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Recommended Citation
Lindseth, Peter, "The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s " (2004). *University of Connecticut School of Law Articles and Working Papers.* Paper 48.
http://lsr.nellco.org/uconn_wps/48

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THE CONTRADICTIONS OF SUPRANATIONALISM: ADMINISTRATIVE GOVERNANCE AND CONSTITUTIONALIZATION IN EUROPEAN INTEGRATION SINCE THE 1950s

Peter L. Lindseth[*]

I. INTRODUCTION[1]

It is common for legal scholars to invoke European integration as perhaps the most advanced example of the "constitutionalization" of a supranational legal order.[2] The specifically constitutional

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1. This essay draws primarily from Peter L. Lindseth, The Contradictions of Supranationalism: European Integration and the Constitutional Settlement of Administrative Governance, 1920s–1980s (Ph.D. dissertation, Department of History, Columbia University, 2002) (on file with author), which contains further discussion of the historical evidence supporting the interpretation advanced here.

2. In this symposium, see, for example, Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. (forthcoming 2003) (manuscript at 6, on file with author) (noting "the powerful example of European constitutionalism" which he says "suggest[s] that 'a conventional treaty regime, once endowed with a judicial mechanism for interpretation and enforcement, can be converted by degrees to a genuine constitutional order'"), *quoting* Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 239 (Roger B. Porter et al. eds.,

character of the European Union (EU) remains, however, deeply ambiguous. On the one hand, European institutions have been built, historically, on the foundations of administrative governance as it has developed on the national level for more than half a century.[3] In particular, the decision making procedures in the EU have depended, to an extraordinary degree, on the constitutional predominance of the national executive in the postwar administrative state—not merely as a "legislator" in its own right but also as the first line of democratic legitimation over policy-making in the administrative sphere, whether national or supranational. European integration has further depended on the political and institutional ascendence within the administrative sphere of the technocrat, whose primary bases for legitimacy were a combination of seemingly "depoliticized" expertise, ministerial oversight, as well as a (judicially-enforced) respect for the tenets of administrative legality. In transferring authority to executive and technocratic institutions on the supranational level, European integration has built on a kind of "enabling legislation" in a new guise—the various Community (and now Union) treaties and related agreements—which, like enabling legislation on the national level, did not specify most regulatory norms directly but rather delegated this normative power to executive and technocratic institutions, albeit ones which now extended beyond the strict confines of the nation-state.

As in the domestic administrative state, however, European integration has required an important judicial mechanism to ensure that all the relevant parties do not defect from their legal commitments under the enabling legislation. This judicial "commitment mechanism," in its supranational form, has entailed not merely judicial review of the legality of Community norms but also, somewhat more unexpectedly, scrutiny of the conformity of Member State laws with the goals of market integration as set forth in the treaties. It was in the exercise of its commitment function that the European Court of Justice (ECJ) began its four-decade effort to "constitutionalize" Europe's supranational institutions. According to the major constitutionalizing decisions of the Court since the early 1960s, these institutions should be understood, legally at least, as a

2001).

3. For more detail, see Lindseth, *supra* note 1, Introduction to Part II.

constitutional level of governance in a federal-type system, rather than as an extension of administrative governance on the national level. In the Court's alternative vision, Europe's supranational institutions have come to embody or represent the authority of a new and autonomous political community over and above the Member States, one whose authority is necessarily superior to national political institutions, at least in those regulatory domains transferred to the supranational level.

These contradictory dimensions of European supranationalism—the administrative seemingly dependent upon, and the constitutional assertedly independent of, national governmental structures—is linked to another kind of historical disconnect in the nature of integration. The scope of the EU's normative power has undoubtedly increased dramatically over fifty years, and yet the governing legitimacy of the supranational institutions that exercise this power has remained stubbornly "weak" as compared to the constitutional structures of the Member States.[4] For better or worse, national constitutional bodies have continued to enjoy a much stronger legitimacy owing to their role as political-cultural embodiments of the sovereignty of their national political community ("people," "demos"), even as they have transferred ever broader normative powers to the EU.[5] By contrast, the legitimacy of

4. *See* Peter L. Lindseth, *'Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union*, 21 OXFORD J. LEGAL STUD. 145 (2001) [hereinafter *'Weak' Constitutionalism*].

5. I am not insisting on an unalterable historical role, true in all times. Rather, I am simply noting that, for the last century at least (indeed longer in several European countries), the prevalent conceptions of democracy have been intimately bound up with the idea that there must exist certain bodies historically "constituted" by the "people" (most importantly, but not exclusively, a parliament) that are broadly perceived to embody or express the capacity of a historically cohesive political community—a "demos"—to rule itself. This historically-grounded condition may carry with it all sorts of negative implications and consequences; nevertheless, as a cultural presupposition, it retains a capacity to order thinking and to give meaning to social and political action affecting whether and how a regulatory regime is *experienced* as a "constitutional democracy." On the relationship of experience and meaningful political action, see E.P. THOMPSON, *History and Anthropology*, *in* MAKING HISTORY: WRITINGS ON HISTORY AND CULTURE 200, 222 (1994) (revised version of a lecture given at The Indian History Congress on Dec. 30, 1976, arguing in an analogous context: "[H]istorical change eventuates . . . because changes in productive relationships are

Europe's supranational institutions, in the absence of a "people" or "demos" of their own, often appears to be little more than that of an administrative "fourth branch of government" *à l'américaine*[6]—normatively independent in important respects, but also dependent on national constitutional structures as the ultimate source for their governing legitimacy.

The aim of this essay is to put forward an historiographical framework to better comprehend the complex interactions of the administrative and constitutional dimensions of European integration over time.[7] Because of my historical focus, this essay will not dwell on perhaps the most prominent recent effort at European "constitutionalization": the draft constitutional treaty recently produced by the Convention on the Future of the European Union (the "European Convention").[8] Nevertheless, a brief glance at the constitutional treaty may be worthwhile, because it suggests the extent to which tensions between the administrative and constitutional dimensions of European integration (tensions with deep historical roots) persist to this day, even in a treaty so intently

experienced in social and cultural life, refracted in men's ideas and their values, and argued through their actions, their choices and their beliefs") (emphasis added). Rather than focusing on productive relationships, as Thompson did, I am focusing on how changing *structures of public governance* are "experienced" in relation to historically-rooted ideas and values of constitutional democracy. Those ideas and values obviously evolve historically in relation to the changing structures of governance, but my basic premise is that prevailing ideas and values of constitutional democracy have remained attached to national institutions in Europe even as a great deal of normative power has become increasingly supranationalized.

6. Giandomenico Majone, *The European Community: An "Independent Fourth Branch of Government?," in* VERFASSUNGEN FÜR EIN ZIVILES EUROPA 23 (Gert Brüggemeier ed., 1994) [hereinafter Majone, *The European Community*].

7. In particular, see *infra* Part III.

8. Draft Treaty Establishing a Constitution for Europe, July 18, 2003, CONV 850/03, *at* http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf (last visited Sept. 28, 2003) [hereinafter CONSTITUTIONAL TREATY]. This introductory discussion is not intended to provide a detailed analysis of the draft treaty. For excellent overview, see Steve Peers, *Statewatch: Annotated Text of EU Constitution, at* http://www.statewatch.org/news/2003/aug/constitution.htm (last visited Oct. 2, 2003) (series of annotated texts prepared for Statewatch by Professor Steve Peers of the University of Essex, UK).

focused on the constitutionalization of the supranational order in Europe.

Given its great length and attention to procedural and policy detail, one could easily confuse the proposed constitutional treaty with an organic statute that any regulatory agency must possess, even one with the institutional complexity and vast normative power of the EU.[9] Up to this point, the various European treaties have served this basic legal purpose, governing both the functioning of the EU's supranational institutions while also regulating various important legal relationships, notably between the Union and the Member States, on the one hand, and between private parties, the Member States and the Union, on the other. From this perspective, the members of the Convention simply attempted to merge the existing organic patchwork into a single legal document, calling the result a "constitutional treaty." To characterize this approach as "constitutionalization," however, is to use the term in a highly formal sense. One could just as easily use "juridification," or even simply "legalization," without making any normative claim that European institutions have attained a political legitimacy separate and apart from, or indeed superior to, the institutions of the Member States (although such a claim is certainly not precluded).

There is, however, a second sense of "constitutionalization" that is explicitly normative in its meaning, and it was this sense that was arguably foremost in the minds of the members of the Convention as they drafted the new constitutional treaty. This normative sense is

9. See, in particular, CONSTITUTIONAL TREATY, *supra* note 8, at Part III. Although the broad descriptions of the competences of the Union in Part I may seem to be of a "constitutional" character, the administrative character of the document is preserved through the insertion of the lengthy and unwieldy Part III. Of particular relevance in this regard is the provision in Part I which states: "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part III." *Id.* at art. 11(6). Rather than providing for a uniform legislative process applicable to all areas of competence, the treaty set forth processes that are both substantively and procedurally differentiated, as one would expect of a piece of enabling legislation in the administrative state. Indeed, even the choice of the term "competences," rather than the more basic and constitution-sounding term "powers," is reflective of the bureaucratic character of Union institutions. *See* DANIEL HALBERSTAM, FROM COMPETENCE TO POWER: BUREAUCRACY, DEMOCRACY, AND THE FUTURE OF EUROPE (Jurist EU: Thinking Outside the Box Editorial Series, Paper No. 7/2003, 2003), *at* http://www.fd.unl.pt/je/edit_pap.htm (last visited Oct. 20, 2003).

grounded in the belief that European institutions have come to represent a new kind of political community over and above the Member States, one which, at least for some purposes, aggregates all of the various "peoples" of the Union into a single polity that possesses an autonomous constitutional legitimacy of its own, separate and apart from the Member States which comprise it. Students of integration know that there is much in existing EU law that already reflects this normative interpretation of Europe's supranational institutions. Most importantly, this view has animated the jurisprudence of the European Court of Justice since the early 1960s. When one looks at the Court's articulation of the doctrines of direct effect and supremacy; its broad interpretation of the free movement of goods, not to mention the other freedoms; its fundamental-rights jurisprudence; or its supranational preference on questions of "institutional balance," what one finds is a fairly consistent effort on the part of the Court to establish Europe's supranational institutions as a constitutionally autonomous level of governance in a federal-type system. By the 1980s, the treaties had become, in the Court's famous phrase, the "constitutional charter of a Community based on the rule of law,"[10] in which the Court, as the autonomous supranational institution par excellence, served as the ultimate legitimating mechanism.[11]

In this more normative understanding of European "constitutionalization," one could say that the formal adoption of a single constitutional treaty to replace the prior patchwork of agreements is a recognition of a longstanding legal reality that, to this point, was simply defined in the decisions of the Court itself. Constitutionalization here is used in an evolutionary sense, referring

10. Case 294/83, Parti Écologiste 'Les Verts' v. European Parliament, 1986 E.C.R. 1339, 1365 para. 23; *see also* Opinion 1/91, 1991 E.C.R. I-6079, I-6102 para. 21; Case C-2/88, Zwartveld, 1990 E.C.R. I-3365, I-3373, para. 16.

11. This self-understanding of the Court's role in fact has deep historical roots. *See, e.g.*, Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 604 (opinion of Advocate-General Lagrange) (claiming that citizens of the Member States "do find within the Community legal system certain guarantees, in particular through review by the Court, which, albeit not identical, *are still comparable* to those which their own national system ensured [prior to the transfer of jurisdiction under the Treaty] by the existence of a more extensive supremacy of [their national] Parliament[s]") (emphasis added). For further discussion, see Lindseth, *supra* note 1, at 366–69.

to "a common-law type" process, to borrow Joseph Weiler's apt phrase,[12] rather than signifying some identifiable political moment when a European constituent power (the ever elusive European "demos") established autonomous supranational institutions to embody or express the sovereignty of a new political community apart from the Member States. The evolutionary interpretation suggests that, over time, the various peoples of Europe have accepted as a basic element of the *acquis communautaire* that the EU "now constitutes a federal-type system in which two levels of legitimate constitutional governance—one national and one supranational—interact."[13]

This process of Court-led, evolutionary constitutionalization has always been troubled, however, by an absence of an explicit political affirmation by the peoples of Europe that they actually intended to create such a constitutionally autonomous level of governance at the supranational level. Thus, the aim of the members of the European Convention was also to break with this evolutionary constitutionalization by forcing precisely the sort of political affirmation that European integration has, up to this point, clearly lacked. I will not judge whether this effort can, over time, be successful. However, there is much in the history of European integration that should make one extremely cautious. Although the Convention clearly sought to imbue the governing treaty framework with normatively constitutional terminology, one could fairly ask: Will this effort lead to a fundamental change in the substance of European public law, or will it prove to have the same sort of ambiguous effect that earlier, formal gestures at "constitutionalization" (in fact, ones stretching back to the 1950s) ultimately proved to have?

12. J. H. H. Weiler, *The Reformation of European Constitutionalism*, 35 J. COMMON MKT. STUD. 97, 126 (1997).

13. Peter Lindseth, *Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 157 (Joerges & Dehousse eds., 2002) [hereinafter *Delegation is Dead*].

II. FORM AND SUBSTANCE: THE HISTORICAL TENSION BETWEEN INSTRUMENTAL AND CONSTITUTIONAL SUPRANATIONALISM IN EUROPEAN INTEGRATION

It is important to recall that, beginning with the negotiation of the Treaty of Paris in 1951 (establishing the European Coal and Steel Community (ECSC), the Member States have always shown a willingness to create institutions in a seemingly constitutional *form*.[14] The "executive" European Commission (originally the High Authority), the "legislative" European Parliament (originally the Assembly), and the "judicial" European Court of Justice all connoted a desire to create a kind of "federal" government at the supranational level. Nevertheless, despite this suggestion of a normatively constitutional structure for a new political community in Europe, the Member States (and, more particularly, their national executives) also strived to maintain themselves as the driving political principals in the supranational system.

The agent for this national political control at the supranational level was originally the Council of Ministers, an institution whose establishment was at first resisted by Jean Monnet and the other drafters of the ECSC Treaty.[15] Monnet saw the essence of supranationalism as technocratic autonomy from even national executive control.[16] However, much of the institutional politics of

14. *Cf.* ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 153 (1998) [hereinafter THE CHOICE FOR EUROPE] (referring to the "quasi-constitutional form" of Community institutions established in the 1950s).

15. *See* Lindseth, *supra* note 1, at 245–55.

16. Reflecting the technocratic mind-set of Jean Monnet—the principal author of the Schuman Declaration of May 9, 1950, calling for the establishment of the European Coal and Steel Community—the only institution mentioned in the original French proposal was the High Authority itself. The High Authority was to serve, in effect, as a kind of independent regulatory agency of an extraordinarily novel type, one which exercised normative power delegated from national parliaments, but which would otherwise be freed from having its decisions subsequently mediated through national institutions (notably via the national executive). The French insistence on an independent, supranational regulatory authority was among the major reasons for the British government's refusal to pursue the negotiations over the establishment of the ECSC on the terms proposed by Schuman and Monnet in May 1950. The French delegation to the negotiations (under Jean Monnet's leadership) was only willing to contemplate the establishment of an assembly composed of national parliamentary representatives which would have no legislative

European integration in its first three decades would center around the largely *successful* effort by national executives to assert their hierarchical legal authority (either severally or collectively) over Community rulemaking. In the early years of integration, the most important manifestation of this effort was the dramatic shift in power away from the High Authority under the Treaty of Paris of 1951 to the Council of Ministers under the Treaty of Rome of 1957. This effort would be continued with the Luxembourg Compromise of 1966, which perpetuated unanimous voting in the Council of Ministers despite treaty provisions to the contrary, thus laying the basis for a "veto culture" that would last another two decades.[17] The political centrality of the national executive in the institutions of European integration was further confirmed in 1974 by the establishment of the European Council. Composed of the heads of state or government of the Member States and assembled in semi-annual summit meetings, the European Council has operated as the body responsible for giving overall political direction to the Community and its institutions.

Thus, from a political perspective (at least until the middle 1980s), European integration involved less "a surrender of limited areas of national sovereignty to the supranation,"[18] and more a surrender of sovereignty by the *national legislature* to the *national executive*, working in conjunction with its fellow national executives in the European Council and the Council of Ministers, aided both by national administrators at home as well as by a new supranational

function in the traditional sense, but would, consistent with shifting views on the proper role of legislatures in the modern administrative state, be able to "control" the High Authority through the right of censure by a supermajority of two-thirds, after the High Authority's issuance of its annual report. This form of limited parliamentary involvement was all that Monnet included in the initial draft treaty presented to the other participating states as the sole basis for further negotiations. Hanns Jürgen Küsters, *Die Verhandlungen über das institutionelle System zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl*, *in* DIE ANFÄNGE DES SCHUMAN-PLANS 1950/51 79 (Klaus Schwabe ed., 1988); DIRK SPIERENBURG & RAYMOND POIDEVIN, HISTOIRE DE LA HAUTE AUTORITÉ DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER: UNE EXPÉRIENCE SUPRANATIONALE, 16–17 (1993). For further discussion, see Lindseth, *supra* note 1, at ch. 3, § 3.1.

17. *See* Anthony L. Teasdale, *The Life and Death of the Luxembourg Compromise*, 31 J. COMMON MKT. STUD. 567 (1993).

18. ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE 4 (1992) [hereinafter EUROPEAN RESCUE].

technocracy in the European Commission in Brussels. Even after the mid-1980s, when the Member States abandoned the national veto in single-market legislation in the Council of Ministers (in favor of a system of qualified majority voting), they also introduced "several other legal mechanisms and principles designed functionally—if not formally—to preserve indirect national hierarchical control over otherwise autonomous rule-making in the Community system," most notably, the system of nationally-dominated oversight committees ("comitology"), the subsidiarity principle, the pillar structure, and "flexibility" provisions.[19]

This persistence of intergovernmental control (even if by indirect means) suggests that, at least as a political matter, regulatory norm-production at the supranational level continued to depend primarily on the plebiscitarian leadership of national executives as constitutional representatives of their national political communities. Indeed, the recently-drafted constitutional treaty may do little to alter this dependence. The proposal to shift from a rotating to a permanent presidency of the European Council, for example, suggests that even the members of the Convention recognize that any form of plebiscitarian leadership at the supranational level must in some way be linked to national-executive control via the European Council. Ardent European federalists understandably fear that such a move will threaten the political position of the President of the European Commission as the (hoped-for) future head of a federal cabinet at the supranational level, akin to a "head of government" responsible before the European Parliament. Rather, for federalists the danger is that the President of the Commission might simply become a sort of "technocrat-in-chief" of an essentially administrative body subject to a political authority that remains primarily in the hands of the democratically-elected executives at the national level, assembled in the European Council. This feature of the proposed constitutional treaty may thus simply help to perpetuate, on the political side of the ledger, the character of European integration as an extension of administrative governance as it has developed on the national level over the past half-century.[20]

19. *Delegation is Dead*, *supra* note 13, at 155.

20. It should be noted, however, that for several smaller Member States, along with the candidate countries in eastern Europe, the shift to a permanent President of the European Council may itself be a step too far, but not for the

As noted previously, however, European integration has also required an important element of supranational adjudicative power. With the ECJ as well, however, one could argue that it built on models drawn from the emergence of administrative governance on the national level in the postwar decades. In the earliest years of European integration it was common for supporters of the Community to analogize the European Court of Justice to the Conseil d'Etat, the summit of the French system of administrative justice. The strategy behind the analogy was clear: the Conseil d'Etat was a much-admired institution which, despite its Old Regime and Napoleonic origins, had proven to be an effective enforcer of the rule of law in the exercise of administrative power.[21] Given the largely technocratic character of the new ECSC as envisioned by Monnet and his team in 1950, it was only natural that a similar institution would be established at the Community level to enforce *légalité* against administrative power in its new supranational guise. The French socialist André Philip, in a pamphlet supporting the Schuman

reasons advanced by federalists. Because this proposal prevents each Member State from serving as the president of the Council on a rotating basis, as the current system provides, it will dilute the intergovernmental character of the European Council and thus potentially expose the smaller states to the domination of the larger Member States. *See* George Parker, *Smaller EU Countries Dig Their Heels In*, FINANCIAL TIMES, Sept. 21, 2003, *at* www.ft.com (last visited Oct. 2, 2003) (on file with the Loyola of Los Angeles Law Review). To the same effect is their opposition to the proposed reform of the Commission, which would institute a rotating system of fifteen fully-fledged commissioners and ten "subcommissioners." The smaller states and candidate countries demand that the present system of one seat per country be maintained (in effect, acknowledging the Commission as a forum for the representation of national interests on the basis of sovereign parity, rather than as an autonomous supranational body). Other states are also dissatisfied with the distribution of seats in the European Parliament (viewing it as too favorable to larger countries like Germany), as well as the weighting of votes for purposes of qualified-majority voting, and the list of domains subject to QMV. *See* Martin Plichta, *Réunion de défiance à Prague contre le projet de Constitution*, LE MONDE, Sept. 3, 2003, *at www.lemonde.fr* (last visited Oct. 2, 2003) (on file with the Loyola of Los Angeles Law Review).

21. *See, e.g.*, PIERRE SANDEVOIR, ÉTUDES SUR LE RECOURS DE PLEINE JURIDICTION 11 (1964) ("Political liberalism has produced two chefs-d'oeuvre, both of which result not from the *a priori* elaboration of an intellectual construction, but from the natural and fortunate culmination of a particular historical evolution: parliamentarism in Great Britain and administrative justice in France").

Plan published by the European Movement in 1951, expressed the typical view. Philip urged confidence in the proposed Court of Justice precisely because it had been explicitly "modeled on the French Council of State (Conseil d'Etat), an administrative institution which has in fact ensured the protection of private interests and individual liberties for more than a century."[22]

The establishment of the European Court of Justice, however, did not merely build upon, but also seriously disrupted the institutional patterns of administrative governance on the national level. By seeking to reproduce the judicial dimension of the postwar settlement on the supranational level, the Member States inadvertently introduced a basic contradiction into the process of European integration. The ECJ became the principal agent in the transformation of what the drafters of the treaty had arguably intended only as a system of "instrumental supranationalism"—that is, a system entailing only so much supranational normative power as was necessary to achieve the market-integration goals defined by the treaty—into one of "constitutional supranationalism."

This process began relatively modestly, grounded in two interrelated ideas: first, that the citizens of the several Member States enjoyed a new patrimony of rights by virtue of the treaties and Community secondary legislation; and second, that it was among the Court's most important duties to protect these rights against national encroachments. In this way, rather than openly characterizing its role as the defender of a new and superior sovereignty over that of the Member States, the Court could strategically depict itself, like any other court, as the defender of the sovereignty of the individual against that of the state.[23] By the late 1970s and early 1980s,

22. ANDRÉ PHILIP, THE SCHUMAN PLAN: NUCLEUS OF A EUROPEAN COMMUNITY 38 (1951); *see also* MINISTRE DES AFFAIRES ÉTRANGÈRES, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, RAPPORT DE LA DÉLÉGATION FRANÇAISE SUR LE TRAITÉ ET LA CONVENTION SIGNÉS À PARIS LE 18 AVRIL 1951 (1951).

23. The ingenuity and force of the Court's constitutionalizing jurisprudence lay in its linkage of the language of rights-based constitutionalism on the national level (a powerful discourse after the devastating experience of 1933–1945) with the Court's instrumental function—indisputable in the treaties—to act as the enforcer of the Member State's supranational commitments to each other. The most important example is the Court's willingness to use the preliminary reference mechanism under Article 177 (now 234) to rule on a Member State's compliance with its obligations under the treaty rather than the

however, the Court moved beyond the original rights-based constitutionalism of the early 1960s to the idea that the Community implicitly constituted an autonomous level of governance in a federal-type system—that is, in some sense it had become the personification or embodiment of the sovereignty of a new political community—with a legitimacy of its own apart from, and superior to, the national constitutional orders which had created it.[24]

From the perspective of the original drafters of the treaties, however, the purpose of delegation to supranational institutions like the Court was not to create an autonomous constitutional level of governance above the Member States. Rather, it was (as with delegation to executive and administrative bodies on the national level) to insulate regulatory decision making from potential future shifts in domestic parliamentary politics—in short, to prevent the various Member States from defecting from the general policies of integration to which they agreed in the treaties.[25] The Member

procedures under the old Articles 169–70 (now 226–27). The key difference was that private parties in effect had standing to challenge national law under the old Article 177, whereas under Articles 169-70 only other Member States and the Commission had standing. *See* Case 26/62, Van Gend & Loos v. Nederlands Administratie der Belastingen, 1963 E.C.R. 1. The Court here drew a direct linkage between a rights-based constitutionalist conception of the Community and the Court's instrumental function to ensure Member State commitment to the goals of integration: "A restriction of the guarantees against an infringement of [the treaty] by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals." *Id.* at 12. More importantly, Article 169 and 170 would be "ineffective," if recourse to them was made "after the implementation of a national decision taken contrary to the provisions of the Treaty." *Id.* The Court concluded: "The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States." *Id.*

24. *See, e.g.*, Case 22/70, Commission of the European Communities v. Council of the European Communities, 1971 E.C.R. 263 [*ERTA*]; and Case 804/79, Commission of the European Communities v. United Kingdom, 1981 E.C.R. 1045 [*Sea Fisheries*]. For further discussion, see Lindseth, *supra* note 1, at 391–402.

25. On the relationship between national and supranational forms of delegation as commitment mechanisms, see Giandomenico Majone, *Europe's "Democratic Deficit": The Question of Standards* 4 EUR. L.J. 5, 17 (1998); GIANDOMENICO MAJONE, TEMPORAL CONSISTENCY AND POLICY CREDIBILITY: WHY DEMOCRACIES NEED NON-MAJORITARIAN INSTITUTIONS 1 (Eur. U. Inst., Working Paper No. 96/57, 1996), *available at*

States' aim with this instrumental delegation of normative power to supranational institutions was to address collective-action problems of coordination and cooperation among disparate political principals, primarily the executives of the various Member States, but also to a lesser extent their parliaments.[26] Hence the creation of the necessary supranational commitment institutions to address these collective-action problems: the European Commission, and much more importantly, the European Court of Justice.

In the creation of these commitment institutions, however, the intergovernmental negotiators of the treaties necessarily recognized the existence of a political interest—the "Community interest"—which was independent of, and perhaps superior to, their own national interests. It was this implicit recognition of an autonomous Community interest, along with supranational commitment institutions to defend it, that laid the foundation for the transformation of the instrumental supranationalism of the drafters of the treaties into the constitutional supranationalism of the European Court of Justice.[27] As a matter of legal logic, the Court recognized

http://www.iue.it/RSCAS/WP-Texts/96_57.html (last visited Aug. 27, 2003). In making his argument about credible commitments, Andrew Moravcsik draws from REGULATING EUROPE (Giandomenico Majone ed., Routledge 1996); *see* THE CHOICE FOR EUROPE, *supra* note 14, at 74–75 nn.106 & 109. Andrew Moravcsik has also drawn the linkage between national and supranational forms of delegation in the context of the emergence of human rights regimes in postwar Western Europe but his reasoning would apply more broadly to the modern administrative state. *See* ANDREW MORAVCSIK, EXPLAINING THE EMERGENCE OF HUMAN RIGHTS REGIMES: LIBERAL DEMOCRACY AND POLITICAL UNCERTAINTY IN POSTWAR EUROPE 11 (Weatherhead Ctr. for Int'l Aff., Working Paper No. 98-17, 1998) *available at* http://www.wcfia.harvard.edu/papers/466__98-17.pdf [hereinafter EXPLAINING HUMAN RIGHTS REGIMES] (last visited Aug. 26, 2003) ("Politicians delegate power to human rights regimes, like domestic courts and administrative agencies, to stabilize future political behavior of domestic governments."); *see also id.* at 9 ("Institutional commitments, properly designed, insulate the administration, interpretation, and enforcement of rules from future political opponents."). In making this argument, Moravcsik relies on Terry Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 213–53 (1990).

26. *See generally* WALTER MATTLI, THE LOGIC OF REGIONAL INTEGRATION: EUROPE AND BEYOND (1999).

27. *Cf. Sea Fisheries*, 1981 E.C.R. at 1075, ¶ 30 (stating that, in any field "reserved to the powers of the Community," the Member States, whether acting alone or via the Council of Ministers, could only "henceforth act only as

that overcoming collective action problems required not only supranational institutions with a degree of relative *autonomy* from Member State control, but also that the normative output of these institutions must have some measure of *supremacy* over national law. Without some claim to legally enforceable (and nationally unmediated) supremacy, supranational institutions could not pursue the Community interest as they understood it; that is, they could not impose the uniformity necessary to make European economic integration a functional reality rather than merely a legal fiction.

The Court's constitutionalizing logic was rooted in this instrumental quest for uniformity, even as it was often bound up with the rights-based legal discourse so prominent in the decades following 1945.[28] The Court's constitutionalizing logic, however, could not negate the basic fact at the heart of the process of integration: Europe's supranational institutions, like administrative bodies on the national level, drew their "authority not from a constitutional enactment of some definable European 'demos' . . . but generally from lawful transfers . . . from national [institutions] as representatives of their national [political] communities."[29] Moreover, even as the Court of Justice openly began to suggest that Community institutions must, in effect, possess the constitutional

trustees of the common interest").

28. This is made plain in several of the Court's leading "constitutionalizing" judgments. *See, e.g.*, *Van Gend & Loos*, 1963 E.C.R. at 12 ("[T]he task assigned to the Court of Justice under Article 177 . . . is to secure [a] uniform interpretation of the Treaty by national courts and tribunals . . . "); Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593 ("The executive force of Community law cannot vary from one State to another . . . without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2)."); Case 22/70, Commission of the European Communities v. Council of the European Communities, 1971 E.C.R. 263, 275 [*ERTA*] (stressing the need for "the unity of the Common Market and the uniform application of Community law"); Case 804/79, Commission of the European Communities v. United Kingdom, 1981 E.C.R. 1045, 1074, ¶ 23 [*Sea Fisheries*] (holding that the textual basis in the treaty for the Commission's claimed approval power over Member State measures was "fragmentary," but finding that the Commission power could nevertheless be justified by "the structural principles on which the Community is founded" as well as "the essential balances intended by the Treaty").

29. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community*, 99 COLUM. L. REV. 628, 636–37 (1999).

legitimacy of a supreme level of governance in a federal-type system,[30] the Community remained dependent, as a socio-legal/socio-institutional matter, on the constitutional foundations of administrative governance as they had been established in the postwar decades. This continuing administrative character of European integration implied that some form of nationally-mediated legitimation (that is, oversight and control by national constitutional bodies as representative of their national democratic communities) continued to be necessary.[31]

This, to my mind, has always been the central contradiction of European supranationalism. On the one hand, forms of nationally-mediated legitimation (primarily, but not exclusively, national-executive oversight and control of supranational norm-production) were still necessary to advance the integration process *politically*. On the other hand, national mediation ran contrary to the Community's countervailing *legal* needs for normative autonomy, uniformity, and supremacy (i.e., the same set of "constitutional" values of integration that the European Court of Justice took it upon itself to promote and protect). To appreciate this contradiction fully, I think it is necessary to look at the process of integration as "one more stage in the long evolution of the European state,"[32] and more

30. See in particular the Court's judgment in *Sea Fisheries*, 1981 E.C.R. 1045, discussed in Lindseth, *supra* note 1, at 397–402.

31. The infamous judgment of the German Federal Constitutional Court in the *Maastricht Decision* of 1993 was concrete expression of this ongoing historical conflict at the heart of European integration, between the demands of supranational normative autonomy and supremacy, on the one hand, and the continuing need for nationally mediated legitimation on the other. *See* Brunner v. European Union Treaty, Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Fed. Const. Court] 89, 155 (F.R.G.) (commonly known as the *Maastricht Decision*), English translations at [1994] 1 C.M.L.R. 57, and 33 I.L.M. 388 (1994) [*Maastricht Decision*]. For further discussion, see Lindseth, *supra* note 1, at 1–15; *see also* PETER L. LINDSETH, THE 'MAASTRICHT DECISION' TEN YEARS LATER: PARLIAMENTARY DEMOCRACY, SEPARATION OF POWERS, AND THE SCHMITTIAN INTERPRETATION RECONSIDERED, (Working Paper 2003/__, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, Italy) (forthcoming on-line *at* http://www.iue.it/RSCAS/Publications/).

32. EUROPEAN RESCUE, *supra* note 18, at x. For other contributions to the literature, see, for example, HANNS JÜRGEN KÜSTERS, DIE GRÜNDUNG DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT (1982); and SPIERENBURG & POIDEVIN, *supra* note 16; and the contributions in DIE ANFÄNGE DES SCHUMAN-PLANS, *supra* note 16 (with contributions in German, English, and

particularly, as one more stage in the evolution of administrative governance over the course of the twentieth century. It is to that historiographical perspective I now turn.

III. THE HISTORIOGRAPHY OF EUROPEAN INTEGRATION AND THE CONSTITUTIONAL FOUNDATIONS OF THE ADMINISTRATIVE STATE

The transfer of regulatory authority to supranational institutions in Western Europe in the second half of the last century is, I suggest, the denationalized manifestation of a diffusion and fragmentation of normative power away from national parliaments, that began to accelerate at the national level in the 1920s and 1930s and then reached its full fruition in the postwar decades with the emergence of the modern welfare state. It was only in the postwar decades that the identifying characteristic of administrative governance—the decline of parliaments relative to national executives in national constitutional orders—was reconciled in any stable way with historical conceptions of democratic and constitutional legitimacy inherited from the eighteenth and nineteenth centuries (which had placed the parliament at the center of the system).[33] The cornerstone of that reconciliation was a shift in the focus of democratic legitimation out of the elected assembly to the plebiscitarian leadership of the chief executive. It was the executive's hierarchical oversight of the administrative sphere, combined with parliamentary and judicial controls (supplemented more recently by increased direct participation in, and transparency of regulatory processes) that became the principal means of managing technocratic autonomy. The efficacy of these mechanisms lay in their capacity to balance the inevitable normative autonomy that came with delegation with forms of mediated legitimation by national constitutional bodies (executive, legislative, and judicial), which might then allow the system to be broadly understood as "democratic" in a historically recognizable

French); IL RELANCIO DELL'EUROPA E I TRATTATI DI ROMA (Enrico Serra ed., 1989) (with contributions in Italian, German, English, and French); and BUILDING POSTWAR EUROPE: NATIONAL DECISION-MAKERS AND EUROPEAN INSTITUTIONS, 1948–63 (Anne Deighton ed., 1995) [hereinafter BUILDING POSTWAR EUROPE].

33. *See generally* Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J. __ (forthcoming 2004) [hereinafter *Paradox*].

sense. European integration built directly on this reconciliation of administrative governance and parliamentary democracy. Thus it is no coincidence that supranationalism emerged as a viable political project in Western Europe at precisely the moment in history when the basic constitutional foundations of administrative governance at the national level were also secured.[34]

This interpretation, with its emphasis on European integration as an extension of administrative governance at the national level, attempts to build on, but also to supplement in important respects, the prevailing historiography of European integration. To date, specifically historical interpretations of integration, especially in its early years, has been dominated by the magisterial works of the British political-economic historian Alan Milward.[35] Milward's various studies of the origins of integration in postwar Western Europe have not, as a general matter, explored the relationship between supranational institutions and the emergence of the administrative state; nevertheless, Milward does at one point raise the connection in a brief, but still illuminating, paragraph in the

34. For this reason, those who would later argue that the Community had somehow "perverted democracy" in an executive and technocratic direction largely missed the real historical lesson to be drawn from the Community's institutional development. *See, e.g.*, J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision*, 1 EUR. L.J. 219, 233 (1995); *see also* Daniel Wincott, *Does the European Union Pervert Democracy? Questions of Democracy in New Constitutionalist Thought on the Future of Europe*, 4 EUR. L.J. 411 (1998). The process of European integration was not the *cause* of the perversion of democracy but rather it was the *beneficiary* of a preexisting transformation of national democracies in a decidedly executive and technocratic direction. *See generally* Lindseth, *supra* note 1, as well as WILLIAM PHELAN, DOES THE EUROPEAN UNION STRENGTHEN THE STATE? DEMOCRACY, EXECUTIVE POWER, AND INTERNATIONAL COOPERATION 25 (Ctr. for Eur. Stud., Harv. U., Working Paper No. 95, 2002) [hereinafter PHELAN]; *see also* Opinion of Advocate-General Lagrange in *Costa*, 1964 E.C.R. at 604–05 ("Community regulations, even the most important ones, are not legislative measures nor, even as is sometimes said, 'quasi-legislative measures,' but rather measures emanating from an *executive power* (Council or Commission) which can only act within the framework of the powers delegated to it by the Treaty and within the jurisdictional control of the Court of Justice.") (emphasis in original).

35. *See generally* EUROPEAN RESCUE, *supra* note 18; *see also* ALAN S. MILWARD, THE RECONSTRUCTION OF WESTERN EUROPE 1945–51 (1984); ALAN S. MILWARD ET AL., THE FRONTIER OF NATIONAL SOVEREIGNTY: HISTORY AND THEORY 1945–1992 (1994).

introductory chapter of his major work to date on the early years of integration, *The European Rescue of the Nation-State*.[36]

Milward's purpose in this passage (set out below) is to challenge the "functionalist" and "neo-functionalist" theories of European integration which were predominant in the 1950s and early 1960s.[37] According to Milward's characterization, the central claim of these theories was that European integration was, somehow, the manifestation of regulatory incapacities of the nation-state which were thus impelling the transfer of functional competences to supranational institutions dominated by technocratic rather than political actors. "Integration [as pursued in the 1950s] was not the supersession of the nation-state by another form of governance as the nation-state became incapable," Milward writes.[38] Rather, it was:

> [T]he creation of the European nation-states themselves for their own purposes, an act of national will. This is not surprising, because in the long run of history there has

36. Andrew Moravcsik has also indirectly dealt with this relationship in an unpublished paper. *See* ANDREW MORAVCSIK, WHY THE EUROPEAN UNION STRENGTHENS THE STATE: DOMESTIC POLITICS AND INTERNATIONAL COOPERATION (Ctr. for Eur. Stud., Harv. U., Working Paper No. 52, 1994) *available at* http://www.ces.fas.harvard.edu/working_papers/Moravcsik52.pdf (last visited Aug. 26, 2003). For a critical appraisal of Moravcsik's argument, advancing an interpretation consistent with the one presented here, see PHELAN, *supra* note 34, at 25 ("[E]xecutive autonomy has been an essential prior ingredient in the formulation of the European Union, rather than a result of it . . . ").

37. *See* EUROPEAN RESCUE, *supra* note 18. "Functionalists" believed that policy-making would be increasingly shifted to specific problem-solving institutions at the international/supranational level, which would be insulated from politics, harmonizing values and concrete objectives according to "technical" criteria. *See, e.g.*, DAVID MITRANY, A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION (1943); Harrop A. Freeman, *International Administrative Law: A Functional Approach to Peace*, 57 YALE L.J. 976 (1948). By the 1950s, the "functionalist" interpretation was displaced by the so-called "neofunctionalist" model, which questioned the separation between the "technical" and the "political." While the neo-functionalists recognized that integration emerged first from a political process of interaction among pluralist interests, once the "rules of the game" were established, functionalist incrementalism could take over through the "spill-over" effect. *See* ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950–1957 (Stanford University Press 1968) (1958); *see also* LEON N. LINDBERG, THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION (1963).

38. EUROPEAN RESCUE, *supra* note 18, at 18.

> surely never been a period when national government in Europe has exercised more effective power and more extensive control over its citizens than that since the Second World War, nor one in which its ambitions expanded so rapidly. Its laws, officials, policemen, spies, statisticians, revenue collectors, and social workers have penetrated into a far wider range of human activities than they were earlier able or encouraged to do. If the states' executive power is less arbitrarily exercised than in earlier periods, which some would also dispute, it is still exercised remorselessly, frequently, in finer detail and in more directions than it was. This must be reconciled in theory and in history with the surrender of national sovereignty.[39]

There are, as Milward implies but does not explore, important linkages to be drawn between the development of the modern administrative state in postwar Western Europe and the process of European integration. Both depended on a combination of "fusion" of normative power in the national executive but also a "diffusion" of power into a complex and far-reaching administrative sphere. The core of Milward's argument in *The European Rescue of the Nation-State* is that the extension of this phenomenon to the Community level in the 1950s actually reflected the "will of the European nation-state to survive as an organizational entity."[40] The same claim can also be made, however, with regard to the institutional changes generally associated with the rise of administrative governance on the national level, particularly the extensive delegation of normative power to the executive and technocratic sphere after 1945. Both forms of delegation, national and supranational, were reflective of a conscious effort by major political actors to reinforce the nation-state by making it a more effective agent in the promotion of public welfare, by insulating decision-making from parliamentary interference and factionalism and thereby pre-committing the state to a stream of purportedly welfare-enhancing future policy choices.

39. *Id*. Earlier, Milward wrote of how nineteenth-century government "did not have the financial resources, *nor in many cases a sufficiently powerful executive*, for its policy choices to be more than inconsistent interventions." *Id*. at 8–9 (emphasis added).

40. *Id*. at 223.

This common political purpose behind national and supranational delegation, as well as the paradoxical combination of fusion and diffusion of normative power in an era of administrative governance, begin to point us toward the reconciliation "in theory and in history" that Milward seeks. For example, Milward argues that the postwar nation-state's survival depended "on the prosperity which sustained the domestic post-war political compromises everywhere."[41] The key to this prosperity, according to Milward, was anchoring the Federal Republic of Germany firmly in the western camp, both economically and politically, through a process of integration.[42] One could also fairly argue, however, that "sustain[ing] the domestic post-war political compromises everywhere" also required the broader constitutional stabilization of administrative governance; that is, the legitimation of regulatory power delegated outside the parliamentary realm, under the auspices of a plebiscitarian chief executive. It was this constitutional stabilization that provided the institutional foundation for both the postwar welfare state as well as the process of European integration, by making each capable of the sort of credible policy commitments that its regulatory ambitions required.[43]

Although Milward alludes to the process of domestic constitutional settlement of administrative governance in the postwar era—not merely to the concentration of governing power in the executive-technocratic sphere, but also to the counter-balancing (presumably judicial) checks to ensure that such power would be "less arbitrarily exercised than in earlier periods"[44]—he does not subsequently pursue this line of analysis.[45] He is, rather, primarily

41. *Id*. at 18.

42. This would allow West Germany's smaller or less dynamic neighbors—especially France—to take advantage, in a "neo-mercantilist" fashion, of West Germany's burgeoning market and economic power. *See id.* at 134 ("Domestic policy was not in the end sustainable unless this neo-mercantilism could be guaranteed by its Europeanization."). *See generally id.* ch. 4.

43. *See generally* Lindseth, *supra* note 1, Part One.

44. EUROPEAN RESCUE, *supra* note 18, at 18.

45. There are also several indirect references to the rise of administrative governance in Milward's second chapter, "The Post-War Nation-State," but again no effort to examine their import in legal-constitutional terms. *Id*. at 24. "By what precise *political mechanism* did the organizational unit of the state . . . come to play such a role in the vast improvement in human life which took place [after 1945]?," Milward queries. *Id.* at 24. (emphasis added). He

an economic historian, or perhaps more accurately, an historian of international political economy and public policy. Thus, when Milward writes that the durability of European integration resulted from its "rest[ing] so firmly on the economic and social foundations of post-war political change,"[46] his analysis is limited only to "changes in the political economy of the post-war state," and not to changes in the legal-institutional mechanisms through which the resulting public-policy choices were formulated or implemented.[47]

As Milward's own findings confirm, however, during the formative period of European integration choices over policy were intimately bound up with the "politics of bureaucratic structure,"[48] that is, negotiations among national executives over the substance of European integration were always linked to negotiations over decision-making procedures and the distribution of powers.[49]

later responds that this was due to *"a different form of political organization based on a new distribution of political power."* *Id.* (emphasis added). Milward seems to be speaking here, however, of political parties rather than administrative institutions, although he acknowledges how "national parliaments became the arena in which [parties] performed stylized rituals which ratified the policy choices already made from the assessment of information gathered deep in the roots of local society and government where they now began to function." *Id.* at 27–28. Milward never examines whether policy choices, rather than being *ratified* in parliaments, were actually *delegated* to the executive and administrative spheres. In a more direct reference to the administrative apparatus, Milward later refers to the role of social insurance between 1945–1968 as "creat[ing] a robust national framework of personal claims on the state's finances, *mediated through a rapidly expanding welfare bureaucracy.*" *Id.* at 32 (emphasis added).

46. *Id.* at 223.

47. *Id.* *See also* Milward's discussion of the "bundle of policies" which all Western European states selected in the postwar era, including increases in social welfare, agricultural protection, employment policies, industrialization policies. *See* Alan S. Milward & Vibeke Sørensen, *Interdependence or Integration? A National Choice*, *in* MILWARD ET AL., THE FRONTIER OF NATIONAL SOVEREIGNTY: HISTORY AND THEORY, 1945–1992, at 5–6 (1993). He makes no mention of the broader constitutional policy choice in favor of executive power through legislative delegation. *Id.* Also, when Milward does reach the question of specific institutional arrangements in *The European Rescue of the Nation-State*, he spends only two pages discussing them. *See* EUROPEAN RESCUE, *supra* note 18, at 217–18.

48. The phrase is taken from Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989).

49. For further elaboration, see the material discussed in Lindseth, *supra* note 1, ch. 3, § 3.2.

Indeed, if one turns to the work of the American political scientist Andrew Moravcsik (whose historical analysis of European integration is broadly sympathetic to that of Milward), this point is made even more explicitly. According to Moravcsik, agreements over decision-making procedures at the supranational level can be understood in game-theoretical terms as the means by which the participating states signaled the credibility of their policy commitments in the specified domains of integration.[50] Like Milward, however, Moravcsik also fails to consider directly the extent to which a state's credibility was also a function of the constitutional stabilization and legitimacy of national administrative governance on which these various supranational structures and procedures were modeled.[51]

Milward and Moravcsik are representative of what is known generally as the "intergovernmentalist" or "state-centric" understanding of the process of European integration.[52] State-centric in this context means that the nation-state, and more particularly national executive politicians, should be understood as the key independent variables that have historically driven the process of European integration. However, neither Milward nor Moravcsik crudely argue that integration was exclusively a "top down" phenomenon; rather, both suggest that there was a complex "social politics," or rather, a complex "political economy" underlying particular national approaches to integration.[53] At the heart of that

50. THE CHOICE FOR EUROPE, *supra* note 14, at 9 (arguing that Member State decisions to delegate to the supranational level in the European Community "are best explained as efforts by governments to constrain and control one another—in game-theoretical language, by their effort to enhance the credibility of commitments"). See also the sources cited *supra* note 25.

51. Moravcsik's work on postwar human rights regimes in Western Europe is, however, suggestive of this linkage. *See* MORAVCSIK, EXPLAINING HUMAN RIGHTS REGIMES, *supra* note 25, at 14–18.

52. For an overview of the contending theories of integration, see, for example, Liesbet Hooghe & Gary Marks, *Contending Models of Governance in the European Union*, *in* EUROPE'S AMBIGUOUS UNITY: CONFLICT AND CONSENSUS IN THE POST-MAASTRICHT ERA 21 (Alan W. Cafruny & Carl Lankowski eds., 1997). For an older but still very useful overview, see CAROLE WEBB, *Introduction* to MAKING IN THE EUROPEAN COMMUNITIES 1 (Helen Wallace et al. eds., 1977).

53. In order to understand the integration process fully, both Milward and Moravcsik conclude that a truly "social history" of integration is necessary. As Moravcsik describes it, this approach would require detailed attention to the

politics was a struggle among the defenders of various powerful interest groups at the national level (e.g., agricultural producers in France, or industrial producers in Germany) over the allocation of the potential benefits of increased intra-European trade.[54]

This acknowledgment by both Milward and Moravcsik of the importance of interest-group politics in driving the process of integration, however, clearly runs contrary to their general emphasis on national-executive political control over the process of integration; indeed, it perhaps constitutes an implied admission that integration cannot be understood entirely in intergovernmentalist terms. When one turns to the subsequent development of European integration from the 1960s to the 1980s, one finds that interest-group pressures, most importantly exerted through preliminary references to the European Court of Justice under the old Article 177 (now 234) of the EC Treaty, also became a significant factor in driving the integration process.[55] For this reason many observers have found that a predominantly intergovernmentalist explanation does not provide a fully satisfactory framework within which to analyze the

array of domestic interests on each side of the integration question (and implicitly how and why they formed), as well as "how conflicts among them are resolved, by what means they are translated into policy, and when they require political integration." THE CHOICE FOR EUROPE, *supra* note 14, at 16; *See also* Alan S. Milward, *The Frontier of National Sovereignty* 197–98 (1998) and Peter Ludlow, *Recasting the European Political System, 1950–1996*, 1 CEPS REV. 25-33 (Summer 1996).

54. The major exception on the primacy of economic factors was West Germany. On the relative primacy of geopolitical considerations in West Germany (i.e., Adenauer's desire to restore West Germany's status as a power in the western camp), see Sabine Lee, *German Decision-Making Elites and European Integration: German 'Europolitik' During the Years of the EEC and Free Trade Area Negotiations*, *in* BUILDING POSTWAR EUROPE, *supra* note 32, at 38.

55. An analysis of Article 177 references in the three decades after 1961, published by Alec Stone Sweet and James Caporaso, found a positive and significant statistical relationship between references and subsequent Community legislation, thus suggesting that increased interest group pressure, manifested through litigation, had an impact on pushing the Community's secondary legislative process forward. Alec Stone Sweet & James A. Caporaso, *La Cour de Justice et l'intégration européenne*, 48 REVUE FRANÇAISE DE SCIENCE POLITIQUE 195 (1998). The study also found, importantly, that there was a nearly linear relationship between increases in intra-Community trade and Article 177 references, suggesting a direct linkage between the two.

integration phenomenon. When one focuses on the body of case law handed down by the European Court of Justice over the last forty years, as well as its arguable impact on the Community legislative process, it becomes clear that the direction of Community development cannot be entirely explained by political decisions made at the level of national governments.

In a series of articles over the course of the 1990s, Anne-Marie Slaughter and Walter Mattli have sought to explain the role of the Court in terms of neofunctionalism, a theory of integration which had fallen out of favor since the middle 1960s for seemingly sound empirical reasons.[56] The Luxembourg Compromise of 1966, which perpetuated unanimous voting in the Council of Ministers despite treaty provisions to the contrary, along with other developments of the late 1960s and early 1970s,[57] all seemed to contradict the basic

56. Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993) [hereinafter *Europe Before the Court*] (Anne-Marie Burley is now Anne-Marie Slaughter); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union*, 49 INT'L ORG. 183 (1995); Walter Mattli & Anne-Marie Slaughter, *The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints*, *in* THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 253 (Anne-Marie Slaughter et al. eds., 1998) [hereinafter *Role of National Courts*]; Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177 (1998).

57. These developments included the establishment of the "Committee of Permanent Representatives of the Member States" (COREPER), the Council's own permanent bureaucracy in Brussels, which has operated in parallel with the European Commission. As the intergovernmental nature of much of the Community's legislative decision-making became more clear over the course of the 1960s, the COREPER took on a concomitantly greater role in Community norm-production. *See* Lindseth, *supra* note 1, at 302–03. In Article 4 of the Merger Treaty of 1965, which created a single Council and single Commission for all three European Communities, the COREPER system was explicitly formalized in treaty law. TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, April 8, 1965, art. 4 1967 J.O.(152)1, 4 I.L.M. 776 [hereinafter MERGER TREATY]. The Merger Treaty also effected another change in Community law of a perhaps more symbolic nature, but one no less interesting for our purposes. In replacing the High Authority of the ECSC with a single Commission for the three European Communities, the Merger Treaty also deleted the old Article 9 of the Treaty of Paris, which spoke of the "supranational" character of the members of the High Authority of the ECSC. The new provision—Article 10 of the Merger Treaty—also specified that the members of the unified Commission would, "in the general interest of the

prediction of the original neofunctionalists. These theorists had believed that the driving force behind integration would be an alliance of Community technocrats and national interest groups, over the heads of national executives, forcing the incremental expansion of the Community's regulatory domain (the "spill-over" effect), all of which would be beyond intergovernmental control. In the years following the Luxembourg Compromise, the predominantly intergovernmental character of the Community legislative process (at least as a political matter) seemed irrefutable—tempered only slightly by the existence of a sphere of autonomous instrumental supranationalism (for example, in the competition law context) that was, in any event, greatly diminished by the Luxembourg Compromise. In the face of the seemingly overwhelming contrary evidence, therefore, the leading neofunctionalist theorists of the 1950s and 1960s felt compelled to recognize the apparently weak predictive quality of their theory.[58]

However, in an initial joint article in 1993, Slaughter and Mattli argued persuasively that this capitulation was far too premature, focusing too narrowly on the supranational legislative process and paying insufficient attention to the process of supranational adjudication, the significance of which was only beginning to emerge in the middle 1960s. Slaughter and Mattli pointed out that "[b]y 1965" (ironically, the year of the "empty chair" crisis which would culminate in the Luxembourg Compromise of January 1966):

Communities, be completely independent in the performance of their duties." MERGER TREATY art. 10. However, in contrast with Article 9 of the Treaty of Paris, Article 10 of the Merger Treaty tracked the language of Article 157 of the Treaty of Rome, dropping the word "supranational" in its description of these duties, stating only that the members of the Commission should "refrain from any action incompatible with their duties," and that "[e]ach Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks." MERGER TREATY art. 10. Thus, what had been the sole mention of the "supranational" character of European integration (in Article 9 of the Treaty of Paris) was now removed from the positive treaty law of European integration entirely.

Finally, the key development from the early 1970s was the establishment of the European Council, specifically outside the treaty framework, in 1974. For further discussion, see generally Lindseth, *supra* note 1, ch. 3, § 3.3.

58. *See, e.g.*, Ernst B. Haas, *The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing*, *in* REGIONAL INTEGRATION: THEORY AND RESEARCH 3 (Leon N. Lindberg & Stuart A. Scheingold eds., 1971).

> [A] citizen of a community country could ask a national court to invalidate any provision of domestic law found to conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek the invalidation of a national law found to conflict with the self-executing provisions of community secondary legislation, the "directives" to national governments passed by the EC Council of Ministers.[59]

These doctrinal innovations by the Court of Justice, Slaughter and Mattli attempted to show, laid the foundation for a dynamic of integration that corresponded remarkably well to the particulars of the neofunctionalist theory, with two major differences: first, it was the law that "function[ed] as a mask for politics, precisely the role neofunctionlists originally forecast for economics";[60] and second, it was the Court of Justice that took the lead in forging an effective supranational alliance with national interest groups (private litigants, their lawyers, and lower national courts) to push the boundaries of integration—the role the neofunctionalists originally envisioned for the Commission.

More recently, Slaughter and Mattli have supplemented their theory by combining it with the model of the so-called "disaggregated state" in order to better understand the motives of the private interests and various institutional actors (subnational, national and supranational) with whom the Court has historically interacted.[61] The purpose of this shift was to "move beyond the assumption of the unitary state" (ironically, an assumption that the ECJ has itself made for strategic reasons[62]) to a more sophisticated appreciation of the state as an assemblage of "different governmental institutions interacting with one another" as well as with private individuals and interest groups.[63] "Each of these institutions," they noted, "has

59. *Europe Before the Court*, *supra* note 56, at 42; for an analysis of the major doctrinal developments of the 1960s and 1970s, see Lindseth, *supra* note 1, at ch. 4, §4.2.

60. *Europe Before the Court*, *supra* note 56, at 44.

61. *Role of National Courts*, *supra* note 56, at 255.

62. *See, e.g.*, Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337, [1975] 1 C.M.L.R. 1 (1974) (treating the Member State as a unity—that is, a kind of "black box"—imposing supranational obligations on all its constitutional branches to the same degree and in the same manner).

63. *Role of National Courts*, *supra* note 56, at 255.

specific interests shaped by the structure of a particular political system, the need to perform specific socio-political functions such as judging or legislating, and the demands of specific political constituencies."[64]

What Slaughter and Mattli appear to be confronting in their new model of the "disaggregated state" seems, in fact, strikingly similar to the phenomenon at the core of administrative governance: the diffusion and fragmentation of normative power within and beyond the modern nation-state, and the differential functions of national constitutional bodies—legislatures, executives, and courts—in mediating the legitimacy of this evolving form of administrative governance.[65] When combined with an historical appreciation of the various elements of the postwar constitutional settlement, the analytical strategy proposed by Slaughter and Mattli can help us to better understand why the integration dynamic predicted by the neofunctionalists in the 1950s and early 1960s *failed* to take hold in the economic-technocratic domain (consistent with intergovernmentalist theory) but *succeeded* in the legal-judicial domain, as Mattli and Slaughter have fairly characterized in neofunctionalist terms.

The key phenomenon at the heart of the theory advanced by Slaughter and Mattli is also something that they admittedly cannot explain: political deference to courts.[66] In their 1993 article, they suggested competing hypotheses—on the one hand, that "judicial deference is a bedrock norm of Western liberal democracies;" and on the other, that it was the consequence of political calculations of rational self-interest (for example, "the oppositional use of a third-party tribunal to check the power of the majority party").[67] For the legal historian, however, these hypotheses hardly seem contradictory: How an idea becomes a governing norm, and how that norm is translated into legal and institutional reality, are always the consequence of the aggregation of experience over time as to what

64. *Id.*

65. This appreciation of diffusion and fragmentation is arguably even greater in so-called "institutionalist" analyses of European integration. *See, e.g.*, KENNETH A. ARMSTRONG & SIMON J. BULMER, THE GOVERNANCE OF THE SINGLE EUROPEAN MARKET (1998).

66. *See Europe Before the Court*, *supra* note 56, at 75.

67. *Id.*

constitutes a stable and just governing system (which can of course include the instrumental recognition of the necessity of judicial independence).[68] The phenomenon of political deference to courts is ultimately a historical question, calling for an examination of the historical relationship of law to power, or, as it has sometimes been called (particularly in the French tradition), of "justice" to "administration."[69]

The distinction between justice and administration has deep roots in the history of modern state formation, and a complete examination of that topic would take us far beyond the scope of this essay.[70] What I propose to do here is simply to suggest a new historical synthesis to account for how the justice-administration distinction manifested itself in Western Europe in the postwar decades and why it resulted in greater normative autonomy for courts (including the ECJ) relative to administrative officials.

In the postwar Western European state, the administrative sphere did indeed come to enjoy a degree of normative autonomy through legislative delegation, although that autonomy resulted not generally from legal right but rather from organizational complexity and the difficulties of hierarchical political control. In contrast with the United States, where the constitutionality of independent regulatory agencies had been firmly established in the 1930s,[71] administrative bodies in postwar Western Europe always remained, in formal-legal terms at least, under the hierarchical authority of the national executive.[72] National executive politicians were of course

68. Compare MORAVCSIK, EXPLAINING HUMAN RIGHTS REGIMES, *supra* note 25, for a concrete example.

69. *See, e.g.*, Marguerite Boulet-Sautel, *Police et administration en France à la fin de l'Ancien Régime*, *in* HISTOIRE COMPARÉE DE L'ADMINISTRATION (IVE-XVIIIE SIÈCLES): ACTES DU 14E COLLOQUE HISTORIQUE FRANCO-ALLEMAND (Werner Paravicini & Karl Ferdinand Werner eds., 1980); *see also* KEITH MICHAEL BAKER, *Science and Politics at the End of the Old Regime* and *Representation Redefined*, *in* INVENTING THE FRENCH REVOLUTION: ESSAYS ON THE FRENCH POLITICAL CULTURE IN THE EIGHTEENTH CENTURY (1990); and for more recent developments, JACQUES CHEVALLIER, L'ELABORATION HISTORIQUE DU PRINCIPE DE SÉPARATION DE LA JURIDICTION ADMINISTRATIVE ET DE L'ADMINISTRATION ACTIVE (1970).

70. *See* sources cited *supra* note 69. *See also* discussion of the British case, Lindseth, *supra* note 1, at 117–21.

71. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

72. Emblematic of the prevailing reliance on hierarchical control by the executive was the statement of Lord Greene, the Master of the Rolls in the

willing to exploit the seeming "neutrality" of technocratic expertise as a means of rationalizing legislative delegation in the sphere of economic policy, but this did not translate into a willingness to grant formal-legal autonomy to technocratic decision-makers without concomitant executive oversight and control over the final policy outcomes. In the postwar decades, the perception of "depoliticized" technocratic expertise thus supported *not* the normative autonomy of administrative officials but rather the further concentration of power in the hands of national executive politicians.[73] Reinforcing this phenomenon was the shift in the main locus of democratic legitimacy to the chief executive as plebiscitarian leader, who remained politically responsible in the broadest sense for the normative output of the administrative sphere.[74]

By contrast, in the judicial sphere, the very purpose of courts and court-like *juridictions administratives* in the postwar constitutional settlement was to serve as an independent check on the exercise of executive and administrative power in the interest of legislatively and constitutionally defined policy goals. Judicial independence was in part rationalized in terms of classical notions of "justice"—that is, in the resolution of particular controversies between private parties and the possessors of public power—now overlaid with an increasing emphasis on rights. Judicial independence also served, however, the functional purpose within the administrative state of checking precisely the normative autonomy that derived from organizational complexity beyond the hierarchical control of the executive and parliament.[75]

Court of Appeal, in 1947: "[T]he ultimate arbiter is the Minister himself." Taylor v. Brighton Borough Council, 1947 K.B. 736, 748–49.

73. Particularly in the French Fifth Republic, the notion of technocratic "depoliticization" provided a kind of ideological cover for the new regime. See, for example, the speech of Michel Debré as newly installed prime minister in January 1959, presenting the first government of the Fifth Republic to the National Assembly, in which he said the "major imperative" of the new constitution was to "depoliticize" policymaking (*quoted in La dépolitisation: mythe ou réalité?*, 120 CAHIERS DE LA FONDATION NATIONALE DES SCIENCES POLITIQUES 51 (Georges Vedel ed., 1962)).

74. See the concluding sections to *Paradox*, *supra* note 33.

75. This demand for judicial independence is aptly demonstrated by the reforms that ensued in Britain following the so-called Crichel Down affair. For a contemporaneous overview, see J.A.G. Griffith, *The Crichel Down Affair*, 18 MODERN L. REV. 557 (1955); *see also* SIR CARLETON KEMP ALLEN,

Administrative and constitutional litigation were means by which the constituent and legislative power at the national level could enlist private interests (via the judiciary) in the task of controlling this sort of normative autonomy—a kind of "non-hierarchical" commitment mechanism.

When these aspects of the postwar constitutional settlement were transferred to the supranational level in the 1950s, however, the result was contradictory trends—the infamous "dual character of supranationalism" which Joseph Weiler attempted to describe at the outset of the 1980s.[76] As for technocratic autonomy, in the earliest years of integration national executives demonstrated a willingness to accept, instrumentally, the Commission's power of legislative initiative but little else, save grants of relatively autonomous authority in certain limited domains like competition policy.[77] Thus,

LAW AND ORDERS: AN INQUIRY INTO THE NATURE AND SCOPE OF DELEGATED LEGISLATION AND EXECUTIVE POWERS IN ENGLISH LAW 343–53 (2d ed. 1956) (1945). The affair exposed problems relating to administrative secrecy, organizational complexity, the lack of clear lines of authority, and opportunities for unfairness which these factors created. To quell the public outcry that flowed from the affair, the British government established a Committee on Administrative Tribunals and Enquiries (the "Franks Committee") in November 1955 to examine the question of administrative justice, which led directly to the passage of the Tribunals and Inquiries Act of 1958, 6 Eliz. 2, c. 66 (1958) (Eng.). The act established a "Council on Tribunals" with broad consultative and review functions over the procedures and the formation of tribunals in the administrative sphere. The work of the Council over the subsequent decade established "a much clearer standard" of what was minimally necessarily consistent with administrative fairness. BERNARD SCHWARTZ & H.W.R. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 153 (1972). Importantly, the act itself provided for extended rights of appeal to judicial courts (reflective of the fundamentally subordinate character of these tribunals on questions of law), as well as a requirement that tribunals publicly provide reasons for their decisions (essential to effective judicial review).

76. Joseph Weiler, *The Community System: the Dual Character of Supranationalism*, Y.B. EUR. L., 1982, at 267.

77. From the inception of the European Community, competition policy was often cited as the domain most amenable to supranational control. *See, e.g.*, COMITÉ INTERGOUVERNEMENTAL CRÉÉ PAR LA CONFÉRENCE DE MESSINE, RAPPORT DES CHEFS DE DÉLÉGATION AUX MINISTRES DES AFFAIRES ÉTRANGÉRES 24 (Brussels, Apr. 21, 1956) [Spaak Report] (asserting that certain regulatory domains specifically required a measure of supranational autonomy from intergovernmental control, the least problematic example being "the application and control of competition rules" which, after all, would be "in the interest of the producers themselves," who would benefit from the

from the establishment of the Council of Ministers in 1951 to the creation of the European Council in 1974 (interestingly, originally outside the treaty framework), national executive politicians sought to impose, consistent with the postwar constitutional settlement, their formal-legal hierarchical authority over technocratic norm-production in its new supranational guise.

This sort of hierarchical legitimation, mediated through national political institutions, proved much more difficult to maintain in the judicial context, precisely because the same insistence on national-executive control ran directly contrary to the judicial role in the postwar constitutional settlement. An anecdote from the first decade of the EEC's existence demonstrates the point: In 1966, the German federal government ordered German customs officials to disregard a decision of the European Court of Justice because it conflicted "with well-reasoned arguments of the federal government."[78] This attempt to assert the normative supremacy of the national executive over the Court provoked a campaign by German legal scholars and the Association of German Exporters against the government's order, culminating in official questions to the government in parliament as to how to reconcile the order with the principles of the *Rechtsstaat*.[79] The linkage drawn in German domestic politics between the ECJ and the *Rechtsstaat* suggests how the Court's normative authority derived from the perception that it was "simply a continuation of the traditional role of European courts and, indeed, liberal courts everywhere: the protection of individual rights against the state."[80]

The Court of Justice can be viewed, then, as an attempt to transfer the judicial component of the postwar constitutional settlement of administrative governance to the supranational level—with one overarching deviation. On the national level, a principal function of judicial review in the postwar constitutional settlement was to *constrain* the normative autonomy of administrative actors through the enforcement of substantive and procedural requirements

rapidity and legal certainty of a common supranational mechanism.").

78. July 7, 1966 (IIIB.4–V 8534-1/66), *Der Betrieb* (1966), 1160, *quoted in* Karen J. Alter, *The European Court's Political Power*, 19 W. EUR. POL. 458, 475 (1996).

79. Gert Meier, *Der Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht*, 3 RECHT DER INTERNATIONALES WIRTSCHAFT 75–77 (1994), *cited in* Alter, *supra* note 78, at 476 n.57.

80. *Europe Before the Court*, *supra* note 56, at 64.

derived from legislation and the constitution. Thus, at the national level, courts and court-like *juridictions administratives* in the French tradition served as mechanisms to mediate legitimacy of administrative institutions that, on the one hand, possessed extensive rulemaking and adjudicative powers but, on the other, had no corresponding democratic and constitutional legitimacy of their own.

By contrast with their national counterparts, however, the European Court of Justice did not view its principal function as one of constraining the normative autonomy of Community institutions, despite their fundamentally administrative character (in the sense of lacking autonomous democratic and constitutional legitimacy). Although the Court took seriously its role as the enforcer of supranational legality under the treaty, it took even more seriously its commitment function, particularly under the Court's own expansive interpretation of the old Article 177 of the EC Treaty.[81] Thus, rather than acting to constrain the normative autonomy of Community institutions (most importantly its own), the Court actively sought to *promote* that autonomy in the interest of developing a more effective mechanism for policing Member State commitment to the goals of integration.

A judge on the Court of Justice would later characterize this expansive interpretation of the commitment function as the "preference for Europe . . . determined by the genetic code transmitted to the Court by the founding fathers."[82] This purported "preference for Europe," however, brought the Court into direct conflict with legislative and constitutional interests on the national level. Despite the claim that national institutions could clearly make to being the locus of democratic and constitutional legitimacy in the Community system, and despite the evidence that the original Member States never foresaw the expansive role that the Court would claim for itself,[83] the Court regarded the idea of supranational

81. The leading case in this regard is of course *Van Gend & Loos*, 1963 E.C.R. at 11–13 (holding the power conferred under Article 177 to rule on preliminary references on "the interpretation of this Treaty" included the power to review the conformity of Member State law with a treaty requirement, something akin to supranational "constitutional review"). For further analysis, see Lindseth, *supra* note 1, at 346–54.

82. G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 186 (1994).

83. See the position of the Netherlands, supported by Belgium and West

legitimacy mediated in any way through national institutions—with good reason, perhaps—as fundamentally incompatible with the instrumental needs of uniformity and effectiveness of Community law throughout the Member States. As a practical matter, therefore, the Court was perhaps the first to recognize that the demands of "instrumental supranationalism," as established by the treaties, were inherently in conflict with national constitutional orders. The extent of the conflict was certainly more than the political negotiators of the various Community treaties ever envisioned.

IV. THE 1980S AND AFTER: CONSTITUTIONAL SUPRANATIONALISM TRIUMPHANT?

The irony in the Court's constitutionalizing jurisprudence of the 1960s and after was that in many respects it was, as noted above, a logical extension of the instrumental commitment function that Member States asked the Court to undertake in the treaty. As Alan Milward has argued, in the drafting of the Treaty of Rome the intergovernmental negotiators recognized that the Community needed "a central system of law" to make European integration a functioning reality.[84] Indeed, despite his attachment to intergovernmentalism as an explanation of integration, Milward has gone so far as to call this central legal system "a constitution, in the form of treaties that call into being a new distinctive legal order to regulate the powers, rights and obligations residing in the integrationist framework and their relationship with the member states."[85]

Here, however, Milward is using the term "constitution" in precisely the formal sense noted at the outset of this essay, rather than in the normative sense of establishing a new political community over and above the Member States. Milward continues to view this "integrationist framework" in primarily inter-

Germany, in *Van Gend & Loos*, 1963 E.C.R. at 11, as well as that of Italy in *Costa*, 1964 E.C.R. 585. *See also* Lindseth, *supra* note 1, at 365 ("Given the fact that four of the six Member States had, in *Van Gend & Loos* and now in *Costa*, explicitly objected to the Court's interpretation of the scope of its authority under Article 177(a), it is highly doubtful that the Member States had 'accepted' anything approaching the sort of supranational constitutional system described by the Court, except perhaps in the most abstract sense.").

84. Milward & Sørensen, *supra* note 47, at 19.

85. *Id.*

governmentalist terms, which leads him to make an assertion that runs directly contrary to the jurisprudence of the Court since the early 1960s. An extended quotation is worthwhile:

> Assuming, as we have done, that nation-states, in order to advance important domestic policy objectives, choose to transfer sovereignty over certain policy areas to common institutions, then their principal national interest will be not only to define and limit that transfer of sovereignty very carefully but also meticulously to structure the central institutions so as to preserve a balance of power within the integrationist framework in favour of the nation-states themselves.
>
> . . . The Treaties of Paris and Rome [thus] state the powers of the institutions as well as the precise relationship between them. Important in this respect was the allotment of the task of policy-making to the Council of Ministers composed of members of national governments, which ensures that control over the future development of the Community remains with the member states. That such control was considered crucial can be seen from the reluctance to include a more detailed goal for the Community than the rather vague commitment to the 'ever closer union'. It can be seen too in the elimination of the word 'supranational' from provisional drafts of the Treaties of Rome. . . . The [member] states themselves, provided there is some concord in policy goals between them, can, as historical events have shown, create an effective, enforceable international law which remains securely under their joint control.[86]

Alan Milward failed to foresee, however, that it was precisely the *instrumentalist* provision for a "central system of law" which led the Court to view the Community as a novel kind of *constitutional* polity with an autonomous governing legitimacy of its own, one approaching—in fact superseding—that of the (implicitly subordinate) institutions of the Member States. For the national executives of the Member States, the Court's judicial "commitment function" was always a two-edged sword, at times reinforcing but at

86. *Id.*

other times undermining their "joint control." When the Court found that the Member State executives, via the Council, were acting consistently with the Court's teleological-constitutional understanding of the Community, the Court supported their efforts.[87] On the other hand, when the Court found that national executives were interpreting the treaty in an excessively intergovernmental fashion at the expense of the "Community interest" as the Court understood it, the Court cast a deeply skeptical eye.[88] More importantly, in its expansive interpretation of its powers under the old Article 177, the Court demonstrated a willingness to deviate from precisely the "meticulous structure" of limited, instrumental supranationalism that Milward argues the Member States sought to create.[89]

In short, in its supranational adjudicative capacity the Court worked hard—based on "the rather vague commitment to the 'ever closer union'," as Milward calls it—to counteract intergovernmental control and oversight in favor of a "constitutional supranationalism" that the Court itself discerned from the treaty. It is for this reason that Anne-Marie Slaughter and Walter Mattli have argued, at least in so far as the Court is concerned, that the process of integration is much better understood in neofunctionalist rather than intergovernmental terms.[90]

87. The best example would be the Council of Ministers' expansive use of Article 235 legislation in the 1970s. For a summary, see John A. Usher, *The Gradual Widening of European Community Policy on the Basis of Article 100 and 235 of the EEC Treaty*, *in* STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY 30 (Jürgen Schwarze & Henry G. Schermers eds., 1988); *see also* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2444–47 (1991); and Lindseth, *supra* note 1, at 311–13.

88. Perhaps the major exception was the Court's treatment of the so-called "comitology system." In a 1970 decision, the ECJ rejected a challenge to the comitology system which asserted that it not only interfered with the Commission's independent right of decision, but also that it was unforeseen by the treaty and therefore distorted the institutional relationship between the Commission and the Council. *See* Case 25/70, Einfuhr und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt, & Co., 1970 E.C.R. 1161. The Court found that a delegation of powers from the Council to the Commission under the treaty was entirely voluntary, and thus it was within the power of the Council to decide on the mechanisms whereby that delegated power would be exercised.

89. *See* sources cited *supra* note 23 and accompanying text.

90. *See* sources cited *supra* note 56 and accompanying text.

The issue for the 1980s and 1990s would be whether the Member States would succumb to the logic of constitutional supranationalism as defined by the Court since the 1960s. In one interpretation of events, the answer has been "yes": Constitutional supranationalism has been, seemingly, triumphant, at least since the political breakdown in the "veto culture" engendered by the Luxembourg Compromise of 1966.[91] After 1982, the unraveling of political support for the Luxembourg Compromise began to accelerate, culminating in the Member States' adoption of the Single European Act (SEA) in 1986.[92] The SEA vastly expanded qualified-majority voting in the Council of Ministers, most importantly in the politically delicate domain of the harmonization of technical non-tariff barriers to trade in completion of the internal market. The SEA, moreover, also broadened the legislative role of the European Parliament, which gained a suspensive veto in certain domains under the so-called "cooperation procedure" (later expanded under the Treaty on European Union of 1992 to include a genuine veto under the "co-decision procedure").

These procedural changes were all bound up with the ambitious legislative program outlined in the Commission's 1985 White Paper *Completing the Internal Market*,[93] with the purpose of achieving a genuinely single market, shorn of all non-tariff barriers to trade, by 1992. The 1992 Program was a monumental legislative undertaking, one which required not merely a more autonomous supranational legislative procedure but also fundamental changes in the Member States' substantive approach to the question of harmonization.[94] The

91. On the "veto culture," see Teasdale, *supra* note 17.

92. Single European Act, 1987 O.J. (L 169) 1 ("SEA") (signed at Luxembourg on Feb. 17, 1986; signed at the Hague on Feb. 28, 1986; entered into force on July 1, 1987). For a consolidated version of the EEC Treaty after the entry into force of the SEA, see Consolidated Version of the Treaty Establishing the European, Office for Official Publications of the European Communities, Treaties Establishing the European Communities 207 (1987).

93. *See* COMPLETING THE INTERNAL MARKET (White Paper from the Commission to the European Council, COM(85)310 final, 1985), *available at* http://europa.eu.int/comm/off/pdf/1985_0310_f_en.pdf (last visited Oct. 4, 2003).

94. Rather than force costly harmonization of technical standards, the Member States decided to follow the ECJ's lead by adopting a "new approach to technical harmonization" based on the mutual recognition principle of the *Cassis de Dijon* decision. Case 120/78, Rewe-Zentral AG v.

subsequent legislative push to achieve the single market by 1992 through "minimal harmonization" entailed an extensive sub-delegation of normative power to the Commission in order to fill in the regulatory details. This in turn led to the vast expansion of the "comitology system," or the committee system dominated by national technocrats, which oversaw the Commission's exercise of its delegated normative power.[95]

There are two ways to interpret the post-1986 changes. First, one may argue that, taken together, they constituted a major "constitutionalizing" step on the part of the Member States themselves, establishing a relatively autonomous legislative process at the supranational level that was in some way representative of a new political community that could not be understood in exclusively national terms. The Single European Act had removed the most serious obstacle to supranational legislation by instituting qualified-majority voting in the Council in most important matters (notably the achievement of the internal market) and perhaps even more significantly had also increased the involvement of a now popularly-elected Parliament through the introduction of the cooperation procedure. The Community thus seemed to be moving toward the establishment of a genuine parliamentary system at the supranational level, while also actively pursuing the goal of achieving the internal market by 1992, delegating extensive normative powers to the Commission to achieve this task.

Nevertheless, the better way of interpreting these changes, I believe, avoids the conceptual language of supranational constitutionalism and instead views them as reflective of changes in the nature of administrative governance both nationally and supranationally over the same period. Like the earlier development of European institutions, the move toward increased supranational technocratic autonomy in the Community in the middle 1980s and throughout the 1990s—particularly the increasing importance of the

Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [*Cassis de Dijon*]; *see also* Communication from the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), 1980 O.J. (C256) 2.

95. *See generally* EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos eds., 1999) [hereinafter EU COMMITTEES].

comitology system—merely extended upon developments also taking place in national administrative states. In France and Britain, for example, there was the increasing recourse to, or experimentation with, decentralized administrative control as the principal means of market regulation, through *autorités administratives indépendantes* and quasi-autonomous regulatory offices. In Germany, the complexity of modern administration began to overwhelm the old notion of a hierarchically-controlled "chancellor democracy," leading some commentators to speak instead merely of a "coordination democracy," in which the chancellor served only as a policy manager at the center of a highly pluralist institutional network.[96]

All of these national developments reflected the broader recognition that the Western European administrative state's old dependence on the executive's direct hierarchical political control over regulatory action was ill-adapted to the management of modern capitalism, which necessitated both greater decentralization as well as regulatory and institutional experimentation. With these moves toward greater administrative autonomy, however, the disconnect intensified between the prevailing notions of democracy (at least as reformulated in the postwar decades, with their dependence on the plebiscitarian leadership of the chief executive)[97] and the reality of ever-more diffuse and fragmented administrative governance in the 1980s and 1990s. In the postwar constitutional settlement, the executive's plebiscitarian leadership and hierarchical oversight (or at least responsibility) had given the modern administrative state the veneer of democratic legitimacy traditionally conceived. Now the evolving forms of administrative governance in the 1980s and 1990s could no longer be understood in strictly hierarchical terms, subject to executive oversight and control. The result, I suggest, was increasing popular anxiety during this period over technocratic autonomy, an anxiety which manifested itself especially at the supranational level. The specter of de Gaulle's worst nightmare—governance by truly "stateless technocrats" (*technocrates apatrides*)—made the democratic anxieties about the changing

96. *See generally* Stephan Padgett, *Introduction* to HEIDRUN ABROMEIT ET AL., ADENAUER TO KOHL: THE DEVELOPMENT OF THE GERMAN CHANCELLORSHIP 18–19 n.19 (Stephan Padgett, ed., 1994).

97. *See Paradox*, *supra* note 33, Part IV.

direction of administrative governance felt more acutely in the supranational realm; hence the constant refrain that the Community suffered from a "democratic deficit."

How did European public law respond to these concerns? In some sense, paradoxically, the first line of defense was through qualified-majority voting itself. The Member State executives were arguably willing to risk the relative degree of regulatory autonomy that qualified-majority voting entailed precisely because such voting in the Council restored some semblance of *intergovernmental* control to the harmonization of technical non-tariff barriers to trade, which to date had effectively been controlled by the ECJ in its free movement of goods jurisprudence.[98] Furthermore, qualified-majority voting also led to the insertion of other mechanisms—comitology, subsidiarity, the pillar structure, "flexibility"—that were aimed at reinforcing (with varying degrees of success) indirect national control over the substantive content of supranationally-created norms.

All these changes in European public law attempted to strike a similar balance: On the one hand, they attempted to maintain some measure of national control over the process of supranational norm-production, even if indirectly. (Indeed, one might fairly understand the expansion of the legislative-veto powers of the European Parliament as creating simply one more constraint on the Commission's autonomous normative power. The net effect is to favor the national regulatory status quo by making it more difficult to legislate at the Community level.)[99] On the other hand, these changes reflected the realization, born of experience under the old unanimity regime, that the construction of the single market requires

98. As a prominent European jurist and professor of law has put it, the post-1986 approach of minimal harmonization, when combined with qualified-majority voting, "was better than the alternative of letting the judicial process continue to make the necessary policy choices incrementally . . . . In other words, Member States were led to prefer political legislation, even at the risk of being pushed into the minority on a vote concluding Council deliberations among the Member States, to a kind of "creeping legislation" through the judicial process, to which they were completely external." Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93, 110–11.

99. Andrew Moravcsik & Kalypso Nicolaïdis, *Keynote Article: Federalist Ideals and Constitutional Realities in the Treaty of Amsterdam*, 36 J. COMMON MKT. STUD. 21 (1998).

some measure of rulemaking autonomy at the supranational level in order to overcome the inevitable collective-action problems that the Member States otherwise face.[100]

The resort to indirect mechanisms of control after 1986 arguably reflected, in other words, a desire to update the old forms of instrumental supranationalism and mediated legitimacy to meet new regulatory demands, rather than a willingness on the part of the Member States to bind themselves to the concept of autonomous constitutional supranationalism. This resort to a modified form of instrumental supranationalism and mediated legitimacy arguably contradicted the central claim of constitutional supranationalists: that the European Union had somehow become a federal system in which two levels of legitimate "constitutional government"—one national, one supranational—were now interacting. Rather, the insertion of these discretion-constraining features into EU law suggests that the Member States still very much saw themselves as the constitutional principals in the Union's political and legal system, and therefore also as the source of its legitimacy. From this perspective, the supranational institutions of the Union continue to act as rulemaking agents of the Member States, with an admittedly wide latitude in the regulatory domains delegated to them (like an independent, administrative "fourth branch of government"),[101] but without any autonomous constitutional legitimacy of their own.

V. CONCLUSION: TOWARD A "TRANSNATIONAL" CONSTITUTIONAL SETTLEMENT FOR EUROPEAN INTEGRATION?

It is too early to tell whether the proposed constitutional treaty will overcome the historical contradiction between the administrative and constitutional dimensions of integration that has marked

100. For a political expression of this aim, consider this passage from François Mitterrand's speech before the European Parliament in 1984:

> How can the complex and diversified entity which the Community has become be governed by rules like those of the old Diet of the Kingdom of Poland, where every member could block decisions? It is time we returned to a more normal and promising way of doing things. . . . The more frequent practice of voting on important questions heralds a return to the Treaties.

Teasdale, *supra* note 17, at 572–73 (quoting European Parliament, 1984 O.J. (Annex 1-314) 261 (May 24, 1984) (Debates of European Parliament)).

101. Majone, *The European Community*, *supra* note 6, at 23.

European supranationalism since its inception. As of this writing,[102] the Intergovernmental Conference (IGC) established to consider the work of the Convention has yet to meet, and it would not be surprising if the IGC introduced significant changes into the proposed treaty before submitting it for national ratification. There is strong evidence, for example, that there remains a good deal of instrumentalist "politics of bureaucratic structure"[103] to play itself out, with demands over the substance of European integration being intimately linked to negotiations over decision-making procedures and the distribution of powers.[104]

Even without any changes, however, my sense is that the proposed treaty would do little to alter the position of national institutions as, effectively, the constitutional "principals" in the European system (rather than some hypothetical European "people," or "demos").[105] It is thus questionable whether the treaty would create a genuinely autonomous constitutional legitimacy at the supranational level, as representative of a new political community beyond the nation-states which comprise it, thus freeing Union institutions from forms of nationally-mediated legitimation. As a regulatory mechanism, despite the high hopes of European federalists going back a half-century, supranational institutions have never really enjoyed anything more than a kind of "technocratic" legitimacy rooted in their capacity to generate sound policy outcomes, supplemented by a (judicially-enforced) "legal" legitimacy derived from their operation within the lawful bounds of

102. September 2003.

103. *See* Moe, *supra* note 48, and accompanying text.

104. In the face of critiques that smaller Member States and candidate countries have leveled against the proposed treaty (*see supra* note 20), larger Member States have warned that any effort to rewrite the constitutional treaty would inevitably have an impact on budget negotiations for the following year. *See* Judy Dempsey, *Germany Warns on EU Constitution*, FINANCIAL TIMES (Sept. 8, 2003), *at* http://www.FT.com (last visited Oct. 2, 2003).

105. Of course, there is much in the current treaty that is undeniably constitutionalist—for example, the incorporation of the Charter of Fundamental Rights into the positive treaty law of the Union. The presence of the Charter can only serve to reinforce the ECJ's rights-based jurisprudence that has provided the foundation of the constitutionalization of European integration for forty years, even as the administrative character of European institutions has persisted.

their delegated power.[106] The institutions of the Member States, on the other hand, have remained the locus of democratic and constitutional legitimacy in Europe, even as significant normative power has been transferred to the supranational level, leaving supranational institutions with a correspondingly "weak" legitimacy by comparison.[107]

The new constitutional treaty does not appear to alter this reality significantly, or at least it is unlikely to do so by fiat. With or without the constitutional treaty, the process of European integration will likely continue to muddle along, "a novelty in want of a convincing label,"[108] one involving extensive delegation of normative power to the supranational level but with constitutional legitimacy remaining largely national. Is this the makings of a proto-"federal" polity? Or is it simply a supranational manifestation of administrative governance (that is, the diffusion of power to administrative institutions without any autonomous constitutional legitimacy of their own)? Although European integration has clearly involved contradictory elements of both constitutionalization and administrative governance, my sense is that the socio-legal character of the EU tips in favor of the latter, and any durable constitutional settlement will need to take this reality into account.

It is for this reason that the idea of the Union as a system of "transnational governance"—a view that has gained increasing adherents in recent years[109]—provides a promising conceptual terrain on which to develop a sophisticated understanding of the relationship between national constitutional orders and supranational regulatory processes. The transnational interpretation emphasizes the extensive normative power and relative autonomy of the supranational regulatory system but also recognizes, as one commentator has written, that "democracy is fundamentally a demos-bound concept

106. *Cf.* Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Gordón eds., 1999).

107. *See generally "Weak" Constitutionalism?*, *supra* note 4.

108. Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 229 (1997).

109. See, for example, the various contributions in EU COMMITTEES, *supra* note 95.

(which cannot be easily translated to the European Community)."[110] From this perspective, the European Union should be understood as a complex system of institutional actors at multiple levels (national, subnational, and supranational), as well as of various types (public, quasi-public, and private), each of which takes part in the production of regulatory norms in the single market. At the core of this institutional "network," a sociological concept central to the transnationalist perspective, is an interlocking system of national administrative authorities that use supranational channels (the comitology system, most notably) to develop new forms of rulemaking and/or enforcement cooperation in Europe.[111]

The detailed proposals that advocates of the transnational perspective advance to legitimize the normative output of these transnational networks—transparency, participation, reasoned decision-making, a measure of parliamentary monitoring (national and European), as well as more traditional ministerial oversight—often read like they are drawn from a treatise in modern administrative law. And why not? Their object is a rulemaking process that is, at its core, essentially administrative—even if highly political. By this I mean that it involves the exercise of delegated normative power within largely technocratic institutions that do not enjoy constitutional legitimacy of their own, corresponding to their own demos-based political community.[112] Such a community may emerge in Europe over time—indeed, the creation of European institutions may slowly help to bring that community into being[113]—but until that time, constitutional legitimacy will remain largely national, leaving the diffuse and fragmented character of Europe's supranational regulatory system as primarily administrative.

110. Jürgen Neyer, *The Comitology Challenge to Analytical Integration Theory*, *in* EU COMMITTEES, *supra* note 95, at 231.

111. *Id.*

112. For further discussion, see *"Weak" Constitutionalism?*, *supra* note 4.

113. More likely, what will call it into being will be widespread opposition to some perceived external threat. It is for this reason that George Bush may have, ironically, done more to advance the emergence of a common European "demos" than any living European in recent memory. The widespread public opposition to the Bush administration's policy in Iraq (even in those countries, like Italy, Spain, and Poland, whose leaders supported the President) may well signify the beginnings of a coherent European "public" transcending national borders, linguistic differences, and national histories, which is defined, in important respects, in opposition to American power in a unipolar world.