The Critical Promise of the New History of European Law

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Abstract

The articles in this special issue test a range of historiographical assumptions – for example, about periodisation (most importantly when legal integration 'began') as well as about the definition of the purported object of study (the seemingly 'constitutional' character of the process of European legal integration) – which have been central to the interpretative baseline established by legal scholars and political scientists over the last several decades. Building on a similar critique of that baseline, this article argues that integration can profitably be understood, in legal-historical terms, as a denationalised expression of diffuse and fragmented (that is, 'administrative') governance. The basic elements of that governance emerged in Western Europe over the course of the inter-war and post-war decades, and these elements have continued to shape EU legal history up to the present.

Historians of contemporary Europe, whether legal or otherwise, are necessarily laggards – and thankfully so. The collective understanding of the contemporary world, and more particularly its change over time, inevitably deepens and becomes more nuanced when historians enter the scholarly fray. But that takes time. The discipline of contemporary history depends (not exclusively, of course, but importantly) on access to archival evidence. And during the time when the archives remain closed to historians, scholars from other disciplines understandably dominate the discourse and set the interpretative baseline against which the inevitably late-coming contemporary historians must later react.

In the case of European law, important elements of this interpretative baseline have, over the last several decades, arguably become so widely accepted among political scientists and legal scholars that much of it stands as a kind of conventional wisdom. This is unfortunate, at least from the historian's perspective. The reason is that this baseline now includes a range of implicit historiographical assumptions – for example, about periodisation (that is, when legal integration 'began' in a scholarly significant

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sense),[1] as well as about the definition of the purported object of study (most notably, the seemingly 'constitutional' character of the process of European integration)[2] – which today demand critical historical scrutiny. This, I would suggest, is the promise of the new history of European law, as represented by the several contributions in this special issue. These articles both critically test key elements of this too-well-settled interpretative baseline while also offering considerable fresh insight that can only come from patiently waiting to see what the archival evidence uncovers. They do so by offering a panorama of this new field of research. The articles here cover aspects of the genesis, creation, implementation and reception of the new European legal order, providing an overview of some depth and breadth.

I

In some sense, however, what we may be witnessing with the new history of European legal integration – reactive late-entry, combined with fresh insight – may well be simply a repeat of the earlier, more general entry of historians into the debate over European political integration in the 1980s and 1990s. Consider the impact, for example, of the magisterial work of the late Alan Milward. When Milward turned his attention from the immediate post-war years (the focus of *The Reconstruction of Western Europe, 1945–51*, published in 1984),[3] to the process of European integration specifically (*The European Rescue of the Nation-State*, published in 1992),[4] political science debates over the nature of the integration process had already gone through several cycles. Over the course of the 1950s, for instance, political scientists had witnessed the transformation of the functionalist theory of David Mitrany (articulated in the 1940s as an aspiration for the post-war world)[5] into the neofunctionalist theory of Ernst Haas and Leon Lindberg, whose views would dominate scholarly discussions in 1960s.[6] The subtle distinctions between Mitrany's functionalism and the Haas or Lindberg versions of neofunctionalism need not concern us here. Suffice it to say simply that each viewed the integration process essentially from the perspective of the purportedly neutral imperatives of regulatory problem-solving, continually expanding into new domains according to the functional demands of economic integration – what the neofunctionalists called the 'spill-over' effect. This spill-over

[1] See nn. 38–48 below and accompanying text.
[2] See nn. 21–35 below and accompanying text.
[3] Alan S. Milward, *The Reconstruction of Western Europe 1945–51* (Berkeley and Los Angeles: University of California Press, 1984).
[4] Alan S. Milward, *The European Rescue of the Nation-State* (London: Routledge, 1992).
[5] David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization, 4th edn* (London: National Peace Council, 1946; 1st edn, 1943).
[6] The key neofunctionalist texts in the integration context were Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950–1957* (Notre Dame, Ind.: University of Notre Dame Press, 2004; originally Stanford, CA: Stanford University Press, 1958), and Leon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford, CA: Stanford University Press, 1963).

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would be determined by technocrats armed with economic expertise, operating in relative autonomy from political control by national executives.

Neofunctionalism would in some sense serve as the house ideology of the European Commission in the 1960s under Walter Hallstein, who reportedly saw it as integration's *Sachlogik* – its fundamental underlying substantive logic.[7] However, over the course of that decade, the apparent reassertion of national-executive control engineered by Charles de Gaulle in and around the Luxembourg Compromise of 1966 seemed to defy neofunctionalist predictions. By the early 1970s, in fact, leading neofunctionalists were themselves questioning the predictive quality of their theory.[8] Consequently, through much of the 1970s and into the 1980s, political science analysis of integration seemed to be as adrift as the integration phenomenon itself, at least in its political dimension. The watchword for the era was the infamous 'Eurosclerosis', in which national executives had, according to the conventional wisdom, stymied the progress towards political integration by maintaining a national 'veto' over the Community's legislative process, contrary to the intentions of the treaty drafters.[9]

Integration theorising did not see a real revival until the reinvigoration of integration in the Single European Act (SEA) of 1986. The negotiation of the SEA, as well as the famous '1992 Programme' of legislation that the SEA enabled (notably through the establishment of qualified majority voting among national executives for the internal market), seemed to mark a reassertion of the autonomous role of the European Commission, now energetically led by Jacques Delors. These developments revived debates between neofunctionalism and its principal theoretical rival, intergovernmentalism, the latter most importantly represented in the work of Andrew Moravcsik.[10]

It was against this theoretical background that the work of Alan Milward on European integration emerged in the 1980s and 1990s. And what Milward confronted in the political science scholarship of that period was, in his matchless phrase, 'a piquant but watery soup through which the historian hunts in vain for solid scraps of nutriment'.[11] Focusing on the archival evidence from the 1950s, what Milward

[7] Matthias Schönwald, 'Walter Hallstein and the "Empty Chair" Crisis 1965/66', in Wilfried Loth, ed., *Crises and Compromises: The European Project 1963–1969* (Baden-Baden: Nomos, 2001), 164.

[8] See, for example, Ernst B. Haas, 'The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing', in Leon N. Lindberg and Stuart A. Scheingold, eds, *Regional Integration: Theory and Research* (Cambridge, MA: Harvard University Press, 1971), 3–42.

[9] Contrary to the older, conventional view that the Luxembourg Compromise established a national right of veto, scholars today understand that the crisis merely formalised the emergent practice of consensus politics in the Council. See, for example, Julio Baquero Cruz, 'The Luxembourg Compromise from a Legal Perspective: Constitutional Convention, Legal History, or Political Myth?', in Jean-Marie Palayret, Helen Wallace and Pascaline Winand, eds, *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years On* (Brussels: P.I.E.-Peter Lang, 2006); Jonathan Golub, 'Did the Luxembourg Compromise Have Any Consequences?', ibid.; and N. Piers Ludlow, 'The Eclipse of the Extremes: Demythologising the Luxembourg Compromise', in Wilfried Loth, ed., *Crises and Compromises: The European Project 1963–1969* (Baden-Baden: Nomos; Brussels: Bruylant, 2001), 250–1.

[10] See, for example, Andrew Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community', *International Organization*, 45 (1991), 19–56.

[11] Milward, *European Rescue*, 20.

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found seemed to provide much greater support to the intergovernmentalist side in the political science debate. But what was arguably more important to Milward's contribution was the historical methodology itself: it was through thick description of the results of archival research that Milward hoped to offer a more 'substantial meal', something that could provide the nourishment for better theorising in the future.

Like both the functionalists and neofunctionalists, Milward's findings suggested that the integration phenomenon could not be separated from the emergence of the post-war welfare state. But unlike the functionalists and neofunctionalists, Milward found little evidence for the idea that the integration somehow marked the displacement or deterioration of state power in favour of some new form of denationalised public authority. 'Integration [as pursued in the 1950s] was not the supersession of the nation-state by another form of governance as the nation-state became incapable', Milward wrote; rather, it was:

> the creation of the European nation states themselves for their own purposes, an act of national will. This is not surprising, because in the long run of history there has surely never been a period when national government in Europe has exercised more effective power and more extensive control over its citizens than since the Second World War, nor one in which its ambitions expanded so rapidly. Its laws, officials, policemen, spies, statisticians, revenue collectors, and social workers have penetrated into a far wider range of human activities than they were earlier able or encouraged to do. If the states' executive power is less arbitrarily exercised than in earlier periods, which some would also dispute, it is still exercised remorselessly, frequently, in finer detail and in more directions than it was. This must be reconciled in theory and in history with the surrender of national sovereignty.[12]

It is perhaps unsurprising, then, that when a younger generation of integration historians followed up on Milward's analysis of the 1950s with intensive scrutiny of the evidence for the 1960s, what they found were 'ever more complex administrative structures to ensure that [national governments] were both as well informed as possible about the way in which policy debates within the Community were evolving and could maximise the impact of their desiderata within EEC debates'.[13] The developments in the integration process in the 1960s and beyond reflected the changing 'nature of European politics from foreign affairs to domestic affairs', in which these complex structures 'came to function as a broad and diverse interface between the European administration and the national administrations'.[14] Undoubtedly, 'the early EEC did necessitate some national sacrifices in terms of total national autonomy', but these sacrifices were always counter-balanced by mechanisms designed to 'ensure that the member states retain[ed] enough leverage . . . to direct the overall evolution of the integration process'.[15]

[12] Ibid., 18.

[13] N. Piers Ludlow, 'The European Commission and the Rise of Coreper: A Controlled Experiment', in Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen, eds, *The History of the European Union: Origins of a Trans- and Supranational Polity 1950–72* (New York and London: Routledge, 2009), 195.

[14] Ann-Christina L. Knudsen and Morten Rasmussen, 'A European Political System in the Making 1958–1970: The Relevance of Emerging Committee Structures', *Journal of European Integration History*, 14 (2008), 51–67, 60.

[15] Ludlow, 'The European Commission and the Rise of Coreper', 201.

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These developments reflected the important ties between European governance and legal forms of executive-technocratic (that is, 'administrative') governance in the post-war Western European state.[16] Milward's own work, however, paid little attention to the legal, or indeed even the institutional, dimension of European integration. *The European Rescue of the Nation-State* asserted that the durability of European integration resulted from it 'rest[ing] so firmly on the economic and social foundations of post-war political change'. The analysis looked, however, only to 'changes in the political economy of the post-war state' and not to changes in the legal-institutional mechanisms through which the resulting public policy choices were formulated or implemented.[17] When Milward (this time writing with Vibeke Sørensen) later discussed the 'bundle of policies' that all Western European states pursued in the post-war era – social welfare programmes, agricultural protection, employment policies, industrialisation policies – no mention was made of the broader, arguably transnational constitutional choice to expand executive-technocratic power, subject to expanded judicial review, which would become the very essence of European integration in its legal and institutional dimension.[18] And thus when *The European Rescue of the Nation-State* reached the question of specific institutional arrangements in the Treaty of Rome of 1957 – which amounted to a further delegation of normative power to national executives (only now working in concert at the supranational level) – Milward in fact spent only two pages discussing them.[19]

Milward of course recognised that, in the drafting of the treaties, the intergovernmental negotiators instrumentally recognised the need for 'a central system of law' at the Community level in order to make European integration a functioning reality.[20] But he never explored what this institutional innovation might mean for the overall direction or character of the integration process. It is on this point that, first, lawyers (in the 1980s) and, then, political scientists (in the 1990s) began to fill the analytical void. In this period, they focused in detail on the specifically legal dimension of the integration process, in which the European Court of Justice (ECJ) seemed to play such a crucial role, with its several 'constitutionalising' decisions of the 1960s and 1970s, developing the doctrines of direct effect, supremacy, implied powers, and fundamental rights. But it is here as well, in this emergence of a legal/social-science literature on 'legal integration' or 'integration through law', that the scholarly literature also witnessed the development of a set of working assumptions – most importantly relating to periodisation as well as the seeming 'constitutional' character

[16] See, generally, Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (New York: Oxford University Press, 2010).

[17] Milward, *European Rescue*, 223.

[18] See Alan S. Milward and Vibeke Sørensen, 'Interdependence or Integration? A National Choice', in Alan S. Milward, Frances M. B. Lynch, Ruggero Ranieri, Federico Romero and Vibeke Sørensen, eds, *The Frontier of National Sovereignty : History and Theory, 1945–1992* (London: Routledge, 1993), 5–6.

[19] Milward, *European Rescue*, 217–18.

[20] See Milward and Sørensen, 'Interdependence or Integration?', 19.

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of integration – that have provided the interpretative baseline for scholarly debate ever since.

II

Let us consider the 'constitutional' aspect of that baseline first, after which we can turn back to the question of historical periodisation.

At the heart of the 'constitutional' interpretation of integration is its break with traditional public international law in several key respects: the limitation of the traditional prerogatives of member-state sovereignty in favour of integration; the creation of rights of individuals enforceable against member states; and the empowerment of a new supranational judiciary – the ECJ – as the mechanism to vindicate those rights. According to the conventional understanding, these various aspects of European law developed primarily as a functional necessity of integration, in order to give maximally binding effect to the supranational commitments made by the member states in the treaties. This purportedly functionally-driven break with public international law gained its first judicial expression in a famous series of decisions in the 1960s,[21] although the scholarly recognition of the 'constitutional' character of this break lagged until the early 1980s. A 1981 article by the American legal scholar Eric Stein is often cited as the initial expression of this new-found awareness in the English-language legal literature:

> Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.[22]

Over the course of the 1980s and 1990s, the seemingly 'constitutional' character of the European legal order would be taken as a given. A 1997 contribution to the *Journal of Common Market Studies* by a leading legal scholar of integration and exponent of the constitutional interpretation, Joseph Weiler, captured the consensus.[23] Using a vocabulary drawn from the information-technology advances of the 1990s, Weiler asserted: 'Constitutionalism is the DOS or Windows of the European Community', something that 'hums silently in the background and . . . is not necessary for the actors to perceive or articulate its impact'.[24] Interestingly, this particular statement appeared in a political science and not a legal journal of integration and in setting forth his working definition of 'constitutionalisation', Weiler relied on the description of a political scientist, Alec Stone Sweet.[25] This was not without significance: over the

[21] Case 26/62, *Van Gend and Loos* v. *Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; Case 6/64, *Costa* v. *ENEL*, 1964 E.C.R. 585.

[22] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 75 (1981), 1.

[23] J. H. H. Weiler, 'The Reformation of European Constitutionalism', *Journal of Common Market Studies*, 35 (1997), 97–131.

[24] Ibid., 97, 99.

[25] Ibid., 97.

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1990s, both Weiler and Stone Sweet were at the forefront of a fruitful exchange between legal scholars and political scientists over the 'constitutional' nature of Europe's 'legal integration'.

Two other leading contributors to this exchange were the lawyer-political scientist Anne-Marie Burley (now Slaughter) and the political scientist Walter Mattli. In a series of articles over the course of the 1990s,[26] Slaughter and Mattli sought to explain legal integration – most importantly the leading role of the ECJ – in terms of the seemingly disfavoured theory of neofunctionalism.[27] In an initial joint article in 1993, Slaughter and Mattli argued that the demise of neofunctionalism as a leading theory in the 1960s resulted from too narrow a focus on the supranational legislative process and insufficient attention to the process of supranational adjudication, the significance of which was only beginning to emerge in the middle 1960s but was largely ignored by political scientists. Slaughter and Mattli pointed out that '[b]y 1965' – ironically, the year of the 'empty chair' crisis which would culminate in the Luxembourg Compromise of January 1966 –

> a citizen of a community country could ask a court to invalidate any provision of domestic law found to be in conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek invalidation of a national law found to be in conflict with the self-executing provisions of community secondary legislation, the 'directives' to national governments passed by the EC Council of Ministers.[28]

These 'constitutionalising' decisions by the Court of Justice, Slaughter and Mattli attempted to show, laid the foundation for a dynamic of integration that corresponded remarkably well to the particulars of the neofunctionalist theory, with two major differences: first, it was the law that 'function[ed] as a mask for politics, precisely the role neofunctionalists originally forecast for economics';[29] and second, it was the Court of Justice that took the lead in driving the process of 'spill-over', forging an effective supranational alliance with national interest groups (private litigants, their lawyers, and lower national courts) to push the boundaries of integration – the role the neofunctionalists originally envisioned for the European Commission.[30]

The legal and political science advocates of this emergent theory of 'legal neofunctionalism', however, were not yet in a position to scrutinise the extent to which judges on the ECJ themselves, along with sympathetic lawyers and legal

[26] Anne-Marie Burley (now Slaughter) and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, 47 (1993), 41–76; Walter Mattli and Anne-Marie Slaughter, 'Law and Politics in the European Union', *International Organization*, 49 (1995), 183–90; Walter Mattli and Anne-Marie Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints', in Anne-Marie Slaughter, Alec Stone Sweet and J. H. H. Weiler, eds, *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (Oxford: Hart Publishing, 1998), 253–76; Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice', *International Organization*, 52 (1998), 177–209.

[27] See n. 8 above and accompanying text.

[28] Burley and Mattli, 'Europe Before the Court', 42.

[29] Ibid., 44.

[30] For an overview, see Lindseth, *Power and Legitimacy*, 137–52.

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scholars outside the Court (particularly in the Legal Service of the European Commission), were instrumental in developing this conception of legal integration. Recent historical research, well represented in this special issue by the contribution of Morten Rasmussen, has suggested that this process of 'constitutionalisation' was in fact a conscious strategy of the ECJ in the 1960s, pursued by its leading judges, most importantly Robert Lecourt, and by clerks and lawyers close to the Court.[31] Indeed, one might fairly say that just as neofunctionalism may have became the house ideology of the European Commission under Walter Hallstein in the 1960s,[32] the legal variant of neofunctionalism, eventually articulated and legitimised in terms of a new kind of supranational 'constitutionalism', became the house ideology of the ECJ and sympathetic lawyers over the next several decades.

The supranational legal professionals in and around the ECJ viewed themselves, as one historical sociologist has put it, as 'the institutionalised carriers of the European idea' in the face of political resistance or reluctance.[33] This insight finds further confirmation, as well as extension, in the innovative contribution in this special issue by Rasmussen on the Commission's Legal Service. Indeed, Rasmussen uses new archival evidence to show that the germ of the 'constitutional practice' – perhaps most importantly the so-called 'teleological method of interpretation' – was in reality developed by leading members of the Legal Service from the early to mid-1950s onwards. These efforts by the Legal Service would bear fruit in the 'constitutionalising' case-law of the ECJ from the early to mid-1960s, in which the judges on the Court openly adopted the teleological method.[34] Thus, Rasmussen's analysis helps to deepen our understanding not merely of the crucial role played by the Legal Service, but also of the extent to which the justification of the ECJ's expansive reading of its role (and that of integration generally) was an explicitly political undertaking. Indeed, the detailed analysis of the archival sources by Rasmussen clearly offers further confirmation that the process of European legal integration was not merely the product of a functionalist (or rather 'legal neofunctionalist') logic of integration. Rather, it was the result of the institutionalisation of certain ideas about the federal *telos* of 'Europe', and therefore its 'constitutional' character, carried forth by this legal elite over time.

[31] See Morten Rasmussen, 'Constructing and Deconstructing European "Constitutional" Law: Some Reflections on How to Study the History of European Law', in Henning Koch, Karsten Hagel-Sørensen, Ulrich Haltern and Joseph Weiler, eds, *Europe: The New Legal Realism* (DJØF Publishing: Århus, 2010), 639–60. See also Antoine Vauchez, '"Integration-through-Law": Contribution to a Socio-history of EU Political Commonsense', *Robert Schuman Centre for Advanced Studies, EUI Working Papers, RSCAS 2008/10* (2008), in particular at 20, citing Robert Lecourt, 'Le rôle du droit dans l'unification européenne', *Bulletin de l'Association des juristes européens*, 17–18 (1964), 5–23.

[32] See n. 7 above and accompanying text.

[33] Vauchez, 'Integration-through-Law', 16, citing the statement of Judge Donner (as quoted in Werner Feld, *The Court of the European Communities: New Dimensions in International Adjudication*, The Hague: Martinus Nijhoff, 1964, 116); as well as Robert Lecourt, 'L'unification du droit européen est aussi un moyen de construire l'Europe', *France-Forum* (1963), 27–31, 31.

[34] For suggestions of the origins of the teleological method in inter-war functionalism, see Lindseth, *Power and Legitimacy*, 140.

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We should also recognise, then, the extent to which the Legal Service was also essential in promoting the 'constitutional' idea of Europe among practitioners and legal scholars, in association with law associations devoted to integration, whether national or European. These included the Association des juristes européens (AJE) in France (studied here by Alexandre Bernier) as well as the Europe-wide umbrella organisation for these associations, the Fédération internationale pour le droit européen (FIDE), which the Legal Service played a key role in establishing. Bernier's contribution contradicts existing social-science research, however, by arguing that the impact of the AJE may well have been marginal in advancing the reception of European law in France, at least up to the 1970s. Indeed, it is important to remember in this regard that the French Conseil d'Etat (Council of State) would hold out on European law primacy until 1989, and only then, per the conclusions of its *commissaire du gouvernement* (in effect, 'advocate-general'), subject to the explicit rejection of the ECJ's full-blown conception of primacy, which he found 'would quite certainly render [integration] unconstitutional, however it may be regarded in the political context'.[35] The process of 'institutionalisation' of the constitutional idea of Europe was indeed a contested one. Historical understandings of the legal character of integration have depended crucially on the perspective of the observer, whether that of the ECJ or the Commission's Legal Service, or, for example, that of national high courts such as the French Conseil d'Etat.

III

To understand this contested process of institutionalisation even more deeply, what is needed is both detailed intellectual history as well as in depth socio-historical examination of the institutionalisation process itself, much like the remaining contributions to this special issue. The aspiration for the historian should be to do the hard work that other scholars have eschewed, tracing the 'micro-foundation' of the emergent institutional structures and their underlying ideas – that is, 'how and why they emerge, develop, or die out within any group', something that in its historical complexity often appears to political scientists (perhaps because of their lack of analysis of the archival sources) as 'problematic' and 'somewhat mysterious'.[36] This new historical analysis must also move beyond what in another context has been evocatively called 'law office' history – that is, the selective use of historical evidence, often from very limited sources, to advance relatively simplistic claims about the past that conform, unsurprisingly, to the legal position being advanced by the advocate or judge.[37]

[35] C. E. Ass., *Nicolo*, 20 Oct. 1989, *Rec.* 190, concl. Frydman.

[36] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 8.

[37] For the classic critique of this form of 'law office' history, see Alfred H. Kelly, 'Clio and the Court: An Illicit Love Affair', *The Supreme Court Review* (1965), 119–58.

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A necessary by-product of this new historical analysis is a reconsideration of the origins of the legal integration process – when it 'began', so to speak – and hence the proper periodisation for our analysis. Among the most influential legal discussions of European integration to date, Joseph Weiler's 1991 article, 'The Transformation of Europe', identifies the years stretching from 1958 to the mid-1970s as the 'foundational period' of European legal integration, focusing almost entirely on the purportedly 'constitutionalising' case-law of the ECJ of the 1960s.[38] In a slightly more ambitious vein, many of the most influential political science analyses of European institutions have started either with the negotiations leading to the Treaty of Rome of 1957,[39] or with the Treaty of Rome itself,[40] without giving significant attention to the negotiation of the Treaty of Paris of 1951 or developments on the national level going at least back to the inter-war period, on which integration would arguably depend.

To their credit, integration historians have never ignored the 1950s.[41] Moreover, some younger political scientists, notably Craig Parsons and Berthold Rittberger, have also begun to push the analytical perspective of their discipline back to the founding of the European Coal and Steel Community (ECSC) under the Treaty of Paris of 1951, with the specific aim of understanding the role of ideas and beliefs in shaping institutional design.[42] Their focus has been on the emergence of the so-called 'community model' (Parsons) – that is, on integration by way of strong supranational institutions exercising some degree of autonomous regulatory power[43] – as well as on how a 'legitimacy deficit' (Rittberger) arose from the very founding of integration as a consequence of supranational delegation, and how these beliefs shaped the power of such institutions as the European Parliament.[44]

These efforts are of course deeply welcome but additional insight is needed into the origins of the ideas that were arguably salient in the normative struggle over integration in the 1950s. Parsons, for example, suggests that the community model prevailed because of its ability to 'connect to established elements of their environment' and 'to already established norms'.[45] But we are left wondering what those elements and norms in fact were. In this regard, the contributions in this

[38] J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1991), 2403–83, 2410–31.

[39] See Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, N.Y.: Cornell University Press, 1998).

[40] See Alex Stone Sweet and Wayne Sandholtz, 'Integration, Supranational Governance, and the Institutionalization of the European Polity', in Wayne Sandholtz and Alec Stone Sweet, eds, *European Integration and Supranational Governance* (Oxford: Oxford University Press, 1998), 1–26, 2 ('We do not explain the founding of the [Community], but rather its institutional development. Our starting point, therefore, is the Treaty of Rome.').

[41] See, most famously, Milward, *European Rescue*. See also, for example, the two essential collective volumes from the 1980s, Klaus Schwabe, ed., *Die Anfänge des Schuman-Plans, 1950/51* (Baden-Baden: Nomos, 1988), and Enrico Serra, ed., *Il Rilancio dell'Europa e i trattati di Roma: La Relance européenne et les traités de Rome* (Brussells: Bruylant 1989).

[42] Craig Parsons, *A Certain Idea of Europe* (Ithaca: Cornell University Press, 2003); Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation-State* (Oxford; New York: Oxford University Press, 2005).

[43] Parsons, *Certain Idea*, 9.

[44] See Rittberger, *Building Europe's Parliament*, 52–7.

[45] Parsons, *Certain Idea*, 20.

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special issue by Jean-Michel Guieu and Karin Van Leeuwen are especially valuable. Guieu focuses on the development of an identifiably 'European' legal doctrine by (primarily French) international law scholars in the inter-war period, as well as its carry-over into the post-war decades; whereas Van Leeuwen explores the fascinating mix of administrative and international law influences in the crucially important Dutch political debates over constitutional change in the 1950s. The histories that each contribution recounts, however, arguably reflect the ongoing intellectual struggle to legitimise an essential reality of post-war governance: the diffusion of normative power outside the realms of the national legislature, first to executive and technocratic (that is, 'administrative') bodies within the state, but eventually to a realm of international or supranational rulemaking *beyond* the state.[46] Indeed, Guieu focuses in his concluding section on Paul Reuter, the French legal scholar who worked closely with Jean Monnet in developing the Schuman Plan. Reuter explicitly drew inspiration for the High Authority of the ECSC (on which the future European Commission would be based) from the model of independent regulatory agencies in the United States.[47]

Coming to terms with this new reality of governance undoubtedly could take any number of forms, although the Dutch example in this regard has been particularly fascinating. That country's peculiarly receptive legal traditions – which, long before the integration process began, had contemplated direct enforcement of international law within the national legal order in certain circumstances – no doubt played a key role in the Dutch constitutional debates in the 1950s, as Van Leeuwen's excellent contribution suggests. But regardless of how that governance was initially rationalised, an essential consequence of the Dutch reforms of the 1950s was the acceptance of a new form of supranational 'administrative' governance, operating pursuant to delegations of normative power to the European level, in which national executives and supranational technocrats and judges would play key roles. It would only be later in the integration process – in the 1990s and 2000s – that serious misgivings would develop in the Netherlands over its constitutional openness to supranational lawmaking. After a half-century of integration, and more particularly the dramatic expansion of supranational power in the 1980s and 1990s, the Dutch were seemingly no longer able to regard integration as the hopeful abstraction it was in the constitutional debates of the 1950s. Instead it had become an extensive, concrete legal and political reality, entailing significant costs to democracy on the national level. And as this reality became increasingly apparent by the turn of the century, the Dutch also then witnessed attempts to reverse its earlier constitutional reforms and their consequences, as Van Leeuwen notes in her conclusion. In the

[46] See, for example, Lindseth, *Power and Legitimacy*.

[47] As he would later recall, he 'knew a bit of the American system', the principal virtue of which in his view was how it conferred on 'independent men' the power to exercise a variety of functions, 'be they "quasi-judicial", administrative, even economic . . . When I proposed [this formula] to Monnet, using the American term "Authority", he accepted it immediately'. Paul Reuter, 'Aux origines du Plan Schuman', in Pierre-Henri Teitgen, ed., *Mélanges Fernand Dehousse* (2 vols, Paris: Fernand Nathan; Brussels: Editions Labor, 1979), vol. 2, 67.

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Netherlands, as elsewhere, the struggle to 'reconcile Europe and the nation-state' unsurprisingly continues.[48]

IV

In the transformation of governance that integration necessarily entailed, lawyers clearly played a crucial role. Consequently, a core aim of the new history of European law must be to deepen our understanding of the evolution of the intellectual mindset and social practices of the post-war legal elite. For insight along these lines, consider the published recollections of Pierre Pescatore, a Luxembourg jurist who would later become a judge on the ECJ in the 1960s. In 1981, Pescatore wrote an article recalling his service on the so-called *groupe juridique* in the negotiations of the Treaty of Rome of 1957,[49] a group of nationally-designated legal experts responsible for drafting the institutional and legal provisions of the treaty. As Pescatore explains it, despite a mandate limited to dealing with 'general', 'nontechnical', and therefore presumably 'nonpolitical' aspects of the treaty – in effect, as a *groupe de rédaction* – the *groupe juridique* operated with great autonomy and considerable (if not well recognised) influence over the institutional design of supranational bodies, most importantly the ECJ.

In her analysis of the establishment of the ECJ in the negotiations of the Treaties of Paris and Rome in the 1950s in this special issue, Anne Boerger-De Smedt confirms this understanding of the *groupe juridique* even as she adds essential details to our understanding that go beyond Pescatore's recollections. The fact that she was even able to assemble these additional details at all is a tribute to her enterprising qualities as a historian. It also demonstrates the key role of the historian in working to 'deconstruct' some of the mythologies around the history of European law.[50] The *groupe juridique*, Judge Pescatore proudly admits, tried to leave no record of its deliberations, thus removing any historical evidence of disagreements that might undermine the future authority of the final text of the treaty through recourse to conflicting *travaux préparatoires* (that is, documents produced in the course of negotiations). According to Pescatore, the only concrete evidence of the group's negotiation should be 'found in the texts themselves' and 'the only trace having a legal value' should be 'the final text of the Treaties'.[51] In a similar vein, Judge Pescatore reportedly ensured that his own large archive of historic materials would be destroyed before he died, presumably for similar reasons.[52]

[48] See generally Lindseth, *Power and Legitimacy*.

[49] Pierre Pescatore, 'Les travaux du "groupe juridque" dans les négociations des Traités de Rome', *Studia Diplomatica*, 34 (1981), 159–78.

[50] Rasmussen, 'Constructing and Deconstructing'.

[51] Pierre Pescatore, 'Les travaux du "groupe juridque"', 167.

[52] See Rasmussen, 'Constructing and Deconstructing'. According to Rasmussen, Robert Lecourt, the judge most responsible for the *Van Gend and Loos* decision of the ECJ, also ensured that his personal archive would be destroyed before he died.

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It is worth reflecting on what Judge Pescatore's recollections suggest about the *mentalité* of the emergent European legal elite that would be so instrumental in advancing the integration process in the post-war decades. According to Pescatore, the effectiveness of the *groupe juridique* depended, in important part, on a shared sense of legal culture of its members: '[G]iven the essentially legal character of our discussions, conflicts of interest hardly arose between us'.[53] Rather, '[w]e were all jurists and, in spite of our national origins, we therefore participated in a world of common values'.[54] Thus, according to Pescatore, the *groupe juridique* worked to ensure that the new Community's adjudicative functions would be the exclusive preserve of lawyers and judges, 'put[ting] an end to the system of the ECSC Treaty which permitted the nomination of judges [to the Court of Justice] who had no legal qualification'.[55] The group's juristic 'common values' also manifested themselves in several of the 'general' and 'nontechnical' provisions which would figure directly in the Court's subsequent constitutionalisation of the Community legal order. These included, most notably, 'the preamble and the preliminary articles which defined the mission of the Community'[56] (which would also have a strong influence on the Court's subsequent interpretation of the treaty), as well as Article 5, which defined the member state's duty of loyalty and co-operation to the Community (and which would form the basis for the Court's doctrine of the primacy of Community law in the coming years).[57]

Judge Pescatore's recollections further suggest that, during the negotiation of the treaty, the *groupe juridique* attempted to exploit the same political-cultural environment that the ECJ would purportedly later enjoy in the coming decades, making possible the 'legal neofunctionalism' discussed above.[58] It was this environment of deference to the law, at least in the conventional telling, that permitted the transformation of essentially political questions into legal ones, which could then be resolved in relative autonomy by legal professionals – lawyers and judges – according to their own professional 'language and logic'.[59]

Indeed, the most important of all the provisions inserted by the *groupe juridique* was the preliminary reference mechanism of Article 177 – the option (and, in some cases, the duty) of national courts to refer questions on 'the interpretation of this Treaty' to the Community's own supranational adjudicative body, the Court of Justice. Article 177 would eventually provide the procedural basis for the Court's claimed power to review the conformity of member-state law with Community law in actions brought by private parties. In Pescatore's recollection, the *groupe juridique* inserted Article 177 without any awareness 'of the importance of th[e] innovation'.[60]

[53] Pierre Pescatore, 'Les travaux du "groupe juridque"', 166.
[54] Ibid., 165.
[55] Ibid., 172.
[56] Ibid., 173–4.
[57] Ibid., 174.
[58] See nn. 27–33 above and accompanying text.
[59] Burley and Mattli, 'Europe before the Court', 44.
[60] Pescatore, 'Les travaux du "groupe juridque"', 173.

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Perhaps, but Boerger-De Smedt's contribution suggests a slightly more considered effort at 'constitutionalising' the ECJ, at least in part. The apparent model was an analogous preliminary reference mechanism to the Italian constitutional court (although a similar mechanism existed in Germany). Thus, drawing on these post-war constitutional examples, this small group of elite lawyers and legal scholars helped to expand the scope of the Community system of judicial remedies and in so doing laid the foundation for the subsequent transformation of the public law of European integration. Originally modelled on the greatest of all *juridictions administratives* – the French Conseil d'Etat[61] – the ECJ now possessed the procedural tool to become, in effect, a 'constitutional court' vis-à-vis the member states, a kind of supranational Bundesverfassungsgericht.

V

It should perhaps be unsurprising, then, that the real Bundesverfassungsgericht – the German Federal Constitutional Court (FCC) – would become the ECJ's most difficult interlocutor over the next half-century, sensing perhaps a genuine rival at the supranational level. In this volume, Bill Davies offers fascinating insight into the political controversy and long-term consequences that ensued from one of the FCC's earliest salvos against the ECJ: the *Solange I* decision of 1974.[62] *Solange I* suggested an aggressive, ongoing role for the FCC in reviewing the decisions of the ECJ – a direct attack not only on supranational supremacy but also, in some sense, on its legitimacy. The German Court stated that 'as long as' the Community lacked 'a democratically legitimated parliament', a genuine oversight over the Council and Commission as executive-technocratic policy-makers, and 'a codified catalogue of fundamental rights' on a par with national protections,[63] the FCC would need to retain jurisdiction to review whether Community norms satisfied national constitutional requirements.[64]

A decade of unremitting scholarly and political criticism (as well as suggestions by the court itself that it was willing to revisit this holding)[65] ultimately led the court to retreat from the full-blown implications of *Solange I*. But in reversing itself in *Solange II* in 1986,[66] the constitutional court did not reject the underlying principle of its earlier decision, notably relating to the non-democratic character of supranational

[61] See the contribution of Anne Boerger-De Smedt in this special issue; see also nn. 77–78 below and accompanying text.

[62] *Internationale Handelsgeselchaft mbH v. Einfuhr- und Vorratstelle für Getriebe und Futtermittel*, case 2 BvG 52/71, BVerfGE 37, 271; [1974] 2 C.M.L.R. 540, 551 (*Solange I*).

[63] *Solange I*, [1974] 2 C.M.L.R. at 551.

[64] Ibid., 551–2.

[65] See the so-called *Vielleicht* ('maybe') decision of 1979, *Steinike und Weinling v. Bundesamt für Ernährung und Fortswirtschaft*, BVerfGE 52, 187, [1980] 2 C.M.L.R. 531; for a discussion, see Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford and New York: Oxford University Press, 2001), 94.

[66] *Wünsche Handelsgesellschaft*, case 2 BvR 197/83, BVerfGE 73, 339; [1987] 3 C.M.L.R. 225 (*Solange II*).

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power. Rather, the FCC found only that the protections of *individual rights* under Community law had advanced to the point that the court would 'no longer exercise its jurisdiction' in that regard.[67] But the court also reiterated (alluding to 'similar limits under the Italian constitution') that the Basic Law could not permit Germany 'to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into the structure which makes it up'.[68]

This, of course, has remained a central concern of the FCC up to the present, from the famous judgments over the Maastricht Treaty in 1993 to the Treaty of Lisbon in 2009, indeed up to the judgments concerning the Eurozone bailouts of 2011. We must wait to see what the archival evidence will eventually suggest about these decisions. But for now, based on the published opinions of other national high courts along similar lines, we can safely say that the influence of the FCC's jurisprudence on this point has been profound, and not just in traditionally Eurosceptic countries.[69] As one commentator recently observed in an analysis of the legacy of the crucially important German Maastricht Decision, 'the decision has never been overruled, the mark it has left on EU law is deep, and the ideas behind it are very much alive'.[70]

The ideas behind it, however, have unfortunately often been misunderstood in the legal and political science literature.[71] The essence of the decision, understood historically, is best seen as focused on the protection of the democratic character of the domestic constitution through national judicial enforcement of bounds of permissible delegation, a cornerstone of the post-war constitutional settlement of administrative governance.[72] European integration has significantly empowered national executives and supranational technocrats (indeed, supranational judges) in

[67] *Solange II*, [1987] 3 C.M.L.R. at 265.

[68] Ibid., 257, citing Antonio La Pergola and Patrick Del Duca, 'Community Law and the Italian Constitution', *American Journal of International Law*, 79 (1985), 598–621.

[69] For an overview, see Lindseth, *Power and Legitimacy*, 166–87.

[70] Julio Baquero Cruz, 'The Legacy of the *Maastricht-Urteil* and the Pluralist Movement', *European Law Journal*, 14 (2008), 389–422, 391.

[71] See, for example, J. H. H. Weiler, 'Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision', *European Law Journal*, 1 (1995), 219–58, 222 (claiming instead that the Court based its claim of ultimate *Kompetenz-Kompetenz* on a conception of democracy derived from Carl Schmitt). For an extended critique of this interpretation, see Peter L. Lindseth, 'The "Maastricht Decision" Ten Years Later: Parliamentary Democracy, Separation of Powers, and the Schmittian Interpretation Reconsidered', *Robert Schuman Centre for Advanced Studies/EUI Working Papers,* RSC No. 2003/18 (2003). For variants on the Weiler interpretation that are suggestive of its influence in English-language scholarship, see, for example, Stone Sweet, *Governing with Judges*, 177 (stating that the decision 'legitimises the very source' of the purported democratic deficit in the Community: its 'intergovernmental elements'); and Alter, *Establishing the Supremacy of European Law*, 107 (lamenting the decision's seemingly 'nationalist tone', and puzzling over how it 'created a constitutional limit on the transfer of national political authority to the EC level based on the inviolability of German democracy'). But see also Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing, 2006), 608 n. 189 ('[w]hat is disturbing is the tone, rather than the content' of the decision); see also Baquero Cruz, 'The Legacy of the *Maastricht-Urteil*', 391 ('[m]any years have passed and we may now be able to read the Maastricht-Urteil with more detachment and even learn something from it').

[72] See generally Lindseth, *Power and Legitimacy*.

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an otherwise highly complex and fragmented regulatory process beyond the state. The German jurisprudence has thus focused on the concomitant loss of democratic influence for the national legislature, the institution which, for better or worse, is understood as the privileged embodiment of the capacity of the national *demos* to rule itself in democratic and constitutional terms.

This focus, however, has not constituted an absolute legal trump of the integration process – far from it. Rather, the FCC has consistently upheld delegations of authority to the supranational level, subject primarily to requirements of increased national parliamentary involvement, the core impact of which have been felt most on the national level (with supranational repercussions to be sure). Thus, contrary to the often conventional understanding, the approach of the FCC has been one of *deference* to the political decision in favour of integration, particularly as it relates to rights. For those who see fundamental rights as the 'chief responsibility' and 'single most significant domain' of national constitutional courts,[73] deference in this area would seem surprising. In fact, it is understandable. The judicial culture of the last half-century has been generally very receptive to rights-based claims; thus, following the resolution of the controversy of *Solange I* in *Solange II* (illuminated here by Bill Davies), the FCC could similarly expect the ECJ to treat a rights-based challenge in a manner reasonably respectful of rights protection. By contrast, the incentives have been much weaker for litigants and (at least) supranational judges to protect national democracy through the enforcement of constraints on delegation of power to the supranational level, consistent with the post-war constitutional settlement of administrative governance. Thus, a (potentially) more aggressive role for national high courts on democracy protection and supranational delegation has become necessary.[74]

VI

Even among its most enthusiastic supporters, European integration has long been perceived, not without cause, as a largely 'bureaucratic affair run by a faceless, soulless Eurocracy in Brussels'.[75] For much of integration history, nothing has perhaps reflected that distant Eurocracy better than the role played by the European Commission in the highly technical yet politically sensitive area of competition policy. The analysis provided by Laurent Warlouzet and Tobias Witschke in this special issue does justice to the complexity of the relationship between law, administration and policy on the ground. The process of consolidating the Commission's role and jurisprudence in the domain of competition policy in fact took several decades, as Warlouzet and Witschke describe. Indeed, the process has continued even more

[73] Claes, *National Courts' Mandate*, 595.

[74] We must wait for a future, enterprising historian such as Bill Davies to test this intuition regarding the motivation of national high-court judges against the historical record revealed by archival research.

[75] Joschka Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', Speech at the Humboldt University in Berlin (12 May 2000), available online at http://www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf (last visited 5 Nov. 2011).

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recently, with the so-called 'modernisation' of competition policy both substantively and procedurally over the 1990s and 2000s.[76] Today the system of competition-law enforcement in the EU entails a complex network of national competition authorities (NCAs) operating in co-operation with the European Commission.

The origins of EU competition policy can in fact be traced back to role of the High Authority under the Treaty of Paris establishing the ECSC in 1951. Given the largely executive and technocratic character of the ECSC as envisaged by Monnet and his team in the negotiations of the treaty, it was only natural that a judicial tribunal would be established at the Community level to enforce legality against administrative power in its new supranational guise[77] (though, as Boerger-De Smedt's contribution suggests, its establishment was not entirely without controversy). The French socialist André Philip, in a pamphlet supporting the Schuman Plan published by the European Movement in 1951, expressed the typical view of the future ECJ and its role: the Court had been explicitly 'modelled on the French Council of State, an administrative institution that has in fact ensured the protection of private interests and individual liberties [against administrative power] for more than a century'.[78]

It is precisely at this point that we can begin to appreciate European integration even more deeply as a denationalised manifestation of modern administrative governance, necessitating legal checks provided by a new kind of supranational *jurisdiction administrative* – the ECJ. In the historical development of such governance on the national level, a perennial concern was always the sort of tribunal – one part of the administration itself, or one belonging to the ordinary judiciary – that should serve as the proper judge of administrative action.[79] This question in fact resonates with perhaps the most venerable principle in the history of French administrative law – *juger l'administration, c'est encore administrer* – 'to judge the administration is still to administer'.

Although these ideas are hardly unique to France, what sets the French tradition apart (certainly from the common law tradition) is the jurisdictional corollary that the state and its agents are entitled to their own judge, imbued with the sense of the state (*le sens de l'Etat*), in principle giving priority to the general interest, operating in a system of tribunals distinct from the ordinary judicial courts.[80] The Community system of judicial remedies (especially the ECJ's seemingly exclusive interpretative jurisdiction under the preliminary reference procedure) arguably reflects an analogous principle – *juger l'intégration, c'est encore intégrer* – or at least the ECJ's case-law would suggest as much. Because judicial review of Community action will have a direct

[76] See David J. Gerber, 'Two Forms of Modernization of European Competition Law', *Fordham International Law Journal*, 31 (2007), 1235–65.

[77] Maurice Lagrange, 'La Cour de Justice des Communautés Européennes du Plan Schuman à l'Union Européenne', in Pierre-Henri Teitgen, ed., *Mélanges Fernand Dehousse* (2 vols, Paris: Fernand Nathan; Brussels: Editions Labor, 1979), vol. 2, 128.

[78] André Philip, *The Schuman Plan: Nucleus of a European Community* (Brussels: European Movement, 1951), 38.

[79] Michael Stolleis, *Public Law in Germany, 1800–1914* (New York: Berghahn Books, 2001), 215–18.

[80] *Terrier*, C. E. 6 févr. 1903, *Rec.* 94, concl. Romieu.

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impact on the success or failure of market integration on a supranational scale, the drafters of the treaties placed (so the argument goes) exclusive jurisdiction over treaty interpretation in an adjudicative body that was autonomously supranational, imbued with *le sens de la Communauté* (so to speak) and therefore reliably committed to the 'Community interest'.[81]

Or so judges on the ECJ would have us believe: according to one member of the Court, writing in 1994, the drafters of the Treaty of Rome purportedly built a 'preference for Europe' into 'the genetic code transmitted to the Court'.[82] The ECJ's historic effort to invest Europe with a new, denationalised sense of constitutional legitimacy, one commensurate with its functional regulatory reach, is obviously appealing on many levels. It is particularly so given the dark history of extreme nationalism in Europe in the first half of the twentieth century, something now deeply ingrained in Europe's collective memory. It is also appealing for many others who have more recently welcomed 'the growth of a transnational economy' in Europe, because it 'rubs away the rough, unrepresentative and (in market terms) illegitimate pretensions of the member states'.[83]

But there has been a basic problem with this 'constitutional' understanding of integration, as the events of the past decade have shown (the collapse of the Constitutional Treaty, the struggle over the Treaty of Lisbon, as well as the convulsions of the Eurozone crisis). What more than a half-century of integration has proven, perhaps, is that the functional demands of integration have not been enough to override widespread attachments to national institutions as the fundamental expressions of democratic and constitutional legitimacy in Europe. And therein perhaps is the real 'rub'. Much less than serving as a 'constitutional moment' for Europe,[84] the events of the past decade have revealed once again that a crucial historical disconnect exists at the heart of integration – between the perception of European governance as bureaucratic and distant, and the popular attachment to national institutions as the political-cultural *loci* of democratic and constitutional legitimacy in the European system.

What this disconnect suggests is that, even as significant regulatory power has migrated to the supranational level in Europe over the last sixty years, the constitutional character of integration has remained stubbornly 'polycentric', something 'deeply rooted in the history of [the European] continent'.[85] The capacity

[81] For a recent scholarly defence of this position, see Baquero Cruz, 'The Legacy of the *Maastricht-Urteil*', 414–15.

[82] G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice', *Modern Law Review*, 57 (1994), 175–90, 186.

[83] Anand Menon and Stephen Weatherill, 'Legitimacy, Accountability, and Delegation in the European Union', in Anthony Arnull and Daniel Wincott, eds, *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002), 119–20.

[84] See Neil Walker, 'After the Constitutional Moment', in Ingolf Pernice and Miguel Poiares Maduro, eds, *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (Baden-Baden: Nomos, 2004).

[85] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford and New York: Oxford University Press, 2005), 173, citing Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (London: Routledge and Kegan Paul, 1951), and Eric Lionel Jones,

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for ultimate democratic and constitutional legitimation of European governance has remained with the various historically 'constituted' bodies of the member states; no similar capacity has yet migrated to the EU level. This perhaps may be the ultimate, critical lesson of the new history of European law.

Le Potentiel critique d'une nouvelle histoire du droit européen

Les articles de ce numéro spécial évaluent plusieurs hypothèses historiographiques – par exemple, la périodisation (surtout la question de savoir quand l'intégration juridique a commencé) et la définition de l'objet étudié (le caractère apparemment 'constitutionnel' du processus d'intégration juridique européen) – qui ont servi de référence de base pour le travail interprétatif des scientifiques de la loi et de science politique pendant ces dernières décennies. Cet article critique aussi ces références de base, et soutient qu'en ce qui concerne l'histoire juridique, on peut avec profit expliquer l'intégration comme étant une expression dénationalisée d'une gouvernance à la fois diffuse et fragmentée – c'est-à-dire une gouvernance administrative. Les éléments de base de cette gouvernance sont apparues en Europe occidentale pendant les années d'entre-guerre et les décennies suivant la guerre, et ces éléments on continué à jouer un rôle dans l'évolution de l'histoire juridique de l'Union Européenne jusqu'à nos jours.

Das kritische Versprechen der neuen Geschichte des europäischen Rechts

Das entscheidende Versprechen der neuen Geschichte des europäischen Rechts Die Artikel in dieser Sonderausgabe stellen eine Reihe historiographischer Annahmen auf den Prüfstand – etwa zur Periodisierung (vor allem als die Rechtsintegration 'begann') sowie zur Definition des angeblichen Untersuchungsgegenstands (des scheinbaren 'verfassungsrechtlichen' Charakters des Prozesses der europäischen Rechtsintegration) – die zentral für die interpretative Ausgangsposition waren, welche Rechts- und Politikwissenschaftler in den letzten Jahrzehnten aufgestellt haben. Dieser Artikel argumentiert aufbauend auf einer ähnlichen Kritik dieser Ausgangsposition, dass die Integration in rechtlich-historischer Hinsicht als denationalisierter Ausdruck diffuser und fragmentierter (d.h. 'administrativer') Governance profitabel verstanden werden kann. Die Grundelemente dieser Governance zeigten sich in Westeuropa im Verlauf der Jahrzehnte zwischen den Weltkriegen und nach 1945, und diese Elemente haben die Rechtsgeschichte der EU bis heute fortwährend geprägt.

The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia (New York: Cambridge University Press, 1987). See also Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation-State and the European Union* (Oxford: Oxford University Press, 2005).

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