directive 90/313 on the Freedom of Access to Information on the Environment provides in Article 9: "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992 at the latest. They shall forthwith inform the Commission thereof." Council Directive 90/313, art. 9, 1990 O.J. (L 158) 56, 58.

87. Macrory, *supra* note 83, at 352.

88. Article 155 of the EEC Treaty assigns this role to the Commission providing that "[i]n order to ensure the proper functioning and development of the common market, the Commission shall: ensure that the provision of this Treaty and the measures taken by the institutions thereto are applied." EC TREATY art. 155.

89. *Id.* art. 169.

90. Informal agreement is often reached with Member States at the first two stages or perhaps earlier following an informal intimation that the Commission is investigating the non-implementation of a particular measure. Macrory, *supra* note 83, at 352.

nally, if no settlement has been reached and noncompliance continues, the matter is referred to the European Court which may find against the non-complying state.

It is important to note at this point, however, that the judgment of the European Court of Justice is in essence only a declaratory judgment. The Court has no power to impose sanctions on member states for failure to comply with Community law, nor can it strike down national legislation found to be incompatible with Community law.<sup>91</sup> If a member state fails to comply with a decision of the Court, it can be sued for a breach of Article 171.<sup>92</sup> However, prior to this second action, the Commission must send a reasoned opinion specifying the manner in which the member state has not complied with the judgment of the Court of Justice.<sup>93</sup> If the Court finds against the member state a second time, a pecuniary sanction may be imposed.<sup>94</sup> Unfortunately, this is a long and complex procedure, unsuited to environmental matters, because the damage to the environment may be irreparable by the time the process is completed.<sup>95</sup>

Apart from litigation by the Commission against member states, the Community has no other legal powers by which it can enforce environmental directives. Direct litigation to compel firms or private persons to comply with environmental directives is not available under Community law. The enforcement of directives which are incorporated into national law is the exclusive responsibility of the member states.<sup>96</sup> Moreover, Community law fails to provide citizens with a meaningful role in the enforcement of environmental legislation. The European Court has no jurisdiction to hear citizen suits concerning the incorporation, implementation, or enforcement of directives.<sup>97</sup> Furthermore, there is no authority for citizen enforcement actions against private bodies under Community law.<sup>98</sup>

Those familiar with U.S. environmental law can readily see that the E.U. lacks the extensive and well-defined methods of enforcement one would expect to see in a developed federation. Crucial differ-

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91. See KRAMER, *supra* note 51, at 155 (observing that it is well known that a number of member states quite openly do not respect community legislation and disregard directives for years without being sanctioned).

92. EC TREATY art. 171.

93. *Id.* art. 171(2).

94. Article 171 of the EC Treaty requires a member state "to take the necessary measures to comply with the judgment of the Court of Justice." EC TREATY art. 171.

95. KRAMER, *supra* note 51, at 154.

96. REHBINDER & STEWART, *supra* note 3, at 145.

97. *Id.* at 159.

98. *Id.* at 164.



ences between the current systems in the U.S. and the E.U. illustrate the severe weakness of the environmental enforcement system available to the central institutions of the E.U. In contrast to the E.U., where litigation by central authorities against private firms or persons is unavailable, the U.S. government possesses extensive powers to sue private individuals in environmental enforcement actions. For example, the Clean Water Act contains provisions which authorise civil enforcement actions for injunctive relief and criminal penalties for negligent violations of the statute.<sup>99</sup> Individual states may elect to implement federal legislation setting standards and authorising regulation, while the federal government may retain the power to enforce implementing measures directly against private violators. Additionally, the U.S. government may revoke the delegation of enforcement powers to states and take over enforcement responsibility itself.<sup>100</sup> Such powers would be unthinkable in the E.U. as they are incompatible with the sovereignty of the member states.

The much greater role played by private citizens in monitoring of the implementation and enforcement of federal legislation is another notable feature of the U.S. system. U.S. citizens can take actions which, in similar situations, are entirely unavailable to citizens of the member states of the E.U. For example, in the U.S., an aggrieved citizen can obtain judicial review of an agency's promulgation of a regulation implementing federal legislation by alleging that the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>101</sup> Congress has also written into many environmental statutes a judicial review provision which gives citizens the right to bring suit for an agency's failure to perform any nondiscretionary duty. The Clean Water Act section 505 citizen suit provision was the prototype in this area.<sup>102</sup> Additionally, many other U.S. statutes contain provisions allowing citizens to sue directly for violations of federal regulatory requirements. In contrast, no provision is made for citizen enforcement of directives or citizen participation in administrative proceedings before the Court of Justice. Moreover, judicial

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99. Federal Water Pollution Control Act § 309(b), (c), 33 U.S.C. § 1319(b), (c) (1988 & Supp. V 1993) [hereinafter Clean Water Act].

100. REHBINDER & STEWART, *supra* note 3, at 191.

101. See Administrative Procedure Act, 5 U.S.C. §§ 702, 706 (1988).

102. Clean Water Act § 505(a), (d), 33 U.S.C. § 1265(a), (d), authorises citizen suits for injunctive relief and civil penalties against any person violating an effluent standard or consent order, and provides for awards of attorneys' fees to prevailing parties. See ROBERT W. PERCIVAL ET AL., ENVIRONMENTAL REGULATION, LAW, SCIENCE AND POLICY 987-88 (1992).

review is extremely limited by restrictive rules of standing and rules limiting the scope of review.<sup>103</sup>

A comparison of the jurisdiction of the U.S. and the E.U. courts in environmental matters is also revealing. As with the legislative competencies of the two entities, the jurisdiction of the Supreme Court of the United States is much more extensive than that of the European Court of Justice. The European Court has jurisdiction over matters of the interpretation and application of Community law, and its decisions must be followed by national courts, however, it has no jurisdiction to consider the national laws of the member states, except where they are in conflict with EC law. The jurisdiction of the United States Supreme Court is not similarly limited, however. Article III of the Constitution grants the Supreme Court original jurisdiction over controversies between states.<sup>104</sup> Additionally, federal courts have jurisdiction over controversies arising under the laws of the United States.<sup>105</sup> These powers have been interpreted broadly to settle disputes over interstate pollution and resource disputes.<sup>106</sup> Federal courts are also given jurisdiction over admiralty and maritime cases.<sup>107</sup>

In the U.S., federal courts have jurisdiction to review federal agency action or inaction related to the exercise of the agency's delegated authority under federal law.<sup>108</sup> Federal courts can hear civil and criminal enforcement actions initiated by (1) the government, (2) citizen enforcement suits against industry and developers for violations of federal regulatory requirements, and (3) disputes among states concerning transboundary pollution actions.<sup>109</sup> The jurisdiction of the European Court of Justice seems minor in comparison. As discussed above, it is restricted to considering matters concerning the interpretation of Community law, and whether member states have complied with their obligations under Community law.<sup>110</sup> In the U.S. this would

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103. These rules vary from member state to member state, resulting in no uniformity in remedies, court powers, and rules of standing. Uniform control over implementation and enforcement of environmental directives, therefore, is extremely difficult. See REHBINDER & STEWART, *supra* note 3, at 149-58 (discussing the limitations of privately initiated administrative and judicial review of member state implementation).

104. U.S. CONST. art. III, § 2.

105. 28 U.S.C. § 1331 (1988).

106. REHBINDER & STEWART, *supra* note 3, at 44.

107. U.S. CONST. art. III, § 2.

108. 5 U.S.C. § 703.

109. REHBINDER & STEWART, *supra* note 3, at 188-91.

110. Article 164 of the EC Treaty provides that the Court's task is to "ensure that in the interpretation and application of this treaty the law is observed." EC TREATY art. 164; *see also id.* art. 169 (setting forth the authority of the Commission to bring before the Court of Justice a member state alleged to be failing to fulfil its treaty obligations); CHARLESWORTH & CULLEN, *supra* note 25, at 28-32 (discussing the Court of Justice).

be comparable to restricting the jurisdiction of federal courts to the interpretation of the Constitution and deciding whether a state had violated the Constitution. It is clear that such a restriction would considerably hamper the ability of the U.S. government to enforce environmental legislation.

The lack of sufficient tools to implement and enforce environmental legislation in the E.U. is a significant structural weakness. It is clear that the present system is failing in many respects.<sup>111</sup> Indeed, the measures available to the Commission to enforce environmental measures is weak even in Community terms. Sophisticated control mechanisms and inspection bodies have been established in the areas of competition,<sup>112</sup> fishery,<sup>113</sup> veterinary questions and customs and regional policy.<sup>114</sup> This has not yet been done for environmental measures. Additionally, there are particular features of the Community's environmental programme which cause difficulties in implementation. Ludwig Kramer has identified one of the key weaknesses of Community environmental law: its lack of readily identifiable parties with vested interests who are willing and able to secure enforcement. Environmental organisations in Western Europe are structurally too weak to defend environmental interests effectively over a long period of time and, as we have seen, neither Community nor member state law provides sufficient legal authority for private individuals or groups to enforce environmental legislation.<sup>115</sup> In this respect, the E.U. has much to learn from U.S. experience with citizen suits.

The relative newness of the Community's environmental policy is also a factor contributing to enforcement difficulties. The Directorate-General responsible for environmental matters has a small and inexperienced staff when compared with the longer established Directorates relating to agriculture and competition policy. Another factor further complicating matters is the use of the relatively impre-

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111. For an illustration of the extent of member state compliance with environmental measures, see REPORT FROM THE COMMISSION OF THE IMPLEMENTATION OF DIRECTIVE 85/337/EEC ON THE ASSESSMENT OF THE EFFECTS OF CERTAIN PUBLIC AND PRIVATE PROJECTS ON THE ENVIRONMENT, EUR. PARL. DOC. (Com (93) 28) (vols. 12 & 13). This report concluded that "there has been a serious overrun on the timetable for formal compliance by the approved date" and as far as application in practice is concerned, "in a number of Member States, only a minority of environmental impact assessments are of satisfactory quality." *Id.* at 5.4, 5.5.

112. See Reg. 17 of Feb. 6, 1962: 1962 O.J. point 13.

113. See Council Regulation 2847/93 Establishing a Control System Applicable to the Common Fisheries Policy, 1993 O.J. (L 261) 1.

114. This point has been repeatedly emphasised by Ludwig Kramer, former head of Directorate-General XI. See KRAMER, *supra* note 51, at 132-33.

115. *Id.* at 132; see also Macrory, *supra* note 83, at 350.

cise directive as the primary means of implementing E.U. policy. When many directives were first agreed to by member states, it is fair to say that based on the large amount of discretion given to member states, the directives may have been viewed in a different light. The developing jurisprudence of the Court of Justice has led to a transformation of directives as legal instruments which are now viewed as giving rise to more extensive and more directly binding legal commitments.<sup>116</sup> As one commentator points out: "[O]ne can only speculate whether Member States would have readily agreed [to] the terms of some [o]f the earlier environmental directives had they appreciated their full legal significance, or had the development in the European Court's jurisprudence occurred at an earlier date."<sup>117</sup> It is likely that the reluctance of member states to implement much environmental legislation may stem from the ambiguous nature of their commitment to the measures. Finding a remedy for these weaknesses in implementation and enforcement has been identified by the Commission as a key area for action. To this end, a European Environmental Agency has been created, which will gather data and analyse the extent of compliance with Community environmental legislation.<sup>118</sup> However, to those familiar with the extensive powers of the U.S. Environmental Protection Agency (EPA), the European Agency is a very poor cousin. It lacks powers of investigation, enforcement, and even policy formulation. Its scope of reference is clearly restricted to information gathering and assessment.<sup>119</sup> Efforts by the European Parliament to provide the Agency with a more explicit enforcement and inspection authority were resisted. The regulation establishing the Agency provides that after two years the Agency's position will be reviewed to determine the extent to which the Agency can participate with the Commission and member states in monitor-

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116. See KRAMER, *supra* note 51, at 154. It has been achieved by the development of the doctrines of direct effect, discussed above, and the doctrine of sympathetic interpretation which requires that national law be given an interpretation which is sympathetic to, and compatible with, Community law. See Case 14/83, von Colson and Kamann v. Land Nordrhein-Westfalen [1984] E.C.R. 1891; see also *supra* note 52 and cases cited therein.

117. Macrory, *supra* note 83, at 351.

118. Council Regulation 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, 1990 O.J. (L 120) 1.

119. Article 1 of the Regulation provides that

the objective shall be to provide the Community and the Member States with:  
—objective, reliable and comparable information at European level enabling them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment.

*Id.* art. 1, at 2.

ing compliance with Community environmental standards.<sup>120</sup> Since the regulation only entered into effect at the end of 1993, this provision is not effective as of this writing. It remains to be seen, therefore, whether the Agency will have even a discernible impact on the enforcement of Community environmental law.

Another innovation that is directed towards the improved enforcement of environmental legislation is an implementation network. The network is charged with the dual tasks of exchanging experiences and information among member states and of developing practical approaches to implementation under the supervision of the Commission. The implementation network was announced in the Fifth Environmental Action Programme, but is not yet fully operative.<sup>121</sup>

In light of the foregoing, the irresistible conclusion is that, in terms of enforcement and implementation of its environmental regulation, the central institutions of the E.U. are only in their infancy. This becomes particularly clear when the E.U. approach is compared with the enforcement regime of the U.S. which has strong teeth, and is supported by a strong and effective system of federal courts. While this might lead one to conclude that the E.U. should learn from the experience and adopt many U.S. enforcement tools, the political reality is that member states are unlikely to agree to more direct enforcement of central environmental measures by a central institution (as this would result in a diminution of their sovereignty). It is also unlikely that this situation will change in the near future.

#### CONCLUSION—SPECIFIC PROBLEMS OF ENVIRONMENTAL FEDERALISM IN THE E.U. AND THE U.S.

The foregoing comparison of the structure of the environmental regimes of the E.U. and the U.S. makes it clear that there are presently many similarities between environmental federalism in the U.S. and the E.U. However, there are at least as many significant differences which create problems of environmental federalism peculiar to each system.

The similarities between the two systems have been discussed above, and are readily apparent. The central institutions of the E.U. and the U.S. both attempt to regulate an environment which varies significantly across the territory being regulated, making any attempt

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120. *Id.* art. 20, at 5.

121. Council Resolution 93/C on a Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, 1993 O.J. (C 138) 1.

to set a rigid central policy undesirable and impossible. Both the E.U. and the U.S. systems comprise a central authority and strong regional entities which are resistant to central regulation of the environment. In the formulation of policy and the enactment of central legislation both entities are subject to similar environmental, economic, and political advantages and disadvantages of central regulation of the environment. However, the strength and weakness of these factors vary greatly in each system. Moreover, effectuation of central policy in both entities must rely to a greater or lesser extent on state authorities to conduct enforcement and implementation functions.

The differences between the E.U. and the U.S. are equally obvious. Federal institutions in the U.S. are more developed, powerful, and confident than their E.U. counterparts. This is true in all branches of the central government. The U.S. government owns up to a third of the land in the country, giving it considerable direct regulatory power. Additionally, the legislative competence of Congress to legislate on environmental matters is far more extensive than in the E.U. Complimenting these strengths in the U.S. is a court system which has a wider jurisdiction and a more extensive range of sanctions and remedies than that in the E.U. Furthermore, the U.S. court system possesses particular significant capacities which are not present in the E.U., such as citizen suits and the authority to review agency discretion. The more developed court system in the U.S. has led to the development of environmental law through the courts, a situation which does not obtain in the E.U.

Another major difference between these systems is the relative strengths of the centre and the regions. In the E.U. it is the member states which are more powerful, in the U.S. the relationship is reversed. Member states in the E.U. must, by and large, directly agree to the adoption of environmental policies and measures, while in the U.S. states have no direct voice other than through their elected federal representatives. In the E.U., reaching consensus with member states that are less developed, and for which the protection of the environment is not a primary objective, thus becomes a primary concern, and a significant difficulty.

In addition to these similarities and dissimilarities, there are a number of impediments to environmental regulation which while present in the U.S., are particularly acute in the E.U. The first and most significant must certainly be the resentment of centralised direction and control by local political entities. The E.C. is composed of sovereign and independent nation-states, some of which are particularly adamant to maintain their sovereignty and independence. The

resentment of strong central power is apparent in all areas of policy, not only in the environmental arena. This resentment leads to a sense of skepticism about the continuing integration of the E.U., and about even its continued existence as presently constituted. In Britain and Denmark, for example, there still remains a sizeable political drive to withdraw from the E.U. While this movement is unlikely to be successful, it is clear that varying levels of commitment to the idea of the E.U. are not conducive to the acceptance of increased central powers to regulate the environment.

Second, differences between legal and administrative systems within each entity are more acute in the E.U. The legal systems in the E.U. have evolved separately over thousands of years, and although they divide into only two main types—common-law systems and civil-law systems—there are divisions in tradition within these types which result in significant differences in fundamental concepts, theories of interpretation, approaches to case law, views of justice, and the place of law in society. There are, in addition, differences in the political structure among the member states. Some countries, such as Ireland and Great Britain, are highly centralised, while others, such as Spain and Germany, are composed of regions which retain great power.

These differences between the E.U. and the U.S. have consequences for the types of environmental regulation one finds in both systems. The more developed central government in the U.S., with its wider legislative competencies, facilitates the development of more comprehensive and more structured federal environmental regulation when compared with that of the E.U. The major causes of environmental damage are regulated at the federal level in the U.S. through such legislation as the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Oil Pollution Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. The difficulty of securing agreement to environmental issues by often reluctant member states which are largely self-interested has meant that E.U. environmental legislation is by no means as comprehensive as that in the U.S. Difficulties in consensus-building also has meant that major environmental problems, such as the protection of the marine environment, are not regulated. E.U. environmental legislation has developed in a reactionary fashion rather than in a proactive and integrated manner.

The U.S. government also has a much wider range of legislative measures open to it than does the E.U. because of its greater legislative competencies. More innovative solutions to environmental problems can therefore be sought in the U.S. An example is the abil-

ity to use the power of taxation to establish economic and fiscal measures to achieve environmental protection. E.U. consideration of the adoption of a tax on carbon or energy must overcome the obstacle of the unanimity requirement for member states for enactment.<sup>122</sup> The E.U. must also contend with the reluctance of member states to surrender their powers of taxation.

Having compared the most significant characteristics of both systems, a number of conclusions can be drawn. First, it is clear that the federal government in the U.S. has greater powers to issue and enforce environmental law than the central institutions of the E.U. This is evidenced by the more comprehensive and coherent body of environmental law in the U.S., and in the existence of central agencies, such as EPA, which have strong enforcement powers. Second, the federal structure of both systems has led to a division of competencies between the centre and the regions. In the U.S. this division has evolved so that policies, objectives, and standards are outlined and defined centrally, and implementation and enforcement typically occur at the state level. In the E.U., policies, objectives, and some standards are defined centrally, and some are implemented and enforced by member states, but these must co-exist beside the policies, objectives, and standards established in each individual member state. Third, in both systems, the political and economic tensions between governmental bodies at the central and regional levels have meant that protection of the environment has not been optimal; opposition to central regulation makes it difficult to enact central measures at all or of sufficient stringency to protect the environment adequately. Furthermore, implementation and enforcement of existing measures has been inadequate in both systems. In the U.S., time consuming and expensive litigation has been required to determine state and federal roles in undertaking actions to protect the environment. It is reasonable to expect similar litigation in the E.U. in the future. Fourth, not only has neither entity solved the difficulties of protecting the environment in a federal system, neither system has even adequately addressed the issues involved. This is perhaps unsurprising given the relatively recent evolution of environmental law as a discrete discipline in both the U.S. and the E.U.

The discussion below presents some points for consideration in solving the problems of environmental federalism. This part will draw on the discussions of the advantages of central regulation in Part I of this Article, and the existing evolution of both systems.

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122. EC TREATY art. 130S(2).



The first suggestion is that, at a minimum, the overall policies and objectives for the environment ought to be defined centrally. This suggestion is made for a number of reasons. Centrally established objectives and policies have the potential to encourage more stringent environmental protection in regions for which the protection of the environment may not be the highest priority. Additionally, in both the U.S. and E.U., the elimination of barriers to trade and the facilitation of free competition between regions is an important objective. A certain amount of central regulation is necessary to achieve these goals. Also, if the entities are to obtain the maximum advantage for themselves in international negotiations, it will be necessary to present a common front, and therefore it will be necessary to decide on common policies and objectives in discrete sectors. The approach of the E.U. and the U.S. in defining policies and objectives at the centre—the E.U. through successive action programmes on the environment and the U.S. through, *inter alia*, comprehensive federal statutes, provides empirical support for this contention. This is not to say, however, that regions cannot outline additional objectives or adopt additional policies to those set centrally. Additional and more stringent measures can be of benefit to the environment and may not constitute barriers to trade. Nor is it argued that the centre should adopt such policies without consultation with the regions. Clearly, a cooperative approach is to be favoured, given the existence of regional hostilities to central regulation.

Beyond the adoption of uniform, minimum policies and objectives for all sectors of the environment at the centre, I would further contend that, in certain sectors, standards ought to be set centrally, at varying degrees of specificity. Environmental issues with transboundary implications, such as pollution of rivers or sea areas, airborne pollution, conservation of migratory species, protection of the outer atmosphere, and so on, clearly cannot be addressed on a region-by-region basis. A minimum harmonisation of product standards is also necessary to prevent the creation of unnecessary barriers to trade.

It is then possible to identify areas which ought to be regulated by the regions. These are sectors where the standards to be set or the approach to be adopted is locality specific and dependant on the physical and geographical characteristics of the region or its state of industrial and economic development. Town and country land use planning falls most clearly within this designation, but it is also possible to include matters such as the identification of habitats to be protected, or the protection of biodiversity in a region, or the clean up of contaminated lands. Implementation and enforcement of central

regulation is also best done by the regions, simply because of the diseconomies of scale which arise and the inefficiencies which are present in any central bureaucracy large enough to enforce central regulation in such large entities as the E.U. and the U.S.

There is a grey middle ground between what is best regulated by the regions and what is best regulated by the centre. In this area, it is more difficult to arrive at a principled approach to the relative roles of the centre and the regions. Nevertheless, I would argue that a cooperative approach should be adopted, with central adoption of at least outline minimum standards or levels of protection at varying levels of specificity, allowing regions either to implement these standards, or to adopt more stringent measures consistent with the objectives of preserving freedom of trade and competition. The regulation of environmental impact assessments can serve as an example of this cooperative approach. The objectives, parameters, and standards involved in environmental assessments can be defined centrally, but the actual impact assessments should be carried out locally by those with a knowledge of the locality or region. In fact, this is the approach currently taken by both the U.S. and the E.U. This cooperative approach is suggested for two reasons. First, it allows environmental regulation to benefit from the harmonising effect of uniform, minimum standards, while allowing sufficient flexibility to the regions to counter hostility to central direction. Second, an analogy may be drawn here with human rights. It is arguable that certain minimum standards of environmental protection ought to be achieved by all countries and regions, particularly if one accepts that the environment is the common heritage of us all.

In conclusion, this Article has sought to compare various aspects of environmental federalism in the U.S. and the E.U. Both systems have been criticised for failing to address adequately the problems created by their constitutional structures for the protection of the environment. Some points for consideration have been offered as solutions to how these problems might be resolved. It is hoped that the U.S. and the E.U. will begin to consider these questions in depth in the future.