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Creating European Rights: National Values and Supranational Interests

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CREATING EUROPEAN RIGHTS: NATIONAL VALUES AND SUPRANATIONAL INTERESTS

*Francesca Bignami**

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I. INTRODUCTION

Contemporary democracies are undergoing a radical transformation: public authority is migrating from the national realm to the global arena.¹ 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.² 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.³ Yet the Commission was conceived as an

¹ See Robert O. Keohane & Joseph S. Nye, *Power and Interdependence* 258 (3d ed. 2001).

² The founding treaties of the European Union are the Treaty of Paris Establishing the European Coal and Steel Community (1951) ["ECSC Treaty"]; the Treaty of Rome Establishing the European Economic Community (1957), in 1992 renamed the European Community ["Treaty of Rome", "EC Treaty" or "TEC"]; the Treaty of Rome Establishing the European Atomic Energy Community (1957); and the Maastricht Treaty on European Union (1992) ["Maastricht Treaty"]. The articles of the EC Treaty and the Maastricht Treaty were renumbered in the Amsterdam Treaty (1997). On June 18, 2004, the Treaty Establishing a Constitution for Europe ("Constitutional Treaty" or "TCE") was approved by European Heads of State. It was signed in Rome on October 29, 2004 and then submitted to each of the Member States for ratification. The Constitutional Treaty would replace the EC Treaty and the Maastricht Treaty. The ECSC Treaty expired in 2002. Under the ECSC Treaty, the Commission was known as the "High Authority." A protocol to the Constitutional Treaty modifies, but does not replace, the Treaty of Rome Establishing the European Atomic Energy Community.

³ 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 TCE, arts. I-33-39. 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

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 number 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.⁴ (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.⁵ 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.⁶ 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 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, 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 generally Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* 3-109 (3d ed. 2003) [hereinafter Craig & Búrca, *EU law*].

⁴ See *infra* text accompanying notes 50-52, 72-109 (discussing French *droit administratif* and German traditions).

⁵ See *infra* text accompanying notes 223-26 (reviewing access to information legislation in Italy, the UK, and Germany).

⁶ See *infra* text accompanying notes 325-35 (reviewing the legislative and rulemaking processes in all Member States).

institutions adopted these constitutional ideals and hence altered the nature of European rights.

The evidence for this explanation comes from the historical record. Part III 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.⁷ 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.⁸ 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

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."

contribute to a more rigorous evaluation of the desirability of the emerging European constitutional order.

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, today, what it is to be a European citizen.

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.

⁹ There are two major types of European institutions, intergovernmental and supranational. 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 U.N. 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 M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 *Int'l Org.* 485 (1988).

¹¹ Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 85-109 (1984) (stating the original liberal institutionalist position).

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 several 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 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 superficial semblances 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 II presents three major sets of explanatory theories with implications for European rights—legal constitutionalism, realism, and neo-functionalism. Part III, 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 IV 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.

II. EXPLAINING RIGHTS

Theories that seek to develop positive explanations for rights have focused generally on national constitutions as opposed to international regimes.¹² Until

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

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 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 treats rights as value choices by voters, legislators, public officials, and judges; the other 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.¹⁴ 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

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").

¹³ See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 271-85 (1995) (describing classic and modified views of international organizations as "creatures of their Member States").

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 *Ann. Rev. Pol. Sci.* 369, 375 n. 4 (1999); 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 and particular groups, as well as broader communities.

others that their position is the better one.¹⁵ 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.¹⁶ 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 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

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.

¹⁶ See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 59-64 (1985).

¹⁷ See generally Hanna Fenichel Pitkin, *The Concept of Representation 195-96* (1972) (discussing Madison's political philosophy).

¹⁸ See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

¹⁹ See James M. Landis, *The Administrative Process—The Third Decade*, 13 *Admin. L. Rev.* 17 (1960).

²⁰ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557 (1996); Martin Shapiro, *APA: Past, Present, Future*, 72 *Va. L. Rev.* 447 (1986).

²¹ See generally Barry R. Weingast, *Rational-Choice Institutionalism*, in *Political Science: State of the Discipline 660* (Ira Katznelson & Helen V. Milner eds., 2002).

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 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

²² Paul K. MacDonald, *Useful Fiction or Miracle Maker: The Competing Epistemological Foundations of Rational Choice Theory*, 97 *Am. Pol. Sci. Rev.* 551, 552 (2003).

²³ Barbara Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics* 180-81(2003).

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 the 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 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

²⁴ See Jon Elster, Introduction, *in* *Constitutionalism and Democracy* 1, 8 (Jon Elster & Rune Slagstad eds., 1997).

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, *supra* note 21, 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).

²⁶ See McNollgast, The Political Origins of the Administrative Procedure Act, 15 *J.L. Econ. & Org.* 180, 183-89 (1999).

²⁷ See Matthew D. McCubbins et al., Structure and Process, *Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431 (1989).

²⁸ See Robert D. Cooter, The Strategic Constitution 20-73 (2000) (discussing interest of legislators in obtaining and preserving power by winning elections and interest of citizens and organized interests in improving material well-being through voting and campaign contributions).

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 IV returns to these theories of rights to explore how their predictions fare when put to the test of the historical record presented in Part III.

1. Legal constitutionalism

European legal scholars are principally concerned with describing and normatively assessing 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.

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.³¹ Nehl concentrates on the jurisprudence of the Court. He argues

²⁹ See generally Gary King et al., *Designing Social Inquiry* 99-114 (1994) (identifying falsifiability and specificity of hypotheses as one rule for constructing causal theories).

³⁰ See, e.g., *The EU and Human Rights* (Philip Alston et al. eds., 1999).

³¹ See Hanns P. Nehl, *Principles of Administrative Procedure in E.C. Law* (1999).

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.³²

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.

³² Id. at 167-68.

2. Realism and neo-functionalism

In political science, two theoretical approaches offer promise for explaining the constitutional rules that shape European institutions: realism and neo-functionalism.³³ 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.³⁴ 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

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 in the present, 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*, 47 *J. L. & Econ.* 569 (2004). 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 to confirm or reject a set of rational choice hypotheses. 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). 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 being intrinsically valuable, is difficult to square with the institutional context 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.

³⁴ See Rainer Baumann et al., *Neorealist Foreign Policy Theory*, in *German Foreign Policy since Unification: Theories and Case Studies* 37 (Volker Rittberger ed., 2001) (describing variants of realist theory); Kathleen R. McNamara, *Where do Rules Come From? The Creation of the European Central Bank*, in *The Institutionalization of Europe* 155, 156, 158-60 (Alec Stone Sweet et al. eds., 2001) [hereinafter Sweet, *Institutionalization*] (describing power politics approach and applying approach to institutional design of European Central Bank).

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-functional approach considered below. But setting aside this initial 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.³⁵ The same might be 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.³⁶ Finally, 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.³⁷ 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

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 (1995) (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.

³⁷ Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 *Am. Pol. Sci. Rev.* 63 (1998) (explaining neo-functional theory).

develop an extensive set of supranational policies and rules.³⁸ 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-functional 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."³⁹ Rights, in the neo-functional line of analysis, are instrumental to the 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.⁴⁰

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.⁴¹ 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.⁴² 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

³⁸ See Neil Fligstein & Alec Stone Sweet, *Institutionalization of the Treaty of Rome*, in Sweet, *Institutionalization*, supra note 34, at 29.

³⁹ See Mark A. Pollack, *Supranational Autonomy*, in *European Integration and Supranational Governance* 217, 219 (Wayne Sandholtz & Alec Stone Sweet eds., 1998) [hereinafter Sandholtz, *European Integration*]; see also Karen Alter, *Establishing the Supremacy of European Law* 45 (2001) ("Judges are primarily interested in promoting their independence, influence, and authority.").

⁴⁰ See generally Alter, supra note 39 (advancing a modified neo-functional explanation of the Court of Justice's major constitutional doctrines); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *Int'l Org.* 41 (1993) (recounting the constitutionalization of the EC Treaty through the neo-functional lens); Alec Stone Sweet & James A. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, in Sandholtz, *European Integration*, supra note 39, at 92, 105 (elaborating on neo-functional theory of the constitutionalization of the EC Treaty); J.H.H. Weiler, *The Transformation of European Law*, 100 *Yale L.J.* 2403 (1991) [hereinafter Weiler, *Transformation*] (recognizing and synthesizing the constitutionalization of the EC Treaty).

⁴¹ See Martin Shapiro, *The Giving Reasons Requirement*, 1992 *U. Chi. Legal F.* 179 (1992); Martin Shapiro, *The Institutionalization of European Administrative Space*, in Sweet, *Institutionalization*, supra note 34, at 94 [hereinafter Shapiro, *Institutionalization*].

⁴² Shapiro, *Institutionalization*, supra note 41, at 98-99.

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."⁴³ 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.⁴⁴ 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 judges, the measure.⁴⁵ 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.

⁴³ Treaty Establishing the European Community [TEC], art. 253.

⁴⁴ 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, *supra* note 41, 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.

⁴⁵ Shapiro, *Institutionalization*, *supra* note 41, at 100.

Table 1—Creating rights before the European Commission: Theories and predictions

	Legal constitutionalism	Realism	Neo-functionalism
Causal mechanism	Courts promote values of dignity, rationality, and workability.	States bargain to protect their citizens in Commission proceedings.	Wealthy litigants go to courts to avoid adverse Commission determinations and courts seek to expand their powers and further anti-technocracy values.
Agents	European Courts	Member States (treaties and laws passed by Council of Ministers)	European Courts
Timing	Gradual, tracking the attribution of powers to Commission.	Sudden, at the time that Commission conferred powers.	Gradual, tracking the attribution of powers to Commission.
Rights	—	Rights existing in most powerful Member States.	Rights similar to those in U.S. administrative law.

III. THREE GENERATIONS OF RIGHTS BEFORE THE COMMISSION

Part II canvassed the most prominent causal theories of European constitutional design and generated predictions for the path of rights before the Commission. This Part turns to the actual development of such rights over time.

Three different sets of rights govern dealings between European citizens and the Commission: the right to a hearing, the right to transparency, and the right to civil society participation. These categories are analytically distinct because they apply to different types of Commission action—individual or general—and because they encompass different sets of entitlements and procedures that citizens may vindicate and that the Commission must respect. The categories are also historically distinct: since Europe's executive branch was first established in 1952, each has undergone transformation, but at different points in time. Below, the same organizing scheme is used to explore each set of rights. First, the original and contemporary law of rights is reviewed. Second, in each case, historical challenge to the Commission's authority triggered transformation. Thus, the current constellation of rights can be explained by analyzing that historical event, the subsequent salience of certain national—in the case of civil society participation, international—rights in European law, and the strategic interest of European institutions in adopting such rights.

Third, examining the right as it has evolved after that historical juncture enables a comparison of the new, invariably more expansive, European right with the right as it first appeared in its place of origin.

The explanation of rights that follows in Part IV both incorporates some of the insights of the theories reviewed earlier and suggests revisions of those theories. Consistent with a realist approach, when the Commission was first established, rights were patterned on the shared public law principles of the Member States, and, in those areas in which the laws of the Member States differed, they were patterned on the public law of the most powerful Member States. Consistent with a neo-functional approach, the transformation of rights subsequent to the founding of the Commission was undertaken by European institutions to further their distinct supranational preference for greater authority. Thus, in the case of creating European rights, both realism and neo-functionalism illuminate; the two theories are complementary, not mutually exclusive. However, the historical record of rights before the Commission also requires that some of the premises of the theories presented earlier be rejected or significantly modified. The comparative law of rights and the diversity of national traditions requires that we discard the legal constitutionalist assumption of a single, widely shared set of values that inspires constitutional design. Furthermore, neo-functional theory generally overlooks the vertical and horizontal dimensions of Commission authority that shape supranational interests and that lead to rights transformation. Only if we grasp the unconventional nature of supranational governance can we understand why certain historical events constituted challenges to the Commission's authority and why certain national or international rights traditions emerged as salient in the effort to preserve and extend supranational authority.

A. The First Generation: The Right to a Hearing

Compared to an ordinary executive branch, the Commission has few direct enforcement powers.⁴⁶ 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 fact that, sometimes, 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 behavior.⁴⁷ In 1969, it was authorized to impose duties on foreign goods and, by extension, the firms selling the goods, if they were being

⁴⁶ See Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 *Mich. J. Int'l L.* (forthcoming 2005).

⁴⁷ See TEC arts. 81 and 82 (ex 85 and 86); Council Regulation 17/62, 1962 O.J. (L 13) 204 (First Regulation implementing arts. 81 and 82 (ex 85 and 86) of the Treaty). This has been repealed and replaced by Council Regulation (EC) 1/2003, 2003 O.J. (L 1) 1 (on the implementation of the rules on competition laid down in arts. 81 and 82 of the Treaty). The Commission has since come to exercise powers in the related areas of merger control and state aids. See *infra* text accompanying note 71, 192, 422.

sold at an unfair price ("dumped") on the European market or were being subsidized by a foreign government.⁴⁸ 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.⁴⁹ What were the rights of French, German, Italian, Belgian, Dutch, and Luxembourg 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.⁵⁰ 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).⁵¹ Administrative decisions in *droit administratif* countries are generally

⁴⁸ See Council Regulation (EEC) 459/68, 1968 O.J. (L 93) 1 (on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community). The Regulation has been amended on numerous occasions. The law currently in force is Council Regulation (EC) 384/96, 1996 O.J. (L 56) 1 (on protection against dumped imports from countries not members of the European Communities).

⁴⁹ See Council Regulation (EEC) 1430/79, 1979 O.J. (L 175) 1 (on the repayment or remission of import or export duties). This law has been repealed and repayment and remissions are currently dealt with under arts. 236-239 of Regulation (EEC) 2913/92, 1992 O.J. (L 302) 1 (establishing the Community Customs Code).

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. In common law countries, the courts are courts of general jurisdiction, with power 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 lawsuits against the government based on the Civil Code, i.e. sounding in contract, tort, or property, are brought in ordinary civil 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 1948 has led to fairly extensive procedural rights whenever an individualized administrative act (*Verwaltungsakt*) is

made with few opportunities for individuals to express their views.⁵² 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 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.⁵³ In the early history of the British administrative state, local government was mostly the task of justices of the peace, responsible for administration of the poor laws, the highways, and liquor licenses.⁵⁴ 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 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

promulgated. *Id.* at 74-80. Nonetheless, the bureaucratic culture of German administration is strong and therefore the quasi-judicial procedures that characterize British administration are less pervasive in the German case.

⁵² See Marco D'Alberty, *Diritto amministrativo comparato* 35 (1992) (comparing Anglo-Saxon proceduralism and French checking of administrative decisions by the Conseil d'Etat).

⁵³ See generally David Foulkes, *Administrative Law* 35-40 (5th ed. 1982) (discussing structure and powers of local government).

⁵⁴ See William R. Wade & Christopher F. Forsyth, *Administrative Law* 448 (8th ed. 2000).

firms.⁵⁵ 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.⁵⁶ Five years later, in 1962, the Council passed Regulation 17/62, designed to implement Articles 85 and 86 (now 81 and 82) of the Treaty.⁵⁷ The Regulation stipulated that:

Before taking decisions as provided 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.⁵⁸

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.⁵⁹ 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.

⁵⁵ In this Article, I do not cover the limits on the Commission’s investigative powers. These include a privilege for attorney-client communications, *Australian Mining and Smelting Europe Ltd. v. Commission*, Case 155/79, 1982 E.C.R. 1575, para. 23 (covering communications made between an independent lawyer and a client for the sole purpose of defending the client in the competition proceeding at issue), a privilege against self-incrimination, *Orkem v. Commission*, Case 374/87, 1989 E.C.R. 3283 (allowing firms to refuse to answer questions that directly go to the question of guilt or innocence), and a duty to respect national search warrant requirements and only collect evidence related to the specific ends of the investigation, *Hoechst AG v. Commission*, Cases 46/87 & 227/88, 1989 E.C.R. 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 TEC arts. 81 and 82 (ex arts. 85 and 86).

⁵⁷ Council Regulation 17/62, supra note 47, at 204. This has been repealed and replaced by Council Regulation 1/2003, supra note 47, at 1.

⁵⁸ *Id.* at art. 19.

⁵⁹ Commission Regulation 99/63/EEC, 1963 O.J. (L 127) 2268 (on the hearings provided for in art. 19(1) and (2) of Council Regulation No. 17).

- 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.⁶⁰ 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.

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.⁶¹ 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.⁶² It must allow the parties to examine all the information in its files.⁶³ Summaries of the evidence or the production of evidence limited to information that the Commission

⁶⁰ TEC art. 253 (ex art. 190). Article 190 provided that "acts adopted by the Council or the Commission shall state the reasons on which they are based"

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., *Hoffmann-La Roche & Co. AG v. Commission*, Case 85/76, 1979 E.C.R. 1139 (French version).

⁶² See *Transocean Marine Paint Association v. Commission*, Case 17/74, 1974 E.C.R. 1063; *BAT and Reynolds v. Commission*, Joined Cases 142 & 156/84, 1986 E.C.R. 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"); *A. Ahlstrom Osakeyhtio v. Commission (Woodpulp II)*, Joined Cases C-89/85, C-104/85, A-114/86, C-116/85, C-117/85 & C-125 to 129/85 1993 E.C.R. I-1307, paras. 40-54, 148-154 (annulling those parts of Commission decision that were not clearly raised in the statement of objections).

⁶³ See *Hoffmann-La Roche*, 1979 E.C.R. at 1139; *Hercules v. Commission*, Case T-7/89, 1991 E.C.R. II-1711, para. 53; *Soda Ash Cases*, Cases T-30/91, T-31/91, T-32/91, T-36/91, T-37/91, 1995 E.C.R. II-1775, II-1821, II-1825, II-1847, II-1901 (setting down "general principle of equality of arms" under which all parties are entitled to know contents of case file); *ICI v. Commission*, Case T-36/91, 1995 E.C.R. II-1847. See generally Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 1997 *Common Mkt. L. Rev.* 531, 545-49 (reviewing case law on the right of access to the file).

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.⁶⁴ 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.⁶⁵ 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.⁶⁶

The Commission has also contributed to the definition of the European right to a 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.⁶⁷ A Commission rule from 1997 defines the classes of documents that are available to the parties and those that are protected from disclosure; the rule also sets down the procedure for enabling parties to consult the documents.⁶⁸

The Commission has also created the figure of the hearing officer.⁶⁹ 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

⁶⁴ See *Cimenteries CBR and Others v Commission*, 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, 2000 E.C.R. II-491, paras. 712-718.

⁶⁵ See *ACF Chemiefarma v Commission*, Case 41/69, 1970 E.C.R. 661, 690; *Michelin v. Commission*, Case 322/81, 1983 E.C.R. 3500.

⁶⁶ See *Cascades SA v. Commission*, Case T-308/94, 1998 E.C.R. II-925, paras. 220-23.

⁶⁷ Commission of the European Communities, 12th Report on Competition Policy (1982).

⁶⁸ See Commission Notice 97/C 23/03, 1997 O.J. (C 23) 3 (on the internal rules of procedure for processing requests for access to the file in cases pursuant to arts. 85 and 86 of the EC Treaty, arts. 65 and 66 of the ECSC Treaty and Council Regulation (EEC) 4064/89); see also Commission Regulation (EC) 773/2004, 2004 O.J. (L 123) 18, arts. 15-16 (codification of 1997 rules) (relating to the conduct of proceedings by the Commission pursuant to arts. 81 and 82 of the EC Treaty).

⁶⁹ See Commission Decision 2001/462/EC, ECSC, 2001 O.J. (L 162) 21 (on the terms of reference of hearing officers in certain competition proceedings). The position was first created in 1982 and then modified in 1990. See Notice on procedures for applying the competition articles of the EEC and ECSC Treaties (arts. 85-86 of the EEC Treaty and arts. 65-66 of the ECSC Treaty), 1982 O.J. (C 251) 2; Commission Decision of 8 September 1982, *in* Commission of the European Communities, 13th Report on Competition Policy 273 (1983) (setting down "terms of reference" of Hearing Officer); Commission Decision of 23 November 1990 on the implementation of hearings in connection with procedures for the application of arts. 85-86 of the EEC Treaty and arts. 65-66 of the ECSC Treaty, *in* Commission of the European Communities, XXth Report on Competition Policy 312 (1991) (modifying "terms of reference" of Hearing Officer); Hartmut Johannes, *The Role of the Hearing Officer*, 1989 Fordham Corp. L. Inst. 347 (Barry Hawk ed., 1990).

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.⁷⁰

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.⁷¹ 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.

2. The historical juncture: Accession of the United Kingdom

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 Commission investigating officers? Accession of the United Kingdom in 1973 tested the European system of legal authority because of the different common law understanding of fair administrative action. European institutions responded to the test by moving away from the *droit administratif* model and adopting the common law right to a hearing.⁷²

a. The common law challenge: The principle of natural justice compared to the French *droits de la défense* and the German *rechtllichen gehörs*

The picture that was drawn earlier of the procedural differences between the *droit administratif* systems of the founding Member States and the United Kingdom 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 national administrative law. This discussion focuses on competition law, which would have

⁷⁰ See Commission Decision 2001/462/EC, ECSC, supra note 69, at art. 8; see also Commission Regulation (EC) 773/2004, supra note 68, at art. 14 (recent codification of oral hearing).

⁷¹ Council Regulation (EEC) 4064/89, 1990 O.J. (L 257) 13, at art. 8 (on the control of concentrations between undertakings). This has been replaced from May 1, 2004 by Council Regulation (EC) 139/2004, 2004 O.J. (L 24) 1 (on the control of concentrations between undertakings - the EC Merger Regulation). See also the implementing regulation, Commission Regulation (EC) 802/2004, 2004 O.J. (L 133) 1 (implementing Council Regulation (EC) 139/2004 on the control of concentrations between undertakings).

⁷² To refer to the country, I use the noun "UK." 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. Since most of the cases come from England, I 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 common law, statutes of Parliament (generally applicable throughout the UK) and activities of government administration (also generally applicable throughout the UK) I use the adjective "British" to modify "law."

been the natural reference point for the civil servants, lawyers, and judges designing Commission procedure.⁷³

In France, the right to make one's case before an administrative decision can be issued is known as 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 contained in an enabling statute, to refute the administration's version of the facts if the administration's decision constitutes a sanction.⁷⁴ In *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.⁷⁵ The Conseil d'Etat found in favor of the defendant and annulled the prefect's decision based on a theory of general principles of law (*principes généraux du droit*), among which figured rights of the defense. In French administrative and constitutional law, this judgment constituted an extraordinary turning point; 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 had to obey.⁷⁶ For the first time, the Conseil d'Etat disregarded the fundamental tenet of French constitutional law under which the law (*la loi*) enacted by the Parliament is the expression of the sovereign French people and under which judges are to apply that law, never make it.

Notwithstanding the significance of rights of the 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 only comprise 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.⁷⁷ 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;⁷⁸ 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;⁷⁹ and police measures (*mésures*

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 court-like British competition proceedings and bureaucratic continental proceedings overlaps with Gerber's typology. This analysis, however, seeks to situate competition law within the larger body of administrative law, so as to understand the force of *droit administratif* and common law principles in designing not simply European competition law but European administrative law broadly speaking.

⁷⁴ The Conseil d'Etat (Council of State) is the highest French court responsible for reviewing decisions of government administration.

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

⁷⁶ See Marceau Long et al., *Les grands arrêts de la jurisprudence administrative* 352-53 (14th ed. 2003).

⁷⁷ *Commissaire du gouvernement (Guy Braibant)*, Conclusions from Conseil d'Etat, Min. Intérieur c. Rohmer, Recueil Conseil d'Etat 12 (Jan. 8, 1960).

⁷⁸ Jean-Marie Auby & Roland Drago, *Traité des recours en matière administrative* 427 (1992).

⁷⁹ Long et al., *supra* note 76, at 356, point 8b.

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.⁸⁰ In sum, rights of the defense are far from universally recognized in the French administration's daily decisionmaking, even in decisions that name particular individuals or that are clearly directed at certain individuals or firms.⁸¹

In addition, the procedure required of 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*).⁸² 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.⁸³

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 dominant position.⁸⁴ The legislation's enforcement mechanism comported with the bureaucratic rationality ideal and the limited nature of rights of the 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*).⁸⁵ The Commission appointed a rapporteur to investigate the matter and

⁸⁰ Auby & Drago, *supra* note 78, 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. Decree No. 83-1025 of Nov. 28, 1983, 1983 J.O. 3492; Law No. 2000-321 of Apr. 12, 2000, 2000 J.O. 5646. 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 rights of the defense. See Long et al., *supra* note 76, at 355, point 7. The acts covered are all those that are unfavorable (*défavorable*) 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 rights of the 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 78, at 429.

⁸³ This is another element of administrative procedure that 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 81, at 15, point 113.

⁸⁴ See Decree 53-704 of Aug. 9, 1953, 1953 J.O. 7045 (anti-competitive agreements); Law 63-628 of July 2, 1963, 1963 J.O. 5915 (abuse of dominant position). See Eric E. Bergsten, *The Law of Restrictive Trade Practices in France*, II *Business Regulation in the Common Market Nations* 1, 109-12 (Harlan Morse Blake ed., 1969).

⁸⁵ Bergsten, *supra* note 84, at 122-26; V.G. Venturini, *Monopolies and Restrictive Trade Practices in France* 88-97 (1971).

to 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.⁸⁶ 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. Even when they were permitted to appear, the parties generally were not allowed representation by a lawyer. Why? Because 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."⁸⁷ Then, the Commission's opinion would be issued to the parties and would be sent to the Minister of Finance and Economic Affairs for a final decision on the infringement and any remedial action. The Commission's recommendation, although technically non-binding, was considered an administrative act, subject to outside scrutiny by the Conseil d'Etat.⁸⁸ 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 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, Germany resembles other *droit administratif* countries, the German 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.⁸⁹ 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 such facts and evidence.⁹⁰ Individuals have the right to a written decision containing the decision's essential factual and legal grounds.⁹¹ 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 courts.⁹² 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 the evidence, independent of the relevance to the party's case, or to make oral representations. Moreover, administrative authorities are not required to afford

⁸⁶ The provisions of the government regulation setting down the procedure of the Commission and the Ministry (Decree No. 54-97 of 27 Jan. 1954) are reproduced in Venturini, *supra* note 85, at 98 n. 41.

⁸⁷ See Bergsten, *supra* note 84, at 124.

⁸⁸ *Société La Langouste*, cited in Bergsten, *supra* note 84, at 125.

⁸⁹ See Georg Röss, Due Process in the Administrative Procedure, in 3 Federation Internationale Pour Le Droit Europeen (FIDE), Due process in the administrative procedure, Rapports du 8ème Congres, 22-24 Juin 1978, 4.1, 4.10 (1978).

⁹⁰ *Verwaltungsverfahrensgesetz* [Federal Administrative Procedures Act or "VwVfG"], §§ 28, 29.

⁹¹ VwVfG § 39.

⁹² VwVfG §§ 71-73.

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 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.⁹³ However, in contrast to ordinary German administrative procedure and proceedings before the French Technical Commission, the parties also had a right to an oral hearing.⁹⁴ But they did not have a right of access to all the evidence in the government's file⁹⁵ nor were the administrative officials responsible for the final decision independent from those responsible for the investigation.

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 administration as containing certain conditions for the lawful exercise of power. 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, English courts will hold administrative action to be *ultra vires*.⁹⁶ These common law principles are so engrained that it is hard to envisage a parliamentary statute that the courts would interpret as instructing 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, as authorizing unreasonable acts, as allowing decisions based on irrelevant considerations, or as permitting disrespect for natural justice.

Natural justice comprises two elements: officials are forbidden from deciding cases in which they may be biased (*nemo iudex 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").⁹⁷ 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 the authorities had disregarded the rules of natural justice.⁹⁸ 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 the evidence,

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 128 (discussing limited access to administration's evidence in German competition proceedings).

⁹⁶ Wade & Forsyth, *supra* note 54, at 37.

⁹⁷ *Id.* at 445, 469.

⁹⁸ See, e.g., *R. v. Rand* (1866) L.R. 1 Q.B. 230 (rule against bias) (discussed in Wade & Forsyth, *supra* note 54, at 448); *Cooper v. Wandsworth Board of Works* (1863) 14 CB (NS) 180 (right to a fair hearing) (discussed in Wade & Forsyth, *supra* note 54, at 473).

and commingling prosecutorial and adjudicatory functions.⁹⁹ However, some of the most common sources of bias in government administration are permitted by the courts. For instance, a minister's decision pursuant to a delegation from the Parliament, will be considered lawful even if the civil servants under his direction were responsible for investigating the case and even if the minister prejudged the matter by announcing a departmental 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 case directly before the deciding authority, although sometimes only written submissions are required.¹⁰⁴ Thus, 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 principle of natural justice has not only been developed by common law courts, but has 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; 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

⁹⁹ Wade & Forsyth, *supra* note 54, at 460-66.

¹⁰⁰ *Id.* at 452, 464-66.

¹⁰¹ *Id.* at 484.

¹⁰² *Id.* at 525-31.

¹⁰³ *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. *Id.* at 509-10.

¹⁰⁴ *Id.* at 511-15.

¹⁰⁵ *Id.* at 466.

¹⁰⁶ *Id.* at 929-37 (table listing tribunals).

¹⁰⁷ *Id.* at 890-98.

and the defendant has the opportunity to respond. Tribunals 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 decision is a discretionary one entrusted to a minister, but in which it is believed that the minister should listen to the public's opinion on the matter. A civil servant is tasked with conducting a fair hearing of all 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, and alter certain types of health services. The parliamentary practice of establishing tribunals in the place of bureaucracies and establishing 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, 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, with jurisdiction over mergers and anti-competitive practices. But the MMC only had the power to make recommendations;¹¹⁰ the Department of Trade and Industry—the government ministry responsible for competition policy—was charged with making the regulatory decision. In sum, cartel policy was the province of a classic administrative tribunal and was fully in line with the principle of natural justice. Monopolies and merger policy was administered by both a commission independent of the government, before which individuals had a right to be heard, and a government ministry, vested with discretionary power and unconstrained by the principle of natural justice. However, in both areas of competition law, the contrast with the French *Commission Technique* and the German *Bundeskartellamt* is evident.

The European 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, to respond in writing, and to 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

¹⁰⁸ Id. at 889, 938-39.

¹⁰⁹ See G.V. Rogers, *United Kingdom Legislation on Restrictive Trade Practices in Comparative Aspects of Restrictive Trade Practices*, Supplementary Publication No. 2, *Int'l & Comp. L.Q.* 1, 10 (1961); Paul Craig, *The Monopolies and Mergers Commission: Competition and Administrative Rationality*, in *Regulation and Public Law 201, 205* (Robert Baldwin & Christopher McCrudden, eds., 1987).

¹¹⁰ See Rogers, *supra* note 109, at 14; Craig, *supra* note 109, at 205, 206, 221 (citing to *Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry* [1975] A.C. 295).

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 might 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 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 a marked shift in the Court's doctrine on procedural rights in competition law.¹¹¹ 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.¹¹² 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 based largely on the finding that Commission procedure comported with the procedure followed by national competition authorities, in particular the German authority.¹¹³ 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 relied upon by the Commission. 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

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 *Etablissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*, Cases 56 & 58/64, 1966 E.C.R. 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 correct outcome before the Court decides the case. See Craig & de Búrca, *EU Law*, supra note 3, at 88, 93-94.

Wettbewerbsbeschränkungen und Europäisches Kartellrecht', 2nd ed., p. 959.)¹¹⁴

The Court followed the Advocate General.¹¹⁵

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, the claim was 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.¹¹⁶ The Commission, as it had in *Consten and Grundig*, relied on the absence of a duty to disclose the file in the cartel 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 The Court hedged only on the question of whether the Commission had to disclose the records from staff visits to certain firms or whether the Commission could simply summarize the results of those visits. 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 that prejudice to be minimal. The failure to communicate the documents and to allow for critical examination of the proof led the Court to conclude 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 85(3) exemption. When Transocean applied for renewal of the exemption, the Commission sent Transocean a notice of objections listing the conditions being

¹¹⁴ Id. at 368.

¹¹⁵ Id. at 338.

¹¹⁶ *ACF Chemiefarma v. Commission*, Case 41/69, 1970 E.C.R. 661, 669-74. See also related cases *Bucher & Co. v. Commission*, Case 44/69, 1970 E.C.R. 733 and *Boehringer Mannheim v. Commission*, Case 45/69, 1970 E.C.R. 769.

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 *Imperial Chemical Industries Ltd. v. Commission*, Case 48/69, 1972 E.C.R. 619, 635-37 (arguments of parties), 697-701 (opinion of Advocate General Mayras), 650-52, paras. 16-44 (judgment of the Court).

¹²¹ *Transocean*, 1974 E.C.R. at 1063.

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. By imposing what amounted to an entirely new condition without a hearing, the Commission had breached that right. Therefore, the Advocate General recommended that the Court 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

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."¹²⁴ 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 the principle. 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.¹²⁵

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

¹²² Id. at 1089.

¹²³ Id. at 1088.

¹²⁴ Id.

¹²⁵ Id. at 1089.

must be given the opportunity to make his point of view known.”¹²⁶ In the past, the Court had framed review of the Commission’s procedures as a matter of policing respect for rights of the defense set down in European competition statutes. In *Transocean*, by contrast, the Court announced a higher principle that could be used to supplement competition statutes. The Court concluded by annulling the condition and sending the case back to the Commission for further proceedings, so that the parties would 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 their supplies from Hoffman-La Roche.¹²⁷ Hoffman-La Roche objected to the Commission’s procedure on the same grounds as the parties in the pre-*Transocean* cases: Hoffman-La Roche had not been allowed 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 Europe’s 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 Advocate General Roemer, he observed that, under German law, the parties to administrative proceedings 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 concerned were unaware. The way in which the Bundeskartellamt (the Federal Cartel Office) applies this principle is evidently to c[ommunicate] 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 documents¹²⁸

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 was 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

¹²⁶ Id. at 1080, para. 15.

¹²⁷ *Hoffman La-Roche*, 1979 E.C.R. at 461, 472.

¹²⁸ Id. at 600.

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—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 had come 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 a hearing officer at the oral phase of Commission competition proceedings also demonstrates the common law’s influence on individual rights. 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 Commission for combining the functions of judge and prosecutor, in breach of the second element 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

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 proceeding, 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. Id. at 513-14, paras. 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, *The Right to be Heard in EEC Competition Procedures*, 15 *Fordham Int’l L.J.* 16, 74 (1991/1992) [hereinafter Joshua, *EEC Competition*] (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”).

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 at 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 post of hearing officer.

The House of Lords exercised a similar influence over the Commission's decision to disclose all the evidence to the parties, regardless of whether the Commission considered the evidence relevant and hence relied on it to build its case.¹³⁴ The Committee's report was published in February 1982, but its inquiry had begun 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 Commission civil servant responsible for competition (Mr. Pappalardo, Director, Directorate-General 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

¹³² See House of Lords, European Communities Committee, Eighth Report on Competition Practice, 1981-82 H.L. 91, at vi, para. 9 (Feb. 23, 1982) [hereinafter Eighth Report] (citations deleted and emphasis added).

¹³³ *Id.* at xx, para. 42(e).

¹³⁴ See *supra* text accompanying notes 128-29.

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)

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 [Directorate-General 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.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 the evidence to the parties to a competition proceeding. He had recited yet another classic common law maxim:

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.¹³⁶

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, 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 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 one of only two common law Member States in a European Community of nine Member States. The answer lies in the distinctive European system of legal authority. Enforcement of European law relies upon national administrations, national police, and, most importantly in the rights context, national courts. The Commission can

¹³⁵ See Eighth Report, *supra* note 132, at 49-50, para. 125-28.

¹³⁶ *Id.* at vii, para. 11 (citing to J-P Warner’s opinion in *The Distillers Co. Ltd. v. Commission*, 1980 E.C.R. 2229, 2295-97).

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 European institutions exist on paper only. When the UK acceded and the British legal community launched the natural justice attack, the Court and the Commission came under immense pressure to accommodate the common law understanding of fair administration. 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 proceedings and adopted the right to be heard to bring the UK into the European system of legal authority.

The dynamic of European legal authority can be rendered starkly or subtly and more realistically. First, the stark account.¹³⁷ 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—by 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.¹³⁸ Especially at the beginnings of European integration, the Commission and the Court were intensely aware of the limits of their authority and this awareness contributed to the making of European law.¹³⁹ A Commission decision or Court 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 judicial sensibilities to rights and the imperative 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 administrators and judges take seriously objections from their counterparts at the national level, schooled in different traditions of public law.¹⁴⁰ A national official'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

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 Weiler, *Transformation*, supra note 40, at 2403. 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.

¹³⁸ See H.L.A. Hart, *The Concept of Law* (2d ed. 1994).

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*, Supplementary Publication No. 1, *Int'l & Comp. L.Q.* 66, 72 (1961) (statement by second President of the Court of Justice on the Court's reliance on national courts to refer cases and execute judgments); Eighth Report, supra note 132, 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 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.

the limits on the powers conferred upon the Commission are national legal traditions. As the Court has repeatedly stated, “the Court draws inspiration from the constitutional traditions common to the Member States.”¹⁴¹ 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. 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 national courts and administrations. But today it runs far deeper. It can be said to define Europe’s new constitutional tradition.¹⁴²

My explanation for the powerful influence of a minority rights tradition is based partly on speculation. However, it is a fact that the Commission and the Court of Justice were policed by national courts: in the early years of the European Community, individuals went to their national courts to protest Commission decisions, and national courts reviewed Commission decisions to ensure that their citizens were not subject to arbitrary and unlawful public power. The Commission and the Court of Justice were well aware of this litigation and the consequences, for their own authority, of disregarding national templates of fair government administration. The case in point is a challenge brought in Italy 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 High Authority decision.¹⁴³ The challenge was based on exactly the same type of argument that, had the Court of Justice not incorporated the right to a hearing 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

¹⁴¹ See, e.g., *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*, Case C-71/02, 2004 E.C.R. 0, para. 48.

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 the 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, *supra* note 139, at 68 (emphasis added). Only an administrative process that respected the right to a 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 Dec. 27, 1965, reported and translated in 1966-67 *Common Mkt. L. Rev.* 81 (1966-67).

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, to monitor and verify 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

Four days later, the High Authority issued new decisions to the parties, imposing significant fines for their failure to comply with the first order (0.5% of the companies' annual turnover) and fining the companies additional amounts for each day's delay in failing to produce the documents, starting 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).¹⁴⁷ 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.¹⁴⁸

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 right (*diritto soggettivo*) by taking their property without respect for the Italian Constitution's guarantees of lawful administrative action.¹⁴⁹ According to the litigants, the ECSC Treaty was unconstitutional. The Treaty and the European Court of Justice did not afford the same guarantees 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.¹⁵⁰ The Naples court first examined whether the Court of Justice was

¹⁴⁴ Treaty Establishing the European Coal and Steel Community [ECSC Treaty], Apr. 18, 1951, 261 U.N.T.S. 140 (1957).

¹⁴⁵ ECSC Treaty, art. 47.

¹⁴⁶ *Società Industriale Acciaierie San Michele and others v. High Authority of the European Coal and Steel Community*, Joined Cases 5/62, 6/62, 7/62, 8/62, 9/62, 10/62, 11/62, 13/62, 14/62, 15/62, 1962 E.C.R. 859 (449 for the English special edition), 1963 C.M.L.R. 13.

¹⁴⁷ *Società Industriale Acciaierie San Michele and others v. The High Authority of the European Coal and Steel Community*, Joined Cases 2-10/63, 1964 C.M.L.R. 146, 148.

¹⁴⁸ *Id.* at 165.

¹⁴⁹ See *Soc. Metallurgica di Napoli (SIMET) S.p.A v. High Authority*, Tribunale di Napoli, Decision of Feb. 28/Apr. 22, 1964; *Merloni S.p.A. v. High Authority*, Tribunale di Milano, Decision of June 24/Sept. 28, 1964; *Soc. Acciaierie San Michele v. High Authority*, Tribunale di Torino, Decision of Dec. 11/69, 1964; *Soc. Acciaierie Ferriere di Roma (FERAM) v. High Authority*, Tribunale di Roma, Decision of Sept. 22, 1964, all reported and discussed in 2 Common Mkt. L. Rev. 449 (1964-65).

¹⁵⁰ In finding that these lawsuits were admissible, all four Italian courts were acting in blatant disregard of arts. 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. Officials of the Member States must

structurally similar to an ordinary Italian court—as opposed to an Italian administrative court, characterized by less independence from the executive branch—because under the Italian Constitution, citizens were guaranteed an ordinary judicial forum for challenges to administrative acts based on basic rights such as property. The Court of Justice passed muster. Hence, the Naples court found that the ECSC Treaty was constitutional; the court concluded that only the European Court of Justice, not Italian courts, had jurisdiction over the decision of the High Authority.

The Rome court decided the case on slightly different grounds. It held that, in the steel companies' case, judicial review in the European Court of Justice met the standards of the Italian Constitution. In so holding, however, the court found that it could not rule out the possibility of future infringements of Italian constitutional rights through inadequate European judicial review. The Rome court 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 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 Italian Constitution's guarantee of access to an ordinary court. 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 Italian Constitutional Court: were the Articles limiting the grounds of review before the European Court of Justice (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

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.*

¹⁵¹ *Soc. Acciaierie Ferriere di Roma (FERAM) v. High Authority*, Tribunale di Roma, Decision of Sept. 22, 1964, 2 Common Mkt L. Rev. 449, 451 (1964-65) (reporting and quoting from case).

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 under Italian law, most notably excess of power (*eccesso di potere*) and violation of law (*violazione della legge*).

law and concluding that the two were roughly equivalent.¹⁵³ It did not give the High Authority and the 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 that case, the Court of Justice had 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[] 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 juridiction*); some maintain even that, once formulated, such an appeal 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.

Therefore, the Constitutional Court concluded that European judicial review satisfied the Italian right to judicial protection, guaranteed under Article 2 of the Constitution. According to the Constitutional Court, the administrative law provisions of the ECSC 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."¹⁵⁶

What is the relevance of this old Italian case for the right to a hearing? At the time that the UK acceded and *Transocean* was decided, the case was not so old. *Transocean* 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.

¹⁵³ Italian Constitutional Court, Decision No. 98/1965, supra note 143, at 82-84.

¹⁵⁴ See *Flaminio Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64, 1964 E.C.R. 1141 (585 for the English special edition).

¹⁵⁵ Italian Constitutional Court, Decision No. 98/1965, supra note 143, at 83.

¹⁵⁶ Mario Berri, Annotation on *Société Acciaierie San Michele v. European Coal and Steel Community*, Italian Constitutional Court, Decision No. 98/1965 of Dec. 27, 1965, 4 Common Mkt. L. Rev. 238, 240 (1966-67) (quoting from Court).

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 Commission decisions, as the Italian courts had done. But would an 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 principle of natural justice? The answer, especially in the early years after accession, was not clear. It is certainly not fanciful to argue that this 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.¹⁵⁷

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 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 earlier cases in deciding 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.

¹⁵⁷ My explanation of the salience of the common law right to a hearing at the moment of accession is also consistent with the explanation that has been advanced by Joseph Weiler, Pierre Pescatore, Federico Mancini, and Imke Rissopp-Nickelson for the emergence of fundamental rights 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* 103-36 (1969); Imke Rissopp-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 *Erich Stauder v. City of Ulm*, Case 29/69, 1969 E.C.R. 419, 425, para. 7. The common wisdom today is that the Court of Justice responded to pressure from the German and Italian constitutional courts.

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 to the ball-bearing producers the cost figures that 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 created to find a right to be heard in 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

¹⁵⁸ Council Regulation (EEC) 459/68, 1968 O.J. (L 93) 1 (on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community). 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 June 30, 1967, and entered into force on July 1, 1968. European anti-dumping and subsidies law has been amended on numerous occasions. The law currently in force is Council Regulation (EC) 384/96, 1996 O.J. (L 56) 1 (on protection against dumped imports from countries not members of the European Communities).

¹⁵⁹ *Id.* at art. 10(4).

¹⁶⁰ *Id.* at art. 10(6).

¹⁶¹ See *Nippon Seiko v. Council and Commission [Ball bearings]*, Case 119/77, 1979 E.C.R. 1303, 1262 (opinion of the Advocate General).

¹⁶² *NTN Tokyo Bearing Company, Ltd. and Others v. Council of the European Communities*, Case 113/77, 1979 E.C.R. 1185.

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*.¹⁶³

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 legislation.¹⁶⁴ However, the Advocate General's declaration attracted considerable attention in academic commentary as well as in policymaking circles.¹⁶⁵ A few months after the judgment was handed down, European anti-dumping law was amended in two fundamental respects.¹⁶⁶ First, firms on both the foreign and domestic sides of proceedings were allowed to inspect all the information gathered in the investigation and contained in the Commission's files. Second, 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 these revisions were made in response to Advocate General Warner's criticism.¹⁶⁷

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 *Timex's* procedural rights, the governing law had to be interpreted broadly.¹⁶⁸

In the second case, *Al-Jubail Fertilizer v. Council & Commission*, the influence of competition principles was unmistakable.¹⁶⁹ In *Al-Jubail Fertilizer*, a manufacturer of fertilizer from Saudi Arabia opposed an anti-dumping duty on procedural grounds: the manufacturer claimed that the Commission had failed to communicate a number of facts relevant to the duty, including information on European costs of production and prices that had led to the finding of injury to the

¹⁶³ *Id.* at 1261.

¹⁶⁴ *Id.* at 1208-10, paras. 20-27.

¹⁶⁵ See *Al-Jubail Fertilizer v. Council*, Case C-49/88, 1991 E.C.R. I-3205, 3221 n.41, para. 72 (opinion of Advocate General discussing reaction of international trade community to earlier opinion of Advocate General Warner).

¹⁶⁶ Council Regulation (EEC) 1681/79, 1979 O.J. (L 196) 1, art. 3 (amending Regulation (EEC) 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community).

¹⁶⁷ See *Stanbrook & Bentley*, *supra* note 158, at 15; J.F. Beseler & A.N. Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities* 24 (1986).

¹⁶⁸ See *Timex Corp. v. Council & Commission*, Case 264/82, 1985 E.C.R. 849, 868-69, paras. 24-25.

¹⁶⁹ *Al-Jubail Fertilizer*, 1991 ECR at I-3220.

domestic industry.¹⁷⁰ Advocate General Darmon first quoted at length from Advocate General Warner in *NTN Tokyo Bearing*.¹⁷¹ He then noted the analogies between the position of the parties in competition and anti-dumping proceedings:

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.¹⁷²

The Advocate General concluded that the rights guaranteed in anti-dumping proceedings should be similar to those guaranteed in the competition area, because the right to be heard naturally applied to both types of determinations:

[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.¹⁷³

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.¹⁷⁴

The Court of Justice, joined by the Court of First Instance in 1988, has since decided a number of cases defining the scope of the right.¹⁷⁵

¹⁷⁰ *Id.* 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-3214, para. 15.

¹⁷⁵ See, e.g., *Kundan Industries Ltd and Tata International Ltd v. Council*, Case T-88/98, 2002 E.C.R. II-4897, para. 132; *EFMA v. Council*, Case T-121/95, 1997 E.C.R. II-2391, para. 84; *Ajinomoto and Nutrasweet v. Council*, Cases T-159/94 & T-160/94, 1997 E.C.R. II- 2461, para. 83; *Champion Stationery v. Council*, Case T-147/97, 1998 E.C.R. II-4137, para. 55.

Customs policy is the last field in which the Commission must abide routinely by the right to a hearing. The same judicial logic is at work as in the anti-dumping cases: precedent and reasoning by analogy. 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.¹⁷⁶ 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.¹⁷⁷ Remission or repayment may also be made under the general fairness clause of the implementing regulation.¹⁷⁸ The proceeding is initiated by the importer by filing an application with the responsible national customs service.¹⁷⁹ The customs service is responsible for determining whether to grant remission or repayment, 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 remission or repayment proceedings. The procedure afforded under national law before the customs service of the Member States was deemed enough. Even when the national customs service sent the file to the Commission for consideration, no provision was made for the trader to make her views known. Then, in *France-aviation v. Commission*, the Court of First Instance held that a trader who requests repayment of customs duties has the right to be heard during the proceeding.¹⁸⁰ 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. In the statement, the trader must certify that she has read the case file and the trader must either list any additional information that she considers relevant or state that she has nothing to add.¹⁸¹ But still no provision permitted individual importers to have any direct contact with the Commission in the course of remissions proceedings.

¹⁷⁶ See Council Regulation (EEC) 1430/79, 1979 O.J. (L 175) 1 (on the repayment or remission of import or export duties). This law has been repealed and remissions are currently dealt with under arts. 236-39 of Council Regulation (EEC) 2913/92, 1992 O.J. (L 302) 1 (establishing the Community Customs Code).

¹⁷⁷ See Council Regulation 2913/92, *supra* note 176, at arts. 236-39.

¹⁷⁸ See Commission Regulation (EEC) 2454/93, 1993 O.J. (L 253) 1, art. 905 (laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code and implementing art. 239 of the Customs Code).

¹⁷⁹ *Id.* at arts. 905-09.

¹⁸⁰ See *France-aviation v. Commission*, Case T-346/94, 1995 E.C.R. II-2841, paras. 34-40.

¹⁸¹ Commission Regulation (EC) 12/97, 1997 O.J. (L 9) 1, art. 1(12) (amending Regulation (EEC) 2454/93 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code).

This changed in two subsequent cases involving remissions applications for customs duties owed on high-quality beef imported from Argentina (known, appropriately, as Hilton beef). 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.¹⁸² Again, the Commission amended its customs rules to reflect the Court's holding.¹⁸³ 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.¹⁸⁴

The Court has sporadically recognized the right to a hearing in other types of Commission proceedings. These are proceedings which, according to the Court's test, "are initiated against a person and are liable to culminate in a measure adversely affecting that person."¹⁸⁵ In these policy areas 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.¹⁸⁶ Another time the reduction of European financial assistance to a Portuguese firm triggered the right.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.¹⁸⁸ The litigants have the right to a brief description of the facts and reasoning supporting the 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 statement of reasons.

Notwithstanding the Court's advocacy of adversarial, trial-type Commission procedure, it recognizes a critical limit to the right to a 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 benefit-conferring, as opposed to burden-imposing, then the right is not guaranteed. In *Windpark Groothusen*, the Commission denied an application for Community aid under a programme promoting energy technologies.¹⁸⁹ The Commission based the decision exclusively on the information

¹⁸² See *Eyckeler & Malt AG v. Commission*, Case T-42/96, 1998 E.C.R. II-401; *Primex Produkte v. Commission*, Case T-50/96, 1998 E.C.R. II-3773. See also *Mehibas Dordtselaan BV v. Commission*, Case T-290/97, 2000 E.C.R. II-15, para. 44.

¹⁸³ See Commission Regulation (EC) 1677/98, 1998 O.J. (L 212) 18 (amending Regulation (EEC) 2454/93 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code) (Regulation 2454/93, art. 906A).

¹⁸⁴ *Common Market Fertilizers v. Commission*, Cases T-134/03 & T-135/03, 2003 O.J. (C 158) 24, 25.

¹⁸⁵ See, e.g., *Fiskano v. Commission*, Case C-135/92, 1994 E.C.R. I-2885, para. 39.

¹⁸⁶ See *Fiskano*, 1994 E.C.R. at I-2885; see also *Kvitsjoen v Commission*, Case T-46/00, 2000 E.C.R. II-03713.

¹⁸⁷ See *Lisrestal v. Commission*, Case T-450/93, 1994 E.C.R. II-1177.

¹⁸⁸ See *Koen Lenaerts & Jan Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process*, 1997 *Common Mkt. L. Rev.* 531, 562-66 (1997).

¹⁸⁹ *Windpark Groothusen v. Commission*, Case C-48/96, 1998 E.C.R. 2873.

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 to a hearing because “the applicant . . . had merely been placed on a reserve list of possible beneficiaries of Community financial support.”¹⁹⁰

The other type of case in which the Court does not recognize that the parties are “adversely affected” is when a third-party individual stands to benefit or lose from a Commission enforcement action. In other words, the individual seeking the procedure is a member of the wider public in whose interest the Commission acts when it enforces 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 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.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 assist unfairly their national firms through direct subsidies or favorable treatment in one form or another. Competitors of national champions often bring 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 national champions 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 would acquire binding legal force in the Constitutional Treaty of 2004. Article II-101 codifies the extensive case law of the Court of Justice on individual rights in European administration, including the right to a hearing chronicled above. 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;

¹⁹⁰ *Windpark Groothusen v. Commission*, Case T-109/94, 1995 ECR II-3007, para. 50; *Windpark Groothusen*, 1998 E.C.R. at 2873, para. 47 (affirming reasoning of Court of First Instance).

¹⁹¹ See *BEUC v. Commission*, Case C-170/89, 1991 E.C.R. I-5709, para. 19.

¹⁹² See, e.g., *Netherlands and Others v. Commission*, Case C-48/90, 1992 E.C.R. 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 *British Airways plc and British Midland Airways Ltd. v. Commission*, Cases T-371 & 394/94, 1998 ECR II-2405; *Commission v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval)*, Case C-367/95, 1998 E.C.R. 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).

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Thus, Article II-101 enshrines the long and steady trajectory of the Court of Justice's jurisprudence that started with *Transocean* 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 procedure in the same 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—the duty to give notice of the government's case, disclose the evidence, and allow the parties opportunity to refute the government's 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, responsible for cartels and certain types of vertical restraints of trade, and the Mergers and Monopolies Commission (MMC), 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 the factual and legal grounds of the case, was not 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 undermined the rights of the parties. 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 vested in the European Commission.¹⁹⁸ After conducting an investigation, the MMC would issue a comprehensive report in which it made findings on injury to the public interest and made recommendations on any appropriate remedies. The Minister, however, was completely free to reject the finding of injury or the proposed remedial measures. This ministerial discretion was used often.¹⁹⁹ The application of largely political considerations at the final stage signified that even though, early on, the parties were heard in a quasi-judicial

¹⁹⁴ Constitutional Treaty [TCE], art. II-101.

¹⁹⁵ See Richard Whish, *Competition Law* 56, 83, 149, 152 (4th ed. 1985) (comparing monopolies legislation and cartel legislation).

¹⁹⁶ See Joshua, *EEC Competition*, supra note 131, at 41, 46.

¹⁹⁷ Cosmo Graham, *The Enterprise Act 2002 and Competition Law*, 67 *Mod. L. Rev.* 273, 285 (2004).

¹⁹⁸ See Whish, supra note 195, at 240-42 (comparing "political approach" of UK scheme with legal approach of European one).

¹⁹⁹ *Id.* at 57-59, 83-84.

proceeding, the final outcome could well turn on factors of which they had had no notice and to which they had 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-date. The British legislation replicates the European Community's rules on anti-competitive agreements, abuse of dominant position, and mergers, as well as the related European enforcement model. While British legislators were not legally required to adopt the European regulatory scheme, that is what they chose to do.²⁰¹ Some of the reforms remedied the procedural defects mentioned earlier: complete disclosure of the evidence and a more exhaustive notice of investigation. Other reforms were designed to de-politicize competition law, removing the Minister's authority to depart from the report of the MMC (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, European rights were transformed to respond to the common lawyer's criticism of European Commission competition proceedings as overly bureaucratic, without adequate opportunities for individuals to test 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, the de-politicization of British competition policy 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 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

²⁰⁰ See Graham, *supra* note 197, 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 *Y.B. Eur. L.* 223 (1996).

²⁰² Graham, *supra* note 197, at 276, 279 (describing new institutional structure); Mark Furse, *Competition and the Enterprise Act 2002* 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 testimony critical of European competition proceedings before the House of Lords Committee in 1981. See Eighth Report, *supra* note 132, at 27. He later served as the UK judge on the Court of First Instance, where he gained extensive experience with Commission competition proceedings. Bellamy has since returned to the UK to serve as the chair of the three-judge Competition Appeals Tribunal. See Graham, *supra* note 197, at 284.

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.

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 administration to the public varies considerably.²⁰⁷ Most government administrations, regardless of whether they operate in a common law or civil law tradition, fall on the closed 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 secrecy. They have not faced 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 and that render it open: 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.²⁰⁸ Although the classic dichotomy between the North and the rest of

²⁰⁴ This is different from lawmaking in the U.S., where bills tend to originate in Congress, but similar to European parliamentary systems. In parliamentary systems, the same political party or set of parties sitting in the government cabinet controls both the executive branch and the legislature; government administration drafts the bills that are 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 right to shape Commission policies indirectly 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.

²⁰⁷ See generally Jacques Ziller, *European Models of Government: Towards a Patchwork with Missing Pieces*, 54 *Parliamentary Aff.* 102, 105, 108 (2001) (describing Swedish open government system and contrasting with majority closed government tradition).

²⁰⁸ *Id.*; Thomas Bull, *The Original Ombudsman: Blueprint in Need of Revision or a Concept with More to Offer*, 6 *Eur. Pub. L.* 334 (2000) (describing powers of Swedish Ombudsman).

Europe is not as stark as it used to be due to a number of contemporary, Europe-wide trends in government administration, the difference remains.

Whether a country has access-to-documents legislation largely tracks the categorization of a system as open or closed.²⁰⁹ 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.²¹⁰ 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.²¹¹

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 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 for internal documents: “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

²⁰⁹ See generally Institut International des Sciences Administratives, *Le secret administratif dans les pays développés* (1977) (providing overview of early European access-to-documents legislation); David Banisar, *The Freedom.org Global Survey: Freedom of Information and Access to Government Laws Around the World* (2004), available at <http://www.freedominfo.org/survey.htm> [hereinafter Banisar, *Freedom.org Global Survey*] (providing overview of contemporary legislation).

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 Millennium* 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 Act concerning the conditions of accession and the adjustments to the Treaties — Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, 1990 O.J. (C 241) 397.

²¹² Law No. 83 of Feb. 9, 1951, art. 6.

²¹³ A new law, replacing the original access to documents legislation, came into force on Dec. 1, 1999. See Olli Mäenpää, *Right of Access to Documents: New Finnish Legislation*, 11 *Eur. Rev. Pub. L.* 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 §§ 5(2), 6 (1999) available at <http://www.om.fi/1184.htm>.

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 that contains the government agency's reflections—draft reports, draft plans, minutes, and notes—and that 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, 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 subject to disclosure.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 choose to transmit the information. In such cases, the information must be communicated in an anonymous form, so as to prevent identification of the individual who gave the opinion.²²⁰

Another difference that separates northern systems is the requirement that government agencies 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. In Denmark and the Netherlands, government agencies are not required to keep registers.²²¹ 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

²¹⁴ See Freedom of the Press Act, ch. 2, arts. 7 & 9 available at http://www.oefre.unibe.ch/law/icl/sw03000_.html; see also Banisar, Freedom.org Global Survey, *supra* note 209, at 81; Thomas Bull, Changing Principles of Freedom of Speech in Sweden?, 8 Eur. Pub. L. 333 (2002).

²¹⁵ Access to Administrative Files Act, §§ 7-8 (internal case material), § 2 (making of law) Act No. 572, (Dec. 19, 1985), available at <http://www.privacyinternational.org/countries/denmark/dk-foi-85.doc>. The first Danish law on access to information was enacted in 1964 and a comprehensive scheme was instituted in 1970 in the Act on Access of the Public to Administrative Files. See Banisar, Freedom.org Global Survey, *supra* note 209, at 26-29.

²¹⁶ Access to Administrative Files Act, §§ 7-8.

²¹⁷ *Id.* at § 10.

²¹⁸ The Government Information (Public Access) Act [WOB], art. 3, Law of Oct. 31, 1991, *Staatsblad* (Official Journal, “Stb”) 1991, 703, as last amended by law of Apr. 5, 2001, *Stb.* 2001, 180. The first Dutch access to information law was adopted in 1978. The right of access to information is recognized in Article 110 of the Dutch Constitution of 1983. See Banisar, Freedom.org Global Survey, *supra* note 209, at 58.

²¹⁹ WOB, art. 1a, para. 1a.

²²⁰ WOB, art. 11.

²²¹ See Banisar, Freedom.org Global Survey, *supra* note 209, at 81 (Sweden), 31 (Finland).

filing requests must generally refer to the documents by name or number; in systems without registers, individuals need only refer to the issue of interest.²²²

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 1992.²²³ A second set of Member States has adopted general legislation that 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. Italy²²⁴ and Greece²²⁵ 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.²²⁶

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. Citizens 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.²²⁷ 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.²²⁸ 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 the expert reports and technical data that served as the basis for administrative and legislative

²²² See Dutch Government Explanatory Memorandum 22-23, Stb 1991, 703 (explaining that Dutch law is modeled on Danish law—not Swedish law—which allows the applicant to refer generally to the issue of interest in her document request and which does not require the listing of specific documents).

²²³ See Banisar, *The Freedom.org Global Survey* supra note 209, at 13 (Belgium), 41 (Ireland), 70 (Portugal), 80 (Spain).

²²⁴ See Law No. 142 of June 8, 1990; V. Italia & M. Bassani, *Procedimento amministrativo e diritto di accesso ai documenti* 535-69 (1995); Banisar, *Freedom.org Global Survey*, supra note 209, at 44.

²²⁵ See Banisar, *Freedom.org Global Survey*, supra note 209, at 36.

²²⁶ See Martin Bullinger, *République fédérale d'Allemagne*, in *Institut International des Sciences Administratives, Le secret administratif dans les pays développés* 197 (1977); Bieber, *Informationsrechte Dritter im Verwaltungsverfahren DOV §§ 857, 867* (1991).

²²⁷ See TEC 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, at 2 (May 5, 1993). 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.

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.²²⁹ 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.²³⁰ 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 documents²³¹

In 1999, the Commission agreed to extend the right of access to the European rulemaking process, including meeting agendas, drafts, and final decisions, and to create a public register of all such documents.²³² Finally, in 2001, the Council, Commission, and European Parliament passed a law giving effect to the right of access in the Amsterdam Treaty.²³³

The Public Access to Documents Law, which has been followed by more precise provisions in each of the institution's rules of procedures,²³⁴ 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.²³⁵ 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

²²⁹ Council Decision 93/731/EC, 1993 O.J. (L 340) 43 (on public access to Council documents); Euratom: Commission Decision 94/90/ESC, EC, Euratom, 1994 O.J. (L 46) 58 (on public access to Commission documents).

²³⁰ Council Decision 93/731/EC, *supra* note 229, at arts. 1, 4; Commission Decision 94/90/ESC, EC, Euratom, *supra* note 229, at Annex ("Exceptions").

²³¹ TEC art. 255.

²³² Council Decision 1999/468/EC, 1999 O.J. (L 184) 23, art. 7 (laying down the procedures for the exercise of implementing powers conferred on the Commission) [hereinafter "Comitology Decision"].

²³³ European Parliament and Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (regarding public access to European Parliament, Council and Commission documents) [hereinafter "Public Access to Documents Law"].

²³⁴ See Council Decision 2001/840/EC, 2001 O.J. (L 313) 40 (amending the Council's Rules of Procedure); Parliament Decision 2001/2135 (REG), 2002 O.J. (C 140 E) 120 (adapting its Rules of Procedure to the provisions of European Parliament and Council Regulation (EC) 1049/2001 on public access to Parliament, Council and Commission documents); Commission Decision 2001/937/EC, ECSC, Euratom, 2001 O.J. (L 345) 94 (amending its rules of procedure).

²³⁵ Public Access to Documents Law, *supra* note 233, at arts. 11-12. For a comprehensive overview of the changes introduced by the Regulation, see Steve Peers, *The New Regulation on Access to Documents: A Critical Analysis*, 21 Y.B. Eur. L. 395 (2002).

institutional author of the document to veto disclosure.²³⁶ As for the exceptions to disclosure of ordinary, non-sensitive documents, the Public Access to Documents Law specifies them in far greater detail compared to the 1993 rules of procedure; most of the exceptions require European institutions to balance the applicant's public interest in disclosure against the commercial 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 rendered the northern model of open government salient 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 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:

²³⁶ Public Access to Documents Law, *supra* note 233, at art. 9.

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.”

²⁴¹ D.M. Curtin, *Between and Between: Democracy and Transparency in the Governance of the European Union*, in *Reforming the Treaty on European Union: The Legal Debate* 95, 101-02 (Jan A. Winter et al. eds., 1995). Parliament indirectly advocated transparency by demanding the incorporation of its Declaration of Fundamental Rights and Freedoms, which as described above, contained Article 18 on the right of access to government information. See Resolution on the Intergovernmental Conference in the context of the Parliament's strategy for European Union, (Martin I Report), para. 3(d) (Mar. 14, 1990), reprinted in Richard Corbett, *The Treaty of Maastricht: From Conception to Ratification: A Comprehensive Reference Guide* 106, 108 (1993).

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 text of the protocol, might very well have been limited to a call for the publication of more official documents and better access to existing data bases.

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.²⁴³ 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.²⁴⁴ 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.²⁴⁵ 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. 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.²⁴⁶ The response was a steady wave of commitments to transparency by European Heads of State at European Council meetings in the fall of 1992.²⁴⁷ The Commission dutifully produced a series of policy

²⁴² Maastricht Treaty, Declaration 17.

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: The Ongoing Struggle for Freedom of Information*, available at <http://www.statewatch.org/secret/freeinfo>.

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 European Union Law* 18 (2002).

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) [hereinafter *Ratification of Maastricht*] (calling for "openness and transparency in [the EC's] decision-making procedures" and "openness in administration").

²⁴⁷ See Conclusions of the Presidency, Birmingham European Council, Oct. 16 1992, Annex I, reprinted in *Ratification of Maastricht*, supra note 246, at 407, 409; Conclusions of the Presidency,

documents in spring of 1993.²⁴⁸ 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

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 shaped by their experiences as citizens of the Netherlands and 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 advocates of transparency? 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

European Council in Edinburgh, Dec. 11-12, 1992, Annex 3 to Part A, reprinted in *Ratification of Maastricht*, supra note 246, at 411, 429.

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, May 5, 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, June 2, 1993.

²⁴⁹ See Francis Jacobs, *Institutional Dynamics after Nice: Views from the European Parliament*, May 2001, at 5 (unpublished paper on file with author) [hereinafter Jacobs, *Institutional Dynamics*]. Francis Jacobs is a long-time civil servant at the European Parliament who worked for the Institutional Affairs Committee on transparency matters. See Interview with Francis Jacobs (June 17, 2004) (notes on file with author).

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.

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 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 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 in 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 out-vote 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

²⁵¹ *Id.* at 6.

²⁵² In the United States, 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 in 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, British American Tobacco International (Investments) Ltd. v. Commission, Case T-111/00, 2001 E.C.R. II-2997. 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.

²⁵³ *WWF UK (World Wildlife Fund for Nature) v. Commission*, Case T-105/95, 1997 E.C.R. II-313; *Svenska Journalistförbundet v. Council*, Case T-174/95, 1998 E.C.R. II-3269; *Rothmans International v. Commission*, Case T-188/97, 1999 E.C.R. II-2463; *Heidi Hautala v. Council*, Case T-14/98, 1999 E.C.R. II-2489.

²⁵⁴ *Carvel v. Council*, Case T-194/94, 1995 E.C.R. II-2765; *van der Wal v. Commission*, Case T-83/96, 1998 E.C.R. II-545; *Svenska Journalistförbundet*, 1998 E.C.R. at II-3269.

²⁵⁵ *Carvel*, 1995 E.C.R. at II-2765; *Svenska Journalistförbundet*, 1998 E.C.R. at II-3269.

²⁵⁶ *Hautala*, 1999 E.C.R. at II-2489.

²⁵⁷ *WWF UK*, 1997 E.C.R. at II-313; *Svenska Journalistförbundet*, 1998 E.C.R. at II-3269; *Hautala*, 1999 E.C.R. at II-2489; *Netherlands v. Council*, Case C-58/94, 1996 E.C.R. I-2169.

²⁵⁸ *WWF UK*, 1997 E.C.R. at II-313; *Svenska Journalistförbundet*, 1998 E.C.R. at II-3269; *Hautala*, 1999 E.C.R. at II-2489; *The Bavarian Lager Co. v. Commission*, Case T-309/97, 1999 E.C.R. II-3217.

²⁵⁹ *Netherlands*, 1996 E.C.R. at I-2169.

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. This foreshadows the argument made later in this section: 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 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 that generated three separate cases.²⁶⁴ 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

²⁶⁰ See Curtin, *supra* note 241, at 103 (describing Dutch position); *Netherlands*, 1996 E.C.R. 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 *Carvel*, 1995 E.C.R. at II-2765; *JT's Corp. v. Commission*, Case T-123/99, 2000 E.C.R. II-3269; *BAT*, 2001 E.C.R. at II-2997; *BAT v. Commission*, Case T-311/00, 2002 E.C.R. II-2781; *Carvel and Guardian v. Council*, Case T-19/96, 1996 E.C.R. II-1519; *Elder v. Commission*, Case T-78/99, 2000 E.C.R. II-3717; *Elder v. Commission*, Case T-178/99, 1999 E.C.R. II-3509; *Elder v. Commission*, Case T-36/00, 2001 E.C.R. II-607; *Netherlands*, 1996 E.C.R. at I-2169; *Van der Wal*, 1998 E.C.R. at II-545; *Rothmans*, 1999 E.C.R. at II-2463; *Kuijjer v. Council*, Case T-188/98, 2000 E.C.R. II-1959; *Denkavit Nederland v. Commission*, Case T-20/99, 2000 E.C.R. II-3011; *Kuijjer v. Council*, Case T-211/00, 2002 E.C.R. II-485; *Le Canne v. Commission*, Case T-41/00, 2002 E.C.R. II-1251 (Netherlands); *Interporc Imund Export v. Commission*, Case T-124/96, 1998 E.C.R. II-231; *The Bavarian Lager*, 1999 ECR at II-3217; *Interporc v. Commission*, Case T-92/98, 1999 E.C.R. II-3521; *Berge v. Commission*, Case T-156/97, 1997 E.C.R. II-2097 (Germany); *Hautala*, 1999 ECR at II-2489; *Oliehandel Kuster v. Commission*, Case T-304/99 (removed from the registry on Oct. 6, 2004) (Finland); *Carlsen and others v. Council*, Case T-610/97, 1998 E.C.R. II-485 (Denmark); *Svenska Journalistförbundet*, 1998 E.C.R. at II-3269 (Sweden); *Meyer v. Commission*, Case T-106/99, 1999 E.C.R. II-3273 (France); *Pitsiorlas v. Council and BCE*, Case T-3/00, 2001 E.C.R. II-717 (Greece); *Associazione delle Cantine Sociali Venete v. Médiateur européen and Parliament*, Case T-103/99, 2000 E.C.R. II-4165 (Italy); *WWF UK*, 1997 ECR at II-313 (World Wildlife Fund, which is a trust incorporated under English law and whose head office is in the UK); *Petrie and others v. Commission*, Case T-191/99, 2001 E.C.R. II-3677 (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.

²⁶⁴ See *Elder & Elder*, 2000 E.C.R. at II-3717; *Elder*, 1999 E.C.R. at II-3509; *Elder*, 2001 E.C.R. at II-607. These are items 4, 5, and 8 on the Statewatch list of "Orders of the Court of First Instance."

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 to gain insight into British and European government decisions.²⁶⁵

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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸

The Parliament also played a key role in the Intergovernmental Conference (IGC) leading to the Amsterdam Treaty and Article 255 on access to documents.²⁶⁹ The Danish 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.²⁷⁰ In all of the European Parliament's contributions to the 1996-1997 IGC, the Parliament insisted

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).

²⁶⁶ Interinstitutional Declaration on Democracy, Transparency and Subsidiarity, 1993 Bull. E.C. 10/93, at 18 (Oct. 25, 1993).

²⁶⁷ See Richard Corbett, *The Treaty of Maastricht: From Conception to Ratification: A Comprehensive Reference Guide* 82 (1993); Richard Corbett, *The European Parliament's Role in Closer EU Integration* 344 (1998) [hereinafter Corbett, *Closer EU Integration*].

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, *Closer EU Integration*, supra note 267, 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 Mar. 29, 1996 and was preceded by a number of reflection documents prepared by the institutions and an ad hoc committee. See *The 1996 Intergovernmental Conference: Retrospective Data Base*, available at <http://europa.eu.int/en/agenda/igc-home>.

²⁷⁰ Committee on Institutional Affairs, Working documents PE 227.237; PE 222.239; PE 222.240.

that commitments to transparency be made in specific treaty articles.²⁷¹ A simple comparison of the Parliament's three major demands—demands not made by the other institutional actors—with the final outcome of the treaty negotiations demonstrates the Parliament's influence.²⁷² 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.²⁷³ While the Parliament's requests were not incorporated word-for-word, the Amsterdam Treaty included all three dimensions.²⁷⁴

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.²⁷⁵ 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.²⁷⁶

The Public Access to Documents Law, adopted to give effect to the Amsterdam Treaty's commitment 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 its

²⁷¹ See Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference—Implementation and development of the Union, 1995 O.J. (C 151) 56, 59, 62; Resolution embodying (i) Parliament's opinion on the convening of the Intergovernmental Conference, and (ii) an evaluation of the work of the Reflection Group and a definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, 1996 O.J. (C 96) 77, 86 [hereinafter "Parliament Resolution on Amsterdam IGC"].

²⁷² See Reflection Group's Report, Messina 2nd June 1995 and Brussels 5th December 1995, at "A more transparent Union," available at <http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html#2.5>; Commission Opinion, Reinforcing Political Union and Preparing for Enlargement, Feb. 28, 1996, at "Simplifying and democratizing Europe," available at <http://europa.eu.int/en/agenda/igc-home/eu-doc/commissn/avis-en.html#onethree>.

²⁷³ See Parliament Resolution on Amsterdam IGC, supra note 271, at 86 (section 20 called "[a] positive response to popular demands for more openness and transparency").

²⁷⁴ See TEU art. 1 ("decisions are taken as openly as possible"); TEC art. 255 (right of access to documents); TEC art. 207 (Council to make public the documents and votes related to its legislative activities).

²⁷⁵ See Commission, Proposal for a Council Decision laying down the procedures for the exercise implementing [sic] powers conferred on the Commission, 1998 O.J. (C 279) 5.

²⁷⁶ See Amendments by Parliament, 1999 O.J. (C 279) 404, 410 ("Except for reasons of confidentiality, all documents shall be made public and accessible by electronic transmission."); Comitology Decision, supra note 232, at art. 7 (providing that "[t]he principles and conditions on public access to documents applicable to the Commission shall apply to the committees" and that "[t]he references of all documents sent to the European Parliament . . . shall be made public in a register to be set up by the Commission in 2001").

plenary session of January 12, 1999.²⁷⁷ Nevertheless, when the Commission eventually came forward with its proposal for legislation, parliamentarians found it disappointing in a number of critical respects.²⁷⁸ The Commission proposal would have excluded all internal documents that were not contained in official acts, in order to protect the so-called “space to think” of the institutions.²⁷⁹ 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.”²⁸⁰ Furthermore, when the documents of third parties were involved, the proposal required that they give their consent before the documents could be released.²⁸¹ All communications with the Member States and with non-Community institutions were at risk of falling into this loophole.²⁸² 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.²⁸³ 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.²⁸⁴

In response, the responsible parliamentary committee produced a highly critical report and proposed a number of amendments.²⁸⁵ 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.²⁸⁶ (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

²⁷⁷ See Resolution on openness within the European Union, 1999 O.J. (C 104) 20; Committee on Institutional Affairs, Report on Openness within the European Union of 8 December 1998 (A4/0476/98) [hereinafter Report on Openness].

²⁷⁸ See Jacobs, *Institutional Dynamics*, supra note 249, at 16-25.

²⁷⁹ See Commission, Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 2000 O.J. (C 177) 70, art. 3(a).

²⁸⁰ *Id.* at art. 4(a).

²⁸¹ *Id.* at art. 4(d).

²⁸² *Id.* at art. 4(a).

²⁸³ *Id.* at art. 9.

²⁸⁴ In August 2000, the Council amended its rules to exclude documents relating to security and defence and classified as “top secret,” “secret,” or “confidential.” See Council Decision 2000/527/EC, 2000 O.J. (L 212) 9 (amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC on the improvement of information on the Council’s legislative activities and the public register of Council documents). Parliament was up in arms and brought a case against the Council in the Court of Justice seeking to annul the decision. See Case C-387/00, 2000 O.J. (C 355) 15, subsequently withdrawn, 2002 O.J. (C 144) 30. Parliament therefore viewed the public interest exception with great suspicion.

²⁸⁵ See Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, Report on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council, and Commission documents, Oct. 26, 2000 (A5-0318/2000). It was approved by Parliament on Nov. 16, 2000. See Public Access to Documents of the European Parliament, the Council, and the Commission (vote), 2001 O.J. (C 223) 194.

²⁸⁶ See Jacobs, *Institutional Dynamics*, supra note 249, at 20. The Presidency of the Council rotates every six months to a different Member State.

United States.) In the final compromise version, the Commission lost its blanket exclusion of “space to think” documents. The Parliament also succeeded in reducing considerably the list of exceptions. Moreover, all European institutions were required to establish electronic registers of documents.²⁸⁷ 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 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 Commission and Council information for itself. Without information, the meager powers the Parliament 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.

²⁸⁷ The register idea, first applied to regulatory documents with the Comitology Decision, and then to all documents with the Public Access to Documents Law, originated with the European Ombudsman. See Special Report to the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents, 616/PUBAC/F/IJH, Dec. 15, 1997, at 7, *available at* <http://www.euro-ombudsman.eu.int/special/pdf/en/970616.pdf>.

²⁸⁸ See Bo Byurulf & 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).

²⁸⁹ Treaty Amending Certain Budgetary Provisions of the Treaties (1970); Treaty Amending Certain Financial Provisions of the Treaties (1975). The provisions can be found at TEC art. 272. For an overview, see Corbett, *Closer EU Integration*, *supra* note 267, at 93-97.

²⁹⁰ Corbett, *Closer EU Integration*, *supra* note 267, at 93-97. The provisions can be found at TEC arts. 275-276.

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 its 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 clearer statistical and explanatory information on the execution of the budget."²⁹² And the Parliament declared that it "[s]trongly deplores 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."²⁹³ The discharges of subsequent years are replete with comments in the same vein.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

²⁹¹ Another place is Parliament's contribution to the Intergovernmental Conference leading up to Maastricht. Parliament's Committee on Budget Control called for the 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, Sept. 27, 1991 (A3-0253/91) at 6, 12.

²⁹² Resolution in accordance with the provisions of art. 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 (May 14, 1984), 1984 O.J. (C 127) 36, 38, para. 14.

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 Article 5 of Annex IV to the Rules of Procedure (Dec. 17, 1984), 1984 O.J. (C 337) 23, 24, para. 4.

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.

through what was known as the consultation procedure.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 again 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 legislative proposals, and the trajectory of proposals once they enter the Council—where more often than not they are heavily amended—is 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.²⁹⁶ If declarations are not published, then, in effect, the Member States on the

²⁹⁵ See generally Craig & Búrca, *EU Law*, supra note 3, at 141-47 (describing consultation, cooperation, and co-decision).

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 *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen*, Case C-292/89, 1991 E.C.R. I-745, para. 18; *Commission v. Denmark*, Case 143/83, 1985 E.C.R. 427, paras. 12-13.

Council can alter legislation without the knowledge or input of the Parliament, even on matters on which the Parliament has full co-decision powers.²⁹⁷

To safeguard its institutional prerogatives as legislator, the Parliament has negotiated an inter-institutional agreement with each new Commission since 1990.²⁹⁸ (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 proposals in the course of negotiations there.²⁹⁹ It has suggested an inter-institutional agreement with the Council, patterned on the agreements with the Commission, but without any success to date.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 rapporteur and the members of the Committee on Budgets with the working documents and minutes of their meetings.³⁰¹

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 to enable the Council to monitor, and sometimes veto or modify, the Commission's implementing regulations and decisions.³⁰² Because comitology

²⁹⁷ This occurred in the case of state aids to shipbuilding, where, thanks to a unpublished statement made at the time of the Council vote, Germany was permitted a derogation for East German shipyards. See Jacobs, *Institutional Dynamics*, supra note 249, at 9 n. 3.

²⁹⁸ See Commission, *Bilan annuel 1991 d'application du "Code de conduite"*: Communication de la Commission au Parlement européen, Annex I, at 4.3, June 5, 1991 SEC (91) 1097 final; Resolution on the obligation for the Council to await Parliament's opinion, 1990 O.J. (C 324) 125, 128 (point 19, urging Commission to fulfil the information-related undertakings in the Code of Conduct); Resolution on the Commission's annual work programme (approving annexed Code of Conduct negotiated with the Commission), March 15, 1995, 1989 O.J. (C 89) 68, 69-70 (points 3.1, 3.2, 4); Framework Agreement on relations between the European Parliament and the Commission, 2000 O.J. (C 121) 122, 124 ("Flow of information", points 12-17).

²⁹⁹ Resolution on the obligation for the Council to await Parliament's opinion, 1990 O.J. (C 324) 125, 127, 128 (points 7, 17).

³⁰⁰ *Id.* at 128 (point 15).

³⁰¹ Resolution on the inter-institutional dialogue on certain budgetary questions, 1981 O.J. (C 101) 107, 107 (point 2).

³⁰² The term "comitology" derives from the French word for committee, "comité," and the suffix indicating a science or branch of knowledge, "ology." See generally, Francesca Bignami, *The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States*, Jean Monnet Working Paper No. 5/99, at 8-13, available at

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.³⁰³ 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.³⁰⁴ Today, after over twenty years of institutional wrangling, the Commission is required to forward to the Parliament the proposals for administrative action submitted to comitology committees, the agendas of committee meetings, the 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. As a matter of normative discourse, after the northern right to transparency came to define the European concept of good government, 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

<http://www.jeanmonnet-program.org/papers/99/990501/html> (describing different types of comitology committees).

³⁰³ See generally Corbett, *Closer EU Integration*, supra note 267, at 133, 256 (parliamentary resolution of 1981 recommending that committees be purely advisory in nature); Kieran St. Clair Bradley, *The European Parliament and Comitology: On the Road to Nowhere?*, 1997 *Eur. L.J.* 230 (1997); Ellen Vos, *Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies* 120 (1999).

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, supra note 303, 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 policies by the Commission, 1993 *O.J. (C 255)* 19, 19-20 ["Klepsch-Millan Agreement"] (agreeing to forward the Parliament all plans for the use of regional development funds—generally elaborated by the Member States and then transmitted to the Commission—all proposals for Community initiatives, and the results of any reviews of the implementation of development projects on the ground); *Modus vivendi* of Dec. 20, 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 232, at arts. 7.3, 8 (codifying information and control powers established in earlier instruments).

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.³⁰⁵ 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.³⁰⁶

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;

7. Proposes that a mediator be appointed within Parliament to monitor compliance with the obligation incumbent on the Community bodies to provide information.³⁰⁷

³⁰⁵ Comitology Decision, supra note 232.

³⁰⁶ Proposal for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission (COM(98)0380—C4-0501/98—98/0219(CNS)), 1999 O.J. (C 279) 404, 407, 410.

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 298, at 128 (point 16).

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 reveal 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.³⁰⁸ The opinion of a related committee (Committee on Legal Affairs and Citizens' Rights) on the report is telling. After discussing transparency guarantees 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 committee 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.³⁰⁹

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.³¹⁰ 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 its 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 [Council of Ministers] 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

³⁰⁸ See Report on Openness, *supra* note 277.

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).

of the Union but 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, in the Public Access to Documents Law, concrete procedures for exercising their transparency rights, the only significant development has been the Constitutional Treaty. The Treaty gives the transparency measures 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, 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 requires the Parliament and the Council to publish documents related to their deliberations on legislative matters. However, the scope

³¹¹ See Report on Openness, *supra* note 277 (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 also pushed for access to preparatory deliberations in the Commission and the Council. See Bjurulf & Elgström, *supra* note 288, at 254. Both the Commission and the majority of members on the Council wished to protect the secrecy of their deliberations. *Id.* at 253-54.

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

³¹⁴ TCE art. II-102 ("Right of access to documents").

³¹⁵ *Id.* at art. III-399.

³¹⁶ *Id.* at art. III-399.1. See, e.g., European Parliament and Council Regulation 1641/2003, 2003 O.J. (L 245) 1 (amending Council Regulation (EEC) 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network; Rules of Public Access to Documents); European Investment Bank, Rules of Public Access to Documents, 2002 O.J. (C 292) 10. For a partial list of access rules of different European bodies, see Steve Peers, *From Maastricht to Laeken: The Political Agenda of Openness and Transparency, in* the European Union in Increasing Transparency in the European Union? 7, 15 (Veerle Deckmyn ed., 2002).

³¹⁷ TCE art. I-50.2. In the case of the European Parliament, both plenary meetings and committee meetings are open to the public. In the case of the Council, only the final meeting of the Council, rubberstamping agreements negotiated previously by low-level, national representatives, are made public. 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." *Id.* at art. I-50.2

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

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.”³¹⁹ 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 through 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.³²⁰ 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.³²¹ Of course, application of the law’s subject-specific exceptions might undermine the

³¹⁸ *Id.* at art. III-399.2.

³¹⁹ See Public Access to Documents Law, *supra* note 233, at art. 4.3.

³²⁰ See Mäenpää, *supra* note 213, 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).

³²¹ See Public Access to Documents Law, *supra* note 233, at art. 4.3; Council Decision 2004/338/EC, 2004 O.J. (L 106), Annex II, art. 11 (adopting the Council’s Rules of Procedure).

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.³²² The right of access to documents also covers the European Parliament and applies to draft reports and agendas of parliamentary committee meetings.³²³ 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.³²⁴ 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 by 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, is the reach of European access-to-documents legislation: it 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

³²² See Comitology Decision, *supra* note 232, at art. 7.

³²³ See European Parliament: Rules of Procedure, 1999 O.J. (L 202) 1, r.97; Jacobs, *Institutional Dynamics*, *supra* note 249, 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, *supra* note 249.

³²⁴ Council Decision 2004/338/EC, *supra* note 320, at art. 8; Parliament's Rules of Procedure, *supra* note 323, at r. 96.

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 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 follow the same basic pattern but they also display certain distinctive features.³²⁵ 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, there are carefully defined exceptions to executive discretion; in areas such as the environment and land-use planning, officials are required 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.

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 American equivalent is a rule or regulation. The American reader should bear in mind that the difference that exists in American public law between lawmaking and rulemaking 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).

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.³²⁶ 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.³²⁷ They are not required under their constitutions or laws to publicize their drafts and consult the public.³²⁸

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.³²⁹ 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.³³⁰ 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.³³¹

Now consider implementing regulations. In most of the Member States, the government discretion and exceptions to that discretion in the domain of lawmaking

³²⁶ See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 117-27 (1999).

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

³²⁸ The British government sometimes engages in consultation, but as purely discretionary 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 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 with administrators concerning when and how to consult.

³²⁹ See Yves Mény, *Government and Politics in Western Europe* 143-46 (2d ed. 1993).

³³⁰ See Victor A. Pestoff, *Globalization, Business Interest Associations and Swedish Exceptionalism in the 21st Century?*, Paper presented at University of North Carolina-Chapel Hill on Mar. 26, 2001, at 1-6 (Feb. 12, 2001), available at <http://www.unc.edu/depts/europe/papers/010319pestoff.pdf>.

³³¹ Mény, *supra* note 329, at 145 (discussing French Conseil Economique et Social).

also characterize implementing regulations.³³² 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 certain types 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.³³³ Government building projects and public investment decisions that have the potential of hurting the environment are another example.³³⁴ 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 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

³³² See generally Edward C. Page, *Governing by Numbers* 124-73 (2001) (describing procedures for drafting and promulgating statutory instruments in the UK); Adam Tomkins, *Delegated Legislation in the English Constitution*, in *Delegated Legislation and the Role of Committees in the EC*, 101, 109-14 (Mads Andenas & Alexander Türk eds., 2000); Etienne Picard, *Delegation of Legislative Power in French Public Law*, in *Delegated Legislation*, supra at 67, 84-93 (reviewing rulemaking powers in France); Alexander Türk, *Delegated Legislation in German Constitutional Law*, in *Delegated Legislation*, supra at 127, 162-81 (describing parliamentary and private sector involvement in German rulemaking). The obvious counterpoint is American notice and comment rulemaking procedure under the Administrative Procedure Act, 5 U.S.C. § 553.

³³³ For Italy, see Aldo Sandulli, *Il Procedimento*, in *2 Diritto Amministrativo Generale* 927 (Sabino Cassese et al. eds., 2000). For France, see Jean-Marie Pontier, *La démocratie de proximité: les citoyens, les élus locaux et les décisions locales*, 55 *La Revue Administrative* 160 (2002). For Germany and the UK, see Theodora Th. Ziamou, *Rulemaking, Participation and the Limits of Public Law in the US and Europe* 141-161 (2001).

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. See Council Directive 85/337/EEC, 1985 O.J. (L 175) 40 (on the assessment of the effects of certain public and private projects on the environment).

³³⁵ See generally Ziamou, supra note 333, at 15-21 (describing distinction between these two types of administrative rules in Germany, Greece, the UK, and the U.S.). The American equivalent would be the rules exempted from notice and comment requirements under 5 U.S.C. § 553(b)(3)(A).

was modeled after their own corporatist traditions.³³⁶ The ESC was constituted of producer interests—employers, workers, farmers, tradesmen, and professionals. 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 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; these organizations were generally pan-European, not national, federations; their advice was sought earlier in the policymaking process, as the Commission was drafting proposals and not after proposals had been completed; their advice was sought on both laws and implementing regulations, not only laws; and, finally, enabling laws establishing committees generally left consultation to the Commission's discretion.

The practice of public participation in Commission decisionmaking was quite different from the closed nature of the procedure in the law on the books. The Commission would often solicit input from firms and associations not represented on advisory bodies 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 Green and White Papers, the Commission would outline a number of issues on which it was contemplating drafting legislation and it would 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. And 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.³³⁸ In consultations, the Commission describes the issues open for discussion, invites the public to submit written

³³⁶ See TEC 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."

³³⁷ See, e.g., Commission Decision 73/306/EEC, 1973 O.J. (L 283) 18 (relating to the setting up of a Consumers' Consultative Committee); Commission Decision 81/195/EEC, 1981 O.J. (L 88) 42 (setting up, within the Advisory Committee on Seeds, a Special Section on the approximation of laws); Commission Decision 2004/391/EC, 2004 O.J. (L 120) 50 (on the advisory groups dealing with matters covered by the common agricultural policy).

³³⁸ European Commission, Communication from the Commission: Towards a reinforced culture of consultation and dialogue — General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final (Dec. 2002) [hereinafter Communication on Consultation].

comments, and publishes the civil society responses.³³⁹ This process is to take place largely through the Commission's website. The Commission then summarizes the comments and explains how its final proposal was or was not altered by civil society's comments:

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.³⁴⁰

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, they will be involved in the implementation of the policy, or their organizational aims are related to the proposal.³⁴¹

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.³⁴² 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.³⁴³

Finally, 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.³⁴⁴ On the other hand, the 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 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

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.

³⁴⁵ Id. at 11.

instruments. A few examples will illustrate 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 The Commission requested comments on a Green Paper addressing 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.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, in the past, was at best a sporadic exercise, limited to mammoth policy initiatives, is today 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 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 from the outside. A closer examination of the historical background, however, demonstrates that, starting in 1999, consultation was in the Commission's interest.

³⁴⁶ See European Commission, Consultation on the New Customs Code, *available at* http://europa.eu.int/comm/taxation_customs/customs/consultations/customs_code_en.htm.

³⁴⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: White Paper on services of general interest, COM (2004) 374 final (May 2004).

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.

³⁴⁹ European Commission, General Report on the Activities of the European Union 22, para. 17 (2004).

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 program. 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, the "Openness and professional ethics" unit manages a database containing a list of Commission advisory bodies with civil society representation 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.

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 the Parliament obtain co-equal legislative powers, but it was also given a variety of legal means 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 accountability powers.³⁵² In January 1999, it voted to set up a Committee of Wisemen to investigate the Commission's financial and employment practices.³⁵³ The report issued two months later strongly criticized 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. 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 the European public. 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

³⁵¹ Among these new accountability tools was an improved appointments power. Before Maastricht, the Commission was appointed exclusively through bargaining among the 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 Craig & Búrca, *EU Law*, supra note 3.

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. TEC art. 193.

³⁵⁴ See TEC art. 201.

³⁵⁵ See European Commission, *Commission Discussion Paper, The Commission and Non-Governmental Organisations: Building a Stronger Partnership*, COM (2000) 11 final (Jan. 2000); European Commission, *Reforming the Commission: A White Paper*, COM (2000) 200 final (March 2000) (especially Action 4 developing a set of recommendations for best practice in consultation); European Commission, *European Governance: Preparatory Work for the White Paper* (2002); *Governance in the European Union* (Olivier De Schutter et al. eds., 2001) (results of academic seminars organized by the Commission in preparation for the White Paper). In total, there were twelve different internal working groups, each of which was responsible for a distinct set of good government issues. Within Work Area No. 2 on "Handling the process of producing and implementing Community rules" there was a Working Group on "Consultation and participation of civil society." European Commission, supra, at 63.

The result was the Commission White Paper on European Governance, published in 2001.³⁵⁶ The principal innovation of the White Paper was the civil society concept.³⁵⁷ Through the "involvement" and "consultation" of civil society, the Commission's policies would be technically better and more democratic. The Communication on Consultation setting down the specifics of consultation procedure followed one year later.

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

Global politics of the last decade have been marked by the emergence of widespread skepticism of international economic organizations. Multilateral organizations such as the World Trade Organization, the World Bank, and the International Monetary Fund have come under fire from a wide variety of social and environmental justice non-governmental organizations (NGOs). To some extent, international organizations are scapegoats for the effects of a market-driven process of globalization. Nonetheless, they and their policies have been criticized for contributing to the inequalities and loss of local control associated with globalization. In the skeptics' view, international economic organizations have not kept their promise of development and prosperity. Rather, they have facilitated global capital's exploitation of the Third World, labor, and the environment.

How were international economic organizations to be salvaged? According to the critics, one significant improvement would be NGO participation in the decisionmaking of international organizations. 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 is tied to the reconceptualization of NGOs as civil society. NGOs have long been part of the international system.³⁵⁸ In the International Labor Organization, which dates back to 1919, representatives of workers and employers sit and vote alongside government representatives on its decisionmaking bodies.³⁵⁹ The founders of the United Nations created a permanent,

³⁵⁶ See European Commission, White Paper on European Governance, COM (2001) 428 final, July 25, 2001 [hereinafter White Paper on Governance].

³⁵⁷ The White Paper on Governance 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. However, both the technocratic characterization of the Commission and transparency were old modes of legitimizing 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 (Iain L. Fraser trans., 2001) (discussing neo-functionalist roots of technocracy argument in the White Paper).

³⁵⁸ See generally Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, 18 Mich. J. Int'l L. 183 (1997) (analyzing the history of NGO participation in international law).

³⁵⁹ The ILO is composed of an annual General Conference, a Governing Body which meets three times a year, and a Secretariat. Representatives of workers and employers sit on both the General

institutional role for non-governmental actors by stipulating that government representatives on the Economic and Social Council should consult NGOs.³⁶⁰ In the mid-1990s, however, these old 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 organization."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—generally defined as social and environmental justice NGOs and not 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 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 This transformation in practice and rhetoric 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

Conference and the Governing Body. See Steve Charnovitz, *The International Labour Organization in its Second Century*, 4 Max Planck Y.B. U.N. L. 147, 171 (2000).

³⁶⁰ See U.N. 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 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).

³⁶¹ See Peter Willetts, *The Rules of the Game: The United Nations and Civil Society*, in *Whose World is it Anyway?* 247, 258 (John W. Foster & Anita Anand eds., 1999). A search of the United Nations Bibliographic Information System (the bibliography of the UN's official library) confirms the impression widely held among academics and policymakers. A search for the key word "civil society" for the years 1984 through 2003 reveals the growing popularity of the term. From one document in 1984, the yearly hits gradually increase to 29 in 1997 and then explode, with 80 in 1998, 101 in 1999, and 261 in 2003.

³⁶² See generally John Keane, *Global Civil Society?* 169, 202 (2003) (putting forward pluralism and solidarity arguments for international civil society); Michael Edwards, *Civil Society* 42-43 (2004) (setting forth republican and communitarian justifications for international civil society).

³⁶³ See, e.g., Richard Falk, *The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions*, in *Cosmopolitan Democracy: An Agenda for a New World Order* 163, 170-71 (Daniele Archibugi & David Held eds., 1995); Mary Kaldor, 'Civilizing' Globalization? The Implication of the 'Battle in Seattle', 29 *Millennium J. Int'l Stud.* 105 (2000); Keane, *supra* note 362, at 169, 202; Willetts, *supra* note 361, at 260.

³⁶⁴ United Nations Conference on Trade and Development, Report of the Trade and Development Board on its fifteenth executive session, TD/B/EX (15)/9, Annex II (Aug. 11, 1997), available at <http://www.unctad.org/en/docs/tb15d9.en.pdf>.

The Commission was influenced by this reconceptualization of organizations outside 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 deal routinely with intermediate associations of farmers, workers, firms, and consumers. In other words, Commission departments with regular contacts with other international organizations were far more likely than Commission departments responsible for internal matters to adopt the language of civil society.³⁶⁵ And it was their discourse that was subsequently taken on by the Commission as a whole. In 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 (international trade) most clearly demonstrates the influence of the civil society concept. In October 1998, negotiations on the Multilateral Agreement on Investment collapsed because of opposition from anti-globalization organizations.³⁶⁶ 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 1998.³⁶⁷ At these meetings, issues related to the upcoming Seattle WTO Ministerial were discussed (transparency, development, the environment, investments, intellectual property, goods, and trade). The European delegation to Seattle included representatives of labor, business, the environment, farmers, and the development community. 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

³⁶⁵ DG Employment first engaged in a "social dialogue" with labor and management organizations pursuant to the mandate contained in the Maastricht Treaty arts. 137-39. Then, starting with the Social Policy Forum in May 1996, DG Employment initiated a "civil dialogue" with non-profit organizations and voluntary associations. See Stijn Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests*, 9 *Eur. L.J.* 473, 475-78 (2003) [hereinafter Smismans, *Civil Society*] (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 European Foundation for the Improvement of Living and Working Conditions and the European Commission's Directorate-General for Employment, Industrial Relations and Social Affairs, *Summary Report of the European Social Policy Forum 49* (1998) (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, the experience of the other two Directorate-Generals narrated in the text demonstrates that one important strand in the Commission's proceduralization of policymaking did draw upon developments in the international realm.

³⁶⁶ See Mikel Muguruza, *Civil Society and Trade Diplomacy in the "Global Age"* (Sept. 2002), available at http://trade-info.cec.eu.int/civil_soc/Civil_society_%20and_Trade_Policy_in_the_EU.pdf (recounting this history).

³⁶⁷ E-mail from Eva Kaluzynksa, DG Trade, Civil Society Dialogue, to Francesca Bignami, Associate Professor, Duke University School of Law (June 17, 2004) (stating that private associations were called "civil society organizations" from the beginning of the dialogue).

“Trade Policy Dialogue with EU Civil Society” and now as the “Civil Society Dialogue” —includes periodic public meetings on trade issues and 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.³⁶⁸ 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 implementation, not the making, of development policy.³⁶⁹ By the mid-1990s, the Commission's foreign aid departments had dubbed non-governmental organizations "civil society."³⁷⁰

c. Supranational interest: The interest of the Commission in reclaiming political standing

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.³⁷¹ 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 understand fully 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

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. Since 1976, the Commission has co-financed projects proposed by NGOs (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, to Francesca Bignami, Associate Professor, Duke University School of Law (Aug. 4, 2004) (on file with author); see also Agnès Philippart, *The Relations between NGOs and the European Commission 1* (Oct. 2002) (executive summary of unpublished thesis) (on file with author) (identifying the Lome Convention of 1975 as the first instance of Commission-NGO partnership).

³⁶⁹ This characteristic of civil society relations, however, might be changing with recent Commission efforts to secure more NGO participation in the initial stages of development policy. See Interview with Peter Bangma, Civil Society and NGO Liaison, DG Development, European Commission (June 17, 2004); European Commission, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Participation of Non-State Actors in EC Development Policy*, COM (02) 598 final (Nov. 2002).

³⁷⁰ See E-mail from France Marion, *supra* note 368 (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 documents this shift: the former refers to "non-governmental organizations," the latter to "non-state actors," defined as the private sector, economic and social partners, and civil society (i.e., what formerly would have been called NGOs). See Agreement Amending the Fourth ACP-EC Convention of Lomé, Nov. 4, 1995, art. 38 (signed in Mauritius); ACP-EU Partnership Agreement, Jun. 23, 2000, arts. 6, 32 (signed in Cotonou), available at http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm.

³⁷¹ In a similar vein, Stijn Smismans argues persuasively that the Commission used the discourse on civil society to improve its own democratic credentials and thus to respond to the legitimacy crisis that it faced. See Smismans, *Civil Society*, *supra* note 365, at 484. However, Smismans does not focus on the international element of the concept.

has been analyzed by political theorists Quentin Skinner, James Tully, and Charles Taylor, drawing on J.L. Austin's concept of "speech act."³⁷² A statement made in the context of the struggle to define, exercise, extend, or modify political authority should be understood as action.³⁷³ 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 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.³⁷⁴ 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 mutilation, a radical innovation given the previous use of the word "circumcision" to describe the very same practice.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 for itself in the institutional balance of powers? First, what were previously understood as "special interest groups,"³⁷⁶ "voluntary associations,"³⁷⁷ the "social partners,"³⁷⁸ and "lobbies"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

³⁷² See James Tully, *The Pen is a Mighty Sword: Quentin Skinner's Analysis of Politics*, in *Meaning and Context: Quentin Skinner and His Critics* 7, 10 (James Tully ed., 1988).

³⁷³ This is related to Wittgenstein's theory of word as "deed."

³⁷⁴ See Quentin Skinner, *Language and Political Change*, in *Political Innovation and Conceptual Change* 6, 14 (Terrence Ball et al. eds., 1989) [hereinafter Skinner, *Language*].

³⁷⁵ Finnemore & Sikkink, *supra* note 14, at 908.

³⁷⁶ See, e.g., Commission Communication on an Open and Structured Dialogue Between the Commission and Special Interest Groups, 1993 O.J. (C 63) 2.

³⁷⁷ See European Commission, *Communication from the Commission on Promoting the Role of Voluntary Organisations and Foundations in Europe*, COM (97) 241 final (1997).

³⁷⁸ See TEC arts. 137-39.

³⁷⁹ See European Parliament, *Rules of Procedure*, *supra* note 323, at Annex IX, 97 ("Provisions governing the application of Rule 9(2)—Lobbying in Parliament").

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.

So '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.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.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. German citizens might deny a role in European governance for the World Federation of Advertisers because they consider it an illegitimate lobby; British citizens might object to the participation of the European Trade Union Conference because they believe it to represent an antiquated social force; French citizens might oppose the involvement of Caritas, the Vatican's charitable organization, because they consider that such involvement would mix religion with public life. No citizen, however, would say that "civil society" should be excluded.

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:

³⁸⁰ Communication on Consultation, *supra* note 338, at 6. The White Paper contains essentially the same definition. See White Paper on Governance, *supra* note 356, at 14 n.9.

³⁸¹ For the history of the concept, see Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power* (Peter Kennealy trans., 1989); John Ehrenberg, *Civil Society: The Critical History of an Idea* (1999); John Keane, *Despotism and Democracy, in Civil Society and the State: New European Perspectives* 35 (John Keane ed., 1988).

³⁸² White Paper on Governance, *supra* note 356, at 14.

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 repeats 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]nvolving 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

And hence, to finish the thought, the Commission should retain its position at the epicenter of European integration:

³⁸³ Id. at 14-15.

³⁸⁴ Communication on Consultation, *supra* note 338, at 5.

³⁸⁵ White Paper on Governance, *supra* note 356, at 14.

³⁸⁶ Id. at 15.

³⁸⁷ Id. at 16.

³⁸⁸ See *supra* text accompanying note 338-50.

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. Speech Act Theory, *in* The Cambridge Dictionary of Philosophy 869 (Robert Audi ed., 2d ed. 1999).

³⁹⁰ See White Paper on Governance, *supra* note 356, at 33-34.

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.³⁹¹

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.³⁹² In seeking to defend the Community method and reclaim authority, the Commission had to work within certain parameters of democratic discourse. The Commission could not say "obey me because I represent divine authority on earth." Nor could it say "obey me because I represent a European nation bound together by a common blood and a common language." Rather, it had to say, "obey me because I am democratic." 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 voluntary associations and 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 precursors to the Constitutional Treaty was the Charter of Fundamental Rights, approved by the

³⁹¹ *Id.* at 34.

³⁹² See Skinner, *Language*, *supra* note 374, 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, expressed by the word. The sense and reference of words are routinely manipulated by social actors so that they 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."

European Council at Nice in December 2000.³⁹³ The process that culminated in the Charter of Fundamental Rights was begun under the German presidency of the European Council in spring 1999. The Charter was not intended to introduce new rights. Rather, it was conceived as a means of improving the legitimacy of Europe by enhancing the visibility of rights already enjoyed by European citizens in their relations with European government.³⁹⁴

In line with this purpose, the European Council designed an inclusive and open process. When drafting began in fall of 1999, the participants include 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; representatives of the Court of Justice and Council of Europe³⁹⁵ were given observer status.³⁹⁶ 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, the European Council did not carve out a role for voluntary associations.³⁹⁷ At that historical moment, "civil society" had not yet acquired the salience that it now enjoys in European politics. The Convention, however, allowed NGOs to take part in the deliberative process: NGO representatives spoke at a number of public hearings and were allowed to submit their proposals and critiques on a Convention website.³⁹⁸ The Commission, consistent with the strategic decision in the White Paper to govern with civil society, strongly supported including civil society organizations.

The earlier experience with the Charter of Fundamental Rights led to a formal role for civil society in the Constitutional Convention. And it was because of the suggestion of civil society representatives 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,

³⁹³ 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.

³⁹⁴ See Gráinne de Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 *Eur. L. Rev.* 126, 128-32 (2001) [hereinafter Búrca, *Drafting*].

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 Búrca, *Drafting*, supra note 394, 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.

³⁹⁸ The European Charter of Fundamental Rights, available at <http://perso.wanadoo.fr/ciemi.org/p17en.html> (n.d.) (discussing first public hearing in December 1999); Antonio Vittorino, Member of the European Commission and representative of the European Commission to the Convention, *Speech Delivered in Lisbon, Portugal*, at 5 (May 13, 2000), available at http://europa.eu.int/comm/justice_home/unit/charte/en/speeches.html (discussing hearing of Apr. 26, 1999 attended by more than 70 NGOs).

the European Parliament, and the Commission.³⁹⁹ 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.⁴⁰⁰ The function of the Forum was purely advisory. The Praesidium, led by a Chairman (Giscard d'Estaing), two Vice-Chairmen (Giuliano d'Amato and Jean Luc Dehaene) and composed of nine members drawn from the Convention, set the agenda and drafted proposals for the consideration of the Convention and the Forum.

The early months were devoted to soliciting views from members of the Convention, what d'Estaing called the "listening stage."⁴⁰¹ In this context, a meeting of civil society organizations was held in Brussels on June 24-25, 2002.⁴⁰² 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—including civil society participation.⁴⁰³ A skeleton outline of the Constitutional Treaty was then circulated and posted on the Convention's website in the fall of 2002.⁴⁰⁴ 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."⁴⁰⁵ 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 a duty on the part of the European institutions to consult civil society in policy planning and decisionmaking.⁴⁰⁶ 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.⁴⁰⁷ Thus, the provision in the Constitutional Treaty was tied to

³⁹⁹ See Organisation of the European Convention, at <http://european-convention.eu.int/organisation.asp?lang=EN>. See generally Peter Norman, *The Accidental Constitution: The Story of the European Convention 19-48* (2003) [hereinafter Norman, *Accidental Constitution*] (describing the structure of the Convention).

⁴⁰⁰ See Forum of the European Convention, at http://europa.eu.int/futurum/forum_convention/index_en.htm.

⁴⁰¹ See Norman, *The Accidental Constitution*, supra note 399, at 48.

⁴⁰² *Id.* at 50.

⁴⁰³ Alain Lamassoure, *Histoire Secrète de la Convention Européenne* 122 (2004).

⁴⁰⁴ *Id.* at 71.

⁴⁰⁵ *Id.* at 131.

⁴⁰⁶ See, e.g., Active Citizenship Network, "Horizontal" Subsidiarity, Democratic Governance and Referendum, available at http://europa.eu.int/futurum/forum_convention/documents/contrib/other/0100_r_en.pdf (last visited Mar. 9, 2005); BirdLife International European Community Office et al., *Concerning: Participatory Democracies, Suggestions for Amendments to Article 34 and 36* (Apr. 9, 2003), available at http://europa.eu.int/futurum/forum_convention/documents/contrib/other/0058_c9_en.pdf.

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.

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. In other words, 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 dedicated to relations between European institutions and civil society says:

Article I-47: The principle of participatory democracy

1. The Union 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 Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
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

Unlike the provisions of the Constitutional Treaty on the right to good administration and the right to transparency, which largely codify 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; the Constitutional Treaty transforms these duties 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

⁴⁰⁸ See Note from Praesidium to Convention, CONV 650/03, at 8 (Apr. 2, 2003), *available at* <http://register.consilium.eu.int/pdf/en/03/cv00/cv00650en03.pdf>.

are bound to respect and uphold in their activities but that is not judicially enforceable?⁴⁰⁹ What types of Commission measures are subject to the duty to consult—only European laws or also implementing regulations? If implementing regulations, all of them or only the most significant ones? Finally, how will the right of civil society participation be construed in the different institutional settings of adjudication by the European Courts, intergovernmental bargaining in the Council of Ministers and the 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 early drafts of legislation. Yet the civil society ideal in the international realm was nebulous. 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 constitute governing with civil society. But this latitude was illusory. Like the two previous episodes of rights transformation, national public law traditions shaped European change: 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.⁴¹⁰ Moreover, internationally, the term covers an extremely fluid set of private associations. And an association qualifies 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 the European Union, as in international organizations, civil society means NGOs.⁴¹¹ But it also embraces producer groups such as farmers, employer associations, sectoral industry groups, labor unions, and

⁴⁰⁹ See *Slooman Neptun Schiffarts AG v. Seebetriebsrat Bodo Ziesemer*, Cases C-72/91 & 73/91, 1993 E.C.R. I-887, at I-934 – I-936 (discussing distinction between programmatic and other types of provisions of the treaties).

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 World Bank Group, *Defining Civil Society*, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK%3A20101499~menuPK%3A244752~pagePK%3A220503~piPK%3A220476~theSitePK%3A228717,00.html> (last visited on Mar. 9, 2005). Associations based on market-related activities are expressly excluded from the definition.

⁴¹¹ See generally Stijn Smismans, *Law, Legitimacy, and European Governance: Functional Participation in Social Regulation 42-52* (2004) (comparing American and European understandings of civil society).

professional associations. Furthermore, civil society in Commission documents and the Constitutional Treaty signifies a fixed reality of organizations that represent 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 representation.⁴¹² The Commission borrowed its definition of civil society from the corporatist European institution par excellence, the Economic and Social Committee. That definition, unsurprisingly, reflected the Economic and Social Committee's own model of interest representation.⁴¹³ Similarly, the new, central database of Commission organizations with civil society representation is a compilation of previously existing advisory bodies, many of which can trace their roots to the 1960s.⁴¹⁴ 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, organizations with a broader set of concerns than the old peak producer associations. Yet, still, these new associational actors must fit a distinctly European mold. Before the Commission will take their claims seriously, private associations must demonstrate a long-standing role in national politics or they must show that they reach out to a significant number of Europeans through their membership activities.

The second major difference between the European right to civil society participation and the international right is the breadth of organizational change that has occurred to accommodate civil society. The consultation procedure adopted by the Commission is more comprehensive than the institutional practices of any other major international economic organization. Among these, the World Bank has gone the furthest. But even the World Bank's procedures do not match those of the Commission: they do not stretch across the board to all policy areas, they do not entail the same, weighty sequence of publication, public comments, and official explanation, and they are not legally binding.⁴¹⁵ 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

⁴¹² See *supra* text accompanying note 336-37, 427.

⁴¹³ See White Paper on Governance, *supra* note 356, at 14 n.9 (quoting from Opinion of the Economic and Social Committee on "[t]he role and contribution of civil society organisations in the building of Europe," 1999 O.J. (C329) 39). The Nice Treaty of 2000 subsequently confirmed this definition with an amendment recognizing the organizations represented on the ESC as 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." TEC art. 257.

⁴¹⁴ See *supra* note 350.

⁴¹⁵ See World Bank Group, *The World Bank and Civil Society*, *a t* <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK%3A20092185~menuPK%3A220422~pagePK%3A220503~piPK%3A220476~theSitePK%3A228717,00.html> (describing World Bank civil society policies) (last visited on Mar. 9, 2005).

previous episodes of rights creation, the Commission did not simply borrow constitutional models; rather it constructed a rights scheme that was more extensive than in the place of origin.

IV. THE 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 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 the underlying 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 their hard-fought political deals contained in the Maastricht Treaty; of the Parliament in improving its legislative powers; and of the Commission in remaining the engine of European integration.

In Part II, I presented three theories of European rights and constitutional change and I derived specific hypotheses for procedural rights before the Commission. Legal constitutionalism, realism, and neo-functionalism generate predictions on a number of dimensions of rights: the bundle of rights that individuals enjoy, the timing of rights creation, and the European institution responsible for advocating rights. 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, as I argue below, fails to account for critical aspects of European rights?

A. Legal Constitutionalism

Legal constitutionalists begin from 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 case law 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 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 in which 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. But their claims were 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. Rather than challenge 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 for the documents based on a general principle of good administration—a principle evidenced by access-to-documents legislation existing in a number of Member States. Tradax also claimed that the right to a hearing, which afforded parties the right to documents in competition proceedings, should also

⁴¹⁶ Tradax Graanhandel BV v. Commission, Case 64/82, 1984 E.C.R. 1359.

apply to a business affected by an implementing regulation.⁴¹⁷ Neither the Advocate General nor the Court was persuaded. The reasoning of the Advocate General illustrates the 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.⁴¹⁸

A Dutch litigant, subscribing to values and ideals formed through experience in the Dutch system of open government, was unable to persuade the Court to adopt an access-to-documents rule.⁴¹⁹ 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.⁴²⁰

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.⁴²¹ A requirement that the Commission respond to the objections of interested parties in the statement of reasons supporting a law or regulation 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

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. *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 is *Bureau Européen des Unions de Consommateurs*, 1991 E.C.R. at I-5740, I-5741.

⁴²⁰ See *Rothmans*, 1999 E.C.R. at II-2463; Case T-111/00, *British American Tobacco International*, 2001 E.C.R. at II-2997.

⁴²¹ In the case of implementing regulations, the deciding institution is the Commission. In the case of laws, the deciding institutions are the Parliament and Council acting on a Commission proposal.

obliged to engage in an exchange of views with the European public before proposing laws and adopting regulations.⁴²²

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 to engage in an exchange of views with civil society. 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, 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.⁴²³ 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. 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.⁴²⁴ 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

⁴²² See e.g. *Firma G. Schwarze v. Einfuhr-und Vorratsstelle f_r Getreid und Futtermittel*, Case 16/65, 1965 E.C.R. 1081 (challenge to agriculture implementing regulation based on duty to give reasons); *P. Moskof AE v. Ethnikos Organismos Kapnou*, Case C-244/95, 1997 E.C.R. I-6441 (challenge to agriculture implementing regulation based on duty to give reasons); *Commission v. Jégo Quéré SA*, Case C-263/02 P, 2002 O.J. (C 233) 14 (challenge to fishing implementation regulation based on Commission's duty to take into consideration different interests under TEC 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 requires the Commission to respond to specific concerns raised in the original complaint. This it does based on 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." See Nehl, *supra* note 31, at 160-63 (discussing *Commission v. Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) & Brink's France SARL*, Case C-367/95 P, 1998 E.C.R. I-1719 (Sytraval II)). However, this use of the duty to give reasons to require the Commission to engage in a consultation-like procedure 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 659/1999, 1999 O.J. (L 83) 1, 7 (laying down detailed rules for the application of art. 93 of the EC Treaty).

⁴²³ See generally Daniel Steel, *Social Mechanisms and Causal Inference*, 34 *Phil. Soc. Sci.* 55, 57-59 (defining social mechanism).

⁴²⁴ See generally Liesbet Hooghe, *Several Roads Lead to International Norms: But Few Via International Socialization: A Case Study of the European Commission*, 59 *Int'l Org.* 8 (2005) (describing theories of action based on norms and theories of action based on utility maximization and discussing modes of empirically distinguishing between the two).

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 for co-opting 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.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 should only want to protect their citizens from arbitrary government action once they perceive 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 in person—was

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 Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 137, 374 (1998).

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

However, by the time the Court of Justice recognized a general right to a hearing in 1974, the realist model loses explanatory power. The right was drawn not 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 Community membership, 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 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 by supranational institutions (the European Council after the Maastricht Treaty had been signed and 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

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 rulemaking and lawmaking through unanimity voting on comitology committees and the Council. In the isolated areas where such checks did not exist—in the nooks and crannies of the management of agricultural prices and customs duties—Member States might have believed that decisions were simply too technical to be able to arbitrarily harm the economic well-being of their citizens.

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 their public law of transparency to European institutions. However, once sovereignty was transferred and momentum for European integration got underway, supranational institutions became the primary agents of rights innovation. Here I use the term "supranational institution" loosely: not only institutions that are conventionally defined as such, namely the Commission, the Court of Justice, and the European Parliament, but also the Member States on the European Council after a bargain had been reached in the Maastricht Treaty. The evidence does not shed light on why supranational institutions took the lead: did they anticipate a preference among Member States 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.⁴²⁸

C. Neo-Functionalism

Neo-functional 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-functional 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, complement the rational choice ones: all point in the direction of an ever-expanding bag of procedural rights.

⁴²⁸ 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.

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 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 them with new legal theories; and 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.⁴²⁹ The history of litigation before the European Courts contains many instances in which plaintiffs advanced theories that would give them access to documents or an exchange of views with the Commission 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.

In addition to 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 U.S. 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 their final rules.⁴³⁰ 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 area of individual competition, anti-dumping, and customs decisions, the Commission's statement of reasons is far from the exhaustive rebuttal of all the parties' objections required under American law.⁴³¹

The difference between the European and American practices lies in the origins of the duty to give reasons.⁴³² That principle was imposed on European institutions in the Treaty of Rome of 1957 to give effect to the rule of law ideal, common to the founding Member States, that all government acts must be based on law.⁴³³ A

⁴²⁹ See *supra* text accompanying note 41-45 (Shapiro), 31 (Nehl).

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 42.

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, transatlantic learning by negative example. See Shapiro, *Institutionalization*, *supra* note 41, 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

European institution promulgating an act had to give the reasons for it: the legal provision on which it was based and the grounds for believing that the government act would further the purposes of that provision.⁴³⁴ 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.⁴³⁵ In the *droit administratif* systems of the original Member States, if the parties believed that government administration had not taken into account an important consideration and hence had acted contrary to the dictates of the enabling law, they could go to court.⁴³⁶ When the common law right to a hearing became European law, it had no impact on the duty to give reasons. The common law right did not provide for a quasi-judicial opinion at the end of administrative proceedings; indeed, it had nothing to say about the form of final administrative decisions.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 to administrative proceedings.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 that the administration acted according to law or that they must go to court to vindicate their right to a government of laws and not of men.⁴³⁹

administration as well as the constitutional principle of effective judicial protection against the executive. Only if a party knows the reasons for a decision can she discern whether her rights have been infringed by the executive. See Ress, *supra* note 89, at 4.4.

⁴³⁴ See *Commission v. Council*, Case 45/86, 1987 E.C.R. 1517 (obligation to state legal basis); *Roquette Frères v. Council*, Case 138/79, 1980 E.C.R. 3333 (obligation to refer to any proposals or opinions required under EC Treaty); *Italy v. Commission*, Case 1/69, 1969 E.C.R. 277 (obligation to give "clear and unambiguous" statement of reasons).

⁴³⁵ Articles 5 and 7 (ex Article 4) of the EC Treaty confirm the rule of law interpretation of the duty to give reasons. Article 5 states: "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 states: "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 51-52.

⁴³⁷ See Wade & Forsyth, *supra* note 54, at 516.

⁴³⁸ See, e.g. *Siemens SA v. Commission*, Case C-278/95 P, 1997 E.C.R. I-2507, at I-2535; *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-198/01, at paras. 59-60 (C.F.I May 12, 2004) (not yet reported); *Siemens SA v. Commission*, Case T-459/93, 1995 E.C.R. II-1675, at II-1690, II-1610 ("[the obligation to state reasons] is intended to give an opportunity to all 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 having decisive importance in the context of the decision . . .").

⁴³⁹ The 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 factual evidence because that would breach the right to be heard. See *Thyssen Stahl AG v. Commission*, Case T-141/94, 1999 E.C.R. II-347, at II-556, II-557. By contrast before an American court, as a general rule, government agencies can rely only on the explanations given in the administrative

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 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 United States, 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.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 neo-functionalist framework.⁴⁴¹ When scholars examine the impact of the Court of Justice and the Commission on European policymaking, they overlook sometimes the unusual structure of supranational public power. 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. When compared with national government, European supranational governance incorporates an uncommon vertical dimension and an uncommon horizontal dimension. Vertically, because the enforcement of executive and judicial decisions depends upon the cooperation of national courts, 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 European rulemaking. Therefore, to focus only on the horizontal relationship between the Court of Justice and the Commission is to miss an

process. (Especially in the rulemaking context, however, a court will overlook an agency's failure to respond to a party's objection in an administrative proceeding if the court determines that the agency's failure had no effect on the final rule and hence was not prejudicial. See *Sierra Club v. Costle*, 657 F.2d 298, 360 (1981).)

⁴⁴⁰ See William N. Eskridge et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 267-498 (2002).

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 law in Europe and elsewhere require further research. See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Rights*, 28 *Ga. L. Rev.* 633, 679 (1994); R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 *Int'l Org.* 103 (2004); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in *Legal Culture and the Legal Profession* 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996). 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 law.

important element of supranational judicial and executive power. We cannot explain European procedural rights as caused exclusively by the assertion of judicial power over Commission bureaucrats. Like European adjudication, European lawmaking is shaped by an uncommon vertical element. Many decisions are taken by consensus, not majority vote. For instance, treaties must be ratified by all countries, not a majority of all European citizens or a majority of Member States. Hence the power of the Danish electorate after they rejected the Maastricht Treaty and the salience of the northern right to transparency.

It is also important to take into account the unconventional horizontal configuration of European public power at the center. Neo-functional examinations of rights tend to focus on the Court of Justice or the Court of Justice and the Commission. However, as we have seen, a variety of supranational institutions motivated by competence-maximizing preferences have been influential in shaping rights. This is especially true for the more recent history of rights, 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 landscape that began in the early 1990s requires that scholars cast their explanatory net more broadly to incorporate the full range of supranational organizations.

A related source of complexity is the interaction of 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.⁴⁴² 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 the relations 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.

⁴⁴² See George Tsebelis, *The Power of the European Parliament as a Conditional Agenda Setter*, 88 *Am. Pol. Sci. Rev.* 128, 133 (1994).

The predictions of the theories, compared to the historical experience, 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 theories matched against the historical record

	Legal constitutionalism	Realism	Neo-functionalism	Historical record
Right to a hearing: rights, agents, timing	--; European Courts; gradually after 1962.	Procedural rights of French and German traditions; Member States; 1962.	Rights under American law; European Courts; gradually after 1962.	Originally rights of French and German traditions (1962 and 1963) followed by English right to a hearing (1974); Member States, European Courts, Commission.
Transparency: rights, agents, timing	--; European Courts; gradually after 1957.	Limited or no access to documents as in French and German closed government traditions; Member States; 1986 or before.	--	Originally no access to documents followed by northern right to transparency (1993); Heads of State and European Parliament.
Civil society participation: rights, agents, timing	--; European Courts; gradually after 1957.	Corporatist interest representation in certain policy areas as in France and Germany; Member States; 1986 or before	Procedure similar to American notice and comment for implementing regulations; European Courts; gradually after 1957.	Originally corporatist interest 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.

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."⁴⁴³ According to 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 organizations of political and social life and their written rules, together with the less formal, unwritten norms associated with those organizations.⁴⁴⁴ 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.⁴⁴⁵ When they explain the origins of institutions, such scholars go back to 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 same needs as fulfilled today.

In the European context, contemporary neo-functional scholar have used historical institutionalism to make the case for ascribing autonomous explanatory force to supranational institutions.⁴⁴⁶ Once such organizations and rules were established in the Treaty of Rome, they re-oriented the strategic behavior and identities of European citizens. They 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, to the experience with public law within the nation-state. The European Union emerged out of six, then nine, then

⁴⁴³ 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 Katznelson & Helen V. Milner eds. 2002); Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 1999 *Ann. Rev. Pol. Sci.* 369; Peter Hall & Rosemary C.R. Taylor, *Political Science and the Three Institutionalisms*, 44 *Pol. Stud.* 936 (1996).

⁴⁴⁴ Hall & Taylor, *supra* note 442, at 938.

⁴⁴⁵ See Paul Pierson, *Path Dependence and the Study of Politics*, 94 *Am. Pol. Sci. Rev.* 251 (2000).

⁴⁴⁶ See Alec Stone Sweet, Neil Fligstein & Wayne Sandholtz, *The Institutionalization of European Space*, in Sweet, *Institutionalization*, *supra* note 34, at 1; Paul Pierson, *The Path to European Integration: A Historical-Institutionalist Analysis*, in Sandholtz, *European Integration*, *supra* note 39, at 27, 48.

twelve, and finally fifteen consolidated nation-states.⁴⁴⁷ Each has a highly formalized and deeply entrenched set of organizations and rules that developed 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 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 supranational 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 Danish rejection of the Maastricht Treaty made European Heads of State take seriously the northern understanding of legitimate 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, neofunctionalist 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 supranational 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 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 Union, they must notify the importer of the shortfall and give the importer fourteen days to respond.⁴⁴⁸ Only once that period has expired can the Spanish authorities issue a final administrative order for payment of the

⁴⁴⁷ 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.

⁴⁴⁸ 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.

difference.⁴⁴⁹ (Customs duties go directly to the European purse, not Member State treasuries, and represent about 10 percent of the European Union's annual budget.⁴⁵⁰) 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 European Union. And since customs duties represent a significant source of European 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. In 2003, the Commission sued Spain in the Court of Justice, on the grounds that the delay constitutes a breach of the time-limit for assessment of the duty specified in European customs law.⁴⁵¹ But the Commission has also 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.⁴⁵²

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 rely on changing Spanish law through the enforcement action might very well be driven by the concern that the case is destined to fail in the Court of Justice. The possibility that Spanish courts might hold European customs orders invalid because in violation of their importers' fundamental rights 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 indicates that the latter outcome is more likely.

V. 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

⁴⁴⁹ See Reglamento General de Inspección de los Tributos, Real Decreto 939/1986 of Apr. 25, 1986, BOE, May 14, 1986, no. 117, at 17200, art. 49.

⁴⁵⁰ See European Commission, General Report on the Activities of the European Union 390, table 26 (2003) (9.8 billion out of the 94.6 billion Euro budget was projected to come from customs duties in 2004).

⁴⁵¹ 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.

⁴⁵² See European Commission, Modernized Customs Code, TAXUD/458/2004—REV 4, art. 59(3) (Nov. 11, 2004), available at http://europa.eu.int/comm/taxation_customs/resources/documents/458_rev_en.pdf.

oral hearing, and give a statement of the grounds for the final decision complete enough so that the parties, and eventually the European Courts, can discern whether the Commission has adhered to the 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 common law right to a hearing. When the right to a hearing migrated to Brussels, it acquired a number of novel features. It guaranteed more thorough-going disclosure of the government's case than in the administration of origin, the UK Monopolies and Mergers Commission. Commission proceedings were also largely free of political discretion after the parties had been 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, 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 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.

Finally, 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 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 governance 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. 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 individual rights.

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 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 a calamitous failure of the nation-state: war. European leaders have given up national control over a variety of policy areas in 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; for that reason it might well be more dangerous. But for that reason too, it is less able to resist European citizens' demands for rights.