scale human rights violations, that is, situations where the respective domestic order shows
signs of a general malfunctioning that is indicative of an inconsistency of the constitutional
system of the country with the basic requirements of the Council of Europe. Or maybe
such countries should not be admitted to the ECHR in the first place, in order to avoid
such situations, which is already somewhat foreshadowed by the situation in Turkey. That
country is itself a party to the ECHR, and the situation of human rights there is, to say
the least, not unproblematic. Accordingly the Commission has held on several occasions
that an expulsion of a Turkish citizen back to Turkey by another party to the Convention
would be equivalent to inhuman treatment.

As to Russia, several members of the European Court of Human Rights and the European
Commission on Human Rights in 1994 undertook an expert mission to Russia on behalf
of the Council of Europe in order to evaluate the status of human rights protection in the
Russian Federation. They came to the conclusion that “so far the rule of law is not
established in the Russian Federation,” and furthermore, “the Russian Federation does
not yet fulfill the condition of the enjoyment of all persons within its jurisdiction of human
rights and fundamental freedoms.” Thus, they recommended that, at this point, the Russian
Federation should not be accepted as a formal member of the ECHR.

An alternative to the membership of Russia in the Council of Europe and the ECHR
would be to further strengthen the role of the CSCE (now the OSCE), which could continue
to serve as a larger forum within which issues of human rights will continue to be dis­
cussed. One has to also acknowledge, however, that even after the creation of the Organ­
ization for Security and Cooperation in Europe the commitments undertaken within this
framework are not legally binding, and there is no effective mechanism to supervise the
implementation of these commitments. In particular, there is no individual complaint
procedure foreseen.

The question of how to integrate more and more states, and particularly Russia, is
politically very sensitive. Any decision will depend upon the general political develop­
ments in the region. It will also possibly take into account the question of whether Russia
should be somewhat compensated for the fact that some of its western neighboring states
might be admitted to NATO in the future and that Russia should at least be admitted to
the ECHR and the Council of Europe. And that, indeed, brings us back to the hors d’oeuvre
presented by Professor Stein.

REMARKS BY JOSEPH WEILER

What I want to present is an overall picture of developments in the Community in the
last, say, three or four years, and I would like to invert the picture a bit—instead of looking
at the interface of the Community with the outside world, I want to look at its interface
with its own constituent members.

To overstate the overall thesis: I would say that the Union is like a shiny apple, but
with a worm gnawing at its constitutional core. That is a polemical statement, but it
underlines the thrust of my thesis. Understand, too, that for many, since the apple has
gone sour, the gnawing is not something to lament.

28 See in particular the Document adopted at the CSCE meeting in Moscow on October 3, 1991, where all
participating states acknowledged that human rights no longer fall within the domestic jurisdiction of the respec­
tive state.
29 See the declaration adopted at the Budapest summit of December 5 and 6, 1994, part I., para. 1 and 29.
30 The guided conciliation procedure, provided for in the Annex of the revised La Valetta dispute-settlement
mechanism, might be considered the only exception in that regard; it does not, however, lead to a binding
decision.
Historically constitutional development was always ahead of political development. So already in the late 1960s and early 1970s, the Community had an operational principle of the supremacy of Community law and a remarkable collaboration between the European Court of Justice and national courts. The European Court of Justice makes the shift, demands supremacy, demands direct effect, and the national courts, on the whole (with little ups-and-downs, with few footnotes), accept this constitutional architecture.

A Euro-American, Eric Stein, writing for the seventy-fifth anniversary of the ASIL said, ‘‘[T]he European Court of Justice has fashioned a federal constitution for Europe.’’ I would only make one correction: ‘‘[T]he European Court of Justice and national courts. . . .’’ Without them, it wouldn’t have happened.

We used to complain that the politicians could not get their act together, that there was a rule of veto, that every member state could block, that their dossiers were never completed, that there was all this wonderful constitutional architecture guaranteeing rights to individuals, enforcing obligations on the states, and yet they could not do much with it since the decisional machinery was so weak. Well, the decisional machinery changed, and the most remarkable change, of course, was not Maastricht; it was in 1987 when the Single European Act came into force with, essentially, a shift to majority voting—and to bargaining under the shadow of majority voting. Dossiers that took twelve years before were now completed in twelve months. The Community in that respect is quite transformed. Regularly, member states find themselves out-voted, even on important issues, and are having to live with Community discipline. And even where they are not out-voted, where the praxis is consensus, it is a consensus of compromise because there is the possibility of being out-voted.

The picture seems to be rosy, because it would appear as if one inherited the constitutional architecture from the period up to 1987, and now one has complemented it with a new decisional procedure that is much more efficient. It’s not super efficient, but is American machinery super efficient? It gets the job done, on the whole.

Now I want to suggest a series of developments that can be characterized as ‘‘The Empire Strikes Back’’—or as someone has described it, as a ‘‘Sleeping Beauty’’ that has suddenly awakened. Governments and others have discovered that it was all very nice when you had supremacy and direct effect, so long as you could say ‘‘no’’ to everything. But in the new climate of the Community, there is supremacy and direct effect—the European structure is for real—and suddenly your government is getting out-voted, and that has re-called into question a lot of fundamental issues of the constitutional architecture. It has put under stress the relationship between the European Court of Justice and its major constituents, which are national courts. And there is a different climate in which sensitivity to the European version of ‘‘state’s rights’’ is ascendant.

I offer some illustrations. Take the par excellence field of classical European Community activity, the internal market, the free movement of goods. The classical constitutional doctrine of the Dassonville case suggested—I am paraphrasing—that ‘‘any state measure, of whatever nature, that has any impact—potential, actual, real, imaginary—on free movement of goods is caught by the prohibitions under Article 30,’’ and the member state would have to justify it.

It caught things ranging from a ‘‘buy Irish’’ campaign, to minute health provisions, to a French cultural policy for defending its cinema industry, and so forth. It also caught Sunday trading rules, the rules of member states that prohibit trade on Sundays out of respect for the Sabbath, or of the cultural or historical traditions of a State.

This has changed, at the hands of the European Court of Justice. In the much discussed recent decision, Keck, a year-and-a-half or so ago the Court said Article 30 will not ‘‘catch’’ member state trading rules, even if they impact on flows of trade between the Member
States, if they are so-called ‘‘selling arrangements.’’ A technical definition: selling arrange-
ments. But, for example, a Sunday trading rule now would probably not be caught because
it is a ‘‘selling arrangement’’—when you may sell or when you may not sell.

What is behind this? Various possibilities and theories have been given, but I want to
suggest to you one possibility that fits in with my overall thesis. It is not exactly a possibility
of ‘‘cold feet’’ on the part of the European Court of Justice, but the following: The European
Court of Justice acknowledges and understands that there’s a huge sensitivity in the mem-
ber states to the competences of the Union. How far does it go? What will the Union be
able to do?

By limiting the reach of Article 30, you might think that the Court was just thinking
of itself, for example, of controlling its docket, of having fewer cases. You might also
think that the Court didn’t want to get into areas of adjudicating member states’ poli-
cies—like whether or not to have Sunday trading, that the court said, ‘‘It’s none of our
business.’’ But the implication of its decision in Keck goes even further. It cuts down
on the legislative competences of the Community! The Community has competence to
harmonize conflicting trade rules. When is that competence triggered, when may the Com-
munity invoke its competence—for the cognoscenti—under, say, Article 100a?

One of the principal triggers is the existence of a conflict of trade rules that are caught
by Article 30. By taking a whole chunk of member state practices and saying, ‘‘This is
outside the scope of Article 30,’’ the Court is also implicitly saying, ‘‘Unless there is a
specific grant of jurisdiction, this is also outside the scope of the Community legislature.’’
This runs contrary to a jurisprudence of expansion of competences of thirty to thirty-five
years.

Here is another example from the field of human rights: One of the most dramatic
judicial developments in some way shadows what in this country is called the ‘‘doctrine
of incorporation,’’ the extension of the federal Bill of Rights to state measures. For many
years we had the unwritten Community Bill of Rights, developed by the European Court
of Justice—of course taking its cue from the constitutional traditions of the member states
and from the European Convention on Human Rights—which applied only to Community
measures, in the same way that the U.S. Bill of Rights applied originally only to acts
of Congress and not to acts of the states until it was extended through the Fourteenth
Amendment.

Then, suddenly the Court of Justice, surprising some, delighting others, eliciting cries
of anguish from yet others, decided that also in the sphere of the European Union there
will be certain categories of member state acts that will be subject to judicial review for
violation of European Community standards of human rights. It was a very dramatic
decision, or set of decisions, but we could say it was in line with the old ethos of expansive
attitudes to competences. Now we see signs of retreat, for example in a recent case called
Bostock. A new composition of the European Court of Justice, with judges with new
sensibilities, operating under the shadow of the rather controversial passage of Maastricht
in the different member states is pulling back. So, in Bostock, which should have been a
straightforward decision applying Community standards to a measure by a member state
implementing Community policy, the Court—by hook or by crook—decided there would
be no human rights review by the European Court of Justice. It is not that it is a wrong
decision, or a sad decision; it is part of the pattern that I am describing to you.

Take Opinion 1/94 on the compatibility of the WTO, which is also part of the same
pattern. First of all, I would point out the aggressiveness of the member states. Foreign
commercial policy was considered the exclusive competence of the Community and, what-
ever the formal arrangement, it really was the Commission and the Community that were
the lead actors in the prosecution of the Community (or the Union) position in world
affairs under the GATT. With the WTO, and its process of implementation, the Council and the member states are very aggressive in insisting on a mixed competence—that is Community and member state competences. They are trying to give a relatively narrow definition of the Common Commercial Policy of the European Community—and, therefore, to have the member states not simply as hangers-on but as participants as-of-right.

In the language of the implementing measures, there are many things that are unprecedented: the fact of mixed character is put in there, on an elaborate legal basis. I think the Community is shooting itself in the foot. For years and years, the Community’s position, rightly, was to tell the rest of the world: our division of competences is of no concern to you.” This position allowed the internal evolution of Community competences. Arguably, under the internal instruments adopting the WTO, the European Community is suddenly retracting from that. And, arguably, it is freezing the relationship of competence, to prevent the Community from expanding its competences by linking them to an international instrument.

There is not the time here to discuss Opinion 1/94 fully, but let’s put it this way: I must believe that the Commission was somewhat disappointed that the Court in some way sanctioned this sort of retreat from a more expansive notion of Common Commercial Policy.

It may have been politically wise. But that is something for discussion, or for reflection.

And my last comment, to move away from the Community to its member states, one has to take a very hard look at the decision of the German Constitutional Court approving the Maastricht Treaty. At face value of course, it approved the Maastricht Treaty, and paved the way for final German ratification and for the entry of the Maastricht Treaty into force. I think that, on the whole, people would say, ‘‘At least they said ‘yes’ to the Maastricht Treaty and it came into force.’’ But a closer look at the Maastricht decision will reveal two things—first of all, the absolute insistence of the Court that ultimately, constitutionally, the Grundnov has not shifted, that the authority, the legal legitimacy of the European construct, derives from the constitutional law of the member states, that the ultimate guarantors are the constitutional courts of the member states—at least in relation to Germany. So that any notions that the European Court of Justice shifted the Grundnov and the member states acquiesced in that (a kind of notion we could have picked up from at least some of the decisions in some of the courts in some of the member states in the great heroic period of the Community, the 1960s and 1970s) has been negated.

If you prefer, it is not only a nationalist constitutional approach to European law, but an international law approach to European law, negating in some way its special nature.

And secondly, on the question of judicial competence: Who gets to adjudicate in the final analysis as to whether the Community is acting within its competence or not? The doctrine of the European Court of Justice is absolutely clear. If there is a question on the competences of the Community, that is a question of Union law, of Community law, and it falls to the European Court of Justice to decide if the Community acted within its competence. (I would say that who gets to decide is ultimately more important than what the competences are.)

The states would have none of that. They laid down, in principle, that ultimately the question of who gets to decide is, at least this is the minimalist reading, also a matter for the national constitutional court and national constitution, that they would have to have at least a concurrent say.

In conclusion, I would say that we see a period of realignment of some very important features of how the Community functions politically, of questioning what seemed to be a settled constitutional foundation of the Community, or the Union.