Creating European Rights: National Values and Supranational Interests

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INTRODUCTION

Contemporary democracies are undergoing a radical transformation: public authority is migrating from the national realm to the global arena. The institutions through which we seek to protect ourselves from physical violence, promote economic prosperity, keep the environment clean, and further the other attributes of the good life are now as much global as national. Domestic legislatures, executive branches, courts, and administrative agencies do not decide alone. They are constrained by the decisions of international bureaucrats, they abide by the rules adopted by transnational networks of regulators, and they comply with the decisions of international tribunals. By establishing, participating in, and adhering to global regimes, domestic polities today share power with government officials and citizens elsewhere in the world and with international organizations to an extent that is unprecedented in recent memory.

What shape will global authority take? What configuration of public power and rights against government will emerge? This Article takes a first step towards developing a positive theory of rights in institutions of global governance through a study of the European Commission, one of the oldest and most powerful international organizations in existence today. Rights, it turns out, are creatures of historical challenges to international organizations, based on national constitutional traditions, and the calculated, rights-innovative responses of those organizations.

The Commission began in 1952 as a specialized international secretariat responsible for the administration of European coal and steel production in six member countries. In 1957, the...
same countries signed the Treaty of Rome, in which they made ambitious commitments to a
common market in goods, services, capital, and labor. The state parties entrusted the
Commission with the far-reaching powers of a classic executive branch. Yet the Commission
was conceived as an organization responsible for administering an international regime, in which
the participants were states, not citizens. Hence individual rights were largely absent from the
Treaty of Rome.

The transformation, a half century later, is remarkable. The Commission must engage in
a full, adversarial hearing when enforcing European law against individuals and firms. It
maintains a public, electronic register of all legislative and administrative documents and makes
those documents accessible to European citizens. Before the Commission submits a legislative
proposal to the Council and the Parliament for a decision, it must invite public comment on an
early draft and incorporate the comments in the final proposal. In sum, European citizens are
guaranteed a host of procedural rights common to national systems of democratic government:
the right to a hearing, the right to transparency, and the right to civil society participation.

Administration through adversarial hearings, extensive disclosure of government
documents, and consultations open to all groups and citizens is common, but not universal.
Another, equally liberal democratic outcome could have been imagined just as easily. Rather
than require a full adversarial hearing before the Commission, the Court of Justice might have
used its extensive fact-finding powers to scrutinize the facts, law, and policy choices
underpinning the Commission decision. (The Court of Justice is the highest court of the
European Union and has jurisdiction over European legislative and administrative acts.) There
might have been no right to official documents. And public comment on draft legislation might
have been staged at the very end of the legislative process, when the Commission proposal was
under consideration in the European Parliament. The alternative, imagined Commission would
have been a very different government body, yet it still would have met comfortably the
standards of today's set of liberal democracies.

Why do Europeans today enjoy this particular constellation of rights when the
Commission exercises authority? How do we explain the legal rules that constrain and shape the
Commission's powers? In this Article, I argue that in the early days of the European
Community, rights before the Commission were patterned on the laws and legal traditions of the
protocol to the Constitutional Treaty modifies, but does not replace, the Treaty of Rome Establishing the European
Atomic Energy Community.

Aside from the treaties, there are three important types of legal acts in the European Union (“EU”): European laws
(which include what are known as Directives and Regulations), European implementing regulations (which include
what are known as implementing Directives and implementing Regulations), and European decisions. See
Constitutional Treaty, arts. I-32, I-36. There are six important government bodies: the European Council, which is
composed of Heads of States and meets every six months to agree on treaty amendments and other types of major
political change; the Council of Ministers (“Council”), on which government representatives of the Member States
sit and vote; the European Commission (“Commission”), staffed by civil servants and headed by a President and
College of Commissioners appointed by the Member States with the consent of the European Parliament; the
European Parliament, directly elected since 1979 through national elections; the Court of Justice, the highest court
of the EU; and the Court of First Instance, established in 1988 to hear cases brought by individuals against European
institutions, with a right of appeal to the Court of Justice. The European legislative and administrative processes can
be described, in very general terms, as follows. Before 1993, European laws were passed by the Council on a
proposal from the Commission. Since 1993, European laws are passed by the European Parliament and Council
acting on a proposal from the Commission. Implementing regulations and decisions are issued by the Commission.

See infra text accompanying note (discussing French droit administratif and German traditions).

See infra text accompanying note (reviewing access to information legislation in Italy, the UK, and Germany).

See infra text accompanying note (reviewing the legislative and rulemaking processes in all Member States).
dominant Member States. Changing political circumstances largely outside the control of the Commission and other European institutions gave rise to a number of discrete, historical challenges to their authority. Most of these challenges came from citizens with allegiances to minority, national constitutional symbols and practices who were determined to retain them in the face of European integration. To preserve and extend their authority, European institutions adopted these constitutional ideals and hence altered the nature of European rights.

The evidence for this explanation comes from the historical record. Part II demonstrates that European citizens enjoy three major, historically distinct, sets of rights in their relations with Europe's executive branch: the right to a hearing, the right to transparency, and the right to civil society participation. The basic parameters of Commission procedure were set down in the founding Treaty of Rome and a number of legislative instruments adopted in the 1960s. Then, in 1973, the United Kingdom acceded. The common law system of administrative law contained a number of anomalies compared to the continental systems that were already part of the European Community. In 1973, the risk was that English courts would not enforce Commission decisions that failed to abide by the common law's guarantees of fair and lawful public power. I show that the Court of Justice and the Commission responded by adopting the common law right to a hearing in European competition proceedings, a right which then migrated to other areas in which particularized Commission decisions adversely affect the interests of firms or individuals.

The second historical moment was the Danish rejection of the Maastricht Treaty in 1992. I demonstrate that, to guarantee Danish ratification of the Maastricht Treaty the second time around, the twelve Heads of State made a series of commitments to transparency, patterned on the Danish, and more generally, northern model of open government. The European Parliament then combined its long-standing institutional interest in more information on Commission policymaking--critical for the exercise of the Parliament's legislative powers--with the northern transparency ideal to push for extensive access-to-documents legislation. The third and final historical juncture was the resignation of the Santer Commission in 1999, after vitriolic criticism from a European Parliament intent on asserting its new treaty power to hold the executive to account. I show that the new Commission's response was to adopt legal measures guaranteeing that civil society--citizens and organized interests--would be consulted in the lawmaking process, hence improving its democratic credentials in the eyes of the European public and creating allies among the civil society groups that were to be consulted. This innovation was patterned on both the trend towards civil society participation in other international organizations and the European tradition of corporatist interest representation.

This Article contributes to a number of different strands in the literature on European integration. Legal scholarship often depicts European rights as a conscious attempt by legislators, judges, and scholars to bring the realities of the new European polity in line with universal norms of fair and democratic government. By exposing national constitutional variation and the politics through which particular constitutional ideals are adopted over others, this Article serves as a corrective to the legal perspective. An empirically grounded understanding of European rights can contribute to a more rigorous evaluation of the desirability of the emerging European constitutional order.

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7 The European Union was formed initially of six Member States (France, Germany, Italy, Belgium, the Netherlands, and Luxembourg). The UK, Ireland, and Denmark acceded in 1973, followed by Greece in 1981, Spain and Portugal in 1986, Sweden, Finland, and Austria in 1995, and the Czech Republic, Slovakia, Hungary, Poland, Estonia, Latvia, Lithuania, Slovenia, Cyprus, and Malta in 2004. It now has 25 Member States.

8 In the interest of historical accuracy, I use "European Community" when specifically referring to the period before the Maastricht Treaty of 1992. Otherwise I use "European Union" or "EU."
In political science, one of the longest-running debates over European integration is the balance between sovereign states and supranational institutions in setting the pace of European integration.\(^9\) While some scholars argue that traditional state interests and the balance of power among states are critical, others take supranational institutions--and their interest in expanding their powers and pushing forward integration--as the decisive force behind integration. My review of the origins of rights before the Commission shows that both sets of actors, at different points in time, were agents of rights. More importantly, the empirical analysis brings to light two important constraints on the ability of states and supranational institutions to design European rights to their advantage, often overlooked in the political science literature. The first is history writ large: understandings of fair and democratic government developed within the nation-state and representing the accumulation of experiences, beliefs, and norms over generations. The second is history writ small: episodic, external challenges to the authority of European institutions that serve as the context in which such institutions further their interests. These factors should be taken into account in explaining the rights that define what it is to be a European citizen today.

The European experience can also inform the literature on international relations and international law. Theories of international systems have sought to answer two related questions: Why do states create international institutions and, once created, do international institutions behave autonomously and hence act as an independent causal force in international politics? The field is divided between the realist and liberal institutionalist camps. Realists take the view that international organizations are established to facilitate relations among states by handling minor tasks; international organizations do not have the power to shift outcomes away from the bargains that the states would reach in their absence.\(^{10}\) Liberal institutionalists attribute far more significance to international organizations. They argue that international organizations are conferred considerable powers by states and that such organizations can shape international relations, independent of their founding states.\(^{11}\) Yet both schools treat the international organization itself as a black box. Courts and administrations in international regimes are presumed to operate according to certain functional imperatives that are common to courts and bureaucracies everywhere, regardless of whether they are national or international. The European experience can serve as a springboard for thinking about why international courts and bureaucracies take the form they do, guaranteeing individuals certain rights and not others.

Understanding European rights is crucial for the American legal profession for a number of reasons. First, as this Article amply demonstrates, rights before Europe’s executive branch are very different from the rights guaranteed under American administrative law. Yet this point is

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\(^9\) There are two major types of European institutions, intergovernmental ones through which sovereign Member States influence policymaking, and supranational ones. The European Council and Council of Ministers are intergovernmental institutions on which representatives of national governments sit and which operate similarly to international bodies like the UN Security Council and the WTO Conference of the Parties. The Commission, Parliament, and European Courts are supranational institutions. They are considered supranational because decisions are made by public officials with five or six-year tenures of office who, under the treaties, are to serve not their national governments but the collective, European mission enshrined in the Treaties. They bear similarities to institutions like international tribunals and international secretariats. This characterization is useful heuristically but the reader should beware that it vastly simplifies the degrees of intergovernmentalism and supranationalism in the European system of government. The classic scholarship defines only the European Council and other meetings of European Heads of State as intergovernmental because they are the only institutions that decide, always, by a unanimity rule and that decide matters not governed by the Treaties.

\(^{10}\) See Joseph Grieco, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 International Organization 485 (1988).

Creating European Rights

missed by American scholars and lawyers alike, to the detriment of their students and clients. The similarities that Americans tend to discern between European and American administrative procedure have the quality of bad puns rather than true resemblances. Only a sustained examination of the roots and evolution of European rights can do away with the misinformation caused by those bad puns and uncover the real nature of European rights. Second, the dynamic of competing national rights traditions and strategic institutional interest that informs European rights is one that we can expect to animate a variety of international bureaucracies and tribunals. Therefore, the European experience contains useful lessons for Americans as they navigate today’s emerging system of global governance.

The argument is organized as follows. Part I presents three major sets of explanatory theories with implications for European rights—legal constitutionalism, realism, and neo-functionalism. Part II, which constitutes the bulk of the Article, presents my argument through a detailed examination of the historical record. For each major set of rights, this consists of an examination of procedural rights before and after the historical event; a description of the event and the nature of the challenge it posed to European authority; specific evidence of the salience of national rights traditions following the event and the strategic use of the right by certain European institutions to consolidate their powers; an analysis of the evolution of the right after the historical moment; and a comparison of the new, invariably more expansive, European right with the right in the place of origin. Because understandings of good government developed within the nation-state were critical, the account of rights before the turning point includes a review of the constitutions and administrative procedure laws of the Member States. Part III returns to the theories of European constitutional design, explores how their predictions fare when faced with the historical record, and proposes revisions and new hypotheses based on my analysis of the evidence. In the Conclusion, I take stock of rights before the Commission and speculate as to why, once certain rights are adopted by European institutions, they tend to become more extensive than in their place of origin.

I. EXPLAINING RIGHTS

Theories that seek to develop positive explanations for rights have focused generally on national constitutions as opposed to international regimes.¹² Until recently, citizenship was conceived exclusively as a matter of belonging to historical, territorially defined communities and hence the duties and entitlements of citizenship were developed within the framework of the political institutions that governed those communities. Beyond the confines of the nation-state were international organizations, but they were believed to order relations among sovereign states, not individuals. Hence their operations did not give rise to duties and rights inhering in individuals, nor could those same individuals make direct claims on international organizations for protection and other collective goods.¹³ A thorough exploration of national constitutionalism

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¹² By rights, I mean both classic liberal rights such as those contained in the American Bill of Rights and rights to participate in democratic decisionmaking through, for instance, the right to vote and have one's representatives influence public affairs. By constitution, I mean all the rules that serve to constitute and define public authority in a political community. These can be set down in a written founding document called a "constitution" but also in parliamentary laws, court judgments, and administrative rules and practices. See, e.g., Mark Tushnet, The New Constitutional Order 1 (2003) (defining "constitutional order" as a "reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions").

is beyond the scope of this Article, but an overview of the principal schools of thought is worthwhile because their insights have animated the nascent debates on individual rights in the European Union.

A. Theories of National Constitutional Design

In the contemporary American legal academy, two types of theories prevail in explaining the emergence and evolution of constitutional orders--one that treats rights as value choices by voters, legislators, public officials, and judges--and the other that treats them as the product of strategic behavior designed to maximize the individual preferences of those same individuals, who are generally assumed to be self-interested. I label the first "legal constitutionalism," to reflect the privileged place that such theories enjoy in the legal academy, and the second "rational choice constitutionalism," to signal the borrowing of the approach from the rational choice study of politics. Both make distinctive assumptions about two central elements of any explanation for the emergence and survival of constitutional rules: human preferences and the way in which individuals collectively create and change the rules.

1. Legal constitutionalism

Legal constitutionalists assume that individuals have preferences for constitutions, rules, and other modes of ordering collective life that do not turn on a calculation of how to maximize self-interest--what I call values. When individuals come together to design or reform government, they give expression to their commonly held values or, if their values turn out to be different, some persuade others that their position is the better one. Constitutional rules are designed to promote the moral choices of members of the political community. The rules of government, in turn, guide human action because they are internalized by individuals; in other words, they become norms of behavior. Thus, a legal constitutionalist explains constitutions, parliamentary laws that set down basic government procedures and rights, and judgments of constitutional courts as a function of the substantive value choices made by national leaders at a constitutional convention, representatives in a legislative assembly, or judges on a deciding court. Citizens act in accordance with the constitution, law, or judgment because they are automatically recognized as legally and morally correct and hence deserving of obedience.

For instance, in American constitutional law, the decision of the Constitutional Convention to divide legislative power between the Senate, the House of Representatives, and the President is explained as a function of Madison's desire to avoid the rise of factions. The institutional design that Americans live with today ensures balance--or, put differently, stalemate--over action because Madison preferred the "enlarged and permanent" interest that

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14 In the political science literature that seeks to explain the rise of institutions and their effects, such preferences are sometimes identified as "ideologies" or "norms." See, e.g., Paul Pierson, Politics in Time: History, Institutions, and Social Analysis 39 (2004); Kathleen Thelen, Historical Institutionalism in Comparative Politics, 1999 Annu. Rev. Pol. Sci. 369, 375n.4; Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 Int'l Org. 887, 891 (1998). The term "value" is more appropriate for present purposes because it avoids the suggestion that this form of motivation is necessarily collective; preferences other than self-interested ones can be held by individuals, groups, or broader communities.

15 Most legal and rational choice constitutionalists avoid considering the influence of differential endowments of resources on the choice of rules. Power, however, informs other strands of scholarship in both the law and political science.

would emerge over time to the "irregular passion" of majority action.\(^{17}\) Likewise, the right to property and contract contained in the Fifth and Fourteenth Amendments is explained as an endorsement by the Founders of Locke's view of limited government.\(^{18}\) To move to a more recent statement of rights, the Administrative Procedure Act (APA), passed in 1946 to structure the relations between federal administration and citizens, was taken by James Landis as a codification of what was fair and just.\(^{19}\) George Shepherd and Martin Shapiro independently explain the APA as a compromise between what Republicans in Congress thought was good government—an administration limited by the common law's protection of property rights—and what Democrats believed was good government—an administration free to alter the status quo and to use its expertise to create prosperity for all citizens.\(^{20}\)

2. Rational choice constitutionalism

Rational choice constitutionalism dates to the early 1980s and is informed by the methods of economics and political science.\(^{21}\) The behavioral assumptions of rational choice scholars depart significantly from the ones employed by legal scholars. Those assumptions are: purposive action, consistent preferences, and utility maximization. Purposive action posits that most social outcomes can be explained by goal-oriented action on the part of the actors in the theory, as opposed to being motivated by habit, tradition, or social appropriateness. Consistent preferences refers to preferences that are ranked, are transitive, and do not depend on the presence or absence of essentially independent alternatives. Utility maximization posits that actors will select the behavior that provides them with the most subjective expected utility from a set of possible behaviors.\(^{22}\)

At first glance, these assumptions might seem consistent with legal constitutionalism. Because rational choice theory does not impute any particular set of preferences, it can accommodate the values that drive individuals to establish constitutional rules and, once such rules are established, the norms that induce individuals to adhere to them. Or can it? Part of the attraction of the rational choice approach is the ability to derive hypotheses about social and political outcomes with a small number of assumptions and a limited knowledge of the particular environment faced by purposive actors. If rational choice analyses did allow any type of preference to be attributed, they would lose their explanatory power. As one advocate of the approach explains:

The theoretical bite of rational choice arguments depends both on the plausibility of the goals attributed to actors and on the ability of analysts to identify the goals a priori, that is, without reference to the specific behavior to be explained. . . . Because the approach sets no limits on what the goals may be, it is possible to construct rational choice explanations for apparently irrational (in the everyday sense of the word) behavior by claiming that actors were rationally pursuing their

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17 See generally Hanna Fenichel Pitkin, The Concept of Representation 195-96 (1972) (discussing Madison's political philosophy).
19 See James M. Landis, Administrative Process—The Third Decade, 13 Admin. L. Rev. 17 (1960-61).
Creating European Rights

own (peculiar) goals. . . . But when goals are directly inferred from observed behavior, rational choice arguments slide from "creative tautology" . . . into mere tautology.23

Thus rational choice theories of constitution-building generally assume self-interested preferences for physical safety, material wealth, and political power. When citizens collectively decide how to govern their joint affairs, they do so by adopting rules that maximize their individual preferences in a Pareto-efficient manner. Once the rules are adopted, they are obeyed because they promote those same selfish preferences. In this school of thought, constitutions and rights are explained as the self-interested decisions of citizens and legislators rather than as the expression of the type of public life they believe to be morally right.

Some of the most influential work by rational choice scholars makes the case that constitutions can be explained as solutions to collective action dilemmas. Jon Elster argues that today’s legislators establish rights and independent courts to enforce rights to protect themselves against the arbitrary actions of tomorrow’s legislators.24 Those with political power today tie their hands through constitutional rules such as majority voting and the right to a fair trial only because they fear that, tomorrow, their opponents will hold the reins of government. Likewise, political scientist Adam Przeworski argues that constitutions are obeyed only when all politicians have a material interest in doing so.25 According to Przeworski, the most basic rule of any democracy, the rule that the individual or party that wins the majority of votes takes political office and allows the losers to keep their property, is viable only when property is distributed so widely that the losers have an incentive to respect the rule. Election losers without property have nothing to fear from staging a rebellion and attempting to establish a dictatorship. Election losers with property have a lot to fear because they know that if they fail, the winners might decide to ignore the rule themselves and establish a dictatorship in which they expropriate all property. Majority rule and property rights, therefore, are obeyed only when election losers have a material interest in doing so.

To turn to the rational choice approach to public administration, Mathew McCubbins, Roger Noll and Barry Weingast (McNollgast) argue that legislators enact procedural rights in order to protect the deal that is struck among competing interests in the legislature when it is sent to administration to be implemented.26 With administration, the analytical tool is the principal-agent relationship. Unless the principal (legislator) has control instruments, the agent (the administration) will do its own bidding. According to McNollgast, administrative procedures and individual rights prevent policy drift when government agencies are charged with implementing statutes. First, procedure empowers organized interests and hence ensures that the interests that lobbied successfully in the legislature can protect their gains in the administration. Additionally, formal procedure facilitates oversight by legislators.27 It bears mentioning that, given the behavioral premises of rational choice theory, the policy choices contained in the

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24 See Jon Elster, Introduction, in Constitutionalism and Democracy 1, 8 (Jon Elster & Rune Slagstad eds., 1988).
25 See Adam Przeworski, Why Do Political Parties Obey Results of Elections, in Democracy and the Rule of Law 114, 131 (Jose Maria Maravall & Adam Przeworski eds., 2003); see also Weingast, Rational-Choice Institutionalism, supra note __ at 679-80 (arguing that constitutional rules must be "self-enforcing in the sense that all actors have incentives to adhere to the rules" if democracy is to be consolidated).
original enabling act being implemented by the administration are themselves the product of the self-interest of voters, organized interests, and legislators.28

An example will serve to synthesize the differences between legal and rational choice approaches. Take a constitutional rule prohibiting torture. For a legal constitutionalist, the rule exists because citizens do not want themselves--or their neighbors--to be subjected to arbitrary physical violence, because they all agree that freedom from arbitrary physical violence is the only moral way of organizing their joint affairs, and because the rule against torture is so deeply engrained that they adhere to it without further reflection. A rational choice constitutionalist would explain the same rule based on an individual preference for personal safety, a historical community in which resources are so widely distributed that individuals can guarantee their own personal safety only by agreeing with other individuals to a rule against torture applicable to all, and the persistence of historical conditions under which individuals suffer threats to their own physical well-being if they harm others. The legal scholar would criticize the rational choice scholar for the simplistic understanding of human motivation and the failure to account for norm-driven behavior, in which strategy plays no role. The rational choice scholar would reply that the legal scholar ignores the historical record, which is full of examples in which rules that would appear to be morally superior, such as a rule against torture, fail to materialize or are routinely flouted. The relationship between individual values, collective outcomes, and rule-abiding behavior is natural for the legal constitutionalist, problematic for the rational choice constitutionalist.

B. Theories of European Constitutional Design

As in the domestic context, students of European governance have developed radically different accounts of rights depending on their disciplinary origins. Each generates predictions for three aspects of rights against the European Commission: the type of rights, the European institution responsible for promoting rights, and the timing of the emergence of rights.29 Part III returns to these theories of rights to explore how their predictions fare when put to the test of the historical record presented in Part II.

1. Legal constitutionalism

European legal scholars are principally concerned with describing and normatively assessing the state of individual rights based on higher principles which are themselves derived from constitutional law or universal theories of justice. Sometimes, however, European legal constitutionalists examine the origins of individual rights and, when they do so, they work with the same assumptions about human motivation and the interaction of individuals in collective life as do their domestic counterparts. The citizens, legislators, and judges who decide rights and obey them are motivated by the values and higher principles that serve as the basis for the normative evaluation.30 The focus of legal scholars is generally the Court of Justice's jurisprudence, but that focus logically can, and does, extend to Europe's legislators, especially when engaged in acts of high constitutional politics such as drafting the European Charter of Fundamental Rights or the Constitutional Treaty.

30 See, e.g., The EU and Human Rights (Philip Alston ed. with Mara Bustelo & James Heenan, 1999).
Among European legal constitutionalists who focus on rights before the Commission, the work of Hanns Peter Nehl is exemplary, both for its breadth and its incisive analysis. Nehl concentrates on the jurisprudence of the Court. He argues that the Court was driven by concerns for fairness, rationality, and administrative efficiency in developing the principles that, today, guide Commission decisionmaking. Nehl is influenced by the neo-functionalist approach, explored in detail below, in which rights serve the institutional interest of the Court in expanding its powers. Ultimately, however, he is wed to the normative understanding of the Court's past and future case law. In Nehl's account, the Court was motivated by the imperative of protecting the dignity of European citizens against the arbitrary exercise of government powers, promoting administrative rationality, and preserving a workable administrative process. The Court will continue to grapple with this set of concerns in deciding future cases. Nehl's legal constitutionalist approach is manifest in the following passage from the concluding chapter of his book:

[I]t is useful to refer once again to the basic rationales determining the existence of process standards. The Community Courts have forcefully stressed the dignitary purpose of those rules and thereby considerably improved individual protection in administrative procedures. Surely, also from the perspective of the instrumental rationale, the high degree of procedural protection and participation is paralleled by an increased standard of rationality, accuracy, as well as transparency of the decisionmaking process. . . . Both the dignitary rationale and the instrumental rationale of process rules as essential components of this notion are to be combined in a reasonable manner. The task of the Community Courts is delicate in this regard. They bear the responsibility for maintaining the workability of the administration and the institutional balance provided for in the Treaty.

Given the normative objective of analyses such as Nehl's, it is difficult to derive robust, forward-looking predictions for the nature of rights. Commission procedure has guaranteed and will continue to guarantee the basic values of dignity, rationality, and workability. Should Commission procedure fall short of these guiding principles, it must be corrected. The question of what type of procedures and rights comport with dignity, rationality, and workability is addressed on a case-by-case basis, when and if litigants claim that the Commission's procedure is deficient. A legal constitutionalist analysis, however, does generate predictions as to which institutions will press for rights in the administrative process: judges sitting on courts. In Nehl's account, the Court of Justice is the institution that seeks to protect fairness, while the Commission, as a typical bureaucracy, is mainly interested in efficiently and expeditiously exercising its powers. Finally, according to a legal constitutionalist, the timing of rights should follow, or slightly lag behind, the attribution of powers to the Commission. As the Commission acquires and exercises enforcement and rulemaking powers, litigants should go to the Court of Justice demanding fair treatment, and the Court should require the Commission to respect procedural rights to the extent warranted by dignity, rationality, and efficiency.

2. Realism and neo-functionalism

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32 Id. at 167-68.
Creating European Rights

In political science, two theoretical approaches offer promise for explaining the constitutional rules that shape European institutions: realism and neo-functionalism. Both proceed from the same assumptions as domestic rational choice constitutionalists: preferences are self-interested and political actors behave strategically to maximize their preferences when designing institutions and rules. However, they differ in their appreciation of which political actors have been responsible for moving forward European integration and in their understanding of the nature and power of supranational institutions.

A realist or "power politics" approach takes sovereign states, intent on protecting themselves from other states in the anarchic international system, as the drivers of international cooperation. In classic realism, state interests are primarily geopolitical and security-related but a more nuanced version can also incorporate preferences for economic well-being and national prosperity. The balance of power among sovereign states determines their relations, including the treaties and other legal instruments they sign. Realists anticipate that the institutions that emerge in the international realm will have minimal powers or will simply reflect, in their decisionmaking activities, the balance of power among states. In either case, institutions will not matter for developments in international relations because their decisions will not depart from the bargains that sovereign states would reach in their absence.

The existence of powerful, supranational institutions like the European Commission and the European Court of Justice creates a puzzle for the realist perspective, a puzzle which has fueled the alternative neo-functionalist approach considered below. But setting aside this initial

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33 A third type of explanation, which I do not consider in this Article, is one that draws on the rational choice study of American administration. As explained earlier, some scholars argue that procedure is an institutional device through which legislators control bureaucrats. Mark Pollack has advanced such a principal-agent explanation of European administrative procedure, but with a focus on the rights and procedures that are available to Member States, not individuals. See Mark A. Pollack, The Engines of European Integration (2003). To predict rights using this approach it is necessary to know whether legislators perceive their preferences as diverging currently, or in the future, from those of administrators. See, e.g., Rui J.P. de Figueiredo, Jr. & Richard G. Vanden Bergh, The Political Economy of State Level Administrative Procedure Acts (Jan. 21, 2005) (paper on file with author). Rational choice theory predicts administrative procedure only if this condition is present. To gauge whether Member States (the main legislators in the Community system) believed that their preferences diverged, or would diverge, from those of the Commission, three elements of the historical context are relevant: the political affiliations of national governments as compared to those of Commissioners; the views of national governments on specific policy areas in which power was delegated to the Commission and procedural rights were--or were not--established; and national attitudes on federalism and supranationalism. Difference between a national governing party and the party affiliations of Commissioners, hostility of a national executive towards a particular Community policy area, or anti-federalist national attitudes should be associated with Member State support for administrative procedure before the Commission. I do not have the fine-grained data necessary to generate and confirm or reject a set of rational choice hypotheses and therefore I do not consider further this line of inquiry. However, it is worthwhile pointing out that the historical background of the earliest form of procedural rights--rights in competition proceedings--does not appear to bear out the principal-agent hypothesis. In the 1950s and 1960s, France was nationalist--not federalist--and resisted competition policy (adopted at the insistence of the Germans), and therefore France should have promoted a comprehensive set of rights before the Commission. Yet such rights had to wait for accession of the UK, no more hostile towards competition policy and no more nationalist than France. Moreover, the rational choice understanding of rights as instruments designed to advance certain self-interested preferences of legislators, rather than intrinsically valuable, is difficult to square with the empirical reality of the European Community. Why would a Member State with an entire state administration available to monitor and control the Commission empower citizens, through rights, to engage in such monitoring and control? At least certain citizens and lobbies will have interests opposed to those of the Member State and therefore will likely be the source of policy drift, not control.

hurdle, what type of Commission, with which individual rights, would we expect to emerge from power politics? One interest sometimes attributed to states is the protection of the well-being of citizens when they leave the sovereign territory of the state. The same might expected when governments cede sovereignty over certain policy matters to an international tribunal or an international bureaucracy. What type of procedure and rights would a state promote as best protecting its citizens? Although international relations theories are largely unhelpful on this question, especially once they are asked to incorporate variation among democratic states, a good working assumption is the bundle of rights and procedures available within the state. And according to the balance of power logic, the most powerful Member States should be the ones that are able to upload their systems of rights onto the Commission.

Thus the realist framework generates a number of predictions for individual rights before the Commission. The types of rights should be those that exist in the most powerful Member States. The actors promoting rights should be Member States, when they negotiate treaties or bargain on the Council of Ministers, not supranational institutions such as the Court of Justice, the Commission, and the Parliament. Lastly, on the question of timing, rights should be established as soon as Member States confer autonomous powers upon the Commission that could be exercised to undermine directly the well-being of Member State nationals.

Neo-functionalism is a theory specific to European integration. It seeks to explain the rise of European governance, namely the attribution of extensive government powers to European institutions notwithstanding the conventional reluctance of states to cede national sovereignty. According to one of the most prominent versions of the theory, once national governments made broad commitments to free trade in the Treaty of Rome, exporters that benefited from trade liberalization acted in combination with the Commission and the Court of Justice to develop an extensive set of supranational policies and rules. Those policies and rules went far beyond the original intentions of the Member States. The contrast with the realist framework is stark: supranational institutions allied with economic and other types of civil society actors can bypass states to promote international cooperation in ways that transcend sovereign interests and power politics.

The critical assumption in the neo-functionalist line of analysis is that supranational bodies have a twin preference for more power and greater European integration. As Mark Pollack puts it, Europe's supranational institutions are "competence maximizing," meaning that they "seek to increase both their own competences and more generally the competences of the European Community." Rights, in the neo-functionalist line of analysis, are instrumental to the

35 See Ian Brownlie, Principles of Public International Law 521-55 (5th ed. 1998) (describing protections under international law for citizens of one state whose persons or property is stationed in the territory of another state).
36 Supranational institutions might anticipate the preferences of Member States and therefore, even in a power politics approach, the Court of Justice or the Commission could operate as the formal agents of rights. See, e.g., Geoffrey Garrett, The Politics of Legal Integration in the European Union, 49 Int'l Org. 171 (arguing that Court of Justice decisions reflect preferences of Member States). However, given the importance of states as the architects of international organizations in this line of analysis, we would expect at least some of the instruments setting down rights to be negotiated directly by states.
39 See Mark A. Pollack, Supranational Autonomy, in European Integration and Supranational Governance 217, 219 (Wayne Sandholtz & Alec Stone Sweet eds., 1998); see also Karen Alter, Establishing the Supremacy of European Law 45 (2001) ("Judges are primarily interested in promoting their independence, influence, and authority.").
competence-maximizing agenda of the Court of Justice because they enable litigants to go
directly to the courts and challenge government action as incompatible with higher, European
law, thus bringing most public decisionmaking within the power of the Court of Justice.\footnote{See generally Karen Alter, Establishing the Supremacy of European Law (2001) (advancing modified neo-
functionalist explanation of Court of Justice’s major constitutional doctrines); Anne-Marie Burley & Walter Mattli,
Europe Before the Court: A Political Theory of Legal Integration, 47 International Organization 41 (1993)
(recounting the constitutionalization of the EC Treaty through the neo-functionalist lens); Alec Stone Sweet &
James Caporaso, From Free Trade to Supranational Polity: The European Court and Integration, in European
Integration and Supranational Governance 92, 105 (Wayne Sandholtz & Alec Stone Sweet eds., 1998) (elaborating
neo-functional theory of constitutionalization of the EC Treaty); J.H.H. Weiler, The Transformation of Europe
(1991) (recognizing and synthesizing the constitutionalization of the EC Treaty).}

Neo-functionalists have largely focused on the Court's role in establishing European
rights that individuals can invoke in their dealings with their national administrations, rather than
with the Commission. Martin Shapiro, however, has argued that similar judicial politics are
responsible for the development of rights in Commission proceedings.\footnote{See Martin Shapiro, The Giving Reasons Requirement, in University of Chicago Legal Forum 179 (1992); Martin
Shapiro, The Institutionalization of European Administrative Space, in The Institutionalization of Europe 94 (Alec
Stone Sweet, Wayne Sandholz & Neil Fligstein eds., 2001).} According to Shapiro, a
mix of wealthy corporate litigants and receptive judges--moved by their activist propensities, the
expansive logic of even the barest of procedural checks on administrative action, and a general
distrust of technocracy--has led to an extensive set of procedural rights similar to those in
American administrative law.\footnote{Shapiro, The Institutionalization of European Administrative Space, supra note __ at 98-99.} Shapiro contends that the structural and legal conditions that
resulted in the proceduralization of American rulemaking in the 1970s are today present in
Europe.

The historical process as recounted by Shapiro can be broken down into a number of
parts. Wealthy corporate litigants using every possible argument to avoid administrative action
and espousing a larger anti-technocracy culture, challenge decisions before the Court on the
grounds that the Commission failed to respect procedural requirements in the administrative
process. They do so using a variety of textual and doctrinal hooks, most notably Article 253 of
the EC Treaty, which provides that all European measures "shall state the reasons on which they
are based."\footnote{EC Treaty, art. 253.} This duty would appear to be minimal, but the provision is used by the Court to
develop a jurisprudence of extensive procedural rights for the parties and, covertly, to engage in
judicial review of the substance of the Commission's administrative determinations.\footnote{For those familiar with the procedural demands made on American administrative agencies in the 1970s, the
American and European trajectories contain some interesting parallels as well as differences. As Shapiro points out,
the requirements of notice, comment, and statement of basis and purpose contained in the U.S. Administrative
Procedure Act served as the textual basis for imposing extensive procedural duties on federal administrative
agencies, much as the duty to give reasons has influenced procedural rights before the Commission. See Shapiro,
The Institutionalization of European Administrative Space, supra note __ at 101. In addition, in the U.S., tougher
judicial review of the substance of administrative decisions induced agencies to adopt greater procedural safeguards-
to build the factual record necessary to survive judicial review. See Citizens to Preserve Overton Park, Inc. v.
Volpe, 401 U.S. 402 (1971). This second logic of administrative procedure has been absent from European law. The
reason might be that the Court has yet to impose demanding standards of substantive rationality on the Commission;
or that the Commission is not confined to the administrative record in responding to objections raised in judicial
proceedings, as in the American case, and therefore it is not compelled to develop an exhaustive administrative
record in anticipation of tough judicial review.} The Court
does so out of a penchant for judicial activism common to constitutional courts. The Court is
also compelled by the legal logic of procedure and democratic, anti-technocracy ideals. Once the
Court requires the Commission to give reasons, it cannot accept just any set of reasons; the Court
demands reasons that respond to the objections of the parties and justify, in the eyes of the
Creating European Rights

In this account, the political imperatives of rights at the European level are slightly different from those that inform the relationship between the Court of Justice and national courts and administrations: the Court is driven less by the desire to maximize competences and more by a reaction, typical in most advanced democracies, to the vesting of extensive discretion in the hands of technocrats. Nonetheless, the self-interest of private plaintiffs and the activist, competence-maximizing tendencies of the Court are critical forces for rights in both settings.

The neo-functionalist account suggests a number of specific hypotheses concerning rights before the Commission. They should be similar to the rights that exist in American administrative law. The Court of Justice should be the actor promoting the rights, in the interest of law, democracy, and judicial power, and the Commission should resist, in an attempt to retain discretion and technocratic expertise. Lastly, procedural rights should develop gradually, as litigants test the waters, the Court of Justice considers and initially rejects novel theories, but then is moved by virtue of the logic of judicial politics to accept the litigants' arguments.

The table below summarizes the theories and the predictions.

<table>
<thead>
<tr>
<th>Legal constitutionalism</th>
<th>Realism</th>
<th>Neo-functionalism</th>
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<tbody>
<tr>
<td>Causal mechanism</td>
<td>Courts promote values of dignity, rationality, and workability.</td>
<td>States bargain to protect their citizens in Commission proceedings.</td>
</tr>
<tr>
<td>Agents</td>
<td>European Courts</td>
<td>Member States (treaties and laws passed by Council of Ministers)</td>
</tr>
<tr>
<td>Timing</td>
<td>Gradual, tracking the attribution of powers to Commission.</td>
<td>Sudden, at the time that Commission conferred powers.</td>
</tr>
<tr>
<td>Rights</td>
<td>Rights existing in most powerful Member States.</td>
<td>Rights similar to those in U.S. administrative law.</td>
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II. Three Generations of Rights Before the Commission

A. The First Generation: The Right to a Hearing

Compared to an ordinary executive branch, the Commission has few direct enforcement powers. Fines, injunctions, orders, and permits under European laws passed in Brussels are generally decided and issued by national administrations in each of the twenty-five Member States. Nonetheless, the very fact that the Commission exercises direct powers over citizens of the Member States, bypassing national governments, is extraordinary in light of the international origins of the organization. The Commission directly enforces European law in three areas: competition law (anti-trust), anti-dumping law, and customs law. In 1957, the Commission was given the power to impose fines and issue orders against firms that engaged in anti-competitive

45 Shapiro, The Institutionalization of European Administrative Space, supra note __ at 100.
Creating European Rights

behavior. In 1969, it was authorized to impose duties on foreign goods and, by extension, the firms selling the goods, if they were being sold at an unfair price ("dumped") on the European market or were being subsidized by a foreign government. In 1979, in a narrow class of cases, the Commission was given the power to decide whether the customs duties that had been paid or were due on imported products under the European Customs Code had to be returned to the importer. What were the rights of French, German, Italian, Belgian, Dutch, and Luxembourger citizens when they first came face-to-face with international authority? What are their rights today? And how can we explain the difference in the rights that a European citizen yesterday could invoke when she learned that she was at risk of paying a hefty fine or duty and those same rights today?

1. The right to oppose adverse Commission determinations then and now

a. National traditions of administrative procedure

In all Western legal systems, individuals have the right to contest vigorously decisions of government administration that inflict hardship upon them. Nonetheless, the stage at which the individual may contest the determination, the forum before which she may vindicate her rights, the scope of the rights, and the range of hardships believed to warrant such procedural rights, differ considerably from one country to another. European systems of administrative law can be divided into the droit administratif family and the common law family. Of the original six Member States, all were squarely droit administratif systems (France, Italy, Belgium, Luxembourg, and the Netherlands) or closely related to droit administratif systems (Germany).

47 See EC Treaty, arts. 81 and 82 (ex 85 and 86); Council Regulation No 17/62, First Regulation implementing Articles 81 and 82 (ex 85 and 86) of the Treaty, 1962 O.J. (L 13) 204. This has been repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1. The Commission has since come to exercise powers in the related areas of merger control and state aids. See infra text accompanying note__.

48 See Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, 1968 O.J. (L 93) 1. The Regulation has been amended on numerous occasions. The law currently in force is Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Communities, 1996 O.J. (L 56) 1.

49 See Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, 1979 O.J. (L 175) 1. This law has been repealed and repayment and remissions are currently dealt with under Articles 236 to 239 of Regulation (EEC) No 2913/92 establishing the Community Customs Code, 1992 O.J. (L 302) 1.

50 The standard classification of countries into droit administratif and common law systems is based on the nature of the court in which individuals can seek redress against administrative action. See John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (2d ed. 1985); L. Neville Brown & John S. Bell, French Administrative Law 1-8 (5th ed. 1998). In droit administratif countries, the courts have jurisdiction only over challenges to acts of the administration and are staffed by specialized judges who can also be employed elsewhere within government administration. In common law countries, the courts are courts of general jurisdiction, with powers over all types of disputes and whose judges are the same regardless of the type of dispute. The characteristic of interest here--the extent and nature of procedural rights before administration--is different from that used to create the standard typology. Nonetheless, the countries fall into the same clusters.

51 German administrative law is generally characterized as related to, but different from, the droit administratif family. See Mahendra P. Singh, German Administrative Law in Common Law Perspective 1-20 (2001). Administrative acts are reviewed in specialized courts but the judges on those courts are recruited and promoted according to the rules governing the entire judiciary. Moreover, fines and other forms of administrative sanctions are reviewed by ordinary criminal courts and law suits against government based on the Civil Code, i.e. sounding in contract, tort, or property, are brought in ordinary courts. As for administrative procedure, German law also stands between the droit administratif and common law families. The attention to individual rights in the Basic Law of
Administrative decisions in *droit administratif* countries are generally made with few opportunities for individuals to express their views. When the administrative process is completed, however, individuals have the right to apply to the courts for full review of the legality of the determination. Thus, while individuals have the right to contest adverse administrative determinations eventually, they do not always have such a right before the administrative authority deciding on the act. Fairness is guaranteed through access to strict "control" (*contrôle*) of the administration's decision in an independent forum. By contrast, in the English common law tradition, many of the same requirements of impartiality and procedure that are imposed on courts are also imposed on government bureaucrats. Government administration acts through trial-type procedures in which the citizen has the right to challenge the factual and legal premises of the determination before an unbiased decisionmaker. Once the determination becomes final, however, access to the courts is restricted, the grounds of review are limited, and the types of remedies available are strictly defined. The fairness of the administrative act in the common law turns on the ability to engage in a quasi-judicial process at the time of its adoption.

The basic difference in procedural rights can be traced to differences in experiences with the administrative state. In France, government administration is highly centralized and professionalized and, consequently, the mode through which it exercises power and renders decisions is characteristic of a bureaucracy. By contrast, in Great Britain, local government is largely autonomous of central government departments in London and is not highly professionalized. In the 1800s, local government was mostly the task of justices of the peace, responsible for administration of the poor laws, the highways, and liquor licenses. Even now, local government administration in England is handled largely by boards of elected local officials. Given these histories, it is no surprise that the *droit administratif* and common law ideals of fair government administration differ. In the *droit administratif* tradition, fair government administration consists of professionalized decisionmaking, without extensive procedural rights for individual citizens, but with intense scrutiny after-the-fact by judges. In the common law tradition, the ideal consists of neutral third-party dispute resolution within the administration, entailing extensive procedural rights for the parties seeking to avoid the adverse government decision, and limited review afterwards, before judges.

b. Administrative procedure of the European Commission

Procedural rights were first established in European competition proceedings, one of the few areas in which the Commission, as opposed to the Member States, is empowered to directly impose sanctions or other burdens upon individuals and firms. These procedural rights were
similar to those available in the *droit administratif* tradition. In the Treaty of Rome, anti-competitive agreements and abuses of monopoly power were prohibited and the Commission was entrusted with enforcement powers. Five years later, in 1962, the Council passed Regulation 17/62, designed to implement Articles 85 and 86 of the Treaty. The Regulation stipulated that:

Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15, 16 the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

In other words, the Commission was required to “hear” the parties whenever it took any action to enforce competition law: decisions that an agreement or practice did not violate Articles 85 and 86, so-called “negative clearance” (art. 2); findings of an infringement of Article 85 or 86 and orders for termination of the infringement (art. 3); decisions under Article 85(3) that an agreement was exempt from the prohibition on anti-competitive agreements (art. 6); decisions on the retroactive application of European competition law to agreements existing before the passage of Regulation 17/62 (art. 7); the revocation or amendment of exemptions granted under Article 85(3) (art. 8); decisions to impose fines (art. 15); decisions to impose “periodic penalty payment” to compel compliance with Commission decisions (art. 16).

The next year, the Commission set down the details of the procedure, which, as shall be explained shortly, followed French and German law. The opportunity to be heard comprised the following sequence:

- The Commission would notify the parties, in writing, of the “objections raised against them.” Art. 2.
- The parties would have opportunity to “make known in writing their views concerning the objections raised against them” and provide exculpatory evidence. Art. 3.
- The Commission would hold an oral hearing at which the parties could present their case, represented by counsel if they wished. Art. 7.
- The Commission's final decision would be limited to the objections on which the parties had had an opportunity to set forth their views. Art. 4.

Under Article 190, now 253, of the EC Treaty, the Commission was also under a duty to state the reasons for official acts, including competition enforcement decisions. Lastly, under Article 173, now 230, of the EC Treaty the parties could go to the Court of Justice to challenge the decision on one of four grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, and misuse of powers.

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related to the specific ends of the investigation, Cases 46/87 & 227/88, Hoechst AG v. Commission, 1989 ECR 2859. Rather, I focus on the procedures the Commission must follow and the rights it must respect when it exercises its decisionmaking powers under the Treaties. The Commission's powers to collect information from individuals and rights in that context are related but tangential to my inquiry.

56 EC Treaty, arts. 81 and 82 (ex arts. 85 and 86).
57 Council Regulation No. 17/62, First Regulation implementing Articles 81 and 82 (ex 85 and 86) of the Treaty, 1962 O.J. (L 13) 204. This has been repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.
58 Id. at art. 19.
59 Regulation No. 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No. 17, 1963 O.J. (L 127) 2268.
60 EC Treaty, ex art. 190 (now art. 253). Article 190 provided that "acts adopted by the Council or the Commission shall state the reasons on which they are based . . . ."
Creating European Rights

The law left open many questions. How detailed did the statement of objections need to be? Would the parties have to rely on the Commission’s characterization of the facts, as set out in the statement of objections or would they have a right to review independently the evidence collected by the Commission? If the parties had the right to review the evidence, did this include all of the information collected by the Commission or just the evidence supporting the Commission’s determination? Could the same civil servants who investigated the case also decide it, or did the decision have to be reached by a neutral third party? In its final decision, did the Commission have to address all of the points raised by the parties, both those going to their alleged anticompetitive behavior and those suggesting less burdensome remedial measures, or could the Commission wait to respond, if and when the decision was challenged in the Court of Justice?

In the following three decades, the Court of Justice, joined by the Court of First Instance in 1988, answered most of these questions. In a line of cases on the right to a hearing, the Court of Justice imposed an extensive set of procedural requirements on the Commission. In the statement of objections, the Commission must notify the parties of all aspects of the planned decision, to allow the parties a full opportunity to answer the case against them and object to the proposed remedial measures. It must allow the parties to examine all of the information in its files. Summaries of the evidence or the production of evidence limited to information that the Commission considers relevant to the case will not suffice. The Commission is not under a duty to separate prosecutorial and adjudicatory functions and therefore the same civil servants who investigate the case may also decide it. Under the separate but related duty to give reasons, the Court requires that the Commission give a complete enough statement of the facts and considerations underlying the final decision so that the parties and the Court can discern whether the Commission has adhered to the substantive requirements of European administrative law. However, the Commission is not obliged to answer all of the objections of the parties in the final decision. If the parties choose to challenge the administrative determination in the European Courts, the Commission can advance more detailed reasons for the decision there.

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61 In French, this line of cases comes under the doctrinal heading of “droits de la défense” and sometimes is translated into English as “rights of the defense.” See, e.g., Case 85/76, Hoffmann-La Roche & Co. AG v. Commission, 1979 ECR 1139 (French version).
62 See Case 17/74, Transocean Marine Paint Association v. Commission, 1974 ECR 1063; Cases 142 & 156/84, BAT and Reynolds v. Commission 1986 ECR 189, para. 13 (defining statement of objections as “a procedural and preparatory document, intended solely for the undertakings against which the procedure is initiated with a view to enabling them to exercise effectively their right to a fair hearing”); Cases C-89, C-116, C-117, C-125 to 129/85, Woodpulp II 1993 ECR I-1307, paras. 40-54 and 148-154 (annulling those parts of Commission decision that were not clearly raised in the statement of objections).
64 See Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, Cimenteries CBR and Others v Commission 2000 ECR II-491, paras. 712 to 718.
The Commission has also contributed to the definition of the European right to a fair hearing. Starting in the early 1980s, the Commission issued a series of policy statements and binding rules, setting down procedures for exercising the right to examine the evidence. Thus, in 1982, the Commission announced that it would attach copies of the evidence to the statement of objections issued to the parties at the beginning of a competition proceeding, or, if the evidence was unwieldy, allow the parties to inspect the files on Commission premises. A Commission rule from 1997 defines the classes of documents that are available to the parties and those that are protected from disclosure and also sets down the procedure for enabling the parties to consult the documents.

The Commission has also created the figure of the hearing officer. This is a civil servant in the Commission department responsible for competition (Directorate-General for Competition), who presides at the oral hearing. Her primary function is to ensure that the hearing is fair by allowing the parties to present their statements, by putting questions to the parties, by entering new evidence into the record, and by allowing witnesses to give testimony. At the conclusion of the oral hearing, the Hearing Officer issues a report in which she summarizes the proceedings, draws conclusions from the hearing, and makes recommendations for new evidence-gathering if she believes it to be necessary.

Lastly, when the Council enacted a European merger law, based on a proposal from the Commission, all of the procedural guarantees developed in the context of Article 85 and 86 (now 81 and 82) enforcement actions were extended to merger proceedings. Firms that seek to obtain clearance for a merger, therefore, enjoy the same procedural rights as firms under investigation for engaging in anti-competitive practices or abusing a dominant position under Articles 85 and 86 (now 81 and 82).

2. The historical juncture: Accession of the United Kingdom

a. The common law challenge: The principle of natural justice compared to the French *droits de la défense* and the German *rechtlichen gehörs*
What explains the choice that has been made in favor of a detailed statement of objections, full disclosure of all the evidence, and a hearing presided by a civil servant independent of the investigating officers? In this section I argue that the accession of the United Kingdom in 1973 represented a critical test of the European system of legal authority because of the different understanding of fair administrative action and that European institutions responded by adopting the common law right to a hearing. The picture that was drawn earlier of the procedural differences between the *droit administratif* systems of the founding Member States and English law was impressionistic. Especially in administrative law, generalization is perilous since administrative procedures and the stringency of judicial review can differ dramatically from one government department to the next, one field to another. To show that the Commission's administrative procedure was first designed on the *droit administratif* model of the six original Member States and then was transformed to mimic the minority common law model, I enter into the details of administrative law in the Member States, in particular, competition law, which would have been the natural reference point for the civil servants, lawyers, and judges designing Commission procedure.

In France, the right to make one's case before an administrative decision can be issued is known as the rights of the defense (*droits de la défense*). The right dates back to 1944, when the French Conseil d'Etat (Council of State) recognized that individuals have the right, above and beyond any of the rights created by the legislator in an enabling statute, to refute the administration's version of the facts if the decision constitutes a sanction. In the case, *Dame Veuve Trompier-Gravier*, the prefect (*préfet*) of the Seine region (*département*) had revoked a newspaper kiosk permit based on the defendant's alleged misconduct without giving the defendant the opportunity to refute the charges against her. The Conseil d'Etat found in favor of Dame Veuve Trompier-Gravier and annulled the prefect's decision based on a theory of general principles of law (*principes généraux du droit*), among which figured the rights of defense. In French administrative and constitutional law, this judgment constituted an extraordinary turning point, for it was the first in a long line of cases in which the Conseil d'Etat created whole cloth, without a textual basis, general principles of law that French administration is required to obey. The Conseil d'Etat in *Dame Veuve Trompier-Gravier* disregarded, for the first time, the fundamental tenet of French constitutional law under which the law (*la loi*) enacted

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72 To refer to the country, I use the noun “UK.” Since the legal system of the UK is comprised of separate courts for England and Wales, on the one hand, and Scotland on the other hand, and most of the cases come from England, I generally use the adjective “English” to modify “law” when I refer exclusively to the judge-made principles of the common law. When I refer more broadly to the statutes and the legislative activities of Parliament—which generally apply throughout the UK—and the activities of government administration—which also generally apply throughout the UK—together with the judge-made law of the courts, I used the adjective “British” to modify “law.”

73 David Gerber’s masterful analysis of European competition laws distinguishes among “juridical” competition regimes (the UK was, in part, such a regime), “administrative” regimes (France), and an “administrative-juridical” regime (Germany). See David J. Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus 217-222, 180, 278 (1998). The contrast drawn here between the court-like nature of British competition proceedings and the bureaucratic quality of continental proceedings overlaps with Gerber’s typology; my analysis, however, seeks to situate competition law within administrative law more broadly, so as to understand the force of *droit administratif* and common law principles when European competition law—and then anti-dumping, customs, and other areas of law—was being designed.

74 The Council of State is the highest French court responsible for reviewing decisions of government administration.

75 *Dame Veuve Trompier-Gravier*, 5 May 1944, Recueil Conseil d'Etat, p. 133.

Creating European Rights

by the Parliament is the expression of the sovereign French people and under which judges are to apply the law, never make it.

Notwithstanding the significance of the rights of defense for French public law, it is critical to appreciate the limits of the right compared to the common law tradition. The right only applies to administrative sanctions. And sanctions comprise only a subset of administrative determinations that impose hardship on individuals. The determination must involve personal facts (caractère personnel) that go to the behavior of the individual concerned for it to be considered a sanction. Sanctions are distinct from three broad classes of individualized decisions: administrative acts that rest entirely within the discretion of the administration and where a hearing of the parties would have no impact; administrative acts that are non-discretionary because they draw the necessary consequences from a previous administrative or judicial determination and where, again, a hearing of the parties would have no impact; and police measures (mises de police), characterized as forward-looking decisions, adopted to protect public safety or health, which concern the whole public and only incidentally affect the interests of a specific individual. In sum, the rights of defense are far from universally recognized in the daily decisionmaking of French administration, even in decisions that name particular individuals or are clearly directed at certain individuals or firms.

In addition, the procedure required of the administration is extremely abbreviated compared to what would be expected in a judicial proceeding. The party must be informed that the government is contemplating a sanction, she must be informed of all the charges against her (griefs), and she must be able to present her case in such a way as to be able to influence the administration's decision (présenter utilement sa défense). With the exception of disciplinary proceedings involving state employees, the duty to inform the party of the factual and legal basis of the contemplated decision does not include the communication of all the administration's evidence; rather it entails a summary description of the facts at issue in the case. Furthermore, the manner in which an individual is entitled to present her case depends on the circumstances of the particular decision and does not entail, as a rule, an oral hearing.

At the time that the European Commission was given powers in the competition area, France also had legislation prohibiting certain types of inter-firm agreements and abuses of

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77 Commissaire du gouvernement (Guy Braibant), Conclusions from Conseil d'Etat, January 8, 1960, Min. Intérieur c. Rohmer.
79 Long et al., supra note ___ at 356, point 8b).
80 Auby & Drago, supra note ___ at 427.
81 My analysis is based on the jurisprudence of the Conseil d'Etat. A number of legislative texts provide greater protection for rights of the defense. The most significant are the Presidential Decree of 28 November 1983 and the Law of 12 April 2000. Under Article 8 of the Decree and Article 24 of the Law, all administrative acts that must be accompanied by a statement of reasons under an earlier law (Law of 11 July 1979) must also allow for an adversary proceeding (une procédure contradictoire), which in French legal terminology is the equivalent of respect for the rights of the defense. See Long et al., supra note ___ at 355, point 7. The acts covered are all those that are unfavorable (dévavorable) to the interested party or that derogate from a standard legal rule (une décision dérogatoire). Jean-Bernard Auby, Juris-Classeur Administratif, Fascicule 107-20, at 14, point 110 (1998). The Decree and the Law have extended the right of defense in a number of ways, for instance, by requiring a hearing even in the case of police measures. However, this legislation post-dates the developments in the Court of Justice and the Commission analyzed below and therefore cannot serve to explain rights in Commission proceedings.
82 Auby & Drago, supra note ___ at 429.
83 This is another element of administrative procedure which was altered by the Decree of 1983. In the administrative proceedings covered by the Decree, individuals have the right to submit written observations and to give an oral presentation of their case. See Auby, supra note ___ at 15, point 113.
dominant positions. The administrative enforcement mechanism comported with the bureaucratic rationality ideal and the limited nature of the rights of defense in French law. The Minister of Finance and Economic Affairs was required to refer a suspected competition infringement to a special commission appointed by the government, and known as the Technical Commission on Cartels and Dominant Positions (Commission Technique des Ententes et des Positions Dominantes). The Commission appointed a rapporteur to investigate the matter and draft a report and a separate advisory opinion that would then circulate to the members of the Commission, the parties, and any government ministries that might be concerned. The firms accused of the anti-competitive behavior had the right to submit written observations on the report, but were not permitted to see the evidence in the file. Moreover, when the Commission met to consider and vote on the case, the parties did not have the right to appear in person and, even when they were permitted to appear, they generally were not allowed representation by a lawyer since, as one contemporary commentator put it, "the Commission has apparently found that lawyers are too technical and want to argue the law, which the Commission feels is not helpful before an economic advisory body." The Commission's opinion would then be issued to the parties and sent to the Minister of Finance and Economic Affairs for a final decision on the infringement and the appropriate remedial action. The Commission's recommendation, although technically non-binding, was considered an administrative act, subject to outside scrutiny in the Conseil d'Etat. Hence, in France, the specifics of the administration of competition policy fell into line with the basic features of the droit administratif tradition: before the deciding authorities, few procedural rights existed, but access to the Conseil d'Etat for scrutiny of the merits of the decision was guaranteed.

The only national understanding of rights and legitimate administration that departed significantly from the droit administratif model in the first decades of the European Commission was German law. Although, broadly speaking, the German system is grouped with the droit administratif countries, the system possessed, and continues to possess, certain unique features. In the realm of administrative procedure, it afforded more extensive rights. The federal Administrative Procedure Act of 1976, which codifies long-standing principles of administrative law, requires that before an administrative authority issues an individual act (Verwaltungsakt) that interferes with rights the parties have a right to be heard (rechtlichen gehörs). Interfering with rights captures a wider class of administrative action than the French concept of sanction. The administration is under a duty to inform the interested party (Beteiligten) of all the facts and evidence relevant to the decision and to give the interested party an opportunity to controvert them. Individuals have the right to a written decision in which the essential factual and legal grounds of the decision are given. Unlike French law, individuals have a right of appeal against the act within the administration (Vorverfahren), as well as a right of appeal to the

86 The provisions of the government regulation setting down the procedure of the Commission and the Ministry, Decree No. 54-97 of 27 January 1954, are reproduced in Venturini, supra note __ at 98n.41.
90 Verwaltungsverfahrensgesetz [Federal Administrative Procedures Act or “VwVfG”], §§ 28, 29.
91 VwVfG, § 39.
As a rule, however, and contrary to the English common law, administrative authorities are not under a duty to allow the interested party to examine all of the evidence, independent of the relevance to the party's case, or to make oral representations. Moreover, administrative authorities are not required to afford an independent, neutral adjudicator to take evidence and consider the government’s case against the individual, as in the common law tradition.

German administrative procedure in competition proceedings also differed from the French procedure. The parties before the German Cartel Office (Bundeskartellamt) had the standard right to notice of the charges and the evidence, the right to respond with a written statement, and the right to receive a reasoned decision. In contrast to ordinary administrative procedure and the proceedings before the French Technical Commission, the parties also had a right to an oral hearing. However, again, they did not have a right of access to all the evidence in the government's file nor were the administrative officials responsible for the investigation independent from those who took the final decision.

Procedural duties in English administrative law, known as the principles of natural justice, are more extensive. Natural justice is one of a number of requirements that English courts impose, as a matter of judge-made common law, on government administration. The courts interpret parliamentary statutes delegating powers to the administration as containing certain conditions for the lawful exercise of powers. The administration may not commit errors of fact and law, exercise discretion so that its decisions are unreasonable or based upon irrelevant considerations, or make decisions without respecting the procedures of natural justice. Should the administration breach any one of these principles, the courts will hold administrative action to be ultra vires. These common law doctrines are so engrained that it is hard to envisage a parliamentary statute that would be interpreted by the courts to authorize the administration to act in breach. Notwithstanding the British constitutional doctrine of parliamentary supremacy, it would be extremely difficult for the Parliament to write a statute that an English court would interpret as permitting errors of fact or law, authorizing unreasonable acts, allowing decisions based on irrelevant considerations, or permitting disrespect for natural justice.

Natural justice comprises two elements: officials are forbidden from deciding cases in which they may be biased (nemo judex in re sua or "no man a judge in his own cause") and every person has a right to be fairly heard (audi alteram partem or "hear the other side"). Both can be traced back to cases decided in the second half of the 1800s, in which decisions of local administrative authorities were quashed because they had disregarded the rules of natural justice. The rule against bias has no equivalent in French or German administrative law. Bias can stem from a number of sources, including a pecuniary interest in the matter, a personal or family relationship to the parties, prejudging the outcome before hearing all of the evidence, and the commingling of prosecutorial and adjudicatory functions. Some of the most common sources of bias in government administration, however, are permitted by the courts. For

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92 VvVfG, §§ 71-73.
93 See Gesetz gegen Wettbewerbsbeschränkungen of 1958 [Act Against Restraints of Competition or “GWB”], §§ 51, 53 (now §§ 54,56);
94 See GWB, § 53 (now § 56).
95 See infra text accompanying note (discussing limited access to administration's evidence in German competition proceedings).
96 Wade & Forsyth, Administrative Law, supra note at 37.
97 Wade & Forsyth, Administrative Law, supra note at 445, 469.
98 See, e.g., R. v. Rand (1866) LR 1 QB (rule against bias) (discussed in Wade & Forsyth, Administrative Law, supra note at 448); Cooper v. Wandsworth Board of Works (1863) 14 CB (NS) 180 (right to a fair hearing) (discussed in Wade & Forsyth, Administrative Law, supra note at 473).
99 Wade & Forsyth, Administrative Law, supra note at 460-66.
instance, if a minister decides a matter pursuant to a delegation from the Parliament, it will be considered lawful notwithstanding the fact that civil servants under his direction might have been responsible for investigating the case or that the minister might have prejudged the matter by announcing a department policy.100

The right to be fairly heard overlaps with the droits de la défense and the rechtlichen gehörs but applies to a broader array of administrative action than the French right and entails more extensive duties than both the French and German rights. Under English case law, administration must respect the right to be heard whenever it plans to make a decision that adversely affects the legal rights or interests of an individual.101 Although the characterization of what is a legal right or interest narrows the application of the right, it is nowhere as restrictive as the French limiting principle of a sanction. Administrative decisions that are entirely forward-looking, discretionary, or policy-driven, must nonetheless respect the right to be heard. As a result, administrative decisions such as land-use planning, awarding funds to local administrative authorities, and awarding licenses to first-time applicants can only be made after the affected parties have an opportunity to make themselves heard.102

As for the content of the right, the courts have held that it includes the right to know the government's case, including the evidence and reports in the government's possession.103 The parties are also entitled, as a general matter, to present their cases directly before the deciding authority, although sometimes only written submissions are required.104 This English administrative procedure differs from its French and German counterparts in both the extent to which the parties have the opportunity to examine the government's evidence and the emphasis on oral hearings.

The principles of natural justice have not only been developed by common law courts, but have also been given effect by parliamentary statutes establishing the institutions of the British administrative state.105 In the early part of the 1900s, a number of special tribunals were created to administer the social legislation of the welfare state and they have since multiplied in virtually all policy domains. Tribunals exist for awarding social security benefits, allocating fishing licenses, deciding on child support, determining whether companies have infringed information privacy laws, and myriad other policy areas.106 Tribunals are charged with making decisions that in droit administratif systems would be made by government ministries. Tribunals are analogous to courts in that they are independent of the ministry responsible for the policy area in which they adjudicate.107 Furthermore, their proceedings are adversarial: the government presents the case against the defendant and the defendant has the opportunity to respond. They are different from ordinary common law courts because they are specialized—their jurisdiction is limited to one administrative scheme—and their procedure is abbreviated compared to a civil or criminal trial. Appeals on questions of law decided by administrative tribunals may be taken to the ordinary courts.

The other type of legislative scheme designed to give effect to the dictates of natural justice is the statutory inquiry. Inquiries are established in areas in which, ultimately, the

100 Id. at 452, 464-66.
101 See id. at 484.
102 See id. at 525-31.
103 See id. at 506-11. There are exceptions to the duty to disclose the evidence, especially where there are good reasons to preserve the confidentiality of the government's sources. See id. at 509-10.
104 See id. at 511-15.
105 See id. at 466.
106 See id. at 929-37 (table listing tribunals).
107 See id. at 890-98.
decision is a discretionary one entrusted to a minister, but in which it is believed that the minister should listen to what the public has to say on the matter. A civil servant is tasked with conducting a fair hearing of all of the interested parties and then making a recommendation to the minister. 108 This is the procedure that is followed before the government may acquire land, build roads or airports, alter certain types of health services, and make a number of other types of administrative decisions. The case law and the parliamentary practice of establishing tribunals in the place of bureaucracies and statutory inquiries in the place of exclusive ministerial power demonstrate the extent to which the principle of natural justice permeates the fabric of British administration.

When the UK joined the European Community, the enforcement of British competition policy adhered to the principle of natural justice. The institutional apparatus was split between the Restrictive Practices Court and the Monopolies and Mergers Commission. The Restrictive Practices Court (RPC) was a full-fledged administrative tribunal, with jurisdiction over cartels and certain forms of vertical agreements in restriction of competition. 109 The Monopolies and Mergers Commission (MMC) was also organized as an administrative tribunal, but it only had the power to make recommendations to the administration on mergers and anti-competitive practices. 110 The government ministry, namely the Department of Trade and Industry, was responsible for deciding on the appropriate prohibitions. In sum, cartel policy was the province of a classic administrative tribunal and was fully in line with the principles of natural justice. Monopolies and merger policy was administered through the combination of a commission independent of the government, before which individuals had a right to be heard, and of discretionary ministerial decisionmaking, without procedural guarantees for individuals. In both cartels and mergers, however, the contrast with the French Commission Technique and the German Bundeskartellamt is evident.

The Commission procedure set down in 1962 and 1963 fell in line with the procedural guarantees of French and German competition law. As in both French and German law, the parties had the right to learn of the government's essential facts and arguments, respond in writing, and receive a reasoned final decision. As in German law, the parties also had the right to an oral hearing. However, the Commission was not required to inform the parties of every aspect of the planned decision, to reveal all the evidence directly to the parties, or to provide for a neutral third party to officiate the administrative proceeding. As in the French and German systems, it was believed that any injustice that could arise from such defects could be remedied when the administrative decision was appealed to the Court of Justice. In 1973, this view was called into question.

b. National value: The influence of the English right to a fair hearing

The English principle of natural justice influenced both the jurisprudence of the Court of Justice and the European Commission's self-imposed procedural reforms. UK accession brought

108 See id. at 889, 938-39.
a marked shift in the Court's doctrine on procedural rights in competition law. In 1966, in the very first challenge to a Commission competition decision, the parties raised the question of the adequacy of their rights in the course of the Commission’s proceedings. The parties claimed, and the Court dismissed, a right to examine Commission evidence, the very same right that the Court declared in 1979 to be part of a fundamental "right to be heard." Consten and Grundig, firms that had been denied an exemption under Article 85(3) for their exclusive distributorship contract, argued that the Commission had violated their rights of defense. They argued that they should have had the right to receive and examine all the evidence gathered in the Commission’s investigation. Consten and Grundig were especially keen to examine memoranda from the French and German authorities responding to questions posed by the Commission, which they believed had influenced the Commission’s decision.

Advocate General Roemer rejected their claims largely based on the finding that the Commission procedure comported with the procedure followed by national competition authorities and, in particular, the German one. The Advocate General recognized that there was a “right to be fully heard” (rechtlichen gehörs) but that, as far as the right to examine the evidence was concerned, Consten and Grundig had the right to only a summary of the facts that the Commission had used in support of the competition decision. The Advocate General based his conclusion on the law governing the German Cartel Office (Bundeskartellamt):

A clear summary of their contents [documents that served as the basis for the decision], which allows those concerned to learn without difficulty of the essential lines of the opinion of the third parties concerned, is enough. These are also the principles which govern the procedure before the Bundeskartellamt. (Cf. Müller-Henneberg and Schwartz, ‘Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht’, 2nd ed., p. 959.)

The Court followed the Advocate General.

In 1970, when the Commission used its power to impose fines for the first time, the parties challenged the decision on similar procedural grounds. Again, they were rejected by the Advocate General and the Court, with one small exception. In ACF Chemiefarma v. Commission, a number of quinine producers were found to have participated in a price-fixing cartel. They argued that the Commission’s statement of objections was not sufficiently precise; that the Commission should have communicated all of the evidence in the file, or in the alternative, should have communicated the documents that served as evidence for the Commission’s allegations; and that the final decision was defective because it did not address arguments made by the parties on the nature of the pharmaceuticals market. The Commission, as it had in Consten and Grundig, relied on the absence of a duty to disclose the file in the cartel

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111 Jürgen Schwarze has also argued that the Court of Justice came under the influence of English administrative law in viewing fairness as turning on the procedural rights available to firms in competition proceedings rather than on the relief they could obtain from the Court through judicial review. See Jürgen Schwarze, Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation, 51 Int’l Comp. L. Q 17, 21 (2001).
112 Cases 56 & 58/64, Consten & Grundig v. Commission, 1966 ECR 299.
113 The Court of Justice is composed of one judge from each Member State and eight advocates general, selected on a rotating basis by the Member States. An advocate general is assigned to each case and issues an extensively reasoned, non-binding opinion advising the Court on the right outcome before the Court decides the case. See Craig & de Búrca, EU Law, supra note _ at 88, 93-94.
114 Id. at 368.
115 Id. at 338.
laws of the Member States in defending its procedure.117 The Advocate General rejected all of the quinine producers’ procedural challenges and, for the most part, the Court followed.118 Only on the question of whether the Commission had to disclose the records from staff visits to certain firms or whether it could simply summarize the results of the investigation did the Court hedge. The Court said that the Commission should have communicated the records, but when the Court went on to examine the prejudice to ACF Chemiefarma, it found prejudice to be minimal. The failure to communicate the documents and to allow for critical examination of the proof led to the conclusion that the Commission had failed to prove its case in one limited respect: the life of the ten-year cartel, and hence the amount of the fine, was reduced by seven months.119

The next competition case, decided in 1972, produced no surprises. In ICI v. Commission, the member of a dyestuffs price-fixing cartel challenged the Commission’s fine. The complainant alleged a similar litany of procedural defects and, again, the Advocate General and the Court rejected them.120

By 1974, the tone of the Court had changed dramatically. Transocean Marine Paint Association v. Commission was one of the first competition cases to be decided after the accession of the UK.121 Transocean, an association of marine paint manufacturers, operated a world-wide sales network for its members. It had previously notified the Commission of the agreement and had obtained an Article 86 (3) exemption. When Transocean applied for renewal of the exemption, the Commission sent Transocean a notice of objections listing the conditions being contemplated by the Commission in order to ensure that the agreement would not have anti-competitive effects. After giving Transocean the opportunity to make written and oral submissions, the Commission issued the final decision. According to Transocean, the decision depended on a condition of which the parties had not been notified: Transocean’s members had to disclose cross-holding patterns between their directors and other firms in the paint sector. Transocean challenged the decision on the grounds that it could not have anticipated the condition from the proceedings and hence had never had the opportunity to make its views known.

The Advocate General assigned to the case was one of the new British members of the Court, Advocate General Warner. He agreed with the Commission that the procedure was perfectly consistent with the letter of the applicable law. Nonetheless, Advocate General Warner concluded that the “right to be heard” was part of Community law and that by imposing what amounted to an entirely new condition without a hearing, the Commission breached the right and it would be necessary to annul the new condition.122 The Advocate General based his conclusion on a long excursion into the laws of the Member States. He first gave what amounted to a textbook statement of the English rule:

> There is a rule embedded in the law of some of our countries that an administrative authority, before wielding a statutory power to the detriment of a particular person, must in general hear what the person has to say about the matter, even if the statute does not expressly require it. *Audi alteram partem* or, as it is sometimes expressed, ‘*audiatur et altera pars*’.123

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117 Id. at 670.
118 Id. at 707-08, 712-13 (opinion of Advocate General Gand); id. at 684-86 (opinion of the Court).
119 Id. at 697, para. 142.
120 Case 48/69, Imperial Chemical Industries Ltd. v. Commission, 1972 ECR 619, 635-37 (arguments of parties), 697-701 (opinion of Advocate General Mayras), 650-52, para. 16-44 (judgment of the Court).
122 Id. at 1089.
123 Id. at 1088.
He then launched into an extensive discussion of the English "rule of natural justice," under which, "although there are not positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." The Advocate General then canvassed the traditions of other Member States. In his tally, England, Scotland, Denmark, Germany, and Ireland clearly embraced the principle, while France, Belgium, and Luxembourg were arguably evolving in that direction, and Italy and the Netherlands clearly rejected it. His results did not support a declaration that the right was ubiquitous or even that it was a majority tradition. Nonetheless, he concluded:

My Lords, that review, which I have sought to keep short, of the laws of the Member States, must, I think, on balance, lead to the conclusion that the right to be heard forms part of those rights which the ‘law’ referred to in Article 164 of the Treaty upholds, and of which, accordingly[,] it is the duty of this Court to ensure the observance.

The Court embraced the common law principle put forward by the Advocate General. For the first time, it found that there was a “general rule” that “a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.” In the past, the Court had framed review of the Commission’s procedures as a matter of policing respect for the rights of defense set down in the competition laws. In Transocean, by contrast, the Court announced a higher principle that could be used to supplement the competition laws. The Court concluded by annulling the condition and sending the case back to the Commission for further proceedings, so that the parties could have the opportunity to make their views known.

By the time the Court decided the next major competition case involving procedural questions, it was clear that the tide had turned towards a court-like administrative process. Hoffman-La Roche, a manufacturer of vitamins, was found by the Commission to have engaged in an abuse of a dominant position by forcing buyer firms to purchase all of their supplies from Hoffman-La Roche. Hoffman-La Roche objected to the Commission’s procedure on the same grounds as the parties in the pre-Transocean cases: in the course of the administrative proceeding, the Commission had not allowed Hoffman to inspect certain documents that supported the findings of fact in the Commission’s final decision. Hoffman argued that the Commission had breached the right to be heard. This time, the Court agreed.

The extent to which the new, English tradition had transformed the judge-made law of rights is illustrated vividly by the difference between the opinion of the Advocate General and the judgment of the Court. Advocate General Reischel recommended to the Court that it find against Hoffman-La Roche. As his predecessor Advocate General Roemer had done in Consten and Grundig, the Advocate General looked to the procedural guarantees in German competition law for guidance. Like Roemer, he observed that, under German law, the parties to the administrative proceeding only had a right to a summary of the evidence, not to examine the evidence for themselves:

According to [the German Law Against Restrictions on Competition] in administrative proceedings the only applicable principle is that the persons concerned must have the opportunity to give their views on the objections laid against them and that a decision cannot be found on facts of which the parties

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124 Id.
125 Id. at 1089.
126 Id. at 1080, para. 15.
concerned were unaware. The way in which the Bundeskartellamt (the Federal Cartel Office) applies this principle is evidently to communicate only the essential content of the pleadings, and in particular to notify them only of the essential purport of the views of the other parties concerned. There is no right to carry out a thorough inspection of documents . . . .128

The Advocate General found “no general legal principle” giving a right to inspect documents. Therefore he recommended that the Court find against Hoffman La-Roche.

The Advocate General proved himself to be behind the times. With British accession the nature of Europe’s legal system had radically changed. The common law principle of natural justice had replaced the German law of procedural rights as the yardstick against which European authority had to be measured. Thus the Court declined to follow the Advocate General and departed from the cases decided before accession. The Court declared, for the first time, that the right to be heard was a “fundamental principle of Community law” and that the ability to examine the Commission’s evidence was part and parcel of the right:

[I]n order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty.129

This rejection of earlier case law is striking. Both the timing of the change in the Court’s doctrine, as well as the reasoning of the Hoffmann-La Roche judgment, in which the Court categorized “the right to be heard” in much the same terms as Advocate General Warner in the earlier Transocean case, support the conclusion that European administrative law came under the spell of the English common law. In the twenty-five years of competition cases that have followed, the European Courts have worked out the ramifications of the fundamental principle of the—now European—‘right to be heard.’

The background of how the Commission came to adopt the figure of the hearing officer at the oral phase of competition proceedings also demonstrates the common law’s influence on individual rights before the Commission. The historical record shows that the Commission drew upon the common law’s rule against bias, the second element of natural justice. As mentioned earlier, in 1982, the Commission announced that a civil servant, unconnected with the investigation, would preside at the oral hearing at which parties accused of anti-competitive behavior give testimony and refute the Commission’s evidence.130 According to a number of sources, this innovation occurred in response to a damning report from the House of Lords European Communities Select Committee.131 There, the House of Lords criticized the European

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128 Id. at 600.
129 Id. at 512, para. 11. It should be noted, however, that ultimately the Court held against Hoffman La-Roche since it found that there had been no prejudice. Although Hoffman La-Roche had not been permitted to examine the documents during the administrative proceedings, it was allowed to do so in the court case, and therefore the Court found that it had been given an adequate opportunity to make its case. See id. at 513-14, para. 15-19.
130 It is important to avoid confusion between Commission hearing officers and American administrative law judges (ALJs). Unlike an ALJ, a hearing officer does not have responsibility for initial determinations of fact and law that may only be altered by the higher echelons of the administrative agency for good reasons. In European competition proceedings, the section responsible for the investigation and the Director General for Competition retain full responsibility for making the findings in the case.
131 See, e.g., Julian M. Joshua, 15 Fordham Int’l L.J. 16, at 74 (1991/1992) (principal administrator at DG Competition stating that “[l]argely as a result of these criticisms [from common lawyers and industry groups], the post of Hearing Officer was created in 1982”).
Commission for combining the functions of judge and prosecutor, in breach of the second principle of natural justice. The Select Committee said:

It is clearly essential that the rules and proceedings of the Commission should be seen to be just and fair as well as effective. The evidence received by the Committee revealed that there exists widespread doubt whether the Commission’s procedures are just and fair to undertakings whose practices are under investigation. . . . For most witnesses, including the Bar and Law Society, the grounds for believing that there was “room for improvement” were derived from the fact that the Commission combines the functions of investigator, prosecutor, and judge. In general it was urged that the requirements of natural justice should, as far as is possible, be observed in the adjudication by the Commission of all contentious or disputed cases and that there should be no departure from natural justice on grounds of administrative convenience.\(^{132}\)

Since the existing treaty framework would not allow for the appointment of an independent figure, similar to a member of a British administrative tribunal, the Committee suggested that a civil servant, removed from the Commission’s investigation, be brought in at the hearing phase: The Committee suggests that the creation of an additional post of Director in Directorate-General IV [the Commission competition department] should be considered. The Director so appointed would enter the case at the stage of the preliminary meeting [the Committee also recommended introducing a preliminary meeting in which the parties would be able to clarify the factual basis and reasoning of the complaint] over which he would preside. He would also preside over the oral hearing, and would assume, within Directorate-General IV, responsibility for the subsequent conduct of the case.\(^{133}\)

The Commission very shortly afterwards adopted the crux of the House of Lord’s recommendation by creating the figure of the hearing officer.

The House of Lords exercised a similar influence over the Commission’s decision to disclose all of the evidence to the parties, regardless of whether the Commission considered the evidence relevant and hence relied on it to build its case.\(^{134}\) Although the Committee’s report was only published in February 1982, its inquiry began one year earlier. The Committee put a number of questions to the European Commission on competition procedure, circulated the critical comments of British lawyers to the European Commission, and called upon a high-ranking civil servant responsible for competition (Mr. Pappalardo, Director, DG IV) to testify before the Committee. The British Lords on the Committee had this to say to the Italian Director about the Commission’s practice of allowing companies to examine only the evidence the Commission deemed relevant:

Lord Fraser of Tullybelton. Without wishing to be more offensive than I can help, Mr. Pappalardo, the difficulty is that if the company concerned knows that the judge has in his file under the table a whole lot more documents but does not quite know what those other documents are, it is apt to leave the company in a dissatisfied position. That is the trouble, is it not?

Chairman (Lord Scarman)


\(^{133}\) Id. at xx, para. 42(e).

\(^{134}\) See supra text accompanying notes __.
The Court said in the La Roche case that the Commission must produce the documents on which they rely. What troubles the undertaking is that there are other documents on which the Commission has not chosen to rely and they want to know what they say?—I know [Mr. Pappalardo]. This is the problem. There are various answers to that, not simply the dogmatic approach that since this is an administrative procedure we do not need to go that far. . . . It is unthinkable for any official of DG IV to have a document which would be favourable to the company and to forget it in order to punish the company.

Chairman. You might not understand the document. You might not see that it was helpful to the undertaking? . . . . I cannot exclude that. [Mr. Pappalardo]

However, it seems to me somewhat theoretical.\textsuperscript{135}

The House of Lords final report recommended that the Commission give access to the entire file and the Commission, shortly thereafter, did precisely that.

In making the recommendation, the House of Lords relied on a recent opinion of Advocate General Warner. There the British Advocate General had criticized the Commission for not disclosing all of the information to the parties to a competition proceeding. He had recited yet another classic common law maxim:

\begin{quote}
The Commission seems to me moreover to have overlooked that “justice must not only be done but must manifestly be seen to be done.” Justice is not seen to be done if there is concealed from an undertaking, for no imperative reason, part of the text of a complaint made against it.\textsuperscript{136}
\end{quote}

This passage from the House of Lords’ report illustrates vividly how British lawyers, statesmen, and judges throughout the European system, on both national and supranational government bodies, working with the British understanding of legitimate administration, joined together to challenge the droit administratif way of governing. The critique from judges and lawyers socialized in the common law tradition spurred yet another transformation in European competition law in the direction of a quasi-judicial administrative process.

c. Supranational interest: The interest of the Court of Justice and the Commission in extending European legal authority

Why did the Court and the Commission alter the rights available in administrative proceedings in accordance with the English principle of natural justice? After all, the UK was a vastly outnumbered minority. In 1973, it was only one of two common law Member States in a European Community of nine Member States, the rest of which were members of the droit administratif family or represented variations on the droit administratif system. The same is true today. The answer lies in the distinctive European system of legal authority. Enforcement of European law relies upon national administrations, police, and, most importantly in the rights context, courts. The Commission can issue decisions and the Court of Justice can hand down judgments, but unless national courts are willing to enforce European law against individuals, the decisions of the European institutions exist on paper only. When the UK acceded and British lawyers, judges, and statesmen launched the natural justice attack, the Court and the Commission came under immense pressure to accommodate them. The consequence of failing to do so was English courts unwilling to enforce Commission competition decisions because the time-honored rights of their citizens had been breached. The Court and the Commission reformed competition

\textsuperscript{135} Id. at 49-50, para. 125-28.
\textsuperscript{136} Id. at vii, para. 11 (citing to J-P Warner’s opinion in The Distillers Co. Ltd. v. Commission, 1980 ECR 2229, 2295-97).
Creating European Rights

proceedings and adopted the right to be heard with the objective of bringing the UK into the European system of legal authority.

The European dynamic of legal authority can be rendered starkly or subtly and more realistically. First, the stark account. To execute any decision against an individual or firm, the Commission and the Court of Justice rely on national administrations and national courts. A firm that does not comply with a Commission competition decision and the Court of Justice judgment upholding that decision can only be brought into line—and a bank account attached or an individual detained for contempt of court—through the decision of a national government officer, upheld in national court. If the government officer and the judge are unwilling to enforce the Commission’s decision, it becomes an obligation in the international law sphere rather than an authoritative command in the positivist sense. Especially at the beginnings of European integration, the Commission and the Court were intensely aware of the limits of their enforcement authority and this awareness contributed to the making of European law. A Commission decision or Court of Justice judgment could not blatantly disregard national cultural traditions of the lawful exercise of public power. The judges on the Court of Justice were particularly attuned to the need to accommodate their English brethren, given the sensibilities of judges to rights claims and the imperatives of protecting individual freedoms in the face of oppressive government action.

The subtle version of the cooperation dynamic builds on the stark one. In making decisions and rendering judgments, European judges and administrators take seriously objections from their counterparts at the national level, schooled in their distinct traditions of public law. A national jurist’s claim that European authority has been exercised unfairly must be examined with extreme care. To put it slightly differently, one of the most important interpretive sources for determining the scope and limits of the power conferred on the Commission by the EC Treaty are national legal traditions. As the Court has repeatedly stated, “the Court draws inspiration from the constitutional traditions common to the Member States.” But, despite what the Court says, sometimes no common tradition exists. Hence, when it comes to determining the limits of European public power in the absence of a common tradition, the tradition that prevails is the one that will object most loudly to the particular exercise of public power. This solicitude for national understandings of legitimate, rights-abiding public authority is related to the absence of European enforcement powers and the corresponding strategic need for cooperation from

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137 I draw upon Joseph Weiler’s analysis of cooperation between the Court of Justice and national courts in enforcing European law over national law. See J.H.H. Weiler, The Transformation of European Law, 100 Yale L.J. 2403 (1991). According to Weiler, supremacy of European law was achieved not by judicial proclamation in Luxembourg, but rather through a gradual process in which the Court accommodated national judiciaries and, reciprocally, national judiciaries came to accept European law and the European Court of Justice as supreme to national law, even national constitutional law.


139 See, e.g., A.M. Donner, The Court of Justice of the European Communities in Legal Problems of the European Economic Community and the European Free Trade Association 66, 72, Supplementary Publication No. 1 of the International and Comparative Law Quarterly (1961) (statement by second President of the Court of Justice on the Court’s reliance on national courts to refer cases and execute judgments); House of Lords, European Communities Committee, Eighth Report on Competition Practice, supra note at 50-51, paras. 133-35 (Director of DG IV stating that Commission’s inspection authority was entirely dependent on whether a British judge would grant a warrant authorizing entry).

140 Indeed, in the case of the some of the European institutions, it is misleading to speak of European and national officials as distinct groups. The Court of Justice is composed of senior judges and legal scholars with extensive experience in their national systems.

141 See, e.g., Case C-71/02, Karner Case, 2004 ECR 0, para. 48
national courts and administrations, but it runs far deeper. It now can be said to define the new, European constitutional tradition.\(^{142}\)

My explanation for the powerful influence of a minority rights tradition is based partly on speculation. However, there is significant evidence that the Court of Justice was aware of the consequences of disregarding national templates of fair and rights-abiding government administration. In the first years of the European Community, individuals indeed did go to their national courts to protest Commission decisions, and national courts were willing to review the decisions to ensure that their citizens were not subject to arbitrary and unlawful exercises of public power. The case in point is the challenge brought in the Italian courts by a number of Italian steel producers to a fine issued by the High Authority, the predecessor to the Commission and the executive branch for the Treaty Establishing the European Coal and Steel Community Treaty (ECSC Treaty).

In 1965, the Italian Constitutional Court was asked by a trial court in Turin to consider the constitutionality of a decision issued by the High Authority.\(^{143}\) The challenge was based on exactly the same type of argument that, had the Court of Justice not incorporated the right to be heard eight years later, might have been made by British litigants: the High Authority’s decision and the review available in the Court of Justice did not satisfy national constitutional principles of lawful administrative action. The facts are as follows: Under the ECSC Treaty, the High Authority had the power to regulate the production of steel in the Member States, including the power to impose certain taxes related to the importation and use of scrap iron for steel production.\(^ {144}\) In 1961, the High Authority requested that producers forward original invoices documenting their electricity consumption, or certified copies of the invoices, as one means of monitoring and verifying the amounts of scrap iron being consumed by individual steel plants. Ten Italian companies replied that they could not comply for various reasons and that the request was unlawful. The High Authority then issued an order pursuant to its information-gathering powers under the Treaty.\(^ {145}\) The steel companies brought a challenge in the European Court of Justice and the Court upheld the order.\(^ {146}\)

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\(^{142}\) In 1961, the second President of the Court, A.M. Donner made a similar point when describing the task of judging on the Court of Justice. He was commenting on the difference between Court of Justice’s practice of deliberating in secret and issuing unanimous judgments and the use of voting and majority and minority opinions in the common law system. He said:

[T]he deliberations of the court are and must remain secret. If differences of opinion occur, they cannot be made public. So the ruling has to be given in one judgment. . . . The exclusion of the possibility of giving separate or dissenting opinions protects the independence of judges. Of course, by clothing the rulings in anonymity, it robs the action of the court of that vivacity, which is so great an attraction in Anglo-Saxon jurisdictions. But on the other hand, it forces us to work out an agreement, which is perhaps not approved by all, but which is considered clear and adequate by lawyers from all six of the Member States. It demands much longer discussion in camera and a very careful wording of the decision, but it ensures rulings that are understandable throughout the Communities and contributes to the establishment of a common fund of legal notions and principles.

See A.M. Donner, The Court of Justice of the European Communities, supra note __ at 68 (emphasis added). Only an administrative process that respected the right to a fair hearing would have been considered "adequate" by the British lawyer who joined the Court in 1973.

\(^{143}\) Italian Constitutional Court, Decision No. 98/1965 of December 27, 1965, reported and translated in 1966-67 Common Mkt. L. Rev. 81.

\(^{144}\) Treaty Establishing the European Coal and Steel Community, UN Treaty Series No. 3729 (1957).

\(^{145}\) ECSC Treaty, art. 47.

Four days later, the High Authority issued new decisions to the parties, imposing fairly significant fines for the failure to comply with the first order (0.5% of the companies’ annual turnover) and fining the companies additional amounts for the each day’s delay in failing to produce the documents, counted from the date of notification of the second set of decisions (2.5% of the daily turnover for nine of the companies and 5% for the tenth company). This time, the parties challenged the High Authority’s order in both Italian court and the European Court of Justice. The Court of Justice upheld the fine, with one exception. It found that since the applicants had to obtain the invoices from third parties, i.e. the electricity company, there had been good reasons for the delay in turning over the documents. Therefore the Court suspended the daily penalties for a period of seven months.

The High Authority's decision did not fare so well on the Italian front. Four separate cases were filed in local courts: one in Milan, one in Naples, one in Rome, and one in Turin. Exercising their rights under Italian law, the steel companies challenged the decisions of the High Authority on the grounds that the order breached a basic interest (interesse soggettivo) by taking their property without respect for the Italian Constitution's guarantees of lawful administrative action. The litigants challenged the constitutional validity of the ECSC Treaty—in particular, the failure of the Treaty and the European Court of Justice to afford the plaintiffs the same protections against arbitrary and oppressive government action as afforded under the Italian Constitution. Only the Milan court held, without reservations, in favor of the High Authority. The Naples court first examined whether the Court of Justice was structurally similar to an ordinary Italian court—as opposed to an Italian administrative court which has less independence from the executive branch—because under the Italian Constitution, citizens are guaranteed an ordinary judicial forum to challenge administrative acts that breach basic interests such as property. The Court of Justice passed muster. Hence, the Naples court found that the ECSC Treaty was constitutionally permissible and that consequently only the European Court of Justice, not national courts, had jurisdiction over the decision of the High Authority.

The Rome court held that the judicial protection from unlawful administrative action that the steel companies had been afforded comported with the requirements of the Italian Constitution. In so holding, however, the court found that it could not exclude the possibility that the constitutional rights of Italian citizens would be undermined in the future through inadequate judicial protection. It said:

[there are] more delicate questions resulting from the inability to impugn before the European Court the decisions of the High Authority on the grounds of conflict

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148 Id. at 165.
150 In finding that these lawsuits were even admissible, all four Italian courts were acting in blatant disregard of Articles 44 and 92 of the ECSC Treaty. Under the ECSC Treaty, arts. 44 and 92, decisions of the High Authority imposing monetary sanctions and judgments of the Court of Justice upholding those decisions must be enforced by the Member States in their territories. The officials of the Member States must do so “with no other formality than the certification of the authenticity of such decisions.” ECSC Treaty, art. 92. Moreover, “enforcement of such [High Authority] decisions can be suspended only by a decision of [the European Court of Justice].” Id.
Creating European Rights

between Community norms . . . and norms of our Constitution which assure
inalienable guarantees for the rights of individuals.151

The Turin court went even further. Unlike the Naples court, the Turin court found that
the Court of Justice was indeed a special, administrative court, without the full array of powers
of an ordinary court of law, and hence judicial review in the Court of Justice breached the
guarantee of access to an ordinary court contained in the Constitution. Moreover, the Turin
court found that the grounds of review set down under the ECSC Treaty were limited, in
violation of the Constitution’s requirement that there be full legal protection of the rights and
interests (diritti soggettivi and interessi legittimi) affected by administrative decisions.152
Lastly, the Turin court linked the case to the broader conflict between the Italian Constitutional Court
and the European Court of Justice on the question of whether European law was supreme to
Italian law. The Turin court repeated the Italian Constitutional Court’s earlier holding that the
Italian Constitution was supreme to the treaties and that a constitutional amendment would be
required to establish the supremacy of European law. Therefore, the Turin court referred two
questions to the Constitutional Court: were the Articles limiting the grounds of review before
the European Court of Justice of High Authority decisions (art. 33) and giving the Court of
Justice exclusive jurisdiction to rule on the validity of European acts (arts. 41 and 92) valid under
the Italian Constitution?

The Constitutional Court decided the question in favor of the High Authority and against
the steel companies. But it did so by systematically comparing the administrative law guarantees
at the European level to those afforded under Italian constitutional law and concluding that the
two were roughly equivalent.153 It did not give the High Authority and European Court of
Justice carte blanche. For students of European law, it should be noted that this decision came
down after the Court of Justice’s judgment in Costa v. ENEL, in which the Court of Justice held
that, contrary to an earlier pronouncement of the Italian Constitutional Court, European law was
supreme to Italian law.154 Obviously, the Italian Constitutional Court was still not persuaded.

According to the Constitutional Court, the independence and impartiality of the Court of
Justice passed Italian constitutional muster:
That Court [Court of Justice] is established and functions according to the rules
corresponding to the basic principles of our own legal system . . . . It is
unanimously recognised that the Court of Justice is endowed with a judicial
character; and it may be observed that its members must fulfil[l] their respective
functions with independence and impartiality.155
Moreover, the Constitutional Court found that, under the ECSC Treaty, San Michele would be
allowed to impugn the High Authority’s decisions in the Court of Justice on the same grounds as
afforded under Italian law.

The [High Authority’s decision] is subject to attack before the Community Court
by virtue of Article 36, para. 2, by way of appeal with full jurisdiction (recours de
pleine jurisdiction); some maintain even that, once formulated, such an appeal

151 Soc. Acciaierie Ferriere di Roma (FERAM) v. High Authority, Tribunale di Roma, Decision of September 22,
152 Unlike the EC Treaty, the ECSC Treaty only allowed individuals to impugn administrative decisions on the
grounds of abuse of power (détournement de pouvoir). ECSC Treaty, art. 33. This excluded a number of grounds
available to national litigants, most notably excess of power (eccesso di potere) and violation of law (violazione
della legge).
153 Id. at 82-84.
155 Id. at 83.
under Article 3, para. 3 [article guaranteeing review of monetary sanctions issued by High Authority] may be used to attack acts contemplated in Article 33, para. 2 [individual decisions of Authority]. The latter, by their nature, could not be subjected to any wider control under the internal order. The Italian Court therefore concluded that the arrangement for review of administrative acts in the ECSC Treaty complied with the Italian fundamental right to judicial protection, guaranteed under Article 2 of the Constitution. The Italian Court said that the administrative law provisions of the Treaty created a judicial order “[i]n accordance with the rules corresponding to the fundamental features of our judicial system, even if they do not repeat literally the whole of the rules.”

What is the relevance of this old Italian case for the right to a fair hearing? At the time that the UK acceded and Transocean Marine Paint was decided, the case was not so old. Transocean Marine Paint was decided only nine years later and many of the same judges were still sitting on the Court of Justice. The Italian case served as a warning that, after accession, British lawyers and judges might challenge the authority of the Commission and the Court of Justice if the Court failed to accommodate those features of the British public law tradition that set it apart from continental systems. The procedural guarantees of the principle of natural justice were precisely such features.

Some will object that because of the British constitutional doctrine of parliamentary supremacy and because the British Parliament had incorporated the treaties through the European Communities Act of 1972, an English court would not assume jurisdiction over the Commission decision, as the Italian courts had done. But would the English court have interpreted the Parliament’s exercise of sovereignty in the European Communities Act as one in which it rejected centuries of common law on the rules of natural justice? The answer, especially in the early years after accession, was not clear. It is certainly not fanciful to argue that this question was on the minds of the members of the Court of Justice and that, to head off resistance from English courts, they adopted the right to be heard and a highly proceduralized blueprint of Commission decisionmaking.

3. The evolution of the right to a hearing

Once the Court established the right to be heard in competition proceedings, the right rapidly migrated to other areas of direct Commission enforcement of European law. The

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157 My explanation of the salience of the common law right to be heard at the moment of accession is also consistent with the explanation that has been advanced by Joseph Weiler, Pierre Pescatore, Federico Mancini, and Imke Risopp-Nickelson for the emergence of fundamental rights generally in the jurisprudence of the Court of Justice. See Federico Mancini, The Making of a Constitution for Europe, in The New European Community: Decisionmaking and Institutional Change (Stanley Hoffmann & Robert O. Keohane eds., 1991); Pierre Pescatore, Die Menschenrechte und die Europäische Integration, 2 Integration 103 –136 (1969); Imke Risopp-Nickelson, Interlocking Regimes and the Protection of Human Rights in Europe 124-76 (Duke University, Ph.D Dissertation, 2002) (on file with author); J.H.H. Weiler, Human Rights and the European Community: Methods of Protection, in The European Union--The Human Rights Challenge II, 580-81 (Antonio Cassese et al. eds., 1991). With fundamental rights, the puzzle is what prompted the Court, in the 1960s, to shift away from categorically denying the power to review European measures for respect of basic rights to the position that fundamental human rights were "enshrined in the general principles of Community law and protected by the Court." See Case 29/69, Erich Stauder v. City of Ulm, 1969 ECR 419, 425, para. 7. The common wisdom today is that the Court of Justice responded to pressure from the German and Italian constitutional courts.
common law understanding of fair administration colonized other areas of Commission action through the logic of judicial decisionmaking. The Court of Justice extended the right to a hearing to other policy fields based upon the precedential value of the earlier cases in deciding the later ones and the similarities that existed, as a matter of fact and logic, between individuals in competition proceedings and other types of European proceedings. The first place where this occurred was anti-dumping law.

As a policy related to the customs union, international trade is an area in which the Commission has had direct enforcement powers since the early years of the European Community. When importers of a product are alleged to have benefited from government subsidies at home or to be selling the product on the European market at a price below the “normal value” of the product (“dumping”), the Commission is responsible for enforcement. The Commission, not national administrative bodies, is charged with determining that there has been subsidization or dumping and calculating the appropriate duty. The duty is intended to offset the unfair price advantage of the imported good.

When the first European law was passed in 1968, it provided for a fairly extensive procedure.158

- The Commission would publish a notice of the investigation in the Official Journal, as well as individually advise the representatives of the exporting government and the exporters and importers known to be concerned.
- The parties would be allowed to examine “all information that is relevant to the defence of their interests . . . and that is used by the Commission in the anti-dumping investigation.”159
- The parties would be allowed to refute the allegations of government subsidies or sale at less than the normal value in writing. If they so requested and if they “showed a sufficient interest,” the parties would be allowed to present their views orally.160

Furthermore, on the request of the parties, the Commission would organize a meeting of the foreign and domestic interests, to enable them to exchange their views.

In 1979, however, the Court of Justice suggested that the procedure did not adequately guarantee the right to a hearing because the parties did not have an adequate opportunity to review the information collected by the Commission.161 The case involved a challenge to an administrative decision imposing an anti-dumping duty on ball bearings and tapered roller bearings from Japan.162 The Commission recommended to the Council of Ministers (the European institution with the final decisionmaking authority in dumping and subsidies proceedings) that a duty of 15% be imposed, without disclosing

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158 Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, 1968 O.J. (L 93) 1. These provision gave effect to the procedural guarantees in the GATT Anti-Dumping Code. See Clive Stanbrook & Philip Bentley, Dumping & Subsidies: The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community 15 (3d ed. 1996). The GATT Anti-Dumping Code was laid down in the Agreement on the Implementation of Article VI of the GATT, which was signed on 30 June 1967 and entered into force on 1 July 1968. The European anti-dumping and subsidies law has been amended on numerous occasions. The law currently in force is Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Communities, 1996 O.J. (L 56) 1.
159 Id. at art. 10(4).
160 Id. at art. 10(6).
162 Case 113/77, NTN Tokyo Bearing Company, Ltd. and Others v. Council of the European Communities, 1979 ECR 1185.
to the ball-bearing producers what cost figures had served as the basis for calculating the duty. Advocate General Warner, ever-ready to vindicate the principles of natural justice, relied on the competition law that he had been instrumental in creating to find that the right to be heard applied to anti-dumping investigations:

It is a fundamental principle of Community law that, before any individual measure or decision is taken of such a nature as directly to affect the interests of a particular person, that person has a right to be heard by the responsible authority; and it is part and parcel of that principle that, in order to enable him effectively to exercise that right, the person concerned is entitled to be informed of the facts and considerations on the basis of which the authority is minded to act. That principle, which is enshrined in many a Judgment of this Court, and which applies regardless of whether there is a specific legislative text requiring its application, was re-asserted by the Court only yesterday in Case 85/76 Hoffman-La Roche & Co. AG v. Commission.  

He easily concluded that the anti-dumping duty was imposed in breach of the producers’ right to be heard.

The Court never reached the procedural question, since it found for the producers and against the Commission and Council on the alternative grounds that they had acted contrary to powers conferred under the European anti-dumping law. However, the Advocate General’s declaration attracted considerable attention in academic commentary as well as in policymaking circles. A few months after the judgment was handed down, European anti-dumping law was amended in two fundamental respects. First, firms on both the foreign and domestic sides were allowed to inspect all the information gathered in the course of the investigation and in the Commission’s files. Second, the firms that exported and imported the product under investigation were given the right to request that the Commission disclose its “essential facts and considerations.” The common wisdom in international trade circles is that the revisions were made to respond to the criticism of Advocate General Warner in NTN Tokyo Bearing.

Then, in 1985 and again in 1991, the Court annulled two sets of anti-dumping duties because they had been imposed in breach of the parties’ right to be heard. In the first, Timex, the main European manufacturer of wrist-watches and the initiator of the anti-dumping proceeding, had not been allowed to examine information collected on watches from Hong Kong. The Commission reasoned that the action was against watches from the Soviet Union, not Hong Kong, and European anti-dumping law only provided for the disclosure of evidence provided by the parties to the investigation. The Court held against the Commission and the Council, reasoning that to protect the procedural rights of Timex, it was necessary to interpret the governing law broadly.

In the second case, Al-Jubail Fertilizer v. Council & Commission, the influence of the right to a hearing in competition proceedings was unmistakable. In Al-Jubail Fertilizer, the

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163 Id. at 1261.
164 Id. at 1208-10, para. 20-27.
166 Council Regulation (EEC) No 1681/79 of 1 August 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, 1979 O.J. (L 196) 1, art. 3.
manufacturer of fertilizer from Saudi Arabia claimed that the Commission had failed to
communicate a number of facts relevant to the imposition of the duty, including the information
on European costs of production and prices of fertilizer, which had served as the basis for
concluding that there had been injury to the domestic industry.  Advocate General Darmon
first quoted at length from the opinion of Advocate General Warner in NTN Tokyo Bearing.  He then noted the analogies between the position of the parties in a competition proceeding and
in an anti-dumping proceeding:

From the viewpoint of an undertaking, the loss of the Community market as a
result of the imposition of a high anti-dumping duty—as in this case—has
financial consequences which are comparable to those which follow the
imposition of a fine for an infringement of Articles 85 or 86 of the Treaty of
Rome.  Finally, in concluding that the Commission had to respect procedural rights in anti-dumping
proceedings similar to those guaranteed in the competition area, the Advocate General said that
the right to be heard announced in the lead competition case naturally applied in the case at hand:

[A] principle as general as the one defined by the Court in its judgment in
Hoffman-La Roche v. Commission, namely that the Commission may not base its
decisions on facts, circumstances or documents on which the party concerned has
been unable to make its views known, would seem to apply to dumping
proceedings as well.

The Court squarely followed the Advocate General’s opinion. It declared that the right to
a fair hearing was a “fundamental principle” of European law and that it applied to anti-dumping
proceedings because of the adverse impact that an anti-dumping duty could have on the interests
of the parties:

[I]t is necessary . . . to take account in particular of the requirements stemming
from the right to a fair hearing, a principle whose fundamental character has been
stressed on numerous occasions in the case-law of the Court (see in particular the
judgement of 17 October 1989 in Case 85/87 Dow Benelux v. Commission
[1989] ECR 3137 [competition case]). Those requirements must be observed not
only in the course of proceedings which may result in the imposition of penalties,
but also in investigative proceedings prior to the adoption of anti-dumping
regulations which, despite their general scope, may directly and individually
affect the undertakings concerned and entail adverse consequences for them.

A number of cases have since been decided in which the Court of Justice, now joined by the
Court of First Instance, have defined the scope of the right.

The last policy field in which the Commission must abide routinely by the right to a
hearing, as a result of the judicial logic of reasoning by analogy and reliance on earlier

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170 See Al-Jubail Fertilizer v. Council, 1991 ECR at I-3220, points 63-64, I-3227, point 99. There are two
components to any anti-dumping proceeding. First, the administrative agency must find that the foreign product was
dumped on the domestic market, that is, it was sold below “normal value” (or in the U.S., “fair value”). Second, the
agency must find that the domestic industry suffered “injury” by virtue of the dumping.
171 Id. at I-3221, para. 72.
172 Id. at I-3221, para. 73.
173 Id. at I-3222, para. 75.
174 Id. at I-32141, para. 15.
175 See, e.g., Case T-88/98, Kundan Industries Ltd and Tata International Ltd v. Council, 2002 ECR II-4897, para.
132; Case T-121/95, EFMA v. Council, 1997 ECR II-2391, para. 84; Case T-159/94 & T-160/94, Ajinomoto and
NutraSweet v. Council, 1997 ECR II- 2461, para. 83; Case T-147/97, Champion Stationery v. Council, 1998 ECR II-
4137, para. 55.
judgments, is customs. Since 1968, the European Community has had a single set of tariff rates for goods imported into the Community from third countries. The duties are calculated and collected, pursuant to an elaborate set of European rules, by national customs services in each of the Member States. Generally, national administrations, not the Commission, handle the collection of custom duties. Since 1979, however, in a narrowly defined class of cases, the Commission has had the power to make individualized determinations affecting specific firms. These are cases in which the importer applies for the repayment (the duty has already been paid) or the remission (the duty is owed but has not yet been paid) of a customs duty due under the European Customs Code. The importer’s claim can be based on any one of a number of circumstances set out in the Customs Code, for instance, negligence on the part of the Commission in administering customs policy. Remission or repayment may also be made under the general fairness clause of the implementing regulation. The proceeding is initiated by the importer by filing an application with the responsible national customs services. The customs services are responsible for determining whether to grant remission, but, in the case of doubt, it may refer the question to the Commission, which has the last word.

Until recently, individual importers did not enjoy the right to a hearing before the Commission in remissions proceedings. The procedure afforded under national law before the customs services of the Member States was deemed enough. Even when the national customs services sent the file to the Commission for consideration, no provision was made for the trader to make his views known. Then, in Case T-346/94 France-aviation v Commission, the Court of First Instance held that that a trader who requests repayment of customs duties has the right to be heard during the proceeding. As a consequence of that judgment, the Commission amended its customs rules in 1996. Under the new provision, when a national customs service sends a file to the Commission, it is required to include a statement by the trader certifying that the trader has read the case file and stating either that she has nothing to add or listing the additional information that she considers should be included. But still no provision permitted individual importers to have any direct contact with the Commission in the course of the repayment or remissions proceedings.

The Court of First Instance changed the state of affairs in two subsequent cases involving remissions applications for customs duties owed on high-quality beef imported from Argentina (known, appropriately, as Hilton beef). There, the Court of First Instance held that if the Commission was contemplating reversing a favorable determination by the national customs service, it was under a duty to give the importers access to the Commission’s file and an opportunity to respond, in writing, to the Commission’s allegations, including the right to submit evidence. Again, the Commission amended its customs rules to reflect the Court’s holding.

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179 See id. at arts. 905-09.


In two pending cases, the Court has been asked by importer firms to extend the right to a hearing even further: the issue under consideration is whether parties to remissions proceedings also have the right to make oral representations to the Commission.\(^\text{184}\)

The Court has sporadically recognized the right to a hearing in other types of Commission proceedings, which, according to the test developed by the Court and reminiscent of the earlier formula of Advocate General Warner in *Transocean Marine Paint Association*, “are initiated against a person and are liable to culminate in a measure adversely affecting that person.”\(^\text{185}\) These are policy areas in which enforcement is almost exclusively in the hands of national authorities, and the Commission intervenes rarely, under exceptional circumstances. In one case, the exclusion of a Swedish fishing company from a Community fishery zone because of allegations of illegal fishing activities was enough to trigger a hearing right.\(^\text{186}\) In another, it was the reduction of European financial assistance to a Portuguese firm that triggered the right.\(^\text{187}\) In these cases, however, the scope of the hearing right is far less extensive than in the core areas of competition, anti-dumping, and now, customs administration.\(^\text{188}\) The litigants have the right to a brief description of the facts and reasoning supporting the contemplated decision, to make their arguments and advance their evidence in a written submission, and to receive a brief and by no means exhaustive reply in the Commission's state of reasons.

Notwithstanding the Court’s central role in establishing adversarial, trial-type procedures in Commission decisionmaking, it has recognized a critical limit to the right to a fair hearing. The Commission decision must “adversely affect” the party vindicating the right. This requirement has led the Court to reject the right in two types of cases. When the Commission’s decision is characterized as a benefit-conferring, as opposed to a sanction or burden-imposing one, then the right is not guaranteed. In *Windpark Groothusen*, the Commission denied an application for Community aid under a programme promoting energy technologies.\(^\text{189}\) The Commission based the decision exclusively on the information submitted in the initial application, without allowing the applicant to submit observations before the final funding decision was made. The Court of First Instance, upheld by the Court of Justice, found that there was no right because “the applicant . . . had merely been placed on a reserve list of possible beneficiaries of Community financial support.”\(^\text{190}\)

The other type of case in which the Court does not recognize that a party is adversely affected is when a third-party individual stands to benefit or lose from the Commission’s enforcement action. In other words, the individual seeking the procedure is a member of the wider public in whose interest the Commission is supposed to act when it applies European law, not the specific individual or firm against whom the Commission is taking action. For instance, the Court denied that a consumer group had the right to a fair hearing in an anti-dumping case

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15, para. 44.
brought against audio-cassettes imported from Japan, Hong Kong, and Korea. The Commission, therefore, was allowed to deny the consumer group access to the information in its files on the alleged dumping.\(^{191}\)

The Court has employed a variation of this logic in state aid cases. In state aid proceedings, the Commission takes action against Member States alleged to unfairly assist their national firms through direct subsidies or favorable treatment in one form or another. Competitors of the national champions often bring the state subsidies to the Commission's attention. The Court has repeatedly held that the Member State under investigation has a right to a hearing.\(^{192}\) By contrast, the procedural rights of the state enterprise and competitor firms are significantly more limited.\(^{193}\)

The most recent chapter in this history is the European Charter of Fundamental Rights of 2000, which, under the Constitutional Treaty of 2004, would be given binding legal force. Article 41 codifies the extensive case law of the Court of Justice on individual rights in European administration, including the right to a hearing chronicled above.\(^{194}\) The relevant paragraphs read as follows:

**Article II-101 Right to good administration**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
   (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

Thus, Article II-101 enshrines the long and steady trajectory of the Court of Justice’s jurisprudence that started with *Transocean Marine Paint Association* in 1974 and continues to this day.

4. European value: The European and British rights compared

How does the European right to a hearing today, after thirty years of Court of Justice judgments and Commission policymaking, compare to the British tradition from which it was drawn? Since generalization in administrative law is dangerous, it is best to compare the procedures in the same substantive policy area. The one field in which such one-to-one comparison is possible is competition. The results are startling: by the early 1980s, the European right had overtaken the British one. The entitlements of the right to a hearing, taken as a combination of the duty to give notice of the government's case, disclose the evidence, and allow

\(^{192}\) See, e.g., Case C-48/90, Netherlands and Others v. Commission, 1992 ECR I-565, paras. 44, 49 (finding a right of defense, including the right to receive a statement of objections and right to make views known for the Netherlands and the Netherlands alone).
\(^{193}\) See Cases T-371 & 394/94, British Airways plc and British Midland Airways Ltd. v. Commission, [1998] ECR II-2405; Case C-367/95, Commission v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval), 1998 ECR 1719, paras. 53, 58 (finding that Commission, in deciding not to pursue complaint from competitor firm, did not need to give competitor access to the information in the file or the opportunity to state its views).
\(^{194}\) Constitutional Treaty.
the parties opportunity to refute the opposing case, were more extensive before the European Commission than before the British authorities.

As the reader will recall, early in the history of British competition policy, jurisdiction was split between two administrative authorities, the Restrictive Practices Court, which was responsible for cartels and certain types of vertical restraints of trade and the Mergers and Monopolies Commission (MMC), which was responsible for investigating monopolies and mergers and a variety of market practices considered to be anti-competitive. By the mid-1970s, the MMC had become the most active of the two authorities.\(^ {195}\) Yet the procedure there fell short of the Commission’s proceedings in certain respects. The parties did not have the right to examine all of the evidence gathered by the MMC.\(^ {196}\) Furthermore, the letter sent out to the parties at the beginning of the MMC’s investigation, informing them of all the facts and arguments against them, was not believed to be as comprehensive as the Commission’s statement of objections.\(^ {197}\)

Although not strictly related to the principle of natural justice, one last, notable difference separated British from European competition proceedings and significantly limited the rights of the parties under investigation. The British system allowed for vastly more discretion in the hands of the Secretary of State of Trade and Industry, i.e. the Minister, than was enjoyed by the College of Commissioners in the European context.\(^ {198}\) The MMC issued a comprehensive report on the anti-competitive practices or merger in which it made findings on injury to the public interest and made recommendations on the appropriate remedies. The Minister, however, had complete discretion to reject the finding of injury or the proposed remedial measures, and this discretion was often used.\(^ {199}\) The application of largely political considerations at the final stage of the proceedings signified that even though the parties were heard, early on, in a quasi-judicial proceeding, the final outcome could well be based upon factors of which they had had no notice and to which they had no opportunity to respond.\(^ {200}\)

In 1998 and again in 2002, British competition law was completely overhauled. A number of the substantive rules and institutional elements of the British system were believed to be out-of-line with the modern consensus on effective, market-protecting competition law. While British legislators were not required legally to adopt the Community’s rules on anti-competitive agreements, abuse of dominant position, and mergers, or the related European enforcement model, that is what they chose to do.\(^ {201}\) Some of the reforms were designed to depoliticize competition law, removing the Minister’s powers to depart from the report of the


\(^{198}\) See Whish, Competition Law, supra note ___ at 240-42 (comparing “political approach” of UK scheme with legal approach of European one).

\(^{199}\) See Whish, Competition Law, supra note__ at 57-59, 83-84.

\(^{200}\) See Graham, The Enterprise Act 2002 and Competition Law, supra note__ at 274.

\(^{201}\) See Imelda Maher, Juridification, Codification and Sanction in UK Competition Law, 63 Mod. L. Rev. 544, 544 (2000). So-called "Europeanization" of national competition law has been observed in a number of Member States, not just the UK. See generally Michaela Drahos, Convergence of Competition Laws and Policies in the European Community: Germany, Austria, and the Netherlands (2001) (analyzing the Europeanization of competition policy); Imelda Maher, Alignment of Competition Laws in the European Community, 16 Yearbook of European Law 223 (1996) (same).
Commission (now called the Competition Commission), and replacing review by the Minister with a powerful appeals tribunal separate from the Competition Commission. 202

There lies the irony. In the 1970s and early 1980s, rights and procedures in European Commission competition proceedings were transformed to respond to the common lawyer’s criticism of an overly bureaucratic process without adequate opportunities for individuals to test administrative decisions and protect their rights. Since then, the British system has been changed to render it more adversarial, expressly modeled on European competition proceedings. 203 To be sure, the procedural and institutional dimensions of modernization were just one part of a complex reform of the entire system of competition law. Moreover, this reconfiguration of British administrative authority does not come under the doctrinal heading of natural justice. But, effectively, the right to be heard and the rule against bias are more vigorously protected in a system with a powerful appeals tribunal and with no ministerial discretion. Here we see the influence of new European conceptions of rights on old national traditions, the effect of which has been to bring the British system closer to the ideal of natural justice.

B. The Second Generation: The Right to Transparency

The next wave of rights to transform the structure of Commission decisionmaking and the relationship between the Commission and European citizens came in 1993. The Commission has the far-reaching policymaking prerogatives of an executive branch in a parliamentary system of government. The EC Treaty gives the Commission the exclusive right to introduce laws into the assemblies with the power to vote and enact laws, the Council of Ministers and the European Parliament. 204 The Commission is also responsible for implementing European laws by promulgating implementing regulations, monitoring implementation by the Member States (which, as mentioned earlier, are charged with day-to-day enforcement normally), and suing Member States in the Court of Justice if their implementation is inadequate. 205 What rights did European citizens have in 1957 when the Commission exercised authority through broadly applicable policy measures? 206 What rights do they have today? And how do we explain the transformation? This section of the Article gives the first part of the answer to this set of questions by examining the rise of the right to transparency.

202 Id. at 276, 279 (describing new institutional structure); Mark Furse, Competition and the Enterprise Act 2002, at 32-37 (2003).

203 The influence of the European model and the cross-fertilization between the European and British systems is evidenced by the person of Sir Christopher Bellamy. Bellamy is a long-standing member of the English bar. He originally litigated competition cases and gave critical testimony on European competition proceedings before the House of Lords Committee in 1981. See House of Lords, European Communities Committee, Eighth Report on Competition Practice, supra note __ at 27. He later served as the UK judge on the Court of First Instance, where he gained extensive experience with Commission competition proceedings and he now has returned to the UK to serve as the chair of the three-judge Competition Appeals Tribunal. See Graham, The Enterprise Act 2002 and Competition Law, supra note __ at 284.

204 This is different from lawmaking in the U.S., where bills tend to originate in Congress, but similar to European parliamentary systems, in which the same political party or set of parties sitting in the government cabinet controls both the executive branch and the legislature and hence relies on the administration to draft the bills that are then sent to the legislature for debate and voting.

205 In carrying out its implementation responsibilities, the Commission generally acts together with committees of national representatives with area-specific expertise, known as comitology committees.

206 As should be clear, I exclude from my discussion the indirect right to shape Commission policies through voting for legislators on the Council of Ministers or the European Parliament, through petitions to the European Parliament and the European Ombudsman, and through challenges to European laws and regulations in the European court system.
1. The right to examine Commission documents then and now

   a. National traditions of open government and the right of access to documents

   In Europe, the openness of government administrations to the public varies considerably. Most government administrations, regardless of whether they operate in a common law or civil law tradition, fall on the close side of the spectrum. Over the centuries, government officials in countries like France, Italy, Belgium, Germany, and the UK have been allowed to draft legislation, promulgate administrative rules, and make administrative decisions in relative secrecy, without the prospect of widespread public scrutiny through reporting requirements, the right of access to documents, and other transparency devices. The exception is government administration in the smaller countries of northern Europe: Sweden, Norway, Denmark, the Netherlands, and Finland. For example, Sweden's legal system contains a number of features that separate it from the majority tradition: powerful parliamentary committees, an ombudsman elected by the parliament with investigative and prosecutorial powers over government officials, constitutionally guaranteed independence for the administration from the prime minister and the cabinet, and the constitutional right of access to government documents. Although the classic dichotomy between the North and the rest of Europe is not as stark as it used to be due to a number of contemporary, European-wide trends in government administration, the difference remains.

   Whether a country has general access-to-documents legislation largely tracks the categorization of a system as open or closed. In the Nordic systems and in the Netherlands, individuals have the right to request documents related to a broad array of government acts, without demonstrating any particular connection to the government proceeding. Especially in Sweden and Finland, this right has deep, historical roots and is part of the constitutional identity of the nation, or at least of the public lawyers of the nation. The declaration on transparency in the Swedish Treaty of Accession gives a flavor of the symbolic nature of the right: Transparency in the management of public affairs and, in particular, access of the public to administrative documents as well as the protection that the Constitution guarantees for the media, are and remain fundamental principles that are part of the constitutional, political, and cultural heritage of Sweden.

   It is important not to exaggerate the scope of the right. The legislation in all of these countries contains significant exceptions. Everywhere, public officials may refuse disclosure to prevent harm to the public interest or to other individuals, albeit according to different, national understandings of what constitutes harm. Moreover, in all these systems, certain internal

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210 The Swedish right of access dates back to the Freedom of the Press Act of 1766, one of Sweden’s basic constitutional laws. See Joakim Nergelius, Constitutional Law, in Michael Bogdan, Swedish Law in the New Millenium 65, 83-84 (2000). Chapter Two of the Act gives citizens the free right of access to official documents. In Finland, the right dates back to the same Freedom of Press Act of 1766, since Finland was governed by Sweden at the time. It now is guaranteed under Section 12 of the Finnish Constitution.

211 1990 O.J. (C 241) 397.
documents are exempted from public access because of their preparatory or political quality; the rationale is that, in some cases, members of the executive branch should be protected from public scrutiny to permit them to engage in frank discussion before making final decisions. Until 1999, Finnish law probably carved out the broadest exception: “non-public” documents were defined as all those that served to prepare a final decision on a government matter.212 Excluded was material such as drafts of legislative bills, memoranda, preparatory reports, and information-gathering documents.213 In Sweden, material containing factual and policy information relevant to final government decisions is made public.214 But the law exempts drafts of government bills and minutes from meetings related to bills, working papers, internal memoranda, and notes. The Danish restrictions on access to internal documents appear similar to the Swedish ones.215 Preparatory material which contains the government agency’s reflections, such as draft reports, draft plans, minutes, and notes, and which is not circulated to other government agencies and thus is considered “internal,” is protected from disclosure.216 Moreover, as in both Sweden and Finland, documents that are highly political in nature, like correspondence between government ministries on draft legislation, minutes of cabinet meetings, and documents prepared for cabinet meetings are excluded.217

The Netherlands appears to have the most liberal system of all. Individuals may request documents related to any general policy decision or individual determination made by any part of the administration, including documents related to the initial preparation and drafting of decisions and including material related to government bills.218 The Dutch statute expressly applies to cabinet ministers, including the Prime Minister; unlike the Danish law, minutes from cabinet meetings and documents prepared for cabinet meetings are not excluded from the law’s coverage.219 The principal exception to the disclosure of internal documents is the one for documents containing personal opinions of public officials. Even on that score, however, in the interests of “good administration" and democratic government, the administration can transmit the information, but is required to do so in an anonymous form, so as to prevent identification of the individual who gave the opinion.220

212 Law No. 83 of 9 February 1951, art. 6.
213 A new law, replacing the original access to documents legislation, came into force on December 1, 1999. See Olli Mäenpää, Right of Access to Documents: New Finnish Legislation, 11 European Review of Public Law 1621, 1623 (1999). It significantly improves access to preliminary documents. Id. at 1622, 1629. Now, materials such as outlines, memoranda, and draft bills are available after the government’s decision becomes final. Other materials such as studies and minutes of departmental meetings can become available before, once finalized by the responsible agency. See Act on the Openness of Government Activities § 6 (1999) available at http://www.om.fi/1184.htm.
216 Access to Administrative Files Act §§ 7 & 8.
217 Access to Administrative Files Act, § 10.
219 WOB, art. 1a, para. 1a.
220 WOB, art. 11.
Creating European Rights

Another difference that separates the northern systems is whether government agencies are required to maintain official registers of documents. In Sweden and Finland, government agencies must keep registers—containing titles and reference numbers of documents but not their full text—unlike their Danish and Dutch counterparts. This difference is primarily structural and organizational: the registers are used to facilitate the processing of access-to-documents requests. In systems with registers, individuals filing requests must generally refer to the documents by name or number whereas in those without registers, individuals need only to refer to the issue of interest.

Among those Member States on the closed side of the spectrum, one group of countries has recently adopted cross-cutting, access-to-documents legislation but is still a newcomer to the habit and law of open government. The UK adopted a law in 2000, Ireland in 1997, Belgium in 1994, Portugal in 1993, and Spain in 1992. A second set of Member States has adopted general legislation which significantly restricts the right by requiring individuals to show a special interest in the document because the document is related to an administrative proceeding affecting their rights and duties. Italy and Greece fall in this category. Lastly, Germany does not provide for a general right of access; rather the right is contained in numerous, sector-specific laws in areas such as the environment and municipal planning.

b. The right of access to Commission documents

Until 1992, European citizens who wished to know how the Commission exercised its powers enjoyed the same rights, or more accurately, lack of rights, as their counterparts in Member States belonging to the closed government tradition. They had the right to know of official acts passed by European institutions pursuant to their powers under the treaties, in the case of individual decisions through the communication of the decision in writing to the concerned party, and in the case of generally applicable measures, through publication in the Official Journal. It is difficult to imagine how matters could have been otherwise: all of the Member States were committed to the basic rule of law principle that, as governments of law and not men, the law should be put down in writing and should be known to citizens. But European citizens did not have the right to be informed of what went on behind the closed doors of the Commission’s offices. As a matter of practice, the Commission was more open than many national administrations. Nonetheless, as a matter of rights, European citizens could not demand to learn about individual decisions that were not of specific concern to them, to review

221 See Banisar, The Freedom.org Global Survey, supra note __ at 81 (Sweden), 31 (Finland).
222 See Dutch Government Explanatory Memorandum 22-23, Stb 1991, 703 (explaining that Dutch law modeled on Danish law, not Swedish law, which allows the applicant to refer generally to the issue of interest in his or her requests and not to specific documents).
223 See Banisar, The Freedom.org Global Survey supra note __ at 13 (Belgium), 41 (Ireland), 70 (Portugal), 80 (Spain).
224 See Law No. 142 of 8 June 1990; V. Italia & M. Bassani, Procedimento amministrativo e diritto di accesso ai documenti 535-69 (1995); Banisar, The Freedom.org Global Survey, supra note at 44.
225 See Banisar, The Freedom.org Global Survey, supra note __ at 36.
227 See EC Treaty, art. 254 (ex art. 191); Decision creating the ‘Official Journal of the European Communities,’ 1958 O.J. (C 117) 53.
228 See Commission of the European Communities, Public Access to the Institutions’ Documents, COM (93) 191 final, 5 May 1993, at 2. The Commission says that “it has already a commendable history of an open door policy, especially in comparison with existing practices in national administrations.” Most would agree that even though this statement is self-serving, it also is true.
the expert reports and technical data that served as the basis for administrative and legislative acts, or to view the correspondence among Commission departments and between the Commission and outside parties on the administration of the law.

In 1993, a process of transformation of European law began. On December 6, 1993, the Commission and the Council entered into an agreement, called a Code of Conduct, pledging to adopt access to document rights for their respective organizations and agreeing to common conditions and principles. Thereafter, the Council and Commission separately promulgated internal rules of procedure implementing the terms of the Code of Conduct. The rules were worded extremely broadly. The documents covered by the rules were defined as any written text held by the Council or Commission and the exceptions to disclosure were sketched in the briefest of terms, covering areas such as public security, privacy, business secrets, and the Community’s financial interests. Four years later, the Amsterdam Treaty created a right of access to documents:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents . . . .

In 1999, the Commission agreed to extend the right of access to material generated in the European rulemaking process, including meeting agendas, drafts, and final decisions, and to create a public register of all such documents. Finally, in 2001, the Council, Commission, and European Parliament passed a law giving effect to the right of access in the Amsterdam Treaty.

The Public Access to Documents Law, which has been followed by more precise provisions in each of the institution’s rules of procedures, elaborates considerably on the terms under which Europeans can exercise their right of access. The most significant innovation is the requirement that each institution establish a register of documents and that, whenever possible, access be provided through direct electronic access to the documents listed in the register. The law also creates a new category of sensitive documents, designed to cover material generated in the fields of foreign affairs, security, and police cooperation, which would enable the institutional author of the document to veto disclosure. As for the exceptions to disclosure of ordinary, non-sensitive

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231 EC Treaty, art. 255.
232 Decision 1999/468/EC of the Council of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184) 23, art. 7 [hereinafter "Comitology Decision"].
236 Public Access to Documents Law, art. 9.
documents, they are specified in far greater detail compared to the 1993 rules of procedure and they require the institutions to engage in more balancing, impelling them to weigh the applicant’s public interest in disclosure against the commercial interest or institutional interest in secrecy.237

2. The historical juncture: The Maastricht Treaty crisis

What explains the radical change in the right of European citizens to know how the Commission exercises its powers? The crisis provoked by the Danish rejection of the Maastricht Treaty led to the salience of the northern model of open government in the eyes of European Heads of State, who consequently made a number of hortatory commitments to transparency. Once the crisis had subsided, momentum for transparency continued because of the presence of government officials from the North within the institutional system--reinforced considerably by the accession of Sweden and Finland in 1995--and through the advocacy of the European Parliament.

a. Danish rejection of the Maastricht Treaty: Northern values and the interest of European Heads of State

The idea of a European right of access to government documents was not new. In the 1980s, the European Parliament called for “legislation on openness of government of Community affairs;”238 a “right to information;”239 and a “right of access to information.”240 In the run up to the signing of the Maastricht Treaty on February 7, 1992, the Dutch government sought to insert a provision, modeled on the Dutch Constitution, that would have required the European institutions to pass legislation on access to information.241 The idea fell flat among the other Member States, and as a compromise measure, the Commission proposed that the text be included as a toothless, non-binding protocol to the Treaty. Hence the following Declaration of the Heads of State:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.242

Nowhere was there mention of an individual right and, aside from the usual diplomatic language, the only concrete action envisaged was a Commission report, which, given the

237 Id. at arts. 4.2, 4.3.
238 Resolution on the compulsory publication of information by the European Community, 1984 O.J. (C 172) 176, para. 1
239 Resolution on the compulsory publication of information by the European Community, 1988 O.J. (C 49) 174.
240 Resolution adopting the Declaration of fundamental rights and freedoms, 1989 O.J. (C 120) 51, 55. Article 18 (Right of access to information) provides: “Everyone shall be guaranteed the right of access and the right to corrections to administrative documents and data concerning them.”
242 Maastricht Treaty, Declaration 17.
The Danish rejection of the Maastricht Treaty in the national referendum of June 2, 1992, was the catalyst that set the right to transparency into motion. The Danish referendum, along with the Euro-skepticism it triggered in a number of other countries, was a tremendous blow to the twelve governments that had signed the Treaty. More than a year had been consumed in the negotiations on the Treaty, and the result was an ambitious project of monetary and political union that surpassed the customs union and common market of the original Treaty of Rome. The Maastricht Treaty was a step beyond the functional, market-oriented vision of Jean Monnet’s European Community. It included European citizenship, a common currency, and cooperation on foreign policy, immigration, and police matters. The signatories had a great stake in ratification, and the Danes and the gloomy mood that set in after their referendum stood in the way of the transition to a monetary and political union.

Transparency emerged as a powerful concept through which the governments could reclaim legitimacy for the European project, largely because it was the open government country of Denmark that had rejected the Treaty. After the “No” vote, the Danish government submitted a memorandum outlining the changes that would be necessary if the Maastricht Treaty was to survive a second referendum. At the top of the list were openness and transparency. The response was a steady wave of commitments to transparency by European Heads of State at European Council meetings in the fall of 1992. The Commission dutifully produced a series of policy documents in spring of 1993. And in summer and fall of 1993 the last Member States ratified the Treaty: the Danish electorate approved Maastricht in a second referendum on May 18, 1993; the UK House of Commons voted in favor of the Treaty on May 20, 1993, and the UK House of Lords approved it on July 20, 1993; and the German Constitutional Court upheld the constitutionality of the Treaty, thereby allowing Germany to ratify it, on October 12, 1993.

b. The aftermath of Maastricht

243 The close observer and freedom of information crusader, Tony Bunyan, is also of the opinion that the Danish rejection of Maastricht, not the Maastricht protocol, was the critical moment. See Tony Bunyan, Secrecy and Openness in the European Union, available at http://www.statewatch.org/foi.

244 Shortly thereafter, the French electorate approved the Maastricht Treaty in a referendum by just over 50 percent, one of the narrowest margins ever. See Bermann et al., Cases and Materials on EU Law, supra note at 18.

245 The Intergovernmental Conferences on Political Union, Economic and Monetary Union were launched at the European Council meeting in Rome on December 15, 1990.

246 Prime Minister’s Office, Denmark in Europe, reprinted in European Institute of Public Administration, The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications 505, 505-06 (Finn Laursen & Sophie Vanhoonacker eds., 1994) (calling for “openness and transparency in [the EC’s] decision-making procedures” and “openness in administration”).


248 See Commission of the European Communities, Increased Transparency in the Work of the Commission, 1993 O.J. (C 63) 8; Commission of the European Communities, Public Access to the Institutions’ Documents: Communication to the Council, the Parliament and the Economic and Social Committee, COM (93) 191 final, 5 May 1993; Commission of the European Communities, Openness in the Community: Communication to the Council, the Parliament and the Economic and Social Committee, COM (93) 258 final, 2 June 1993.
Creating European Rights

i. National value: The influence of the northern tradition of open government

After the Maastricht Treaty was ratified by all Member States in the fall of 1993, transparency could very well have faded from the political agenda and could have become a hortatory duty without any real bite in the day-to-day operation of the institutions. Instead, the advocacy of Europeans with cultural allegiances and expectations shaped by their experiences as citizens of the Netherlands, Denmark, and later Sweden and Finland ensured that the impetus for transparency was sustained. The evidence of the significance of the northern mental map of rights and democracy comes in the form of surnames. Who were the transparency advocates? The parliamentarians who have chosen to make transparency their mission have mainly come from the North: Jens-Peter Bonde (Denmark), Maj-Lis Loow (Sweden), Hanja Maij-Weggen (Netherlands), Heidi Hautala (Finland), Cecilia Mamlström (Sweden), and Astrid Thors (Finland).249 Certainly, there were exceptions. A few British parliamentarians have also been active on the issue and, over the years, parliamentarians from a couple of other Member States have shown sporadic interest.250 Nonetheless the northern provenance of most of the transparency advocates is striking, especially given that, in the Parliament’s system of weighted representation, relatively few parliamentarians come from the small northern Member States.

Likewise, within the Council of Ministers, the representatives of northern Member States have consistently come down on the side of transparency, against representatives of Member States in the center and south of Europe. The voting record of the Council working party on access to documents is illustrative on this score. When an application filed with the Council possibly comes within one of the exceptions to the right of access, it is sent to a working party of Member State representatives. In 2000, the working party was divided on whether to grant access in 24 instances. Denmark voted to grant access in 88% of those cases, Sweden in 83%, Finland in 53%, the Netherlands in 29%, the UK in 20%, Ireland in 17%, Greece and Germany each voted to granted access in only one case (4%), and the remaining Member States (Austria, Belgium, Italy, Luxembourg, France, and Sweden) voted to deny access in all 24 cases.251

The citizens and Member States of northern Europe also made their mark in the judicial branch (Court of Justice and Court of First Instance). Member States intervened on the behalf of plaintiffs in seven out of the 28 cases brought between 1993, when the first rules of procedure entered into force, and summer 2002.252 They were all northern Member States: Sweden in four

250 Id. at 4, 5. Jacobs names Michael Cashman and Nicholas Clegg, from the UK, Dirk Sterckx, from Belgium, and Antonio Di Pietro, from Italy, as active on the issue.
251 Id. at 6.
252 See id. at 6.
253 In the U.S., the functional equivalent is litigation under the Freedom of Information Act (FOIA) by individuals who file a request with the government for documents, are denied the documents on the basis of one of the many exceptions available under FOIA, and then sue the government to contest the denial. My count of European cases is based on a list developed by the activist Tony Bunyan and the academic Steve Peers for the period 1993-August 5, 2002, and available at: http://www.statewatch.org/caselawobs.htm. I counted as a different case any case that was assigned a different number by the Court of First Instance. This led to the omission of one case from the Statewatch list of Court of First Instance orders, item 10, Case T-111/00, BAT v. Commission, 2001 ECR II-Feb. 21. I have independently done a search to check for the accuracy of the count, as well as the categorization of intervenors and plaintiffs. For purposes of the count, I included all of the lawsuits brought by individual plaintiffs and the one lawsuit brought by a privileged, non-individual plaintiff, namely the Netherlands.
cases,253 the Netherlands in three,254 Denmark in two,255 and Finland in one.256 Member States also intervened in support of the defendant institutions (the Council and Commission, alternatively). They were countries with traditions of closed government: France in four cases257 and the UK in four.258

The Netherlands also sued the Council independently over the first Council access-to-documents rules. The Netherlands, supported by the European Parliament (which because of the rules of standing existing at that time was only allowed to sue in the Court of Justice to protect its own legislative prerogatives and could not bring suit independently), sued the Council on the grounds that access to documents should be set down in a legislative measure rather than through internal rules of procedure.259 The consequence of adopting the access-to-documents measure as internal rules of procedure had been to allow the Council to act by a simple majority, thereby enabling the Member States in favor of continued secrecy to easily outvote Member States like the Netherlands in favor of transparency and to allow the Council to cut out the Parliament entirely from the decisionmaking process. Both the Netherlands and the Parliament considered that the exceptions to the access-to-documents principle were far too broad and hence vitiated the right to transparency.260 They lost, foreshadowing the argument that the Parliament, not the Council or the Court of Justice, was the main institutional proponent of transparency because it could act notwithstanding the majority, closed government tradition and because it had a strategic, institutional interest in doing so.261

The nationalities of the plaintiffs are also revealing.262 Eight were from the UK, eight from the Netherlands, four from Germany, two from Finland, one from each of Denmark, Sweden, France, Greece, and Italy, and two were public interest groups with diverse membership.263 Plaintiff nationalities roughly correspond with expectations, albeit less strikingly than in the case of government intervenors. In terms of their numbers relative to population, citizens of northern, open-tradition countries are disproportionately represented. British citizens

260 See Curtin, Betwixt and Between, supra note at 103 (describing Dutch position); Case C-58/94, Netherlands v. Council, 1996 ECR at I-2193 (describing Parliament’s position).
261 See infra section II.B.2.b.ii.
262 I counted a firm as a national of a Member State if the Court of First Instance said that it had a place of establishment in the Member State. I classified individuals based on where the Court of First Instance said the person resided.

263 Cases T-194/94, T-123/99, T-111/00, T-311/00, T-19/96, T-78/99, T-178/99, T-36/00 (UK); Cases C-58/94, T-83/96, T-188/97, T-188/98, T-20/99, T-211/00, T-41/00 (the Netherlands); Cases T-124/96, T-309/97, T-92/98, T-156/97 (Germany); Cases T-14/98, T-304/99 (Finland); Case T-610/97 R (Denmark); Case T-174/95 (Sweden); Case T-106/99 (France); Case T-3/00 (Greece); Case T-103/99 (Italy); Case T-105/95 (World Wildlife Fund, which is a trust incorporated under English law and whose head office is in the UK); Case T-191/99 (Incorporating Committee (Associazione) for the Defence of Foreign Lecturers, established in Italy). In the case of the Incorporating Committee for the Defence of Foreign Lecturers, the place of establishment is deceptive for purposes of identifying nationality: all the members were foreign and the most active one was English.
are an interesting anomaly: they vindicate access to information rights even though they have never had access-to-documents legislation at home, their national administration is widely known for resisting open government measures, and their government was one out of only two Member States that intervened in support of defendant European institutions. Part, but certainly not all, of the high case count can be attributed to a single dispute between the Commission and two British nationals over certain VAT documents which generated three separate cases. A number of factors explain the litigiousness of British nationals in the transparency domain: they are accustomed to extensive discovery in judicial proceedings, unlike their civil law counterparts, and use transparency as a functional substitute for discovery; in practice, citizens enjoy fairly good access to government documents through the British ombudsman system; and British litigants use the European right of access strategically to circumvent official secrecy and gain insight into British and European government decisions.

ii. Supranational interest: The interest of the European Parliament in information on policymaking in the Commission and the Council

In the ordinary politics following the Maastricht ratification crisis, the European Parliament proved to be the most significant institutional proponent of transparency. A number of episodes in the development of transparency after the Maastricht debacle demonstrate the centrality of the Parliament. In the aftermath of the high-level European Council meetings of fall 1992 and the final national ratifications of the Maastricht Treaty in summer and fall of 1993, the Parliament, Commission, and Council negotiated an inter-institutional agreement on transparency. It is widely held among policymakers and scholars alike that the inter-institutional agreement of October 1993 served as the basis for the Commission and the Council’s first rules on access to documents. Yet the Council originally was determined to discuss subsidiarity only, and it was intense pressure from the Parliament that put transparency and democracy on the bargaining table as well. In the agreement, the Council undertook to make some of its debates public, publish voting records, and improve access to documents. The Commission and the Parliament also committed themselves to a number of transparency measures.

The Parliament also played a key role in the Intergovernmental Conference (IGC) leading to the Amsterdam Treaty and Article 255 on access to documents. The Danish

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265 I am grateful to Carol Harlow for suggesting these possible explanations. For a discussion of the British system of ombudsmen and their role in promoting access to documents, see Carol Harlow & Richard Rawlings, Law and Administration 441, 448-52 (1997).


268 Parliament, not entirely happy with the result, entered a unilateral declaration pressing for greater openness in Council meetings, stating that “the adoption of all legislative texts by a public vote is a sine qua non of democracy and transparency.” Corbett, The European Parliament’s Role in Closer EU Integration, supra note __ at 344. In 1994, the Institutional Affairs Committee of the Parliament sought to negotiate a more comprehensive inter-institutional agreement on transparency, appointing three parliamentarians as “explorers,” but with no success. See Mr. Donnelly, Mr. St. Pierre & Mr. Tsatsos, Working Document on Transparency and Democracy of November 1994, PE 210.692/A (on file with author).

269 The Treaty of Maastricht foresaw an intergovernmental conference in 1996. The IGC was officially launched on 29 March 1996 and was preceded by a number of reflection documents prepared by the institutions and an ad hoc
parliamentarian Jens-Peter Bonde issued a number of working documents on behalf of the parliamentary Committee on Institutional Affairs recommending the inclusion of transparency provisions in the Treaty. In all of the European Parliament’s contributions to the 1996-1997 IGC, the Parliament insisted that commitments to transparency be made in specific treaty articles. A simple comparison of the Parliament's three major demands--demands not made by the other institutional actors--to the final outcomes of the treaty negotiations demonstrates the Parliament’s influence. The Parliament proposed that the principle of openness be written into the Treaty, that a rule of access to documents be included in the Treaty, and that the legislative meetings of the Council of Ministers be opened to public scrutiny, both through open meetings and through access to the minutes, votes, and reservations recorded at those meetings. While the Parliament's requests were not incorporated word-for-word, the Amsterdam Treaty included all three dimensions.

After Amsterdam, the very first significant legislative innovation in the transparency area was adopted at the behest of the Parliament. New legislation setting down the structure and operation of European administration was adopted in summer of 1999. The original proposal submitted by the Commission did not make any mention of the public’s right of access to the documents generated in the administrative process. Following an amendment proposed by the Parliament, the law provided that a public register of documents would be created and that the access-to-documents rules set down in the Commission’s rules of procedure would also apply to the administrative process.

The Public Access to Documents Law, adopted to give effect to the commitment of the Amsterdam Treaty to transparency, was also strongly influenced by the Parliament. In the aftermath of Amsterdam, the Parliament tasked its Committee on Institutional Affairs with coming forward with recommendations for the implementation of Article 255, which were adopted by the entire Parliament in the plenary session of January 12, 1999. Nevertheless, when the Commission eventually came forward with its proposal for legislation,
parliamentarians found it disappointing in a number of critical respects. The Commission proposal would have excluded from the coverage of the law all internal documents that were not contained in official acts, in order to protect the so-called “space to think” of the institutions. The list of exceptions to the right of access was far more extensive than those in the earlier access-to-documents rules of the Council and the Commission. It contained some dangerously broad categories such as the protection of “the effective functioning of the institutions” and “the stability of the Community’s legal order.” Furthermore, when the documents of third parties were involved, the proposal required that they give their consent before the documents could be released. All communications with the Member States or with non-Community institutions were at risk of falling into this loophole. Another shortcoming of the Commission’s proposal was the failure to use the device of the public register to make documents directly available to the public, electronically, without the need to file a request. Lastly, the Parliament was concerned that the Council would use the public interest exception to exclude most documents related to common foreign and security policy and police and judicial cooperation.

In response, the responsible parliamentary committee produced a highly critical report and proposed a number of amendments. The Parliament approved the amendments to the Commission’s text, after which followed a series of trilogues between the Parliament’s representatives, the Swedish Presidency of the Council, and the Commission. (Trilogues are tripartite negotiations among the deciding institutions on the final text and are functionally equivalent to conference committees of members of the House of Representatives and the Senate in the U.S.) In the final compromise version, the Parliament succeeded in reducing considerably the list of exceptions. Moreover, all European institutions were required to establish electronic registers of documents. For legislative documents, direct, electronic access to the document is mandatory and for other documents such access should be provided where possible. In conclusion, had the Amsterdam Treaty not required that the legislation be adopted by co-decision, the law would have almost certainly represented a step backwards for transparency. (Co-decision gives the Parliament decisionmaking powers equal to those of the Council and thus

278 See Jacobs, Institutional Dynamics after Nice, supra note at 16-25.
280 Id. at art. 4(a).
281 Id. at art. 4(d).
282 Id. at art. 4(a)
283 Id. at art. 9.
286 See Jacobs, Institutional Dynamics after Nice, supra note at 20. The Presidency of the Council rotates every six months to a different Member State.
requires the Commission to anticipate the Parliament's position in the original proposal and to allow the Parliament to vote on the final text.) The Parliament ensured that the Council and Commission did not back-pedal on their existing rules of procedure and, in some respects, improved the access-to-documents scheme.288

Why did the Parliament campaign so hard for transparency, above and beyond other principles associated with good European governance, and more assiduously than other institutional actors? Since the European Parliament was first directly elected in 1979, it has pushed for access to information on the Commission and the Council for the Parliament. Without information, the meager powers it originally possessed under the Treaty of Rome would have been virtually nonexistent. After Maastricht, the growing currency of the northern value of transparency led the Parliament to couple the strategic, institutional need for information with the campaign for open government.

To demonstrate the logic of supranational institutional interest and national value, it is again necessary to review the history. The Parliament’s campaign for information can be divided into three categories: the budget, legislation, and administration. In the past, the European Parliament’s most important, and some would say, only, powers were in the area of the budget. In two treaties dating to the 1970s, the Parliament acquired the right to propose amendments to the European Community’s annual budget and to reject the budget if dissatisfied with the outcome after final voting in the Council.289 The Parliament also obtained the right to review or “discharge” the European Community’s accounts, after the expiration of the fiscal year, to ensure that the money appropriated under the budget had been spent lawfully.290 Since the Parliament was first directly elected in 1979, it has consistently called for more documents, reports, and statistics on the programs to be financed by each of the line items in the budget. It has also called for more information on how the monies appropriated were spent.

Dissatisfaction with the scant information provided by the Commission has been expressed repeatedly, in many forms. The comments accompanying the Parliament’s annual discharge reports are one place where such dissatisfaction can be found.291 More information on the intended use of budget appropriations, as well as the implementation of the different programs, is a staple of the recommendations and criticisms put forward by the Parliament. Portions from the Parliament's report on the discharge of the budget from the 1982 financial year give a flavor of this critique. Explaining its decision to defer the discharge—at the time an extraordinary expression of disapproval, equivalent to a parliamentary no-confidence vote—the Parliament said that it "[r]equests the Commission to consider ways of providing more and

288 See Bo Byuruf & Ole Elgström, Negotiating Transparency: The Role of Institutions, 42 J. Common Mkt. Stud. 249, 264 (2004) (finding that the co-decision requirement was extremely significant in shaping the Public Access to Documents Law).
290 Corbett, The European Parliament’s Role in Closer EU Integration, supra note __ at 93-97. The provisions can be found at EC Treaty, arts. 275, 276.
291 Another place is Parliament’s contribution to the Intergovernmental Conference leading up to Maastricht. Parliament’s Committee on Budget Control called for strengthening of Parliament’s “right to information,” by requiring information to be transmitted by European institutions besides the Commission and by establishing a right of parliamentary inquiry. See Final Report of the Committee on Budgetary Control on strengthening Parliament’s powers of budgetary control in the context of its strategy for European Union, 27 Sept. 1991 (A3-0253/91) at 6, 12.
clearer statistical and explanatory information on the execution of the budget."\textsuperscript{292} And the Parliament declared that it "[s]trongly deplors the fact that the present Commission has taken a step backwards, as compared with the preceding college, by refusing to make certain basic document available to the Parliament."\textsuperscript{293} The discharges of subsequent years are replete with comments in the same vein.\textsuperscript{294}

In the 1980s and the 1990s, the Parliament also pushed the Commission for more information in connection with its legislative powers. Until 1986, the Parliament only had the power to give non-binding opinions on European legislation through what was known as the consultation procedure.\textsuperscript{295} The real decisionmaking power rested with the Commission, which had the power to propose legislation, and with the Council, which had the power to adopt legislation. In the Single European Act of 1986, the co-operation procedure was introduced in certain policy areas. Co-operation required that the Parliament review proposals at two separate stages in the legislative procedure, once after the Commission issued the initial proposal, and a second time, after the Council had voted on the proposal. On the second reading, the Parliament could propose amendments, which the Council could reject, but only by a unanimous vote. The Parliament’s legislative powers were improved in the Maastricht Treaty of 1992. Maastricht introduced co-decision, which preserves the two-readings structure of cooperation, but requires the Council to adopt the Parliament’s amendments if the legislation is to pass. As the label suggests, in co-decision, the Parliament and the Council are co-legislators: the approval of both is necessary for a piece of legislation to be enacted. In the treaties negotiated subsequent to Maastricht, co-decision has been extended to a wide number of areas, so that today, outside the foreign policy and criminal law areas, it is the prevalent mode of enacting European laws.

In all three procedures, information on the Commission’s policy agenda, the Commission’s specific legislative proposal, and the trajectory of the proposal once it enters Council—where more often than not it undergoes numerous and substantial amendments—is

\textsuperscript{292} Resolution in accordance with the provisions of Article 85 of the Financial Regulation informing the Commission of the reasons for the deferral of discharge in respect of the implementation of the budget of the EC for the 1982 financial year (14 May 1984), 1984 O.J. (C 127) 36, 38 (para. 14).
\textsuperscript{293} Decision refusing to grant a discharge to the Commission of the EC in respect of the implementation of the EC budget for the 1982 financial year in accordance with the provisions of Annex IV to the Rules of Procedure (17 December 1984), 1984 O.J. (C 337) 23, 24 (para. 4).

\textsuperscript{294} See Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1983, 1985 O.J. (C 122) 35, 36, 37, 38, 39 (paras. 1, 5, 6, 7, 8, 22, 23); Resolution embodying the comments which form an integral part of the Decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1984, 1986 O.J. (L 120) 141, 142, 143 (paras. 15, 19, 20, 32); Resolution on action taken by the Commission in response to the comments made in the resolution accompanying the decision granting a discharge in respect of the implementation of the 1984 budget, 1987 O.J. (C 318) 128, 128 (para. 3(a)); Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1988, 1990 O.J. (L 174) 42 (paras. 4, 20, 24, 30); Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1989, 1991 O.J. (L 146) 24 (paras. 6, 17, 64, 74, 75); Resolution containing the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1990, 1993 O.J. (L 19) 26 (paras. 3, 36, 70); Resolution on the Commission report on action taken in response to the observations contained in the resolution accompanying the decision giving discharge in respect of the general budget of the European Communities for the 1990 financial year, 1993 O.J. (C 315) 89, 89, 90 (paras. 3, 16); Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1991, 1993 O.J. (L 155) 72 (paras. 18, 37, 53, 84).

\textsuperscript{295} See generally Craig & de Búrca, EU Law, supra note ___ at 141-47 (describing consultation, cooperation, and co-decision).
critical. Without advance warning of the different proposals in the Commission pipeline, and without access to the information supporting the Commission’s proposals, parliamentary committees are handicapped in researching the issues and writing their reports, and the Parliament as a whole cannot take informed votes. In the consultation procedure, if the proceedings in the Council are secret, the Commission’s proposal can be transformed by the Council and enacted into law without any warning to the Parliament. The Parliament’s power of consultation is rendered meaningless, since the Commission proposal on which the Parliament gives its opinion may bear no relation to the law ultimately passed by the Council. Information on Council proceedings is also important in co-operation and co-decision; advance warning of the likely outcome of the Council vote is necessary for the Parliament to react fully and to propose its own, well-considered amendments in the second reading.

The failure to disclose declarations made by Member States when approving European laws in the Council can also undermine the Parliament’s legislative prerogatives. These declarations are similar to reservations in international treaties and can modify the text of the agreement, either by allowing derogations for certain Member States or by altering the interpretation of the legislation for certain Member States.\textsuperscript{296} If declarations are not published, then, in effect, the Member States on the Council can alter legislation without the knowledge or input of the Parliament, even on matters on which the Parliament had full co-decision powers.\textsuperscript{297}

To safeguard its institutional prerogatives as legislator, the Parliament has negotiated an inter-institutional agreement with each new Commission since 1990.\textsuperscript{298} (A new Commission takes office every five years.) In all, timely and complete information on the Commission’s policy initiatives and the state of play of negotiations in the Council have figured prominently. The Parliament has also separately urged the Council to notify the Parliament of any planned changes to the proposal in the course of negotiations there.\textsuperscript{299} It has suggested an inter-institutional agreement with the Council, patterned on the agreements with the Commission, but without any success to date.\textsuperscript{300} As far back as 1981, in connection with the power to approve the annual budget, which it shared with the Council, the Parliament voiced frustration with the secrecy of the Council and requested information on the state of play of negotiations among the Member States sitting on the Council:

[Parliament c]onsiders that the procedure of budgetary collaboration between Council and Parliament during the annual budgetary process should be improved by a series of practical measures: for example, the Committee of Permanent Representatives and the Budgetary Committee of Council should supply the

\begin{footnotesize}
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\item \textsuperscript{296} It should be noted, however, that if a legal challenge is brought to the law, such a declaration would not be found binding and would not be used to assist in the judicial task of interpreting the law. The Court of Justice has consistently denied that such declarations have legal effects. See Case C-292/89, Antonissen, 1991 ECR I-745, para. 18; Case 143/83, Commission v. Denmark, 1985 ECR 427, paras. 12, 13.
\item \textsuperscript{297} This occurred in the case of state aids to shipbuilding, where, thanks to an unpublished statement made at the time of the Council vote, the Germans were permitted a derogation for East German shipyards. See Jacobs, Institutional Dynamics after Nice, supra note \textsuperscript{295} at 9 n. 3.
\item \textsuperscript{299} Resolution on the obligation for the Council to await Parliament’s opinion, 1990 O.J. (C 324) 125, 127, 128 (points 7, 17).
\item \textsuperscript{300} See id. at 128 (point 15).
\end{itemize}
\end{footnotesize}
rapporteur and the members of the Committee on Budgets with the working documents and minutes of their meetings.  

Information has also been at the heart of the Parliament’s attempt to establish legislative oversight of European administration. The implementation of European legislation by the Commission, through implementing regulations or individualized decisions, very often requires the approval of committees of national regulators. So-called comitology committees are designed to serve as surrogates for the Council and enable the Council to monitor, and sometimes veto or modify, the Commission's implementing regulations and decisions. Because comitology committees empower the Council, the Parliament views them with great suspicion. In the Parliament’s eyes, comitology committees constitute a device through which the Council can undermine legislative commitments, by obtaining results that would otherwise be impossible because of opposition from the Parliament. The Parliament has staged a long, but futile battle to eliminate comitology committees in European administration and to entrust the Commission, acting alone, with implementation. In compensation, the Parliament has sought to establish supervisory powers over European administration equal to those of the Council.

The Parliament has asserted control over administrative decisionmaking since the mid-1980s through a series of resolutions, inter-institutional agreements, and now, legislation. The duty of the Commission to transmit information on administrative proceedings to the Parliament is common to all of these instruments. Today, after over twenty years of institutional wrangling, the Commission is required to forward to the Parliament the proposals for administrative action submitted to the committees, the agendas of committee meetings, the

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301 Resolution on the inter-institutional dialogue on certain budgetary questions, 1981 O.J. (C 101) 107, 107 (point 2).
304 See Resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Regulation laying down the procedures for the exercise of implementing powers conferred to the Commission, 1986 O.J. (C 297) 94, 95 (point 1); Plumb-Delors Agreement of 1988, cited in Vos, Institutional Frameworks of Community Health and Safety Regulation, supra note__ at 126 (agreeing to forward all proposals for implementing measures to the Parliament at the same time as they are submitted to comitology committees); Code of conduct on the implementation of structural polices by the Commission, 1993 O.J. (C 255) 19, 19-20 ["Klepsch-Millan Agreement"] (agreeing to forward the Parliament all plans, generally elaborated by the Member States and then transmitted to the Commission, for the use of regional development funds, all proposals for Community initiatives, and the results of any reviews of the implementation of development projects on the ground); Modus vivendi of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty, 1996 O.J. (C 102) 1 (undertaking to forward all proposals for implementing measures, to allow Parliament the opportunity to vote on proposals, and in the event of a negative vote, to adopt the measure only after “taking due account of the European Parliament’s point of view”); Resolution on the draft general budget of the European Communities for the financial year 1997—Section III—Commission, 1996 O.J. (C 347) 125, 125, para. 72 (agreeing to forward the Parliament a wider array of documents--the agendas of committee meetings and the results of votes taken in comitology committees—and to allow parliamentarians to attend comitology meetings if there is no objection from the national regulators on the committee); Comitology Decision, supra note__ at arts. 7.3, 8 (codifying information and control powers established in earlier instruments).
Creating European Rights

names and organizational affiliations of committee members, and the votes and minutes from committee meetings. Furthermore, the Parliament today has the right to vote on implementing measures adopted by comitology committees, although a "no" vote has only moral force and does not bind the Commission.

The need for information on the work of the Commission and the Council led the Parliament to trumpet the right to transparency for two reasons. After the northern right to transparency became a defining element of the European concept of good government, as a matter of normative discourse, the Parliament’s past successes in obtaining documents, as well as its subsequent crusades to obtain yet more information, had to be extended to all European citizens. In other words, once transparency became a European value, the Parliament could not ask for information for itself and itself alone. The piggybacking of the right to transparency onto the Parliament’s information initiatives is evident in the administrative area. The first law guaranteeing parliamentary oversight of the administrative process (comitology committees) both codified the gains that the Parliament had made in the previous decade through inter-institutional agreements, and included a right of access for the public-at-large. The provision was pushed by the Parliament, not the Commission or the Council. The Parliament’s transparency amendments were watered down in the end but, had it gotten its way, the law would have read:

Having regard to the rules and principles of transparency and access to documents flowing from Articles 1 of the EU Treaty, 207 and 255 of the EC Treaty and Declarations 35 and 41 attached to the Final Act of the Amsterdam Treaty,

Except for reasons of confidentiality, all documents shall be made public and accessible by electronic transmission. The new European value of transparency redefined the Parliament's institutional interest in information.

The second reason for the Parliament’s advocacy of transparency was the moral resource that the right brought to the strategic interest in information. The rhetoric of one of the Parliament's earliest resolutions demonstrates the instrumental nature of the right. There, the Parliament expressly coupled information as a fundamental right for all European citizens, with information as a necessary complement to its powers in the legislative and administrative processes:

1. [Parliament] [t]akes the view that right to information is one of the fundamental freedoms of the people of Europe and that it should be recognized as such by the European Community;

4. Requests that the minutes of Council meetings which concern the discussion of and decision-making of a regulation or directive should be published, including the statements which alter the purpose of the directive or give another interpretation to the published document;

6. Wishes to see open access to information concerning the activities of the management and the advisory committee [comitology committees involved in European administration], with a view to obtaining precise information on the scope of the decisions taken;

305 Comitology Decision, supra note__.

7. Proposes that a mediator be appointed within Parliament to monitor compliance with the obligation incumbent on the Community bodies to provide information.  

The Parliament linked the institutional battles narrated above to the fundamental freedom of the right to information.

The Parliament’s initiatives that followed the Amsterdam Treaty of 1997 also revealed the instrumental quality of the right. As mentioned above, the Parliament tasked a committee (Committee on Institutional Affairs) with producing a report on the legislation that would be needed to implement Article 255 on access to documents. The opinion of a related committee (Committee on Legal Affairs and Citizens’ Rights) on the report is telling. After discussing the means of guaranteeing transparency for European citizens, the Committee moved on to transparency measures for parliamentarians:

A rapporteur [the parliamentarian tasked by the appropriate committee with preparing a report on a proposed European law] should have increased rights of access when drawing up his report. Access to all documents used during the preparation of a Commission proposal might be considered in this context.

The competent parliamentary committee should be granted rights of access during the commitology procedure [European administrative process described above].

Parliament as a whole might be granted rights of access in the case of major interinstitutional issues and problems connected with institutional law.

The opinion of a second related committee (Committee on Civil Liberties and Internal Affairs) was even more pointed in calling for a right to transparency for both the public and the Parliament. In the foreign and security policy area (so-called Second Pillar) and in the police and immigration areas (so-called Third Pillar and parts of the First Pillar), the Parliament’s legislative prerogatives are extremely limited. The Parliament has not, in contrast with areas in which it has cooperation or co-decision powers, been able to cajole or threaten the Council and Commission with deadlock in order to obtain information and influence. In the opinion, the Committee used the right of access to documents to make the case for greater parliamentary information and influence in police and immigration matters:

The current campaign for access to documents of the Justice and Home Affairs Council is crucial in fostering a culture of transparency within the Union.

It goes without saying that the European Parliament should be informed and therefore consulted before any legislative decision. Public access to documents must also relate not only to the official institutions and bodies of the Union but

307 See Resolution on the compulsory publication of information by the European Community, 1988 O.J. (C 49) 175, 175-76; see also Resolution on the obligation for the Council to await Parliament’s opinion, supra note __ at 128 (point 16).


309 Id. (Opinion for the Committee on Institutional Affairs, section C., at 21 of electronic version).

310 TEU, art. 21 (common foreign security policy); art. 39 (police cooperation); art. 67 (immigration).
also to all formal or informal working parties in which the Union is directly or indirectly involved. 311

The conflation of the general right of access to documents with the Parliament’s powers to require information and to be consulted is evident. 312

3. The evolution of the right to transparency

Since European citizens obtained concrete procedures through which they can exercise their transparency rights in the Public Access to Documents Law, the only significant development has been the Constitutional Treaty. The Treaty gives the transparency measures that have been established over the past decade the status of higher, constitutional law. In the first part, the duties incumbent upon the European institutions are set down. 313 The second part of the Constitutional Treaty, which incorporates the Charter of Fundamental Rights adopted in 2000, recognizes the individual right of access to documents. 314 Lastly, Article III-399 sets out the structural, institutional conditions of transparency, which are largely repetitive of the rights set out in the first part of the Constitutional Treaty. 315

The principal change wrought by the Constitutional Treaty is the symbolic, constitutional status conferred upon the principles of openness, transparency, open meetings, and access to documents. As a practical matter, the new articles do not add much. They recognize the legislative practice of requiring all institutions, committees, and agencies, in addition to the Commission, the Parliament, and the Council, to respect access to document rights. 316 They also constitutionalize the rules of procedure of the Parliament and the Council under which debates on the adoption of legislation are open to the public and under which parliamentary reports and the votes and statements from high-level Council meetings are made public. 317 Lastly, the Constitutional Treaty specifically requires the Parliament and the Council to publish documents related to their deliberations on legislative matters, but the scope of the requirement turns on the access-to-documents rules of the respective institutions and hence access to such documents would not need to be significantly broader than it stands at present. 318

311 See Report on Openness, supra note__ (Opinion of the Committee on Civil Liberties and Internal Affairs, Introduction, at 26 of electronic version).

312 In the negotiations over the Public Access to Documents Law, the Parliament was also driven by its strategic need for information about preparatory deliberations in the Commission and the Council. See Bjurulf & Elgström, Negotiating Transparency, supra note__ at 254. By contrast, both the Commission and the majority of members on the Council wished to protect the secrecy of their deliberations. Id. at 253-54.

313 Constitutional Treaty, art. I-50 ("Transparency of the proceedings of Union Institutions, bodies offices and agencies").

314 Constitutional Treaty, art. II-102 ("Right of access to documents").

315 Constitutional Treaty, art. III-399.


317 Constitutional Treaty, art. I-50.2. In the case of the European Parliament, both plenary meetings and committee meetings are open to the public. See infra text accompanying note__. In the case of the Council, only the final meeting of the Council, rubberstamping the agreements negotiated previously by low-level, national representatives are made public. See infra text accompanying note__. There is nothing to suggest that the Constitutional Treaty means anything different by "the Council [shall meet in public] when considering and voting on a draft legislative act." Art. I-50.2

318 Constitutional Treaty, art. III-399.2.
4. European value: European and northern transparency compared

In conclusion, how does the European right to transparency compare with the administrative law of the northern Member States? The European right combines different elements from the northern traditions of open government, but it has also taken on dimensions not found in any of those traditions. Europeans have a right of access to scientific studies, policy documents, and other preparatory material, if not outweighed by the public interest in confidentiality before the legal act is adopted and without exception after the measure is adopted. In this, the European right approximates all the northern systems. However, material such as internal memoranda, notes, outlines, and drafts is not categorically excluded from disclosure, as under the Swedish and Danish laws, or excluded from disclosure until after the matter has been decided, as under the Finnish law; material revealing personal opinions is not, as a rule, exempted from disclosure as under the Dutch law. Rather, access to such documents before a decision becomes final “shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure”; access after a decision becomes final “shall be refused if disclosure of the document would seriously undermine the institution’s decisionmaking process, unless there is an overriding public interest in disclosure.” European institutions are under a duty to maintain registers of all documents that can be easily consulted, approximating the Swedish and Finnish systems. Yet where possible the institutions are also under a duty to give individuals direct access to documents, electronically, rather than requiring them to undertake the lengthy, bureaucratic process of an access-to-documents request. This goes beyond Swedish and Finnish law.

The most notable element of the European right is that, at least in theory, it extends to government activities of a highly political nature. The reader will recall that legislation in most northern systems makes it difficult, if not impossible, to obtain documents relating to the contribution of government cabinets and ministers to draft legislation. Likewise, with the exception of Sweden, parliaments are not covered by access-to-documents legislation. The situation is different in the European Union. Some of the drafts, minutes, votes, and declarations produced and recorded in the meetings of the Council, in which representatives of national governments negotiate the text of European laws, are subject to the right of access. Of course, application of the law's subject-specific exceptions might undermine the general rule, but, in theory, individuals should have access to documents and minutes from the low-level "working groups" of national civil servants, the mid-level meetings of Member State diplomats (Committee of Permanent Representatives or "COREPER"), and the high-level meetings of government ministers. Citizens can also consult documents from comitology committees (part of the European administrative process) which, in some cases, reproduce the intergovernmental politics of the Council. The right of access to documents also covers the European Parliament.

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319 See Public Access to Documents Law, supra note __, at art. 4.3.
320 See Mäenpää, Right of Access to Documents: New Finnish Legislation, supra note ___ at 1626 (stating that parliament not covered under Finnish law); Swedish Freedom of the Press Act, art. 5 (stating that parliament covered under Swedish law); Danish Constitution § 49 and Danish Parliament’s Rules of Procedure §§8, 38 (setting down rules on access to plenary sessions of parliamentary and parliamentary committee meetings as well as publication of parliamentary deliberations and documents); __ (Hubert).
322 See Comitology Decision, supra note __, at art. 7.
and applies to draft reports and agendas of committee meetings. Furthermore, the European right to transparency includes the principle of open, public meetings of legislative bodies: Council meetings giving final approval to European laws, parliamentary committees, and plenary sessions of the European Parliament. The negotiations and political deals that, even in the northern traditions of open government are generally conducted behind closed doors, are coming under pressure, albeit still limited, from the European right to transparency.

These added dimensions of transparency are related to the Parliament's strategic interest in information and the unique European institutional landscape in which the Parliament operates. As exemplified in the harsh criticism of its annual discharge reports, the Parliament has called consistently for greater openness in the Council and the Commission to further its own powers. Related to this competitive and at times, hostile, relationship with the Commission, the European legislation covers not only studies and reports containing the factual grounds for Commission action but also internal memoranda, outlines, and notes that are generated in the Commission’s decisionmaking process. Parliament's campaign for information not only extended to the Commission but also to the highly political, intergovernmental bargaining in the Council; consequently, the European right, in contrast to the northern systems where it originated, applies there too.

C. The Third Generation: The Right to Civil Society Participation

The last generation of rights before the Commission and the second set, after transparency, to revamp Commission authority in the area of broadly applicable policies began in 1999. The civil society phase is different from the two previous ones in a number of important respects. First, the right did not originate in domestic public law; rather it was drawn from the international arena where civil society had become the dominant paradigm for legitimizing international organizations. Nevertheless, the right has assumed a distinctly European significance. The international provenance of the right meant that it was poorly defined compared to the right to a hearing and transparency, which had been worked out in the institutionally and historically rich political space of the nation-state. The amorphous nature of the international value of civil society meant that European political entrepreneurs, constrained by old, European maps of legitimate relations between public bodies and private citizens, quickly infused the new right with the familiar, European practice of corporatism.

Secondly, unlike the right to a hearing and transparency, this historical moment of rights creation is still in progress. A number of important elements remain to be decided: Will European citizens and their organizations be able to vindicate the right in the European Courts? What type of policy measures will it cover? And will the right apply, and in what shape, to European institutions besides the European Commission? The following section employs the same organizing scheme as the previous two sections but the reader should bear in mind that the right to civil society participation is still unsettled. Certain facets of the right are treated as part of the aftermath of the historical juncture not for purposes of complete descriptive accuracy but

323 See European Parliament, Rules of Procedure, 1999 O.J. (L 202) 1, r.97; Jacobs, Institutional Dynamics after Nice, supra note__ at 11-14. Transparency in Parliament’s own affairs, through access to draft committee reports and open committee meetings, came rather late. The adoption of rules to protect rights of access was directly tied to the charge of hypocrisy, namely that Parliament could not demand that the Council and the Commission be transparent and, at the same time, fail to guarantee the right in its own affairs. See Interview with Francis Jacobs (June 17, 2004) (notes on file with author).
324 Council’s Rules of Procedure, supra note__ at art. 8; Parliament’s Rules of Procedure, supra note__ at r. 96.
to relate this episode of rights creation to the previous ones and to draw lessons for a general theory of rights.

1. The right to be consulted on legislation and implementing regulations then and now

   a. National traditions of public participation in lawmaking and rulemaking

   National procedures for the drafting of legislation and implementing regulations adhere to similar blueprints of lawmaking and rulemaking but they also display certain distinctive features. National procedures are similar in that, generally speaking, the government and the administration enjoy considerable discretion in drafting legislation and rules and they are not required legally to interact with members of the public. Before submitting bills to the parliament for a vote or laying implementing regulations before the legislature, sometimes for a vote and other times simply for purposes of information, the executive is not required to make its draft public and consult with interested citizens and organizations. National procedures are also similar in that, in most Member States, carefully defined exceptions to executive discretion in areas such as the environment and land-use planning direct officials to publicize drafts and consult the public. National procedures are different in that, notwithstanding the government's considerable discretion, some systems require drafts to be reviewed by a specialized, independent body within the administration (Council of State) and other systems rely heavily on advisory bodies composed of interest organizations.

   To elaborate a bit on this element of domestic public law: Consider lawmaking. All the Member States are parliamentary democracies, meaning that the executive is elected by the members of the legislative assembly and therefore enjoys the confidence of the legislative assembly. The government cabinet and the administration are given extensive power to initiate legislation and to adopt implementing regulations because they are considered to be the expression of the popularly elected legislative assembly. In drafting legislation, most national administrations are not under a duty to adhere to any special procedures. They are not required under their constitutions or ordinary legislation to publicize their drafts and consult the public.

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325 The term "implementing regulation" covers any legal measure promulgated by government administration that is designed to affect a broad class of individuals and that is issued pursuant to a delegation contained in a law passed by the legislative assembly (or, in the case of France's presidential system, pursuant to the President's autonomous powers under the Constitution). Implementing regulations are known as règlement in France, Rechtsverordnungen in Germany, decreto legislativo in Italy, and "statutory instrument" in the UK. The functional American equivalent is a rule or regulation. The American reader should bear in mind that the categorical difference between lawmaking and rulemaking in American public law is much less pronounced elsewhere. That is because in parliamentary systems, unlike the American separation of powers system, the government cabinet answers to Parliament when it drafts both laws and rules (at least in constitutional theory, although the practice can be very different).


327 In this, there is no difference between European systems of lawmaking and the legislative process in the U.S.

328 The British government sometimes engages in consultation, but as a purely discretionary matter of good administrative practice and not because of a legal duty. One of the modernization initiatives of the Blair government has been to require government departments to consult with the public when they draft legislation or major pieces of delegated legislation, i.e. statutory instruments. See Cabinet Office, Code of Practice on Written Consultation (Nov. 2000), available at http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm. As a general rule, government departments must allow twelve weeks for comment, synthesize and summarize those comments for public consumption, and then explain the policy choices ultimately made. However, these are just Cabinet Office guidelines, namely they do not create binding legal duties and they vest a significant amount of discretion concerning when and how to consult with administrators.
Member States vary on two important exceptions to government discretion in lawmaking: the duty to consult a specialized body of civil servants and corporatism. In countries influenced by the French administrative law tradition (droit administratif), the government is often required to submit draft legislation to a specialized section of the administration. The Council of State, as the body is known in France, Italy, Belgium, and Greece, checks the bill for technical drafting errors, respect for constitutional principles, consistency with other legislation, and so on. Second, in some instances, the government is required to submit bills to advisory bodies composed of organizations representing the relevant interests, a practice which is often referred to as corporatism because it bears some resemblance to the powerful corporations of tradesmen and artisans that governed the city states of early modern Europe. This is typical of certain policy areas, for example welfare, industrial policy, and consumer protection. Such advisory boards are far more common in places such as Germany and Scandinavia, where interests are highly organized and governments and intermediate organizations have a long history of corporatist relations. In virtually all Member States, however, including those whose administrations are not viewed as particularly open to outside interests, advisory boards composed of peak associations exist in certain fields.

Now consider implementing regulations. In most of the Member States, the government discretion and exceptions to that discretion in the domain of lawmaking also characterize the field of implementing regulations. An additional set of exceptions, however, apply to rulemaking. In most European systems, administrators must publicize their intentions and consult with the public-at-large in carefully defined forms of rulemaking. These forms of rulemaking include decisions believed to have concrete effects on discrete, geographically defined groups of citizens. In addition, the decisions subject to the extra requirements are generally made by local and regional administrators, not central government. Land-use planning is one example. Government building projects and public investment decisions that have the potential of hurting the environment are another example. Rules that are considered insignificant, usually because they address matters of internal administrative organization, deal with a limited class of cases, or have limited temporal effects are subject to fewer procedural

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331 Mény, supra note __ at 145 (discussing French Conseil Economique et Social).
334 Although this has existed since the early 1980s in certain European countries, environmental impact statements have now become a feature of every national system through the Environmental Impact Assessment Directive, 85/337/EEC, 1985 O.J. (L 175) 40.
requirements than draft legislation and implementing regulations. 335 Very often they are promulgated by individual ministers, not by prime ministers sitting in the cabinet of ministers, and they are not subject to review by the Council of State or advisory bodies.

b. Public participation in Commission lawmaking and rulemaking

Until the late 1990s, the European Commission's procedure for drafting legislation and implementing regulations was very similar to that of its national counterparts. The Commission was not formally required to publish drafts or consult the public. As a matter of law, the Commission's proposal could remain entirely confidential until the moment it was sent to the other institutions for adoption, principally the Council, and, starting in the late 1980s, the European Parliament. As in the Member States, organized interests represented on corporatist advisory bodies were the exception to the rule of executive discretion.

Two different forums for the participation of private associations existed. In 1957, the founding Member States established, alongside the other original institutions, an advisory body called the Economic and Social Committee (ESC) that was modeled after their own corporatist traditions. 336 The ESC was constituted of producer interests-- employers, workers, farmers, tradesmen, and professionals--and the organizations sent to Brussels to represent such interests were appointed by their governments and were generally highly structured, peak associations with national constituencies. Later, consumer organizations were added to the ESC. The Treaty of Rome required that the Commission consult the ESC on legislative proposals: at the same time that a proposal was sent to the Council for a decision and the Parliament for an opinion, it was also sent to the ESC for an opinion. Notwithstanding the legislative role carved out for the ESC, it quickly developed a reputation as the weakest, least influential institution in Brussels.

The second forum for corporatist interest representation was the issue-specific advisory committee, created by law in a particular policy area to assist the Commission when drafting laws and rules. 337 The interest representation that occurred through advisory committees differed from the ESC in a number of ways. The Commission, not the Member States, chose the organizations that sat on the committees; the organizations were generally pan-European, not national, federations; their advice was sought earlier in the policymaking process, as the Commission was drafting the proposal and not after the proposal had been completed; their advice was sought on both laws and implementing regulations, not only laws; and, lastly, the enabling laws establishing the committees generally left consultation to the Commission's discretion.

The practice of public participation in Commission decisionmaking was, in fact, quite different from the closed nature of the procedure in the law on the books. The Commission would often solicit input from producer groups, firms, and associations not represented on the

335 See generally Ziamou, Rulemaking, Participation and the Limits of Public Law in the US and Europe, supra note __ at 15-21 (describing distinction between these two types of administrative rules in Germany, Greece, the UK, and the U.S.). The functional American equivalent would be the rules exempted from notice and comment requirements under 5 U.S.C. § 553(b)(3)(A).
336 See EC Treaty ex art. 194. In 1957, Article 194 read: “The Committee shall be composed of representatives of the various categories of economic and social life, in particular, representatives of producers, agriculturists, transport operators, workers, merchants, artisans, the liberal professions and of the general interests.”
advisory bodies in order to build political momentum for proposals. It did so largely on an informal basis although it sometimes would also publish forward-looking policy documents, known as Green and White Papers and available to the public-at-large, in which it would outline a number of issues on which it was contemplating drafting legislation and ask for the public's response. But the law permitted the civil servants in the Commission to draft in splendid isolation from the European citizenry. The Official Journal is full of directives and regulations that started in precisely that fashion.

Then, in December 2002, the Commission adopted a policy document, called a Communication, in which it outlined the procedure that all divisions within the Commission would follow for consulting individuals and their associations, billed "civil society," in drafting policy proposals. The Commission first describes the issues open for discussion, the public is invited to submit written comments, and the civil society responses are published. This process is to take place largely through the Commission's website. The Commission then summarizes the comments and explains how the final proposal was or was not altered by the civil society responses:

The Commission will provide adequate feedback to responding parties and to the public at large. To this end, explanatory memoranda accompanying legislative proposals by the Commission or Commission communications following a consultation process will include the results of these consultations and an explanation as to how these were conducted and how the results were taken into account in the proposal.

Parallel to the consultation of the public-at-large, the Commission also solicits the opinions of certain "target groups" which are believed to have a special interest in the proposal because they will be directly impacted or will be involved in the implementation of the policy, or because they pursue organizational aims related to the proposal.

In the Communication on Consultation, the Commission qualifies the procedure in a number of essential respects. On the one hand, the Commission minimizes the importance of the procedure by asserting that the final decision on the content of the legislative proposal is a political one for it alone to make. Moreover, the Commission states that the standards set out in the Communication are meant to guide administrative practice but do not constitute legally binding duties enforceable in court:

[A] situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures.

Lastly, the Commission confines the procedure to "major policy initiatives," namely, proposals for European laws, and excludes the "minor" changes to the European legal framework contained in implementing regulations and other types of official instruments. On the other hand, the

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339 Id. at 19-22.
340 Id. at 22.
341 Id. at 19.
342 Id. at 12.
343 Id. at 10.
344 Id. at 10, 15.
Commission makes clear that the procedure set down in the Communication on Consultation constitutes a floor; it might choose to consult on more specific matters that would fall within the ambit of administrative rulemaking.345

The commitments undertaken in the Communication on Consultation have significantly affected the procedure for drafting policy initiatives and legislative proposals. Since the Communication was published, there has been a steady flow of consultations in a variety of fields and on a number of different types of policy instruments. A few examples will provide a sense of the change in the Commission's working methods. The Directorate-General responsible for customs has published and solicited comments on a draft proposal for a new Customs Code.346 Earlier in the policy chain, the Commission requested comments on a Green Paper outlining a number of issues related to the quality and general accessibility of services in areas of the European market undergoing liberalization.347 Downstream in the policy process, the Commission conducted a public consultation on the implementation of the European broadcasting law, to determine whether there were problems with the existing framework and subsequently issued a series of official interpretations of the law, as guidance for the Member States.348 In 2003, the first year after the Communication came into force, the Commission held a total of 21 public consultations.349 It appears that what was, at best, a sporadic exercise, limited to mammoth policy initiatives in the past, is becoming routine throughout the Commission.350

2. The historical juncture: The fall of the Santer Commission

What explains the Commission's decision to engage in the systematic consultation of the public in drafting legislative proposals? Why did it depart from its past practice, as well as the standard mode of administration in the Member States? This turn of events creates a real puzzle, more so than the right to be heard and transparency, because civil society consultation was entirely self-imposed, not compelled in part by the judiciary (as with the right to be heard) or by European legislators (as with transparency). The experience with government bureaucracies has been that their interest lies in unfettered discretion and that rights and procedures are imposed

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345 Id. at 11.
348 Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive, 2004 O.J. (C 102) 2.
350 There has been organizational change in the Commission to manage the new right to civil society consultation. The “Openness and professional ethics” unit in the Commission Secretariat-General (the functional equivalent to the Executive Office of the President in U.S. administration) is responsible for transparency, principally access to documents, and consultation. The five civil servants who work on civil society consultations are responsible for encouraging Directorate-Generals to conduct consultations on the items included in the Commission’s annual work programme. See Interview with Lea Vatanen, European Commission, Secretariat-General, Directorate B “Relations with civil society,” Openness and professional ethics (June 16, 2004). They also field questions from personnel around the Commission on how to structure the procedure. In addition, they manage a data base containing a list of advisory bodies with civil society representation in operation in the different Directorate-Generals and a voluntary registry of civil society organizations. This data base is called Consultation, the European Commission and Civil Society (CONECCS) and is available at http://europa.eu.int/comm/civil_society/coneccs/index_en.htm. There is also a central data base for all consultations being conducted by the Commission’s Directorate-Generals. See http://europa.eu.int/yourvoice/consultations/index_en.htm.
Creating European Rights

from the outside. A closer examination of the historical background, however, demonstrates that, starting in 1999, consultation was in the Commission's interest.

a. The fall of the Santer Commission

The Commission has been criticized for fiscal mismanagement and cronyism ever since it underwent major expansion in the 1970s and 1980s. As long as the Commission and the Council were the only strong organizations within the European institutional complex, the charges of inefficiency and corruption never amounted to much. That changed in the 1990s with the reforms made in the Maastricht and Amsterdam Treaties and the rise of the European Parliament as a powerful actor. Not only did it obtain co-equal legislative powers, but it was given a variety of legal means through which to hold the Commission accountable, similar to an ordinary, national parliament.\(^{351}\) When, in 1998, it came to light that Edith Cresson, the French Commissioner responsible for Research and Development, had given out an expert contract to her dentist, the Parliament took the scandal as an occasion to demonstrate its new role as the legislative body to which the Commission had to answer.\(^{352}\) It voted to set up a Committee of Wisemen to investigate the Commission's financial and employment practices in January 1999.\(^{353}\) The report that was issued two months later, on March 15, 1999, was a tough indictment of the Commission and concluded with a fatal statement: "It is difficult to find a member of the Commission with any sense of responsibility." The Commission, headed by President Jacques Santer, was at risk of being the first Commission in history to be censured by the Parliament, and, rather than face such a motion, it resigned.\(^{354}\)

When the new Commission headed by President Romano Prodi took office on September 17, 1999, it faced a crisis. The Commission's reputation was at an all-time low. On the agenda was enlargement to the East, after the Luxembourg Crisis and the single market agenda of 1986, the single biggest transformation of the European Union since its founding. The Prodi Commission was called upon to manage a complicated task, full of political minefields, at the same time as it suffered from low esteem from the Parliament and, more broadly, European public opinion. The response was to undertake a massive, Commission-wide exercise on good governance. Numerous divisions and special task forces within the Commission, as well as outside think tanks and scholars, were called to reflect on how to render the Commission more legitimate.\(^{355}\) The result was the Commission White Paper on European Governance, published

\(^{351}\) For instance, before Maastricht, the Commission was appointed exclusively through bargaining among European Heads of State, but in Maastricht, Parliament acquired the power to vote on the Commission as a whole (but not individual members) and in Amsterdam, the power to vote on the Commission President. See Paul Craig & Gráinne de Búrca, EU Law: Text, Cases and Materials (2d ed. 1998).

\(^{352}\) See Karel Van Miert, Le marché et le pouvoir 241-59 (2000) (recounting this history from the insider perspective of a Commissioner at the time).

\(^{353}\) Parliament acted pursuant to the power acquired in Maastricht to set up temporary Committees of Inquiry. EC Treaty, art. 193.

\(^{354}\) See EC Treaty, art. 201.

The principal innovation of the White Paper was the civil society concept. Through the "involvement" and "consultation" of civil society, the Commission's policies would be more democratic and of better quality. The Communication on Consultation setting down the specifics of the consultation procedure followed one year later.

b. International value: The influence of the idea of legitimacy through governance with civil society

Global politics of the last decade have been marked by the emergence of widespread skepticism of international agreements and organizations. The benefits of multilateral organizations such as the WTO, the World Bank, the IMF, and the OECD have been challenged by a wide variety of social and environmental justice NGOs. To some extent, international organizations are the scapegoats for the effects of a market-driven process of globalization. Nonetheless, they and their policies have been critiqued for contributing to the inequalities and loss of local control associated with globalization. In the view of the skeptics, international economic organizations have not kept their promise of development and prosperity and instead have facilitated global capital's exploitation of the Third World, labor, and the environment.

Disparagement of international economic organizations was accompanied by the demand that NGOs have a voice in their decisions. The call for participation was made on the grounds of democracy, legitimacy, and effectiveness; only if international decisionmakers were responsive to NGOs would their policies be fair, equitable, and responsive to the needs of developing countries. This demand extended to a wide array of international decisionmaking: treaty negotiations, inter-state dispute resolution, foreign lending decisions, and the allocation and distribution of foreign aid at the local level.

The call for greater NGO participation was tied to the reconceptualization of NGOs as civil society. NGOs have long been part of the international system. The International Labor Organization created in 1919 provided that representatives of workers and employers would sit and vote alongside government representatives on its decisionmaking bodies. Later, the founders of the United Nations created a permanent, institutional role for non-governmental actors by providing in the Charter that the government representatives on the Economic and Social Council were under a duty to consult NGOs. In the mid-1990s, however, these old

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357 The White Paper contained two other major themes: confining the Commission to the technical, administrative realm while leaving political decisions to the Council and the Parliament; and improving transparency. Both the technocratic characterization of the Commission and transparency, however, were well-established arguments for European integration and the Commission. See generally Christian Joerges, "Economic order"--"technical realization"--"the hour of the executive": some legal historical observations on the Commission White Paper on European governance, Jean Monnet Working Paper No. 6/01, at 16 (discussing neo-functionalist roots of technocracy argument in White Paper).
360 See UN Charter, art. 71 ("The Economic and Social Council may make suitable arrangements for the consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."). See generally United Nations Non-Governmental Liaison
actors took on a new identity as civil society. The official rhetoric of the UN system, the World Bank, and a variety of other international organizations shifted from "NGO" to "civil society" and "civil society organizations." 361

The change in language was not simply a matter of form. It was related to a vast body of academic and policymaking literature in which civil society, by which is generally meant social and environmental justice NGOs as opposed to market actors or their associations, was put forward as the key to legitimate global governance. An analysis of the normative claim in favor of civil society participation in international organizations is beyond the scope of this Article. Suffice it to say that the organizations of global civil society are believed to foster transnational solidarities, pluralism in the international system of governance, republican commitments to collective self-government, and communitarian values. 362 Most dramatically, some claim that the organizations of civil society represent the global people. 363 The transformation that the practice and rhetoric of international organizations underwent in the 1990s is nicely captured in a statement by the Secretary-General of the United Nations Conference on Trade and Development:

I am happy to see that nowadays there is practically no international organization, not only in the United Nations system but also outside it, that is not actively seeking ways of integrating the civil society. What was new in December 1995 is becoming a common concern of international organizations now. 364

The Commission was influenced by the global reconceptualization of organizations outside of the state in adopting the consultation procedure for lawmaking proposals. The evidence for this claim can be found in the origins of civil society talk within the Commission. The Commission is composed of over thirty Directorate-Generals but only three--the Directorate-Generals responsible for international trade, development (international aid), and employment and social affairs--began to conceive of their relations with private associations as relations with "civil society" in the late 1990s. Departments such as DG Agriculture, DG Internal Market, and DG Competition did not develop a civil society discourse even though they routinely deal with intermediate associations of farmers, workers, firms, and consumers. In other words, departments with regular contacts with other international organizations were far more likely than departments that largely dealt with internal matters to adopt the language of civil society. 365 And it was their discourse that was then taken on by the Commission as a whole. In

Service (NGLS), The NGLS Handbook of UN Agencies, Programmes, and Funds Working for Economic and Social Development 6-7 (2d ed. 1997) (describing the mechanism for consulting NGOs).


365 DG Employment first engaged in a "social dialogue" with labor and management organizations, following the specific mandate contained in the Maastricht Treaty, arts. 137-39 and then in a "civil dialogue" with non-profit
the White Paper that first proposed consultation for the entire Commission, the Commission singled out the experiences of the trade and development departments: "This [involving civil society] already happens in fields such as trade and development, and has recently been proposed for fisheries."

The experience of DG Trade, responsible for international trade, most clearly demonstrates the influence of the civil society concept from the international sphere. In October 1998, the negotiations on the Multilateral Agreement on Investment collapsed because of opposition from anti-globalization organizations. The response of the Trade Commissioner, Sir Leon Brittan, was to organize a series of public meetings, open to all "civil society organizations," starting in November 1998. At the meetings, a number of general and sectoral issues on the agenda of the upcoming Seattle WTO Ministerial were discussed (transparency, development, the environment, investments, intellectual property, goods, trade). The European delegation to Seattle included representatives of labor, business, the environment, farmers, development organizations, and so on. After the Seattle protests of December 1999 and the collapse of WTO negotiations, DG Trade instituted a more formal version of the meetings held the previous year. Consultation, known initially as the “Trade Policy Dialogue with EU Civil Society” and now simply as the “Civil Society Dialogue” includes period public meetings on trade issues as well as regular Internet chats with the Trade Commissioner.

The popularity of civil society talk in the Commission’s foreign aid departments also supports the claim of international influence. The Commission has a long history of distributing development aid through NGOs. Since 1975, the Commission has also consulted NGOs on broader policy questions through the Liaison Committee of NGOs, now known as CONCORD (European NGO Confederation for Relief and Development). The relationship between the Commission and NGOs is weighted toward the clientelistic, implementation side, although that might be changing with recent Commission efforts to secure more NGO participation in the organizations and voluntary associations starting with the Social Policy Forum that it organized in May 1996. See Stijn Smismans, European Civil Society: Shaped by Discourses and Institutional Interests, 9 Eur. L. J. 473, 475-78 (2003) (analyzing the rise of civil society participation in DG Employment and Social Affairs). By 1998, DG Employment came to refer to its interlocutors as part of “civil society.” See Summary Report of the European Social Policy Forum, Brussels 24-26, 1998, at 49, published by the European Foundation for the Improvement of Living and Working Conditions and the European Commission’s Directorate-General for Employment, Industrial Relations and Social Affairs (on file with author). The early adoption of civil society rhetoric in DG Employment does not support the case for international influence since DG Employment deals largely with internal, European affairs. However, this historical fact does not controvert the claim that one strand in the Commission’s proceduralization of policymaking drew upon developments in the international realm.

367 See E-mail from Eva Kaluzynksa, DG Trade, Civil Society Dialogue (June 17, 2004) (stating that private associations were called “civil society organizations” from the beginning of the dialogue).
368 There are two ways in which NGOs can take responsibility for implementing European international development aid. Since the 1970s, NGOs have been paid to distribute specific forms of aid such as food aid, and since 1976, they have been able to propose projects to the Commission for co-financing (at least 15% of the financing must come from the NGOs’ own resources). See E-mail from France Marion, EuropeAid Co-operation Office, European Commission (Aug. 4, 2004) (on file with author); see also Agnès Philippart, The relations between NGDOs and the European Commission 1 (Executive summary of unpublished thesis, Oct. 2002, on file with author) (identifying the Lome Convention of 1975 as the first instance of Commission-NGO partnership).
initial stages of policymaking. By the mid-1990s, the Commission's foreign aid departments had dubbed non-governmental organizations "civil society."

c. Supranational interest: The interest of the Commission in reestablishing political standing within the European institutional complex

Civil society consultation served the interest of the Prodi Commission in reestablishing credibility because it brought the Commission closer to the ideal of good global governance. The strategic use of the concept was manifest in the policy documents setting out the procedures for civil society consultation. A brief excursion into theories on the role of language in political conflict is necessary to fully understand the deployment of the civil society concept in the White Paper and, later, the Communication on Consultation. The mechanism by which words and ideas are used by actors like the Commission in struggles to define political authority has been analyzed by political theorists such as Quentin Skinner, James Tully, and Charles Taylor, drawing on J.L. Austin's concept of "speech act." A statement made in the context of the struggle to define, exercise, extend, or modify political authority should be understood as action. It is not epiphenomenon. In the speech act theory of language, authors use words to affirm or change the existing structure of authoritative decisionmaking. Because language is deployed strategically by the participants in a political debate, it cannot be assumed that words are being used in accordance with prevailing linguistic conventions: a political actor might use an old word unconventionally or, albeit rare, might even coin a new word rather than work within the limits of the existing linguistic conventions.

A couple of examples will buttress the point. Feminists such as Betty Friedan have applied the old language of "exploitation" to the new category of middle-class suburban housewives, thereby mounting a formidable challenge to existing structures of patriarchy. In the literature pertaining to social movements, this practice is identified as "framing." Thus Margaret Keck and Kathryn Sikkink argue that the international movement against female genital mutilation was able to place the issue on the agenda of national governments and international organizations only after it applied the language of "castration" to female genital

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370 See E-mail from France Marion, EuropeAid Co-operation Office, European Commission (Aug. 4, 2004) (on file with author) (stating that she believes that "civil society" was used for the first time in the Lome IV Convention signed on 15 December 1989). The difference between the agreement on aid to ACP (African, Caribbean and Pacific) countries of 1995 and that of 2000 is evidence of this shift: the former refers to "non-governmental organizations," the latter to non-state actors, which are defined as comprising the private sector, economic and social partners, and civil society, i.e. what in former times would have been called NGOs. See Agreement Amending the Fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, arts. 38; ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000, arts. 6, 32.
371 Stijn Smismans has also argued incisively that the Commission used the discourse on civil society to improve its own democratic credentials and thus respond to the legitimacy crisis that it faced. See Smismans, European Civil Society, supra note  at 484. However, he does not focus on the international element of the concept.
373 This is related to Wittgenstein's theory of word as "deed."
mutilation, a radical innovation given the previous use of the word "circumcision" to describe the very same practice.\textsuperscript{375}

How, then, did the Commission deploy the language of "civil society" in the debate over the constitution of European public authority and reclaim a central role itself in the institutional balance of powers? First, what were previously understood as "special interest groups," \textsuperscript{376} "voluntary associations," \textsuperscript{377} the "social partners," \textsuperscript{378} and "lobbies" \textsuperscript{379} were redefined as "civil society organizations." According to the Commission, the non-state actors that counted as "civil society" included:

- the labour-market players (i.e. trade unions and employers federations--the 'social partners');
- organisations representing social and economic players, which are not social partners in the strict sense of the term (for instance, consumer organisations);
- NGOS (non-governmental organisations) which bring people together in a common cause, such as environmental organisations, human rights organisations, charitable organisations, educational and training organisations, etc.;
- CBO's (community-based organisations), i.e. organisations set up within society at grassroots level which pursue member-oriented objectives, e.g. youth organisations, family associations and all organisations through which citizens participate in local and municipal life; and religious communities.

"Civil society organisations' are the principal structures of society outside of government and public administration, including economic operators not generally considered to be 'third sector' or NGOs. The term has the benefit of being inclusive and demonstrates that the concept of these organisations is deeply rooted in the democratic traditions of the Member States of the Union.\textsuperscript{380}

The old word "civil society" and the new positive connotations of "civil society," developed in the rhetoric of the international sphere, were used to categorize a set of social actors and government practices that were very familiar in European politics yet were looked upon with suspicion by citizens of a number of Member States and by some of the civil society actors themselves.\textsuperscript{381} With this definition, the Commission recharacterized a set of long-standing interest organizations and government practices that were the subject of debate and contention in Europe. The Germans might deny a role for the World Federation of Advertisers in European governance because they consider it an illegitimate lobby, the British might do the same for the European Trade Union Conference because they believe it to represent an antiquated, inefficient social force, and the French might oppose the involvement of Caritas, the Vatican's charitable organization, because they consider that such involvement would mix religion with public life.

No nationality, however, would say that "civil society" should be excluded.

\textsuperscript{375} Margaret Keck & Kathryn Sikkink, Activists beyond Borders: Advocacy Networks in International Politics (1998).
\textsuperscript{376} See, e.g., Commission Communication on an open and structured dialogue between the Commission and special interest groups, 1993 O.J. (C 63).
\textsuperscript{377} See Communication on Promoting the Role of Voluntary Organisations and Foundations in Europe (1997).
\textsuperscript{378} See TEC, arts. 137-39.
\textsuperscript{380} Communication on Consultation, supra note__ at 6. The White Paper contains essentially the same definition. See White Paper, supra note__ at 14 n.9.
In a related rhetorical step, the Commission embraced the prevailing theory of civil society as good for democracy and global governance because private associations foster transnational solidarities, contest power holders in government, encourage republican participation in government, and promote communitarian values. First, the White Paper:

Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs. . . . The organisations which make up civil society mobilise people and support, for instance, those suffering from exclusion or discrimination.382

Another passage in the White Paper reads:

Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest.383

The Communication on Consultation repeated the point:

The specific role of civil society organisations in modern democracies is closely linked to the fundamental right of citizens to form associations in order to pursue a common purpose as highlighted in Article 12 of the European Charter of Fundamental Rights. Belonging to an association is another way for citizens to participate actively, in addition to involvement in political parties or through elections.384

The last move made by the Commission was to ally itself with civil society by setting down a set of rules for consulting civil society in the policymaking process. In the White Paper, the Commission promised that it would take the steps necessary for "[i]nvolve civil society."385 It committed to "[m]ore effective and transparent consultation"386 and "a reinforced culture of consultation and dialogue."387 And, in the follow-up Communication on Consultation, the Commission put forward full-blown standards for the routine, structured participation of civil society in drafting policy initiatives.388

What then, might one ask, was the Commission doing by saying it would consult "civil society"? No less than that it should continue to rule because it was closer to the good government ideal of today.389 The overtly political nature of the White Paper makes interpretation unnecessary. The Commission was explicit:

Better consultation and involvement, a more open use of expert advice and a fresh approach to medium-term planning will allow it to consider much more critically the demands from the Institutions and from interest groups for new political initiatives. It [the Commission] will be better placed to act in the general European interest.390

382 White Paper, supra note__ at 14.
383 Id. at 14-15.
384 Communication on Consultation, supra note__ at 5.
385 White Paper, supra note__ at 14.
386 Id. at 15.
387 Id. at 16.
388 See supra text accompanying note__.
389 To translate this into speech act theory, this is a sequence of illocutionary and perlocutionary acts. When a person says "The door is open" to someone else she may be requesting that the other person close the door (illocutionary act). If she actually gets the hearer to close the door, she has performed a perlocutionary act. See Entry under Speech Act Theory, The Cambridge Dictionary of Philosophy 869 (Robert Audi, general editor 2d ed. 1999).
390 See White Paper, supra note__ at 33-34.
And hence, to finish the thought, the Commission should retain its position at the epicenter of European integration:

Both the proposals in the White Paper and the prospect of further enlargement lead in one direction: a reinvigoration of the Community method. This means ensuring that the Commission proposes and executes policy; the Council and the European Parliament takes decisions; and national and regional actors are involved in the EU policy process.\footnote{Id. at 34.}

One final point. That the civil society idea was adopted by the Commission for the strategic reason of reclaiming political standing after the resignation of the Santer Commission does not bear upon the normative analysis of civil society participation. To be blunt, civil society is not superstructure.\footnote{See Skinner, Language and Political Change, supra note \textsuperscript{108} at 10-13. The use of language in contemporary political theory underscores my insistence on attributing moral force to the idea of civil society, independent of the strategic reasons that led to its adoption. According to Skinner, words can be broken down into their sense, reference, and evaluative force. Sense is the abstract criteria for applying a word, reference is the range of factual circumstances to which the word applies, and evaluative force is the range of attitudes, positive or negative, which the word expresses. The sense and reference of words are routinely manipulated by social actors so that may benefit from their appraisative force. At the same time, because the vocabulary available to social actors is limited and meaning can be stretched only so far, social actors are also constrained by words. Skinner gives the example of Elizabethan merchants who describe their commercial activities as "religious", in the attempt to give trade the same status as other forms of economic activity, for instance landholding. Trade and the accumulation of wealth were a far cry from the activities to which "religious" routinely referred. Nonetheless, Elizabethan merchants could not engage in any type of trade, rather they had to be conscientious, punctual, and fair in their trading relations to adopt the label of "religious."}

Civil society, as one variation of "I am democratic," is not an infinitely malleable concept. Although the precise definition of the term is hotly disputed in the different arenas of global governance, all are in agreement that civil society excludes corporations in their profit-seeking guise. Furthermore, the revival of civil society in the 1990s was accompanied by an understanding of the values served by promoting the formation of voluntary associations and encouraging their participation in public affairs: transnational solidarities, pluralism, republican citizenship, and community. The Commission, in consulting civil society, was, and continues to be, constrained by this set of judgments. Because "consultation of civil society" cannot be stretched to accommodate, for instance, European regulatory policy dictated by a single profit-seeking corporation, it is an idea with autonomous force that must be evaluated on its own merits.

3. The evolution of the right to civil society participation

In fall of 1999, at the same time that the Commission began the good governance exercise that culminated in the White Paper, the Prodi Commission was influential in setting into motion another chain of events that produced one of the major innovations of the recent Constitutional Treaty--an article on the right of civil society to participate in European governance. One of the acknowledged precursors to the Constitutional Treaty was the Charter of Fundamental Rights, approved by the European Council at Nice in December 2000.\footnote{See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. The rights set down under the Charter only apply to European, not national, government bodies and are not officially binding on European government bodies.} The
German presidency of the European Council, which had been the prime mover behind the Charter of Fundamental Rights, did not intend for the Charter to introduce new rights; rather, it was conceived as a means of improving the legitimacy of Europe by enhancing the visibility of the rights already enjoyed by European citizens in their relations with European government.  

In line with this purpose, the European Council designed an inclusive and open process. When drafting began in fall of 1999, the participants included a number of actors that had been excluded from the high politics of European treaty negotiations in the past: representatives of the European Parliament and national parliaments were given membership on the drafting body ("Convention"), alongside the Member States and the Commission, and representatives of the Court of Justice and Council of Europe were given observer status. Furthermore, the European Council instructed the Convention to seek the opinions of the Economic and Social Committee, the Committee of the Regions, and the Ombudsman and to conduct its affairs as openly as possible. Significantly, a specific role for voluntary associations was not carved out. At that historical moment, "civil society" had not yet acquired the salience that it now enjoys in European politics. Ultimately, however, NGO representatives spoke at a number of public hearings and they were allowed to submit their proposals and critiques on a Convention website. The Commission, consistent with the strategic decision in the White Paper to govern with civil society, strongly supported including civil society organizations in the deliberative process of the Charter.

The Constitutional Convention, which did include a formal role for civil society, was modeled on the earlier experience with the Charter of Fundamental Rights. And it was because of the suggestion of civil society representatives heard at that Convention that the Constitutional Treaty now contains a far-reaching right to civil society consultation. In December 2001, the Laeken European Council decided to create the Convention responsible for drawing up the Constitutional Treaty. The Convention was composed of 102 members and 102 alternates, chosen by national governments, national parliaments, the European Parliament, and the Commission. Alongside the Convention was a Forum for civil society organizations. The Forum consisted of a website, open to all voluntary organizations, on which drafts of the Constitutional Treaty were published and on which comments and proposed amendments from members of the public could be posted. The function of the Forum was purely advisory. The Praesidium, led by a Chairman (Giscard d'Estaing), two Vice-Chairmen (Giuliano d'Amato and

395 The Council of Europe is a separate international organization, headquartered in Strasbourg, that is charged with enforcing the European Convention on Human Rights.
396 Indeed, it is clear that notwithstanding the name of the document, the drafting of the Charter was not believed to be an episode of high politics. It was taken by the European Council to be mainly a codification exercise and one that would culminate in a symbolic, rather than a legally binding, statement of rights.
397 de Búrca, The drafting of the European Union Charter of fundamental rights, supra note ___ at 132 (analyzing the Tampere European Council conclusions of October 1999). The European Council, however, encouraged the Convention to invite “other bodies, social groups or experts” to give their views.
Jean Luc Dehaene) and composed of nine members drawn from the Convention, set the agenda and drafted proposals for the Convention and the Forum to consider.

The early months were devoted to soliciting views from the members of the Convention, what d'Estaing called the "listening stage." In this context, a meeting of civil society organizations was held in Brussels on June 24-25, 2002. There, Joseph Bresch, the President of the Economic and Social Committee, put forward the suggestion that the Constitutional Treaty provide for the principle of participatory democracy and include civil society. A skeleton outline of the Constitutional Treaty was then circulated and posted on the Convention's website in the fall of 2002. The drafters anticipated a provision on "participatory democracy" which would guarantee that: "The Institutions are to ensure a high level of openness, permitting citizens' organizations of all kinds to play a full part in the Union's affairs." Anyone, including individuals, voluntary associations, and interest organizations could submit comments on the draft, which were also posted on the Convention's website. They did, and many called for including a duty on the part of the European institutions to consult civil society in policy planning and decisionmaking. The more complete draft released on April 2, 2003 included an article on participatory democracy very similar to the final version, in which civil society organizations were given a right of participation in the decisionmaking of European institutions. Thus, the decision to attribute constitutional status to civil society participation was linked directly to the Commission's bid in fall 1999 to improve its democratic credentials and re-establish institutional stature by trumpeting civil society. The provision in the Constitutional Treaty was tied to the structure of the Convention, namely the Forum for civil society organizations, which in turn was based on the decision to include citizen groups in drafting the Charter of Fundamental Rights.

The provision dedicated to relations between European institutions and civil society says:

Article I-47: The principle of participatory democracy

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

401 See Norman, The Accidental Constitution, supra note ___ at 48.
402 Id. at 50.
404 Id. at 71.
405 Id. at 131.
407 The final version of the Constitutional Treaty was signed by all members of the Convention on July 10, 2003, presented to the Italian Presidency of the European Council on July 18, 2003, and agreed to by the European Council, with a few modifications (which do not affect the article on civil society consultation), on June 18, 2004. The Constitutional Treaty must now be ratified by all 25 Member States. See Information Note from the Secretariat to the Convention, CONV 852/03 (July 18, 2003), available at http://register.consilium.eu.int/pdf/en/03/cv00/cv00852en03.pdf; European Commission, Summary of the agreement on the Constitutional Treaty (June 28, 2004), available at http://europa.eu.int/futurum/documents/other/oth250604_2_en.pdf.
Creating European Rights

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Accompanying the first appearance of Article I-47, were comments explicitly connecting participatory democracy with civil society: "The purpose of this Article is to provide a framework and content for the dialogue which is largely already in place between the institutions and civil society." 408

While the provisions of the Constitutional Treaty on the rights to good administration and transparency simply constitutionalize existing law, Article I-47 both elevates civil society consultation to the rank of higher law and extends the right to a host of new areas. Insofar as the Commission is concerned, Article I-47 converts what was previously an administrative practice set down in a non-binding policy document into a constitutionally guaranteed procedure. With respect to other European institutions, the provision creates an entirely novel set of rights and duties. The duty to engage in "dialogue" and the duty to give citizens and their associations an opportunity to make their views known were good government principles originally developed by the Commission, for the Commission, but in the Constitutional Treaty they have been transformed into a general principle of democracy applicable to all European institutions.

The turning point for European rights that started in 1999 with the resignation of the Santer Commission has still not come to a close. A number of basic questions continue to surround the right to civil participation and will probably not be resolved until the Constitutional Treaty is ratified (or not), the first legal challenges are brought to European measures on the ground that the principle of participatory democracy was violated, and the first legislative measures are taken to give effect to the principle. Among the most significant questions that remain open are: Will the right be legally binding and enforceable in the European Courts or will it be interpreted as a programmatic article, that is, a right that European public officials are bound to respect and uphold in their activities but that is not an area for the intervention of judges? 409 What types of Commission measures are subject to the duty to consult, just European laws or also implementing regulations, and if implementing regulations, all of them or only the most significant ones? Lastly, how will the right of civil society participation be construed in the different institutional setting of adjudication by the European Courts, intergovernmental bargaining in the Council of Ministers and European Council, and technical administration and information-gathering in the European agencies? The coming years promise to be eventful ones for the right to civil society participation.

4. European value: Civil society in European and global governance compared

The Commission drew from the international realm when it set into motion the civil society phase of European governance. None of the Member States had a developed discourse on the importance of civil society for good government or a procedure, applicable to all lawmaking, in which citizens and associations were systematically invited to comment on the early drafts of legislation. Yet the civil society ideal in the international realm was nebulous and ill-defined. Unlike the right to a hearing and transparency--public law principles that had been elaborated in the thick institutional space of the nation-state--global governance rhetoric left the Commission with significant latitude in designing the organizational changes that would

408 See Note from Praesidium to Convention, CONV 650/03, at 8 (April 2, 2003), available at http://register.consilium.eu.int/pdf/en/03/cv00/cv00650en03.pdf.
constitute governing with civil society. This latitude was illusory, however, because of the ever-present constraints of European mental maps of legitimate government, in this case corporatist relations between public bodies and private interest organizations.

The European right to civil society participation differs in two critical respects from the international right. First, the understanding of civil society is different. In the international realm, "civil society" generally refers to NGOs that seek social or environmental justice, not associations of firms or workers whose agendas are informed by their market activities. Moreover, the term encompasses an extremely fluid set of private associations. And an association qualifies as civil society just by virtue of being an organization that is one step removed from the institutions of government. As long as a group has a name, an e-mail address, and a core of activists, it counts as civil society. In Europe, civil society means NGOs. But it also embraces producer groups such as farmers, employer associations, sectoral industry groups, labor unions, and professional associations. Furthermore, civil society in the Commission documents and the Constitutional Treaty signifies a structured reality of organizations that represent distinct functional interests, religious traditions (churches), and political values. It refers to a self-contained universe of labor unions, employer organizations, consumer federations, umbrella environmental organizations, anti-discrimination groups, political liberties associations, and churches. Finally, to count as a civil society organization in Europe, an association is expected to have a membership base, a physical address with offices, and a bit of history.

Europe's different understanding of civil society is directly tied to the Commission's strategic use of the international discourse in the old institutional setting of European corporatist interest group representation. All of the Commission documents borrow their definition of civil society from the corporatist European institution par excellence, the Economic and Social Committee, which had developed earlier a definition of civil society that, not surprisingly, reflected its own model of interest representation. The new, central database of Commission organizations with civil society representation is simply a compilation of previously existing advisory bodies composed of organized interests, many of which can trace their roots to the 1960s. I do not wish to suggest that civil society is only a label and that nothing has changed in the relationship between European institutions and the public. Certainly, the civil society concept brought with it a commitment to consult a wider array of non-state organizations with a broader set of concerns than the old peak associations of labor, business, the professions, and farmers. Yet these new associational actors still must fit a distinctly European mold. Before the

410 For instance, the World Bank uses civil society “to refer to the wide array of non-governmental and not-for profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.” See http://web.worldbank.org/WEBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK%3A20101499--menuPK%3A244752--pagePK%3A220503--piPK%3A220476--theSitePK%3A228717.00.html. Associations based on the market-related activities are expressly excluded from the definition.
412 See supra text accompanying note__.
413 See White Paper, supra note_ at 14 n.9 (quoting from Opinion of the Economic and Social Committee on "The role and contribution of civil society organisations in the building of Europe," 1999 O.J. (C329) 39). The Nice Treaty of 2000 subsequently affirmed the ESC's bid to associate itself with civil society with an amendment equating the organizations represented on the ESC with civil society: “The Committee shall consist of representatives of the various economic and social components of organised civil society and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers, and the general interest.” EC Treaty, art. 257.
414 See supra note__
Commission will take their claims seriously, voluntary associations must demonstrate a long-standing role in national politics, i.e. churches, or must show that they reach out to a significant number of Europeans through their membership or other activities.

The second major difference between the European right to civil society participation and the international right is the breadth of the organizational change that has occurred in order to include civil society in public decisionmaking. The consultation procedure adopted by the Commission is more comprehensive than the institutional practices of any of the major international economic organizations (World Bank, IMF, NAFTA, WTO). While, for instance, the World Bank has developed venues for civil society participation, they do not stretch across the board to all policy areas, do not entail the same, weighty sequence of publication, public comments, and official explanation, and do not have binding, legal status. The participation that can be expected once (and if) the Constitutional Treaty is ratified and Article I-47 takes effect, will surpass wildly anything that exists in the international realm. As with the previous episodes of rights creation, the Commission did not simply borrow constitutional models; rather it was driven to construct a more extensive rights scheme than existed in the place of origin.

III. THE ALTERNATIVE THEORIES AND THE EVIDENCE

This historical experience highlights two important elements of an explanation of European rights: national legal traditions and contingent, historical circumstances that put obstacles in the way of the strategic interests of European institutions. In all three cases, normative understandings of good government developed within the confines of the nation-state were extremely influential in shaping the new rights and procedures that emerged to structure public authority in the post-national setting. The right to a hearing and the right to transparency were clearly driven by individuals with allegiances to their national constitutional symbols and practices. The right to civil society participation was more complex: the Commission adopted a normative discourse of good government that had been developed outside Europe, yet precisely because the institutions and social understandings in the international realm were so ill-defined, old European values quickly took over. National legal traditions spurred and constrained rights innovation. Spurred because they served as the basis for the initial design and subsequent transformation of procedural rights before the Commission. Constrained because rights that were foreign to the European normative toolkit were less likely to succeed even though they might have been strategically advantageous to certain citizens and public officials.

These three cases also demonstrate the importance of changing political circumstances in shaping the rights-based strategies adopted by European institutions to advance their preference for supranationalism and greater powers. Accession of a new Member State, one Member State's failure to ratify a treaty, and confrontation between two supranational bodies--the European Parliament and the Santer Commission--resulted in far-reaching rights innovation. Each time, rights operated as a context-specific strategy to advance a basic, institutional preference for supranational authority: the interest of the Court of Justice and the Commission in enforcing their decisions; of Heads of State in securing ratification of a hard-fought set of political deals contained in the Maastricht Treaty; of the Parliament in improving its legislative powers; and of the Commission in preserving its institutional role as the engine of European integration.

In Part I, I presented three theories of European rights and constitutional change and I

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derived specific hypotheses for the case of procedural rights in Commission decisionmaking. Legal constitutionalism, realism, and neo-functionalism generate predictions on a number of dimensions of rights in Commission proceedings: the bundle of rights that individuals enjoy, the time when different types of rights are acknowledged by the Commission, and the European institution responsible for advocating and imposing the rights on the Commission. How do these theories fare when matched against the pattern of institutional change that has occurred over time? And how can my analysis suggest revisions of these theories, each of which I argue below fails to account for critical aspects of European rights?

A. Legal Constitutionalism

Legal constitutionalists begin with the premise that constitutional designers are motivated by universal principles of democracy and justice and that the constitutional rules adopted by conventions and courts further those principles. Hanns Peter Nehl's work best exemplifies this approach in the context of the European Commission. Given the normative underpinnings of this form of scholarship, the forward-looking element of the theory combines the positive "will" with the normative "should"; therefore, it is difficult to discern the concrete mix of rights Nehl believes a constitution designer will (and should) protect at a given historical moment. His analysis, however, does produce expectations as to which institutions will press for rights in the administrative process and when they will do so. First, given that their professional and institutional mission is inextricably woven with higher principles of justice, judges should be the most receptive to claims that European administration is unfair and illegitimate. Bureaucrats, by contrast, can be expected to focus on getting the work of administration done. In other words, procedural rights should be driven by the judgments of the European Courts. Second, such rights should emerge as soon as the Commission begins exercising different types of power and private parties go to the courts to complain that it was exercised unfairly.

In the case of the right to a hearing in individualized Commission proceedings, Nehl's expectations as to the institutional proponent of the right are mostly borne out by the historical record. The Court of Justice set down the right to a hearing in competition proceedings and then extended the right to other areas of Commission administration where private parties could show that they were similarly burdened. Yet the late arrival of the right—eight years after the first competition case was decided—and the Commission's entrepreneurship in undertaking organizational change are difficult to explain.

The events that pose significant difficulties for legal constitutionalism are the rise of the right to transparency and civil society participation. Many years before they became standard elements of European rights discourse, individual litigants had made functionally similar claims before the Court of Justice and their claims had been rejected. For instance, Nehl narrates a case from 1984 in which a trader vindicated, unsuccessfully, the right of access to documents.416 In Tradax Graanhandel BV v. Commission, a Dutch importer of maize challenged a duty ("levy") assessed as part of the European price support scheme for agricultural commodities, but rather than challenging the implementing regulation setting down the duty, the Dutch importer requested the information that had been used to make the calculations that resulted in the duty. The Commission turned down the Dutch importer's request and, when Tradax went to the Court of Justice, both the Advocate General and the Court dismissed the claim.

Tradax argued that the general principle of good administration required the Commission to provide the documents—as evidenced by the access-to-documents laws common to a number

Creating European Rights

of Member States--and that the right to a hearing, through which parties obtained documents in competition proceedings, should also apply to a business affected by an implementing regulation. Neither the Advocate General nor the Court was persuaded. The reasoning of the Advocate General illustrates the institutional limits of judges and fairness doctrines in reforming administration:

Nor does it seem to me that there is any general or absolute principle of Community law, as is suggested, which requires information to be disclosed by the institutions of the Community to persons affected by Community acts in the absence of express provision and in the absence of litigation. The provisions of the laws of Member States which have been cited requiring disclosure of information in the possession of governments, in the interests of more open government, may support an argument that there should be specific or general measures laying down some rules. It does not seem to me to establish a general principle of "unwritten law" which aids the applicants in this case. Moreover, the fact that in competition and staff cases the Court has recognized that, before a decision is taken affecting an individual he has a right to be heard and to know the case against him, does not seem to me to lead to the conclusion that after a levy is fixed for all traders (since it is not contended that there is a right to the information before the levy is fixed) the information must be given to individual traders.

A Dutch litigant, acting according to values and ideals formed through education and experiences in the Dutch public law system of open government, was unable to persuade the Court to adopt an access-to-documents rule. It was only after Maastricht, the declarations of European Heads of State in fall of 1992, and the enactment of the first Commission access to document rules in 1993 and 1994, that the Court began enforcing a right of access to documents to the benefit of traders in situations almost identical to that of Tradax.

The same unsuccessful testing of legal theories before the Court of Justice has occurred in the sphere of civil society participation. The primary doctrinal candidate for obtaining, through the Court of Justice, the functional equivalent of the right to participation is the duty to give reasons under Article 190, now 253, of the EC Treaty. A requirement that the Commission respond to the objections of interested parties in the statement of reasons supporting a regulation or law would approximate the explanatory memorandum that the Commission now issues in civil society consultations. Yet the Court has always rejected the claim that the Commission is obliged to engage in an exchange of views with the European public, known today as civil society, before adopting regulations and proposing laws.

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417 Tradax also claimed the right to information based on the doctrines of legal certainty and legitimate expectations, on the theory that an individual should be able to check that the law was rightfully applied by examining the information and reasoning used by the administration in promulgating an implementing regulation. See id. at 1369-70.
418 Id. at 1386 (opinion of Advocate General Gordon Slynn).
419 Another case in which the litigants attempted, unsuccessfully, to make creative use of the right to a hearing to obtain documents that now may be requested under the right to transparency (although the documents might, nevertheless, be covered by one of the statutory exceptions) is Case C-170/89, BEUC v. Commission, 1991 ECR I-5709. See supra note __.
421 The deciding institution in the case of implementing regulations is the Commission and in the case of laws are the Parliament and Council acting on the Commission's proposal.
422 See, e.g., Case 16/65, Firma G. Schwarze v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel, 1965 ECR 1081 (challenge to agriculture implementing regulation based on duty to give reasons); Case C-244/95, P. Moskof
As far as the anticipated timing of rights is concerned, legal constitutionalist theory also disappoints. The Commission has always possessed the power to adopt rules and propose laws and it has exercised this power since the 1960s. Yet, notwithstanding the objections from individual litigants chronicled above, until recently the Commission exercised such powers free of any duty to disclose documents or engage in an exchange of views with civil society organizations and members of the public. Only in 1993 and then in 2002 did such rights and obligations come into being. In sum, it appears that even though judges are moved by complaints of oppressive government action to make administration fairer, they will only go as far as required by their pre-existing, national understandings of rights and their need to obtain the cooperation of national courts for enforcement purposes.

Turning to the social mechanism underlying the legal constitutionalist account, the historical record supports the contention that individuals advance values, as opposed to self-interested preferences, when they design constitutional rules. The most telling piece of evidence in support of this claim is the over-representation of citizens from northern countries in designing European transparency rules, primarily in the Parliament and in litigation before the European Courts. Were transparency simply a mode of maximizing preferences for political power (parliamentarians) or material well-being (litigants), then we would expect all Europeans, regardless of their countries of origin, to use and advance the European right to transparency. But that has not been the European experience. Swedes, Finns, Danes, and the Dutch significantly outnumber the French, Italians, Spaniards, and other nationalities in the transparency area.

Yet this very same evidence points to a significant weakness in the legal constitutionalist account: what is thought to be morally right is not universal but varies based on historical experiences with law and government within the nation-state. Furthermore, in the emerging European polity, the mode through which certain national constitutional values are adopted as European ones departs from the persuasion mechanism central to the legal constitutionalist model. In each generation, rights served as instruments with which supranational institutions co-

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AE v. Ethnikos Organismos Kapnou, 1997 ECR I-6441 (challenge to agriculture implementing regulation based on duty to give reasons); Case C-263/02 P, Commission v. Jégo Quéré SA, 2004 O.J. (C 106) 13 (challenge to fishing implementing regulation based Commission’s duty to take into consideration different interests under EC Treaty, art. 30, previous involvement of the parties, and right to be heard). Nehl is correct to observe that, in the context of Commission decisions on whether to pursue a complaint against a Member State for a breach of the Treaty prohibition on state aids, the Court has used the duty to give reasons, together with the duty "in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint" to require the Commission to respond, in the statement of reasons, to specific concerns raised in the original complaint. See Nehl, Principles of Administrative Procedure in EC Law, supra note__ at 160-63 (discussing Commission v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL [Sytraval II], 1998 ECR I-1719). This use of the duty to give reasons to require the Commission to engage in a consultation-like procedure, however, is closely tied to the existence of a complaint procedure established under European law, permitting competitor firms to alert the Commission of illegal state subsidies. See Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999 O.J. (L 83) 1, art. 20.

423 See generally Daniel Steel, Social Mechanisms and Causal Inference, 34 Philosophy of the Social Sciences 55, 57-59 (defining social mechanism).

opted recalcitrant constituencies; they were not the product of debate involving all European citizens in which agreement was reached as to which rights were best.425

This revision of legal accounts of constitutional design has important implications for the normative ambitions at the heart of such theories. When assessing whether European rights meet standards of fairness and justice, it is important to understand first the extent to which such standards are commonly shared. The experience with rights before the Commission shows a propensity towards national bias which can color the process of constructing and criticizing constitutional rules. Moreover, the strategic adoption of rights cautions against taking their emergence as evidence that the new European polity is adapting to the demands of democracy and fairness. Whether this is the case should be a matter of critical, inclusive deliberation and persuasion. The mere existence of a new right or constitutional rule does not reveal whether such normative criteria have been fulfilled.

B. Realism

In a realist approach, state interests and the balance of power among states should shape the rules through which European institutions govern. One plausible account in the procedural domain is that states seek to protect the well-being of their own citizens from arbitrary government action by transposing their national patterns of individual rights and public duties to the European Commission. Intergovernmental bargaining should produce a set of rights faithful to those existing in the most powerful Member States.

From the beginnings of European integration to the present day, France and Germany have occupied the position of the two most powerful Member States, notwithstanding the many waves of accession and membership of the UK, another wealthy, large country.426 A realist, therefore, would expect European citizens to enjoy the rights that French and German citizens are guaranteed under their domestic constitutions and laws. Moreover, in the power politics approach, rights should be promoted by Member States and they should be set down in treaties and laws negotiated by Member States. Lastly, the timing of rights should track historically the conferral of powers upon the Commission, since states would only want to protect their citizens from arbitrary government action once they perceived that the Commission had the power to impose it.

The power politics explanation is persuasive in the early days of the Commission. The first area in which the Commission exercised direct enforcement powers was competition law. The opportunity to be heard was set down in a Council regulation and the details of the hearing--the right to be notified of the Commission's evidence and arguments and to object in writing and orally--was set down in a Commission regulation. The Commission was also required to give a statement of the reasons supporting the final competition decision under Article 190 of the Treaty of Rome. This conformed to French competition procedure (notice, a right to reply in writing, and a reasoned opinion of the Technical Commission on Cartels and Dominant Positions) and German competition procedure (the same plus the right to an oral hearing). The institutional advocates of rights also followed expectations: the basic framework was set down by the states that negotiated the Treaty of Rome and the Council Regulation. And the anticipated timing is historically accurate: as soon as the Commission was given direct enforcement powers

425 See generally Rawi Abdelai, Mark Blyth, and Craig Parsons, Constructivist Political Economy (Jan. 14, 2005) (paper on file with author) (identifying persuasion, manipulation, and socialization as three mechanisms through which norms are constructed).
426 See Moravcsik, The Choice for Europe, supra note__ at 137, 374.
Creating European Rights

(Council Regulation of 1962) it was also required to respect basic rights (Council Regulation of 1962 and Commission Regulation of 1963).

By the time the Court of Justice recognized a general right to a hearing in 1974, however, the realist model loses explanatory power. The right was not drawn from France, Germany, or even a majority legal tradition, but from the UK. Especially in the early years after accession, as the UK was adjusting to the different conditions of membership in the European Community, she had little power compared to France and Germany. Furthermore, the right was established by supranational institutions— the Court of Justice and, to a lesser extent, the Commission—and emerged at a time when no change in the Commission’s powers had occurred.

The same initial consistency with, followed by departure from, the power politics approach is true also of transparency and civil society participation. Before 1993, individuals did not have a right to documents, as in the majority, closed government tradition, which included France and Germany. After 1993, the predictions falter, for the right came from Member States that were powerless as a matter of their economies and populations (Denmark and the Netherlands), was established partly by a supranational institution (the European Parliament), and was introduced well after the Commission had come to exercise significant rulemaking and lawmaking powers independent of the Member States.427

Likewise, before 2002, public participation in rulemaking and lawmaking followed the majority corporatist model of consulting advisory bodies on which select interest organizations were represented. The Economic and Social Committee was established in the Treaty of Rome and advisory committees were set down in a number of European laws that dated to the 1960s and 1970s. Thus, both forms of interest representation were promoted by the Member States, and promoted at the time that the Commission was first given rulemaking and lawmaking powers. After 2002, while the understanding of which actors constituted the public retained the original corporatist bent, the procedure for consulting interests, as well as the types of private associations that were consulted, became significantly more inclusive. Furthermore, the institutional proponent of the new right to civil society participation was the supranational Commission. Finally, the appearance of the right did not occur at a time when the Member States transferred new powers to the Commission.

This historical pattern is revealing. A power politics approach can account for the procedural baseline that existed before each of the historical challenges that prompted organizational change and new rights. Thus what was a plausible, but not necessary, set of assumptions—states seek to protect the well-being of their citizens before international institutions by transferring their domestic rights to the international realm—finds support in the historical record. Moreover, a fairly crude balance of power analysis can account for outcomes when national laws and procedures conflict. Even though open government Netherlands was an original member of the European Community (and adopted access to documents legislation in 1978) and even though Denmark acceded in 1973 (Denmark’s original legislation dates to 1970), the two states were too small and insignificant to transfer successfully their public law of transparency to European institutions. However, once sovereignty was transferred and momentum for European integration got underway, supranational institutions became the

427 By 1986, with the introduction of qualified majority voting for harmonization measures in the Single European Act, the Commission had the power to act contrary to the wishes of Member States and, by extension, their citizens. Before 1986, Member States might have believed that they could control Commission activities in the rulemaking and lawmaking areas through unanimity voting on comitology committees and the Council, or that, in the isolated areas where such checks did not exist, in the nooks and crannies of the management of agricultural prices and customs duties, the decisions were simply too technical to be able to adversely—and arbitrarily—harm the economic well-being of their citizens.
primary agents of rights innovation. Here I use the term "supranational institution" loosely: not only institutions that are conventionally defined as supranational, namely the Commission, the Court of Justice, and the European Parliament, but also the European Council after a bargain had been reached in the Maastricht Treaty and the Member States had a common interest in getting the bargain ratified. The evidence does not shed light on the question of why supranational institutions took the lead: did they anticipate a preference among Member State for the highest-common-denominator system of rights (regardless, a preference that does not fit with the realist account), did national governments perceive rights before the Commission as a technical area for legal experts, were Member State preferences transformed by the actions of European institutions, or did Member States lose control to European institutions? But, for whatever reason, the Member States did not attempt to reassert control over rights before the Commission.\footnote{It should be recalled that the Council attempted to dilute the transparency guarantees in the Access to Documents Law, but only for rights before the Council, not the Commission.}

\section{Neo-Functionalism}

Neo-functionalist theories of Europe, like realist ones, assume self-interested preferences and strategic, utility-maximizing behavior but they identify supranational institutions rather than inter-state bargains as the critical force behind European integration. Martin Shapiro has come the closest to articulating a neo-functionalist view of constitutional innovation in the Commission. Shapiro employs a rational choice approach in which litigants, with the money to hire lawyers and an interest in avoiding administrative action, challenge Commission decisions on novel legal theories and judges, driven by competence-expanding, activist tendencies, rule in their favor. His account also includes anti-technocracy, pro-democracy values and the internal logic of legal doctrine. These value-driven premises, however, are complementary to the rational choice ones: all elements of the neo-functional model point in the direction of an ever-expanding bag of procedural rights.

According to Shapiro, procedural rights before the Commission should gradually come to approximate those under American administrative law. The institutional advocate of rights should be the Court of Justice, since judges are interested in expanding their powers, as well as in remaining faithful to the doctrinal demands of the duty to give reasons and the political demands of protecting litigants (and democracy) against overweening bureaucrats. Lastly, the timing of the rights should track, with a slight lag, the exercise of different types of government powers by the Commission: the Commission issues decisions and rules, litigants oppose the measures and test the waters with new legal theories, the Court of Justice considers and initially rejects the theories, but is moved eventually by self-interest, pro-democracy norms, and doctrinal logic, to accept the litigants' arguments.

Even though Shapiro's model of constitutional change is very different from Nehl's, his predictions on institutions and timing are virtually identical, and, neither finds support in the historical record of transparency or civil society participation.\footnote{See supra text accompanying note\_\_.} The history of litigation before the European Courts contains many instances in which plaintiffs advanced theories that would give them access to documents and an exchange of views with the Commission in advance of the enactment of a rule or law, and the Courts refused, repeatedly, to entertain their claims. In establishing the right to transparency and the right to civil society participation, the Court of Justice was a marginal actor and the incremental logic of judge-made law did not apply.
Creating European Rights

In addition to the predictions on institutions and timing, Shapiro anticipates that the Commission will be required to respect procedures analogous to American ones, by which he means principally notice and comment rulemaking. The judicial interpretation given to the Administrative Procedure Act in the late 1960s and 1970s requires federal agencies to publish rulemaking proposals, including the policy considerations and scientific information underlying proposals, accept comments from the public, and give detailed explanations of their policy choices in the final rule. Shapiro argues that the duty to give reasons will eventually be interpreted in such a way as to give individuals a very similar set of rights. But that has not happened. Even in the core administrative area of individual enforcement decisions under competition, anti-dumping, and customs law, the Commission's statement of reasons is far from the exhaustive rebuttal of all of the objections of the parties required under American law.

The difference between the European and American practices lies in the origins of the duty to give reasons. That principle was contained in the Treaty of Rome of 1957 and was imposed on European institutions to give effect to the rule of law principle common to the founding Member States that all government acts must be based on law. The European institutions promulgating the act had to give the reasons for it: the legal provision on which it was based and the grounds for holding that the government act furthered the purposes of the legal provision. The duty to give reasons was not conceived as a device for guaranteeing pluralist participation in administrative proceedings, as the analogous provisions of American law have been interpreted by American courts.

The right to a hearing came to be recognized as part of European law, it had no impact on the duty to give reasons because the common law right to a hearing did not provide for a judicial-like opinion at the end of the proceeding; indeed, it had nothing to say

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430 This set of requirements does not include transparency. Even in the judicialized American system of government, a congressional act (the Freedom of Information Act) was necessary before individuals had a general right to learn how their administration governed.

431 See supra text accompanying note 430.

432 Shapiro acknowledges that the European statement of reasons is not as extensive as the American statement of basis and purpose. He attributes this to the European Courts's desire to avoid the American experience of overly proceduralized agency decisionmaking or, in other words, cross-Atlantic learning by negative example. See Shapiro, The Institutionalization of European Administrative Space, supra note 430 at 101-02. However, many, if not most, judges on the European Courts are unfamiliar with American administrative law; even though some might be wary of following the American route, it is unlikely that the American experience is the only or principal explanation for the European outcome.

433 The duty to give reasons appears to have had special legal significance in Germany. The “obligation to give full reasons” is considered part of the constitutional principle of lawfulness of administration as well as the constitutional principle of effective judicial protection against the executive, since only if a party knows the reasons for a decision can he or she discern whether her rights have been infringed by the executive. See Georg Ress, Due Process in the Administrative Procedure, supra note 433 at 4.4.

434 See Case 45/86, Commission v. Council, 1987 ECR 1517 (obligation to state legal basis); Case 138/79, Roquette, 1980 ECR 3333 (obligation to refer to any proposals or opinions required under EC Treaty); Italy v. Commission, 1969 ECR 277 (obligation to give “clear and unambiguous” statement of reasons).

435 Articles 5 and 7 (ex Article 4) of the EC Treaty confirms the rule of law, as opposed to pluralist participation, understanding of the duty to give reasons. Article 5 says: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” Article 7 says: “Each institution [European Parliament, Council, Commission, Court of Justice, Court of Auditors] shall act within the limits of the powers conferred upon it by this Treaty.” The duty to give reasons under Article 253 should be read in conjunction with the duty to remain within the limits of the powers conferred by the Treaty under Articles 5 and 7. I am indebted to Xavier Lewis for this insight.

436 See supra text accompanying note 432.
Creating European Rights

about the form of the final administrative decision.\textsuperscript{437} Thus, the statement of reasons that the Commission today gives in competition and international trade cases does not answer each and every point made by the parties in the administrative proceeding.\textsuperscript{438} Knowing the grounds for a Commission decision is one thing, obtaining a reply on every objection of fact, policy, and law is another thing. The European Courts require only that the statement of reasons be complete enough to enable the parties to determine whether the administration acted according to law or whether it is necessary to go to court to vindicate their right to a government of laws and not of men.\textsuperscript{439}

Moving beyond individual decisions to the duty to give reasons for general acts, the European path has also taken an unexpected turn, at least compared to the American one. With the right to civil society participation, the proceduralized sequence of public notice, opportunity to comment, and government response has been introduced for acts of a general nature but, for the time-being, only for European laws, not implementing regulations. The Commission, in reasserting authority after the resignation of the Santer Commission, needed the normative support of civil society to justify its role in making the fundamental, political choices contained in European legislation. It had no strategic interest in involving civil society in what was perceived as the technical domain of rulemaking. This is precisely the opposite from the American experience. In the U.S., regulations must adhere to notice and comment procedures but congressional statutes, as a matter of constitutional and statutory law, are free from requirements of public debate before they are passed.\textsuperscript{440} Although politically inconceivable, legislation could in theory be enacted by the President and Congress without any opportunity for public comment.

The divergence between this analysis and the actual trajectory of procedural rights suggests a number of revisions to the application of the neo-functionalist framework in the rights domain.\textsuperscript{441} When scholars examine the impact of the Court of Justice and the Commission on

\textsuperscript{437} See Wade & Forsyth, Administrative Law, supra note, at 516.
\textsuperscript{438} See, e.g., Case C-278/95 P, Siemens v. Commission, 1997 ECR I-2507, para. 17; Case T-198/01, Technische Glaswerke Ilmenau GmbH v. Commission, 2004 ECR II-(unpublished), paras. 59-60; Case T-459/93, Siemens SA v. Commission, 1995 ECR II-1675, para. 31 ("[the obligation to state reasons] is intended to give an opportunity to the parties of defending their rights, to the Community judicature of exercising its powers of review and to the Member States and to all interested parties of ascertaining the circumstances in which the Commission has applied the Treaty . . . . However, . . . , in stating the reasons for the decisions it has to take in order to ensure that the rules of competition are applied, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations have decisive importance in the context of the decision . . . .").
\textsuperscript{439} This difference between the American statement of basis and purpose and the European duty to give reasons is complemented by a difference in the procedure for judicial review of administrative decisions. If the parties decide to challenge a Commission decision and they decide to make the same (sometimes unanswered) objections in court, the Commission is allowed to reply with new arguments, albeit not new factual evidence because that would breach the right to be heard. See Case T-141/94, Thyssen Stahl AG v. Commission, 1999 ECR II-347, paras. 608-11. By contrast, before an American court, as a general rule the administration can only rely on the explanations given in the administrative process, although especially in the rulemaking context, the courts will overlook the failure to respond to a party's objection in the administrative proceeding if it determines that it had no effect on the final rule and hence was not prejudicial. See Sierra Club v. Costle, 657 F.2d 298, 360 (1981).
\textsuperscript{441} The persistence of these differences in European and American administrative procedure, notwithstanding the importance of multinationals and their American law firms in litigating cases before the European Courts, indicates that claims about the Americanization of the law in Europe and elsewhere require further research. Indeed, the mechanism underlying the creation of European procedural rights—objections to European law based on national traditions of legitimate government and accommodation of such objections in the interest of preserving European government powers—suggests that non-European legal traditions will have significantly less influence over
European policymaking, they overlook sometimes the unusual structure of European government power--judicial, executive, and legislative. This structure operates as the context in which supranational bodies further their competence-aggrandizing preferences and therefore shapes the policies and constitutional rules that emerge from the pursuit of such preferences. For instance, Martin Shapiro focuses on the horizontal relationship between the Court of Justice and the Commission and argues that we can explain procedural rights as the outcome of a process through which judges assert power over bureaucrats. But the history of the right to a hearing reveals that the logic of European rights is more complicated. Because the enforcement of executive and judicial decisions depends upon the cooperation of national courts, the individual rights guaranteed before the Commission must meet with their approval. National understandings of legitimate government authority can provoke rights innovation--as with the common law’s principle of natural justice--or limit such innovation--as with the absence of procedural rights akin to American notice and comment in the rulemaking domain. European lawmaking also contains uncommon structural elements, one of which is the relative insignificance of majority voting as a means of resolving disputes. Treaties must be ratified by all countries, not a majority of all European citizens or a majority of Member States. Hence the bargaining power of the Danish electorate after they rejected the Maastricht Treaty and the salience of the northern right to transparency.

Second, neo-functionalist examinations of individual rights tend to focus on the Court of Justice or the Court of Justice and the Commission. However, a variety of supranational institutions motivated by competence-maximizing preferences have been influential in shaping rights. Today this is especially true, with the empowerment of a growing number of institutions at the European level, including the European Parliament, the Ombudsman, and European agencies. The transformation of the European political and institutional landscape that began in the early 1990s requires that the net be cast more broadly to incorporate a wide variety of supranational organizations.

A third source of complexity is the interaction among supranational institutions and their competence-aggrandizing preferences. In the early days of the European Community, the Commission and the Court of Justice were allied in pushing for the constitutionalization of the Treaty of Rome--the transformation of obligations incumbent on states into rights inhering in citizens. As the discussion of the right to a hearing has revealed, they were also allied in expanding the rights that individuals could invoke in supranational, Commission proceedings, in the interest of guaranteeing enforcement of Commission competition decisions. But the relationship between the Commission and the European Parliament is different. Many commentators anticipated that the two also would join to promote the pro-integration cause, against a foot-dragging Council of Ministers and nationalist Member States. Contrary to expectations, the history of transparency and civil society participation demonstrates that Parliament and the Commission can compete as well as collude. In seeking more information through the right to transparency and in forcing the resignation of the Santer Commission, the Parliament sought to expand its powers over all branches of European government, including the Commission. And in adopting the right to civil society participation, the Commission reacted to the Parliament's bid for greater powers with an offensive move of its own. European integration is at a point where the constitutional relationship between the federalist center and the Member States has been settled—more-or-less--and those among government bodies at the center are

under construction. In this historical phase, the competence-aggrandizing impulses of supranational bodies induce them to compete for a role in the governing process, just as in the early history of integration those same motives led them to collude in favor of a federalist center.

The predictions of the theories, compared to the historical experience with rights, are summarized below. The discrepancy between the anticipated and actual evolution of rights before the Commission demonstrates the need to develop an analytical framework that can incorporate both comparative law and events that fall short of major episodes of treaty-making.

Table 2---Predictions of the alternative theories matched against the historical record

<table>
<thead>
<tr>
<th>Individualized proceedings: rights, agents, timing</th>
<th>Legal constitutionalism</th>
<th>Realism</th>
<th>Neo-functionalism</th>
<th>Historical record</th>
</tr>
</thead>
</table>

<table>
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<tr>
<th>Transparency: rights, agents, timing</th>
<th>Legal constitutionalism</th>
<th>Realism</th>
<th>Neo-functionalism</th>
<th>Historical record</th>
</tr>
</thead>
<tbody>
<tr>
<td>European Courts; gradually after 1957.</td>
<td>Limited or no access to documents as in French and German closed government traditions; Member States; 1986 or before.</td>
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<td>Originally no access to documents followed by northern right to transparency (1993); Heads of State and European Parliament.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Civil society participation: rights, agents, timing</th>
<th>Legal constitutionalism</th>
<th>Realism</th>
<th>Neo-functionalism</th>
<th>Historical record</th>
</tr>
</thead>
<tbody>
<tr>
<td>European Courts; gradually after 1957.</td>
<td>Functional representation in certain policy areas as in France and Germany; Member States; 1986 or before</td>
<td>Procedure similar to U.S. notice and comment for implementing regulations; European Courts; gradually after 1957.</td>
<td>Originally functional representation on ESC (1957) and advisory committees (1960s and 1970s), now routine and formal procedure for early consultation of public on all legislative proposals (2002); Commission.</td>
<td></td>
</tr>
</tbody>
</table>

D. Insights of Historical Institutionalism

The explanation of European rights advanced in this Article owes an intellectual debt to a research approach in comparative politics known as "historical institutionalism." According to

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442 See generally Paul Pierson, Politics in Time: History, Institutions, and Social Analysis (2004); Kathleen Thelen, How Institutions Evolve: Insights from Comparative Historical Analysis, in Comparative Historical Analysis in the Social Sciences 208 (James Mahoney & Dietrich Rueschemeyer eds., 2003); Paul Pierson & Theda Skocpol, Historical Institutionalism in Contemporary Political Science, in Political Science: State of the Discipline 693 (Ira
historical-institutionalists, we can understand the roots of cross-national differences in political and economic outcomes by understanding institutions. Institutions are defined broadly as the formal organizations of political and social life, and the written rules, together with the less formal, unwritten norms, associated with those organizations. Legislatures, courts, parliaments, constitutions, laws, regulations, judicial decisions, administrative circulars, and standard bureaucratic operating procedures, all fall squarely within the definition of institution. Researchers working in this tradition often find that once institutions come into being, they show remarkable staying power and affect political outcomes in predictable ways (“path dependence”). In the sociological variant of historical institutionalism, this is because rules and conventions shape the values, beliefs, preferences, and identities of the individuals who work within those rules. In the rational choice variant, the same persistence of institutions is explained as a result of their role in solving collective action dilemmas and the difficulty, due to the very nature of collective action dilemmas in political life, of discarding one sub-optimal set of rules and organizations for another, better set. When they explain the origins of institutions, such scholars go back to the historical circumstances that existed at the point in time when institutions were created or altered. They regard functionalist explanations of institutions with skepticism. The logic of path dependence and unintended consequences makes it unlikely that historical actors created organizations and rules to serve the needs that they fulfill today.

In the European context, contemporary neo-functionalist scholars have used historical institutionalism to make the case for ascribing autonomous explanatory force to supranational institutions. Once such organizations and rules were established in the Treaty of Rome, they re-oriented the strategic behavior and identities of European citizens and thus acquired a life of their own. In this historical-institutionalist account, the Treaty of Rome set into motion a logic of path dependence that can help explain the current shape of European governance.

In this Article, I have argued that two other historical sources of institutional innovation apart from the bargain struck in the Treaty of Rome should be taken into account. The first stretches back to before the Treaty and the experience with public law within the nation-state. The European Union emerged out of six, then nine, then twelve, and finally fifteen consolidated nation-states. Each has a highly formalized and deeply entrenched set of organizations and rules that developed largely independently of one another because of the territorially bounded nature of economic and social life in the era of nation-building. National constitutional rules, such as the procedures that must be followed by government administration and the rights of citizens to object to government decisions, serve as powerful templates in designing European institutions. When officials and citizens interact in international institutions, they do not set out to design, what, by common consensus, is the fairest and most efficient of organizations, rather they promote the different national models of democracy into which they have already been

443 Hall & Taylor, supra note ___ at 938.
446 Given the recent date of the accession of Central and Eastern European states as well as the more malleable, less-established nature of their government systems, I do not count them among the “consolidated nation-states” underlying the current European legal order.
Creating European Rights

socialized. Purposeful, strategic human action is constrained by the mental maps of democracy developed in national polities.

The other, overlapping source of institutional innovation is to be found in events that occurred after the original six Member States signed the Treaty of Rome, events largely outside the control of the institutions that were subsequently transformed. UK accession prompted the Commission and the Court of Justice to adopt a slew of common law principles in the interest of maintaining their enforcement powers. The failure of the Maastricht Treaty in Denmark made European Heads of State take seriously the northern understanding of legitimate government in designing European government. And the European Parliament's challenge to the Santer Commission led to an effort to improve Commission legitimacy through organizational change and provoked a search for new rights, drawn this time from the international realm.

A fine-tuned account of Europe's supranational institutions and their strategic context, together with a richer set of historical sources of constitutional innovation, improves our understanding of European rights. It also allows us to anticipate when national legal communities and voters, subscribing to their national rights traditions, will be able to force changes to the European status quo. And when supranational bodies will prompt other such bodies to engage in constitutional transformation.

For instance, the logic of the right to a hearing leads us to anticipate that accession of a state with an idiosyncratic set of individual rights should provoke the Court of Justice and the Commission to engage in constitutional innovation. Exploration of this hypothesis lies beyond the scope of this Article. However, a cursory examination of developments in European administrative law after Spain acceded in 1986 suggests that this line of inquiry is promising indeed. The legal community in post-Franco Spain has been committed to entrenching an extensive set of individual rights, many of which go beyond those enjoyed by citizens in established, long-standing democracies. Under Spanish law, before the customs authorities may recover any difference between customs duties paid at the time of importation and those owed to the European Community, they must notify the importer of the shortfall and give the importer fourteen days to respond.447 Only once that period has expired can the Spanish authorities issue a final administrative order for payment of the difference.448 (Customs duties go directly to the Community purse, not Member State treasuries, and represent about 10 percent of the Community's annual budget.449) This has the effect of delaying the enforcement of European customs law--by the time that separates calculation of the duty from the final order-- with the practical consequence that Spanish importers begin owing interest on the amounts due fourteen days later than importers in the rest of the Community. And since customs duties represent a significant source of Community revenues, the Commission takes a very dim view of the delay caused by Spanish procedural guarantees.

The Commission's response to the Spanish law has been inconsistent. On the one hand, in 2003, the Commission sued Spain in the Court of Justice for the delay, on the grounds that such delay constitutes a breach of the time-limit for assessment of the duty specified in European

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447 This is known as "post clearance recovery" and may occur within a period of three years after the initial customs declaration and the release of the goods into the common market with payment of customs duties.
customs law.\textsuperscript{450} On the other hand, the Commission has incorporated the Spanish right in its draft of a new European Customs Code:

> The debtor(s) shall, within a period following this advice [notice from the national customs authority of the duty to be paid] to be determined in accordance with the committee procedure [procedure for adopting implementing regulations], have the opportunity to make his views known before the duties are recovered. Upon expiry of this period, the debtor(s) shall be notified, in the appropriate form, of the decision determining the amount of duty to be recovered.\textsuperscript{451}

If this provision passes, the minority Spanish right will become the standard for customs proceedings throughout the European Union. The decision to modify European law rather than change Spanish law through the enforcement action might very well be driven by the concern that the enforcement action is destined to fail in the Court of Justice. The possibility that Spanish courts might hold European customs orders invalid because in violation of the fundamental procedural rights of importers is not something that the Court would take lightly. Whether Spain will come into line with Europe, or Europe with Spain, remains to be seen but past experience points in the direction of the latter outcome.

**CONCLUSION**

The European executive branch today is strikingly different from the one led by Jean Monnet fifty years ago. Before the Commission may issue adverse, individual decisions, it must notify the parties of all aspects of the planned decision, allow the parties to examine the information in its files, accept written submissions, hold an oral hearing, and give a statement of the grounds for the final administrative decision complete enough so that the parties, and eventually the European Courts, can discern whether the Commission has adhered to the substantive requirements of European law. This set of rights is most extensive in competition and anti-dumping proceedings, slightly less so in customs remissions proceedings, and even less so in the other, rare instances in which the Commission bypasses national administrations and makes adverse individualized determinations. Europe's lawmakers were inspired by the droit administratif tradition and the English right to a hearing. When the right to a hearing migrated to Brussels, it guaranteed the parties more thorough-going disclosure of the government's case than in the administration of origin, the UK Monopolies and Mergers Commission. It also operated largely free of political discretion after the parties were heard, contrary to British administration of competition policy.

As for transparency, the Commission is required to maintain a public, electronic register of all the documents generated in the administrative and legislative process--technical studies, committee agendas, and reports that serve to prepare official acts--together with the official acts. The Commission is under a duty to make those documents immediately accessible through the register or, as a second-best, to provide the documents upon a request from a European citizen or resident. The right of citizens to know how government makes decisions day-to-day, before and after the public debates in a parliamentary assembly, expanded in its adoptive home. None of the northern systems, where the right originated, combined the transparency guarantee of an electronic public register with that of access to documents preliminary and political in nature.

\textsuperscript{450} Case C-546/03: Action brought on 23 December 2003 by the Commission of the European Communities against the Kingdom of Spain, 2004 O.J. (C 59) 12.

Lastly, when the Commission drafts proposals for European laws, it must respect the right of civil society participation. It is obliged to make an early draft of the proposal available to European civil society, accept comments, and explain in the final version why it did or did not modify the proposal in light of the comments. The definition of which associations count as the civil society that must be taken seriously in the consultative process borrows from the European corporatist tradition of interest representation, although it is more inclusive than the corporatist model. The systematic and cross-cutting procedure for involving civil society in Commission decisionmaking goes beyond any of the reforms yet undertaken by international organizations, the place where the idea of civil society participation originated.

Notwithstanding that procedural rights emerged in different historical periods and that they were informed by different cultural traditions and supranational interests, they display one striking common characteristic: they afford citizens a greater set of entitlements against European government than in their place of origin. What accounts for this surprising outcome? One contributing factor is the weak nature of the Commission as a government organization. The Commission relies on cooperation from national administrations and national courts in enforcing European law. It does not have a police force that it can call into action, European courts in which it can appear to seek the execution of orders, or jails into which it can put recalcitrant citizens. It does not have independent enforcement powers. Politically too the Commission is weak. It is not led by a popularly elected official, as are executive branches at the national level—a directly elected president in presidential systems of government, or a prime minister and cabinet appointed after parliamentary elections in parliamentary systems of government. It is led by a College of Commissioners, headed by a President, that is appointed by common consensus among the Member States, with some input from the European Parliament. In no way can the Commission be said to enjoy an electoral mandate when it undertakes its mission. In responding to challenges from national judges, lawyers, and statesmen, as in the case of a right to a hearing, the Commission cannot use legal enforcement powers. In responding to challenges from national voters and elected officials, as in the case of the right to transparency and civil society participation, the Commission cannot use the political mandate of a popular vote. The Commission cannot say, as national executive authorities generally do when faced with demands for rights, that it governs in the name of the people and therefore, the will of the majority and the greater good must, under the circumstances, prevail over the rights of the individual.

The history of procedural rights before the Commission is heartening because it shows that as authority migrates beyond the confines of the nation-state, citizens, lawyers and judges with allegiances to their strong national—and to some extent international—rights cultures are vigilant in protecting rights in new political spaces. And when such actors succeed in uploading certain constitutional guarantees from the national to the European arena, those guarantees can expand in the European place of destination.

Nonetheless, history reveals a startling irony. The European project, at the heart of which is the Commission, was begun in response to one, calamitous failure of the political space of the nation-state: war. European leaders have given up national control over a variety of policy areas on the belief that their countries do better by pooling sovereignty rather than going it alone. Yet even though, in the original treaties, the Commission obtained significant powers to further the cause of European integration, today, as the European Union makes the transition from international organization to political community, the Commission is circumscribed by an expanding set of procedural rights. The institutional weakness that has contributed to this outcome is the result of the design of the same Member States that originally conferred powers upon the Commission. No European Head of State wants competition from a directly elected President of the European Commission. Nor would any national voter want to be arrested, tried,
and sentenced by a public official who spoke a different language, had been schooled in a different legal system, and had allegiances to a different set of cultural and political institutions. The procedural guarantees have also been driven by an unexpected institutional competitor of the Commission: a directly elected European Parliament with extensive, treaty-based powers. As the margins of the right to a hearing and the right to transparency are worked out in existing and novel policy areas, the different dimensions of the still-uncertain right to civil society participation are decided, and new rights are added to the European constitutional order, this dynamic should be kept in mind. The Commission is not an ordinary executive branch and for that reason it might well be more dangerous, but for that reason too, it is less able to resist demands for rights.