

Title should read:

Transatlantic Functionalism: New Deal Models and European Integration

Transatlantic Functionalism (and Its Limits): New Deal Models, Technocratic Autonomy, and European Integration

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Abstract

For many advocates of European integration in the late 1940s and early 1950s, the seeming example of technocratic independence under the New Deal offered a justification for the delegation of regulatory power to autonomous supranational bodies. The New Deal represented, from this perspective, the triumph of “functionalist” governance—that is, governance that evolved as a function of the problems it sought to address, rather than being determined by seemingly outdated constitutional categories (“separation of powers” in the purported case of the New Deal, “national sovereignty” in European integration). The irony, of course, was that Roosevelt’s New Deal was much less receptive, both in principle and practice, to the sort of technocratic independence that these advocates believed to be inevitable and desirable in the case of integration. Indeed, consistent with a more nuanced understanding of the New Deal model, European integration would eventually secure a durable institutional existence only after being brought more directly under the shared control and oversight of the national executives of the member states. Contrary to expectations of functionalist (and later so-called neofunctionalist) theorists, governance beyond the state in postwar Western Europe did not evolve merely as a consequence of functional demands for technocratic independence. Rather, two additional dimensions of change also proved decisive: the political—or the defense of existing institutional advantages and/or the struggle to realize new ones; and the cultural—or the mobilization of conceptions of “right” or legitimate governance in the face of purported functional and political pressures for change. As a consequence of the interplay of all three dimensions—functional, political, and cultural—European integration ultimately settled on a form of governance in which the political oversight and control of national executives played a decisive role, a feature of European supranationalism that persists to this day. Even if a measure of supranational technocratic autonomy was broadly recognized as functionally necessary to the European project, national executives worked successfully to preserve significant institutional advantages in the integration process by mobilizing conceptions of legitimacy that, for better or worse, remain wedded to national institutions to a significant degree. It was through national executive oversight—eventually supplemented by national parliamentary and national judicial oversight—that integration has been able to maintain a connection to conceptions of democratic and constitutional legitimacy on the national level, even as functional pressures seemed to warrant a shift in governance to autonomous supranational bodies.

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For Western European elites faced with the daunting task of reconstruction in the aftermath of World War II, the New Deal seemed to offer a successful model of institutional

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and regulatory innovation in the face of devastating crisis. “[T]he situation at the end of this war will resemble that in America in 1933, though on a wider and deeper scale,” wrote David Mitrany, a Romanian-born, naturalized-British scholar of international relations, in 1943. “And for the same reasons the path pursued by Mr. Roosevelt in 1933 offers the best, perhaps the only chance for getting a new international life going.”¹ Historians of European integration have also noted the impact of the New Deal on the thinking of Jean Monnet, among the more successful proponents of European integration in the postwar decades.² The American historian John Gillingham, for example, has written: “The essential elements of [Monnet’s] policy”—the creation of an explicitly supranational “High Authority” (today called the European Commission) with seemingly unprecedented degree of regulatory powers capable of binding national governments—“underscore the importance of the New Deal inspiration.”³ Monnet wanted nothing less, in Gillingham’s view, than “a New Deal for French, and European, industry and planned to launch and land it with the help of a handful of like-minded men who wielded decisive power in the post war world.”⁴

From an institutional standpoint, the New Deal seemingly offered a political operator like Jean Monnet or a theorist like David Mitrany a model of relatively autonomous, technocratic governance, freed from legal limitations inherited from the past. Outdated notions of “national sovereignty” in the case of European integration—like those of “separation of powers” in the purported case of the New Deal—would no longer be allowed to impede the creation of new supranational and international bodies for the purposes of international cooperation. These bodies, rather, would be designed according to functional demands—that is, they would emerge and develop as a function of the problems they were designed to address, which inherently transcended national boundaries—rather than being forced to fit into *a priori* legal norms derived from outdated categories like national sovereignty and separation of powers.

Functionalism, of course, had been an *idée-force* the interwar period, particularly (but not exclusively) among Anglo-American public law scholars.⁵ The functionalist out-

¹ David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* 30 (4th ed. 1946) (1943).

² See, e.g., John Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945-1955: The Germans and French from Ruhr Conflict to Economic Community* 232 (1991); Frederic J. Fransen, *The Supranational Politics of Jean Monnet: Ideas and Origins of the European Community* 92 (2001).

³ Gillingham, *supra* note 2, at 232.

⁴ *Id.* at 368.

⁵ See generally Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. Toronto L.J. 361 (2005). Functionalism, however, was not the exclusive preserve of domestic public law theorists in the interwar period (witness Mitrany), nor was it the sole property of the intellectual left in the Anglo-American world. See, e.g., Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (legislative Delegationen)*, 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252 (1936). For a discussion of Schmitt and other authoritarian/fascist theorists of the interwar period who argued in a functionalist vein, see Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* 63-64, 70-74 (2010).

look seemed to offer an objective justification for departures from traditional institutional patterns or legal categories that these scholars thought were demanded in the regulation of a modern industrial society. As the New Dealer David Landis had put it in his 1938 book, *The Administrative Process*, the expansion of autonomous technocratic governance in the United States in the prior half-century was a consequence of “the inadequacy of a simple tripartite form of government to deal with modern problems.”⁶ The guiding principle of institutional design in the face of profound social change, a young Anglo-Canadian scholar wrote in 1935, should be “neither one of law nor of formal logic, but of expediency.”⁷ Functionalist approaches to questions of public law were common throughout the English-speaking world during this time, with Americans like Landis or Felix Frankfurter, or Britons like Harold Laski, Ivor Jennings, and William Robson, at the intellectual forefront of what was, in effect, a transatlantic scholarly movement.

Over the course of the interwar and into the postwar period, this line of functionalist thinking migrated out of the domestic public-law realm into that of international relations. The aim of a theorist like Mitrany or a political actor like Monnet was, in effect, to take the “administrative process” of a Landis—that is, problem-solving by legal and technocratic experts in institutions insulated from direct political control—to a whole new level, one beyond the nation-state. Indeed, several postwar constitutions in Western Europe seemed to give express sanction to this normative aim.⁸

David Mitrany’s 1943 pamphlet, *A Working Peace System: An Argument for the Functional Development of International Organization*, became the foundational text for this line of thinking in the international-relations context over subsequent decades.⁹ Indeed, Mitrany arguably anticipated, if sometimes reluctantly, many of the difficulties that would confront Jean Monnet and his team in the negotiations leading to the establishment of the European Coal and Steel Community (ECSC), the first “functional” step in European integration that would eventually culminate in the European Union of today.¹⁰ Inevitably the advocates of supranational delegation would be forced to confront a tension between technocratic independence and national executive oversight in modern administrative governance. This tension was characteristic *both* of the New Deal model as well as the first quarter-century of institutional development in European integration—beginning in the

⁶ James Landis, *The Administrative Process* 1 (1938).

⁷ See John Willis, *Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional*, 1 U. Toronto L.J. 53, 75 (1935).

⁸ Article 24(1) of the West German Basic Law of 1949, for example, provided: “The Federation may by legislation transfer sovereign rights [*Hoheitsrechte*] to interstate institutions [*zwischenstaatliche Einrichtungen*].” The postwar Italian constitution contained a similar provision (Article 11) by which Italy agreed “on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view.”

⁹ See Martin Griffiths, *Fifty Key Thinkers in International Relations* 191-94 (1999).

¹⁰ In setting forth this thesis, this paper draws on, but also significantly expands, the discussion in Lindseth, *supra* note 5, at 95-97.

1950s with the treaties of Paris and Rome in 1951 and 1957, continuing through the Luxembourg Compromise of 1966, and culminating in the creation of the European Council in 1974. What this history suggests is that institutional design is not just the result, as Mitrany hoped, of a functional calculus of “specific ends and needs.”¹¹ Rather, as Mitrany recognized but did not develop, the key challenge in designing supranational institutions would be to find a way to “reconcile” functional problem-solving outside the confines of the nation-state with the persistent pull of national identity, sovereignty, and control.¹² As this article will seek to show, the assertion of national executive oversight over the otherwise seemingly autonomous supranational policy process provided a crucial mechanism to satisfy those political-cultural demands.

In this way the emergence of European integration in the postwar decades provides an object lesson in the complexity of institutional change in an era of administrative governance (of which European supranationalism was merely a novel version of the phenomenon). In order to capture this complexity, one must undertake an examination that is sensitive to change along three interrelated historical dimensions. The first is indeed the “functional”—in that regard Mitrany and his like-minded contemporaries were clearly correct—in which existing institutional structures and legal categories are brought under pressure and even transformed as a consequence of objective social and economic demands (e.g., international competition, the extension of markets beyond national borders, transnational environmental challenges, etc.). The second, however, is the “political,” or the ways in which divergent interests struggle over the allocation of scarce institutional and legal advantages in responding to these structural-functional pressures. And the third and perhaps most important is the “cultural,” or the ways in which competing conceptions of legitimate governance (often legally expressed) are mobilized in politics to justify or resist these changes in institutional and legal categories or structures.

Functional change is often seen as the prime mover, but it should not be understood as the “independent variable” in a social-scientific sense. If that were the case, then we would observe much greater evolutionary change in legal and political institutions instead of their notorious “stickiness.” Such stickiness can be explained by the fact that structural shifts in the functional dimension (e.g., the extension of markets beyond national borders) are promoted and resisted in the political dimension (e.g., the creation of, or opposition to, transnational forms of governance to regulate those markets), and then are aided by justifications and interpretations mobilized in the cultural dimension (e.g., theories of constitutionalism or democracy “beyond the state,” or invocations of “sovereignty” to define the true locus of legitimate governance as “national”). The interaction of these dimensions of change results in a complex interplay of reciprocal influences that can

¹¹ See *infra* note 28 and accompanying text.

¹² See *infra* note 24 and accompanying text. For more details on the theory of institutional change informing this thesis, see Lindseth, *supra* note 5, at 13-14; see also Peter L. Lindseth, *The Eurozone Crisis, Institutional Change, and “Political Union,”* in *Political, Fiscal, and Banking Union in the Eurozone?* 149, 151-52 (Franklin Allen et al. eds., 2013).

only be explored historically, through an analytical narrative of institutional evolution that tries its best not to privilege change along any single dimension at the expense of the others. A durable institutional settlement can only emerge, I theorize, if the processes of change along these various dimensions are somehow “reconciled” in some roughly stable way—that is, if structural-functional and political demands are satisfied but the outcome is still recognizable from the perspective of persistent, though evolving, cultural conceptions of legitimacy.

I.

Mitrany’s *A Working Peace System* cannot be said, in itself, to have directly influenced the thinking of Monnet in the 1950s (or at least research has not uncovered any direct evidence of that influence).¹³ There is, however, strong evidence that Monnet served as a model for Mitrany as he developed his own theories of international cooperation in the 1930s and 1940s. Monnet was a leading actor in an emergent type of international cooperation dating back to inter-allied supply and transport boards during World War I, which Mitrany would later come to characterize as “functionalist” in a series of lectures at Yale in 1932.¹⁴ During the interwar period, Mitrany became associated with several international actors and theorists who became leading proponents of this sort of cooperation, including Leonard S. Woolf, G.D.H. Cole, and in particular Arthur Salter, a British economist who had worked extensively with Monnet both during the First and Second World Wars on these boards, as well as at the League of Nations.¹⁵ These boards were charged with allocating shipping tonnage and other resources among the allies in the interest of the overall war effort. Monnet reportedly advocated a proposal (which was ultimately rejected by governments) to have the boards evolve into “an international council . . . with full authority (*pleins pouvoirs*) to direct a general pool of tonnage”—that is, a fully autonomous supranational regulatory body.¹⁶ The notion of *pleins pouvoirs* was a term of art in interwar French public law to refer to fully autonomous normative power.¹⁷

¹³ Monnet does not mention Mitrany in his memoirs. See generally Jean Monnet, *Memoirs* (Richard Mayne trans., 1978). Nor do Jean Monnet’s two major biographers, François Duchêne, *Jean Monnet: The First Statesman of Interdependence* (1994), and Eric Roussel, *Jean Monnet* (1996).

¹⁴ See David Mitrany, *The Progress of International Government*, William Dodge Lectures, Yale University, 1932 (1933).

¹⁵ See Martin David Dubin, *Transgovernmental Processes in the League of Nations*, 37 *Int’l Org.* 469, 493 (1983).

¹⁶ “Conférence des Alliés, 1. Section des Importations et des transports maritimes. Décisions prises au cours des séances de Commission des 29, 30 Novembre et 1 Décembre 1917,” 3 December 1917, F12/7802, AN, as quoted and translated in Fransen, *supra* note 2, at 24; see also Monnet, *supra* note 13, at 68-69; Duchêne, *supra* note 13, at 36-39.

¹⁷ See Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 *Yale L.J.* 1341, 1377-81 (2004). But see Duchêne, *supra* note 13, at 38 (“there was no question of international authority over governments”). For Monnet’s similar efforts at the outset of World War II, see Fransen, *supra* note 2, 72-74; see also Gillingham, *supra* note 2, at 369 (the High Authority “was meant to be run as Monnet imagined wartime boards of American industry had been”).

In seeking to understand the relationship between functionalist theory and Monnet's efforts in the early years of European integration, one should first take note of the strikingly similar tone and conceptual vocabulary of *A Working Peace System* and Monnet's most important contribution to postwar integration, the Schuman Declaration of May 1950.¹⁸ Whereas Mitrany wrote in 1943 that functionalist cooperation in Europe "will acquire a living body not through a written act of faith but through active organic development,"¹⁹ Monnet wrote in 1950 that "an organized and living Europe . . . will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity." The "common economic system" would in turn, Monnet claimed, be a "leaven from which may grow a wider and deeper community."²⁰

The key difference between the two documents was Monnet's willingness to indulge in the hope that the "the setting up of common foundations for economic development" through the ECSC might serve "as the first step in the federation of Europe."²¹ For Mitrany, the goal of supranational federation (in Europe or elsewhere) was a chimera, requiring adherence to predetermined constitutional models that "may actually hold up progress" to functional cooperation.²² "The truth is that the federal idea goes in one sense too far and in another sense not far enough. Politically it is more than we can hope to obtain at present . . .; economically and socially it offers less than what is needed for a unified peaceful development."²³ As Mitrany recognized (and as Jean Monnet would later be forced to do), the key to designing supranational institutions was to find a way to "reconcile" denationalized, pragmatic problem-solving through functional institutions, with the persistent pull of national identity, sovereignty, and control.²⁴

Over time (and certainly over the course of the 1950s), Mitrany's intuitive hostility to the language of federalism would be vindicated in the process of European integration, at least in part. In the negotiations and institutional design of the ECSC, and more particularly of its successor, the European Economic Community (EEC), federalist-constitutionalist discourse would be avoided in favor of a seemingly functionalist vocabulary. Nevertheless, Mitrany's vindication would be only partial. Like Monnet after him, Mitrany greatly overestimated the capacity of national executives to acquiesce in a supranational system built primarily on technocratic autonomy, no matter how "functionally" necessary that autonomy might seem to be.

¹⁸ Declaration of 9 May 1950 (http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm) [hereinafter Schuman Declaration].

¹⁹ Mitrany, *supra* note 1, at 18.

²⁰ Schuman Declaration, *supra* note 18.

²¹ *Id.*

²² Mitrany, *supra* note 1, at 9.

²³ *Id.* at 10.

²⁴ *Id.* at 6.

The insistence on the functional necessity of administrative independence arguably reflected a misunderstanding of the New Deal example on both Mitrany's and Monnet's part. Whatever Roosevelt might have thought of fostering administrative independence as a practical matter, one need only look at the administration's position in the famous 1935 Supreme Court case of *Humphrey's Executor* (upholding the constitutionality of independent regulatory agencies in certain circumstances) to see that Roosevelt was clearly hostile to it as a matter of law.²⁵ Roosevelt was, one might argue, an advocate of the "unitary executive" theory *avant la lettre*.²⁶ Thus, like Monnet after him, Mitrany was clearly selective in understanding the New Deal model. Indeed, had both men paid more attention to the central place the Roosevelt Administration gave to maintaining some form of hierarchical political control over administrative actors, they might have more been prepared for the assertions of national executive prerogatives in European integration that were to come.

What both Mitrany and Monnet clearly did wish to see emulated, however, was the apparent refusal of the New Deal to confine its institutional responses to "the old constitutional grooves"; rather, as Mitrany somewhat inartfully put it, President Roosevelt "simply stepped over them," and, by implication, the leaders of postwar international cooperation in Western Europe should do the same.²⁷ This refusal to be constrained by traditional constitutional categories, Mitrany insisted, reflected the "whole trend of modern government," which was increasingly moving toward organization "along the lines of specific ends and needs, and according to the conditions of their time and place, in lieu of traditional organization on the basis of a set constitutional division of jurisdiction of rights and powers."²⁸ The emergence of "specific administrative agencies" of the New Deal-type was, as Mitrany put it, "the peculiar trait and indeed the foundation of modern government," whose purpose and power was being "determined less by constitutional norms than by practical requirements."²⁹

Mitrany called for harnessing this functionalist dynamic in service of peaceful change *among states*, allowing New Deal-type administrative governance to "do internationally what it does nationally."³⁰ "The functional bodies contemplated here," he wrote, should have "autonomous tasks and powers,"³¹ hopefully staffed by "experts representing their respective technical departments, without passing through the complicating network

²⁵ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

²⁶ See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 278-89 (2008); see also Scott Horton, *Six Questions for Steven Calabresi, Author of The Unitary Executive*, No Comment Blog (Sept. 30, 2008) (<http://harpers.org/archive/2008/09/hbc-90003611>) ("Roosevelt was a major champion of the Unitary Executive").

²⁷ Mitrany, *supra* note 1, at 29.


²⁸ *Id.* at 28.

²⁹ *Id.*

³⁰ *Id.* at 34.

³¹ *Id.* at 7.

of political and diplomatic censors.”³² Indeed, Mitrany called for “a detached international civil service,” which in his view “would be the best insurance against any possible abuses” (i.e., assertions of excessive national control) and would foster instead “a new conscience” of independence and practical problem-solving on a transnational scale.³³

As for political control of this new technocracy, Mitrany was vague, even contradictory. He rejected the view that, in keeping with traditional notions of sovereignty, any particular country should “by right” have a veto over the operations of these new entities (noting that “neither the various local authorities in the London Transport Board, nor the seven states concerned in the T.V.A.” could make such a claim).³⁴ Indeed, Mitrany questioned what he called “the habitual assumption  that international action must have some over-all *political authority* above it” (his emphasis).³⁵ He thought some “comprehensive authority”—“hardly less than a world government”—was “not now a practical possibility”³⁶ and in any event would not be desirable even if it were. Rather, as Mitrany stressed, “it is the central view of the functional approach that such an authority is not essential for our greatest and real immediate needs. The several functions could be organized through the agreement, given specifically in each case, of the national governments chiefly concerned, with the grant of the requisite powers and resources.”³⁷

Mitrany himself also recognized, however, the inherent limitations of any such enabling agreement, what rational-choice theorists would today call the problem of “incomplete contracting.” The inevitability of gaps and ambiguities in the enabling agreement might allow the new supranational agents to pursue their own interests rather than those of their multiple principals (the so-called “agency cost problem,” albeit on an international scale). Here a certain measure of ambivalence about technocratic autonomy clearly entered Mitrany’s thinking. Given the inevitability of gaps and ambiguities, Mitrany recognized that some form of political control would probably be required. As he put it: “If issues should arise in the functional system which would call either for some new departure or the interpretation of existing arrangements, that could only be done in council by all governments concerned.”³⁸ He further contemplated the creation of “some body of a representative kind” that “could discuss and ventilate general policies, as an expression of the mind and will of public opinion.” But he added, in keeping with the technocratic understandings of the proper role of legislatures in the administrative state, that any such

³² Id. at 35.

³³ Id. at 48.

³⁴ Id. at 47.

³⁵ Id. at 45.

³⁶ Id.

³⁷ Id.

³⁸ Id.

body “could not actually prescribe policy, or this might turn out to be at odds with the policy of governments.”³⁹

Contrary to Mitrany’s claims, however, the “whole trend of modern government” was clearly not exclusively in a functionalist direction, and “constitutional norms” more than simply “practical requirements” still mattered in the design of institutions. Other factors—politics, for example, manifest in contests over scarce resources and institutional advantages; or more generally political culture, manifest in different (and sincerely held) views over the proper form of legitimate governance—still helped to shape institutional and policy outcomes. Indeed, as already noted, the New Deal legacy, like the entire legacy of the interwar period, was much more complex than Mitrany’s functionalist reading of it supposed, certainly with regard to Roosevelt. Rather than “simply stepping over”⁴⁰ constitutional limitations in the face of crisis, constitutional resistance to Roosevelt’s efforts, as well as the inevitable process of constitutional negotiation that ensued, deeply shaped the New Deal institutional environment. These contests were sometimes of a purely a political nature—inter-branch struggles over scarce institutional advantages—but at other times they dealt with questions of principle—real differences over the meaning of legitimate governance in a modern industrial society.⁴¹ Landis himself had acknowledged as much in *The Administrative Process*, observing that any functional change in institutions still needed to “preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government.”⁴² A kind of legal-cultural reconciliation was required, Landis seemed to suggest, between the constitutional values inherited from the past and the “exigencies of governance” in the present.⁴³

II.

In the negotiations over European integration in the 1950s, it would soon become apparent that a similar sort of reconciliation would be required. At the heart of integration was the tension between the functional demands for delegation of some measure of autonomous regulatory power to supranational bodies, on the one hand, and the continued recognition for some form of national oversight and control, on the other. The resulting political, legal, and institutional framework proved to be quite different from the functionalist vision of Mitrany in *A Working Peace System*, or the functionalist proposals of Monnet in the Schuman Plan. In this new framework, national executives would be repeatedly called upon to place their political weight, and more importantly their

³⁹ Id. On the changing understandings of the legislative function in the postwar constitutional environment, see Lindseth, *supra* note 5, at 75-81; for more detail, see Lindseth, *supra* note 17, pt. III.

⁴⁰ See *supra* note 27 and accompanying text.

⁴¹ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); for succinct summary of inter-branch conflicts during the New Deal, see Calabresi & Yoo, *supra* note 26, at 278-89.

⁴² Landis, *supra* note 6, at 1.

⁴³ Id. at 2.

constitutional legitimacy as international representatives of their national communities, behind the seemingly “technical” deals that were struck over economic substance. Indeed, integration would prove once again that, in an era of administrative governance, the line between the purportedly “political” and “technical” realms was deeply blurred, and the felt need for political legitimation of even technical decision-making was much greater than functionalist theorists had supposed.⁴⁴

Reflecting Monnet’s fundamentally functionalist mind-set, the only institution mentioned in the Schuman Declaration was an independent technocratic body, the so-called High Authority, a name intentionally evocative of administrative agencies on the New Deal model (like the Tennessee Valley Authority). Paul Reuter, a French law professor who was a member of Monnet’s drafting team, later acknowledged that the proposal for a High Authority stood “in a disquieting solitude.”⁴⁵ According to Reuter, the High Authority’s independence “was in some sense a desperate solution,” because there was “neither a European parliament, nor government, nor people”⁴⁶ on which to build an integrated polity or market. Reuter argued that the only way “to build Europe without Europeans” was “to address ourselves to independent personalities”⁴⁷ whose decisions would then be binding on national governments. Reuter would later recall that 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.”⁴⁸

Thus, in the original French proposal the High Authority was to serve, in effect, as a kind of autonomous regulatory agency of an extraordinarily novel type, one that possessed normative power delegated from national parliaments but would otherwise be freed from having its decisions legitimized by subsequent national oversight (notably via the national executive). The original insistence of Monnet on an independent, supranational regulatory authority was among the major reasons for the British government’s refusal to pursue the negotiations on the terms proposed by the French government in May 1950.⁴⁹ The United Kingdom’s refusal to participate, however, would prove ironic in

⁴⁴ The subsequent discussion is a condensation of chapter 3 of Lindseth, *supra* note 5.

⁴⁵ Paul Reuter, *La Communauté européenne du charbon et de l’acier* 51 (1953). According to Frances Lynch: “It was Paul Reuter who [proposed] the form of a supranational High Authority whose decisions would be binding on governments.” Frances Lynch, *The Role of Jean Monnet in Setting up the European Coal and Steel Community*, in *Die Anfänge des Schuman-Plans 1950/51*, at 120 (Klaus Schwabe ed., 1988) (citing 81 AJ 152, *Élaboration de la proposition du 9 mai 1950*); see also Monnet, *supra* note 13, at 296-97.

⁴⁶ Reuter, *supra* note 45, at 51-52.

⁴⁷ *Id.* at 51.

⁴⁸ Paul Reuter, *Aux Origines du Plan Schuman*, in 2 *Mélanges Fernand Dehousse* 66, 67 (Pierre-Henri Teitgen ed., 1979).

⁴⁹ One historian has referred to “a fundamental clash of assumptions between the British and the French,” the former not opposed to a coal and steel community in principle but favoring only one based “on the principle of inter-governmental cooperation,” whereas the latter sought a “‘supra-national’ authority, the

many respects. British qualms over supranationalism in the ECSC were in fact shared not only by elements within the French government itself,⁵⁰ but also, more importantly, by the Benelux governments (led by the Dutch).⁵¹ Although the Dutch agreed to join the negotiations, they worked tirelessly—and with some success, as it turned out—to transform the ECSC into something much closer to the sort of intergovernmental body that Britain would have preferred.⁵² Perhaps most importantly, the Benelux countries agreed that together they would press for the establishment of both a Council of Ministers to oversee the High Authority's activities in a political sense, as well as a Court of Justice to oversee its activities in a legal or judicial sense.

A compromise on institutional questions subsequently emerged that aggregated the various elements of the Benelux and the French positions. On the one hand, several leading provisions of the Treaty of Paris of 1951, notably Article 9, would seem to reflect the French position that the *sine qua non* of supranationalism was the autonomy of the High Authority from national control.⁵³ On the other hand, as Robert Schuman, the French Foreign Minister, would himself later recognize, one could not speak of the supranational independence of the High Authority under Article 9 without noting that it was exercised only “within the limits of the Treaty.”⁵⁴ The most important limit involved the High Authority's relationship with the “Special Council of Ministers,” or simply the

establishment of which would involve the surrender of sovereignty by the member states.” Roger Bullen, *The British Government and the Schuman Plan May 1950–March 1951*, in *Die Anfänge des Schuman-Plans 1950/51*, supra note 45, at 199, 206 [hereinafter Bullen, *The British Government*]. See also Roger Bullen, *Britain and “Europe” 1950–1957*, in *Il Rilancio dell'Europa e i Trattati di Roma 317, 326* (Enrico Serra ed., 1989) (referring to one of the features of British policy as “the refusal to relinquish the sovereign authority of Parliament to supranational bodies”); as well as Alan S. Milward, *The United Kingdom and the European Community: The Rise and Fall of a National Strategy, 1945–1963*, ch. 3 (2002).

⁵⁰ See Lynch, supra note 45, at 123 (describing the views of the French finance minister, Petsche); Milward, supra note 49, at 76 (describing views of Petsche as well as those of Bidault, former foreign minister, and Mayer, justice minister); see also Craig Parsons, *A Certain Idea of Europe* 61 (2003) (similarly negative views held by Buron, Economic Affairs; Louvel, Industry and Trade; and Bacon, Labor).

⁵¹ Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation-State* 79 (2005).

⁵² According to Bullen, the adoption of the so-called “Dutch formula” in fact “was considered as raising the possibility of Britain belatedly joining the negotiations on the basis that further dilutions of supranationalism would be possible.” Bullen, *The British Government*, supra note 49, at 208; but see Milward, supra note 49, at 64 (quoting Rogers Stevens, head of Economic Relations Department, to Ernest Bevin: “[The Dutch formula] is still far removed from any concept which ministers would be prepared to accept.”); see also id. at 73 (criticizing Edmund Dell, *The Schuman Plan and British Abdication of Leadership in Europe* (1995)).

⁵³ Robert Schuman, “Preface” to Reuter, supra note 45, at 7. Article 9 provided that the members of the High Authority were to “exercise their functions in complete independence, in the general interest of the Community”; they were not to “solicit nor accept instructions from any government or any organization.” Not only did Article 9 require members of the High Authority to “abstain from all conduct incompatible with the supranational character of their functions,” it added that each Member State was obligated “to respect this supranational character and not to seek to influence the members of the High Authority in the execution of their duties.” Treaty of Paris, Article 9.

⁵⁴ Schuman, supra note 53, at 7.

“Council,” the body composed of ministerial representatives of national governments whose establishment Monnet originally opposed.

Under the terms of Article 26, the Council of Ministers was formally speaking not to exercise any oversight or control function. Rather, the Council existed simply to “harmoniz[e] the action of the High Authority and that of the governments which are responsible for the general economic policies of their countries.” Nevertheless, the more specific provisions of the treaty specified a whole range of domains in which the High Authority could not act without first consulting with, or, more importantly, gaining the agreement of, the Council of Ministers.⁵⁵ Perhaps most importantly Article 95 of the Treaty of Paris provided that only the Council, acting by unanimity, could authorize the High Authority to act in “cases not expressly provided for in this Treaty” but which nevertheless appeared to the High Authority to be necessary to fulfill the goals of the common market.⁵⁶

These were the so-called “spill-over” issues. They were important because, as functionalist theory evolved into so-called “neofunctionalism” over the course of the 1950s, the process of spill-over became central to theoretical predictions about the future evolution of integration. The leading neofunctionalists, like the American political scientist Ernst Haas, tried to present themselves as less normative and more positive in their approach than their functionalist predecessors.⁵⁷ Neofunctionalists recognized that the initial decision to delegate was the by-product of a highly political rather than merely functional/technical process. But like the functionalists, neofunctionalists still saw the driving force behind any *subsequent* expansion of the supranational regulatory competences to be the neutral imperatives of functional problem-solving (the spill-over effect), as determined by lower level technocrats, operating in relative autonomy from political control by national executives, and in alliance with sub-national economic interests committed to expanding integration. Article 95 of the Treaty of Paris ran directly contrary to this theory, vesting the power to control spill over in the national executives, sitting in the Council of Ministers.

What the ECSC negotiations suggested was the fundamental impossibility of separating the purportedly “technical” from the “political.” The basic premise of the Benelux call for the establishment of a Council of Ministers was that technical decision-making at the Community level would inevitably impinge on political questions of values or the allo-

⁵⁵ For an exhaustive analysis, see Raymond Prieur, *La Communauté européenne du charbon et de l'acier: Activité et évolution* 73-81 (1962). For example, only the Council in the first instance, acting by unanimity, could establish consumption and allocation restrictions in times of serious shortages in production of coal, steel or related products (Treaty of Paris, Article 59(2)) and only where the Council could not decide did the High Authority gain the power to make these allocations (Article 59(3)). For other examples, see Article 54 (unanimity required to authorize “works or installations” to increase production or lower production costs); Article 50(2) (two-thirds majority required to raise the one-percent levy on the production of coal and steel). And in the area of non-compliance by a Member State with its obligations under the treaty, only the Council, acting by a two-thirds majority, could authorize the High Authority to impose sanctions on the recalcitrant state. Treaty of Paris, Article 88.

⁵⁶ Treaty of Paris, Article 95.

⁵⁷ See Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957* (1958).

cation of scarce resources, for which political control would be necessary.⁵⁸ Organizational questions were thus intimately bound up with the intergovernmental effort “to determine as far as possible the extent and direction of national gain and loss before the High Authority began to function.”⁵⁹ Given the legal framework within which the High Authority was supposed to operate, it is hardly surprising, as Alan Milward later concluded from his examination of the archival evidence, that it did not subsequently act “as a neutral functional regulator as [the neofunctionalists] claimed.”⁶⁰ The organs of the ECSC arguably came into existence in the legal form they did “precisely because the issues involved could not be reduced to the merely functional level.”⁶¹

III.

The functionalist and neofunctionalist advocates of integration in the 1950s no doubt underestimated the genuinely political character of the ECSC’s regulatory activities and, therefore, the need for national governments to institute mechanisms of political supervision through the Council of Ministers. Nevertheless, the emphasis these theorists placed on the technical character of the Community as primarily a problem-solving entity corresponded to reality in at least one important sense: In the coal and steel context, precisely because it was broadly *perceived* to involve regulatory issues of a largely technical or functional nature, supranational delegation was less *politically* problematic, requiring little or no parliamentary involvement. Although knowledgeable insiders recognized otherwise—as the detailed provisions of the Treaty of Paris suggested—this seemingly technical character of coal and steel regulation helped to neutralize political opposition to the adoption of the Treaty of Paris when it was presented to national parliaments.⁶²

The same sort of stratagem was unavailable, of course, once the process of European integration shifted from such a narrow and seemingly technical realm to one that went to the very heart of the nation-state’s traditional political responsibilities: national defense and control of the armed forces. The French proposal in the fall of 1950 for a

⁵⁸ Dirk Spierenburg & Raymond Poidevin, *Histoire de la Haute Autorité de la Communauté européenne du charbon et de l’acier: Une expérience supranationale* 20 (1993).

⁵⁹ Alan S. Milward, *The Reconstruction of Western Europe, 1945-51*, at 498 (1984).

⁶⁰ Alan S. Milward, *The European Rescue of the Nation-State* 15 (2d ed. 2000); see also Karen J. Alter & David Steinberg, *The Theory and Reality of the European Coal and Steel Community*, in *Making History: European Integration and Institutional Change at Fifty* 89 (Sophie Meunier & Kathleen R. McNamara eds., 2007).

⁶¹ Milward, *supra* note 60, at 15.

⁶² In the debate over the Treaty of Paris in the French National Assembly, for example, a Gaullist deputy complained that French sovereignty was being “abandon[ed] . . . to a stateless and uncontrolled technocracy.” Jacques Soustelle, *Journal officiel, Débats parlementaires, Assemblée nationale* 8881 (Dec. 6, 1951). However, a center-right supporter of the ECSC could offer the more comforting argument that the High Authority was “merely the organ for the administration of common rules,” with delegated normative powers subject to the detailed and precise terms of the treaty. Alfred Coste-Floret, *id.* at 8854. Outside of those strictly delimited and largely technical realms, Coste-Floret implied, national governments and parliaments retained the full prerogatives of sovereignty. For a discussion of the parliamentary debates, see Henry L. Mason, *The European Coal and Steel Community: Experiment in Supranationalism* 22-23 (1955).

European Defense Community (EDC), culminating in the signing of the proposed EDC Treaty in May 1952, quickly revealed the limits of political support for supranational delegation. Given the highly political nature of national defense, the measure of technocratic autonomy that the High Authority enjoyed at the head of the ECSC—and perhaps even more importantly, the *supranational* character of that technocratic autonomy—could not be transferred to the EDC equivalent (the “Commissariat”). This was true even if the Commissariat was supposed to operate under the supervision of a Council of Ministers, at least not without giving rise to profound political misgivings at the national level.

The rejection of the EDC by the French National Assembly in 1954 would directly influence both the substantive scope and institutional form of the so-called “relaunch” of European integration in the mid-1950s, after the collapse of the EDC. The Treaty of Rome of 1957, establishing the European Economic Community (EEC), would retain the quadripartite organizational *form* of the ECSC (a national-executive Council of Ministers, a supranational technocratic body now called the “European Commission,” a parliamentary “Assembly,” and a Court of Justice). But there would be one major *substantive* difference between the institutional structures of the new EEC and the old ECSC: The legal balance of power under the EEC would shift formally and decisively toward the Council of Ministers, which gained the final say in most aspects of legislative norm-production at the Community level.

The success of the negotiations leading to the Treaty of Rome thus would turn not merely on its economic merits; rather, it would ~~but~~ also turn on the conscious effort on the part of key political actors to manage the entire institutional question in the direction of national executive control and strictly limited supranational technocratic autonomy. Throughout this process, the notion of supranationalism as a federal constitutionalist ideal would be studiously avoided,⁶³ in favor of an even more functional supranationalism that accepted a measure of autonomous authority at the Community level but only to police the compliance of Member States with their agreements over economic substance. Otherwise, functional supranationalism was designed to preserve the freedom of action of national executives that had been so strenuously achieved at the national level in the constitutional stabilization of domestic governance in the postwar decades. In this sense, the Member States recognized that certain commitment institutions—the European Commission, the Court of Justice—would be instrumentally necessary, not as the foundation of a future federal Europe, but as guarantors of the narrowly-defined policy goals of economic and market integration set forth in the Treaty of Rome.

This reliance on a functionalist, instrumental supranationalism (cloaked as much as possible in the guise of political intergovernmentalism) manifested itself in the earliest stages of the relaunch. In the joint memorandum calling for the establishment of a customs union that the Benelux countries prepared (in advance of the conference of ECSC foreign ministers in June 1955 in Messina, Italy), no mention was made of the idea of su-

⁶³ John Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy?* 44, 49 (2003), quoting Robert Marjolin, *Architect of European Unity: Memoirs, 1911-1986* (1983).

delete "but"

pranationalism or of a High Authority. Rather, the memorandum spoke only of “common authorities” or an “organism,” with the remaining institutional questions to be left to the intergovernmental conference responsible for drafting the treaty.⁶⁴ The purpose of such vagueness was to avoid “awaken[ing] the strong anti-supranational sentiments in France and elsewhere,” as well as to facilitate “the adherence of the other governments to the basic idea of organizing a conference on the issues raised by the Benelux.”⁶⁵

At the Messina meeting itself, rather than a decision in favor of an intergovernmental conference directly, the ECSC foreign ministers decided first to refer the Benelux proposal for further study to an ad hoc interministerial committee of high-level officials, which Paul-Henri Spaak, the Belgian Foreign Minister, would lead. Although the Spaak Committee engaged in sensitive political discussions of the substantive and institutional framework for future intergovernmental negotiations, the committee’s seemingly technocratic composition allowed it to be portrayed domestically (particularly in France) as primarily an “expert” body.⁶⁶ The report produced by the committee⁶⁷ also followed a similarly functionalist/technocratic strategy on institutional questions, placing emphasis on substantive policy goals (like a customs union) and only then making mention of the new Community institutions “of which the competences will be clearly defined.”⁶⁸

Like the Benelux memorandum, the Spaak Report studiously avoided even mentioning the idea of supranationalism or a High Authority, opting instead for the name “European Commission,” an even more functionalist and administrative sounding term. In the determination of what the competences of the organs of the new common market should be, the Spaak Report adopted the following basic distinction: “questions of general economic policy” were to “remain the reserved domain of the governments” of the Member States, whereas “problems” associated with the “functioning” of the common market would be delegated to the Community level.⁶⁹ The report further asserted that, even though most questions of general law and policy would remain the province of national institutions, certain of these laws and policies would nevertheless have “such a decisive impact on the functioning of the market” that the creation of some kind of “common institution” would be warranted to make proposals to national governments

⁶⁴ See Anjo G. Harryvan & Albert E. Kersten, *The Netherlands, Benelux and the Relance européenne 1954-1955*, in *Il Rilancio dell’Europa e i Trattati di Roma*, supra note 49, at 125, 150-51, citing BZ, II, 913.100, no. 139 (“Memorandum des Pays Benelux aux Six Pays de la C.E.C.A.”).

⁶⁵ Harryvan & Kersten, supra note 64, at 150-51. Cf. Pierre Pescatore, *Les travaux du “groupe juridique” dans les négociations des Traités de Rome*, 34 *Studia Diplomatica* 159, 165 (1981) (speaking of the desire of the negotiators at the future intergovernmental conference “to appease the demons which [the EDC] had aroused”).

⁶⁶ Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 116 (1998).

⁶⁷ Comité intergouvernemental créé par la Conférence de Messine, *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères* (Brussels, Apr. 21, 1956) [hereinafter Spaak Report].

⁶⁸ Id. at 23.

⁶⁹ Id. at 24.

(via the Council of Ministers) to adopt measures to “coordinate” them. Indeed, such coordination could be “so indispensable to the functioning and the development of the market” that the treaty might have to dispense with the rule of unanimity in the Council of Ministers “in strictly enumerated cases or after the passage of a determinate period.”⁷⁰

The Spaak Report quite rightly suggested, in other words, that functional questions could not be easily separated from political ones, and that the construction of a common market was not simply a matter of the straightforward creation of a customs union or other forms of sectoral integration. Rather, it would require significant harmonization among national laws and policies in related domains. Although no autonomous supranational body should have the right to *impose* such harmonization, the report asserted that such a body—the Commission—should still have the power of initiative at least to *propose* it—the infamous “Community model.”⁷¹ Moreover, the Commission’s harmonization proposals should not in every case require the unanimous support of all Member State governments in the Council of Ministers. Although unanimity would remain “the rule,”⁷² the report stated that in certain cases the Council of Ministers should be able to adopt harmonization measures through qualified-majority voting, in the over-all interest of achieving a functioning common market.

The institutional principles enunciated by the Spaak Report well anticipated the central problems that would confront the negotiators of the Treaty of Rome over the course of the next year. On the one hand, the Spaak Report’s overall institutional discussion (which was actually quite limited) adhered closely to functionalist language in describing the Commission’s responsibilities.⁷³ On the other hand, it also made quite clear that the authority of the Commission under the Community model would inevitably overlap to a great degree with political questions close to the core responsibilities of the Member States. Moreover, that model required a dramatically augmented role for national executives via the Council of Ministers, in order to distinguish itself from the institutional system of the ECSC.

This did not mean, however, that the effort to strike the right balance in the treaty between the Council’s and Commission’s relative functions would be easy. The task was given over to a group of nationally designated legal experts—the *groupe juridique*—which was responsible for drafting the institutional and legal provisions in the Treaties of Rome.⁷⁴ The legal group clearly recognized, based on the political decisions made at high-

⁷⁰ Id.

⁷¹ See generally Parsons, *supra* note 50, at 9 (describing the institutionalization of the “community model”).

⁷² Spaak Report, *supra* note 67, at 25.

⁷³ The report, for example, spoke of the Commission primarily “administering the treaty and overseeing the functioning and the development of the common market.” Id.

⁷⁴ The major questions of policy were the responsibility of the other two main negotiating groups, for the common market and atomic affairs respectively. The legal group was assembled originally as a drafting group (*groupe de rédaction*) responsible for putting into legal forms the agreements over political and economic substance made by the other groups. It took on, however, a key role in the actual negotiation of the institutional provisions. See generally Pescatore, *supra* note 65; see also Anne Boerger-De

er levels, “that the central institution would henceforth be the Council, in the hands of which would be largely concentrated the political power of decision, as well as the legislative function.”⁷⁵ Nevertheless, in its capacity as principal drafter of the institutional provisions, the legal negotiators paid a great deal of attention to “the articulation between the right of initiative of the Commission and the right of decision of the Council.”⁷⁶ Given the ultimate decisional power in the Council, the *groupe juridique* inserted a provision designed to protect, at least, the Commission’s unfettered discretion in making legislative proposals.⁷⁷ Although largely ignored at the time, these decisions would ultimately prove controversial, particularly in France after de Gaulle’s return to power in 1958. Gaullists would later maintain that the institutional weakness of the French executive under the Fourth Republic undermined its capacity to negotiate a treaty sufficiently respectful of France’s sovereign prerogatives (which de Gaulle of course equated with national-executive control over supranational policy decisions, just as in the administrative state).

IV.

When de Gaulle assumed the presidency of the newly established Fifth Republic in 1959, he understood the economic benefits of integration, most importantly the Europeanization of agricultural protection. But he was also deeply hostile to some of the more supranational elements of the Treaty of Rome in other domains. Particularly troublesome was the progressive shift to qualified-majority voting in the Council over the course of the second and third stages of the “transition period” (lasting twelve years from the entry into force of the treaty, divided equally into three parts). De Gaulle would later assert that, to accept majority voting after “we had decided to take destiny into our own hands” at home in 1958, would leave France “exposed to the possibility of being overruled in any economic matter whatsoever, and therefore in social and sometimes political matters” as well.⁷⁸

De Gaulle was nevertheless willing to disguise this hostility when open expression did not serve French national interests. De Gaulle held off his battle over qualified-

Smedt, *Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome*, 21 *Contemp. Eur. Hist.* 339 (2012). The deference that the political negotiators gave to the *groupe juridique* on institutional questions (its proposals, always presented unanimously, were never rejected) was arguably a harbinger of the sort of deference that would be characteristic of “legal” neofunctionalism that took hold in integration in the 1960s. See generally Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *Int’l Org.* 41 (1993).

⁷⁵ Pescatore, *supra* note 65, at 168.

⁷⁶ *Id.* at 169.

⁷⁷ Article 149 thus provided that, as long as the Council had not acted, the Commission remained free to alter its proposal at any time. By contrast, for the Council to amend a proposal of the Commission, Article 149 required unanimity of the Member State representatives. In this respect, the legal group borrowed from the model established by the ECSC Treaty, in which a Council unanimity requirement was actually often used to augment the normative autonomy of the Commission (although the Council still retained the ultimate power of decision in most cases, in striking contrast to the Treaty of Paris).

⁷⁸ Press Conference, Sept. 9, 1965 (quoted in Anthony L. Teasdale, *The Life and Death of the Luxembourg Compromise*, 31 *J. Common Market Stud.* 567, 568 (1993)).

majority voting until the final year of the second stage, in 1965. By then France had secured its principal policy goal: generous, Community-based support for French agriculture under the terms of the common agricultural policy (CAP). De Gaulle had long recognized that the move to qualified-majority voting in the third stage would greatly strengthen the position of the Commission—“this embryonic technocracy, for the most part foreign”⁷⁹—which would no longer need to satisfy each and every Member State in order to see its legislative proposals adopted in the Council.⁸⁰

To block this shift, the French government announced in mid-1965 that it would boycott all meetings of the Council, in a policy famously known as the *chaise vide*, or “empty chair,” until its concerns over qualified-majority voting had been properly addressed. The “empty chair” crisis was not resolved until January 1966, one month after de Gaulle prevailed over François Mitterrand in the French presidential election in December 1965. In what came to be known as the Luxembourg Compromise, France secured the right for any Member State to demand a Council decision by unanimity when it believed that “a very important national interest” was at stake.⁸¹

The Luxembourg Compromise, however, arguably only codified the traditional practice of consensus politics in the Council, a strong norm to be sure, but not the *révision d'ensemble* (“complete overhaul”) of the qualified-majority voting provisions in the treaty that was the stated goal of the French government.⁸² As a matter of both law and subsequent practice within the Council, the Luxembourg Compromise did not lay the foundations for a “veto culture” as is often supposed,⁸³ much less a “second European constitution” apart from the original Treaty of Rome itself.⁸⁴ The events of 1965-66 simply marked the *reassertion* of an older set of ground rules for European integration which had manifested themselves first in the negotiations of the Treaty of Paris and then in actual operation of the ECSC over the course of the 1950s: Community norm-production needed to be mediated in some way through national executives, just as in the administrative state.

⁷⁹ Id.

⁸⁰ So long as Member State amendments to a Commission proposal could only be made upon a unanimous vote under Article 149 (discussed *supra*, in note 77), the Commission would enjoy an effective veto over Member State changes, “unless by some extraordinary chance, the six states were unanimous in formulating an amendment.” Press Conference, Sept. 9, 1965, *supra* note 78. Thus, de Gaulle sought to exploit the crisis to remove “certain mistakes and ambiguities in the treaties,” notably the shift to qualified-majority voting at the beginning of the third stage. Id.

⁸¹ See Bulletin of the European Communities 8-10 (Mar. 1966).

⁸² Jean-Marie Palayret, De Gaulle Challenges the Community: France, the Empty Chair Crisis and the Luxembourg Compromise, in *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years On* 63 (Jean-Marie Palayret et al. eds., 2006).

⁸³ Teasdale, *supra* note 78, at 570.

⁸⁴ Sabino Cassese & Giacinto della Cananea, The Commission of the European Economic Community: The Administrative Ramifications of Its Political Development (1957-1967), in *Die Anfänge der Verwaltung der Europäischen Gemeinschaft* 75, 86 (Erk Volkmar Heyen ed., 1992).

The issue driving the empty chair crisis was thus not *whether* the policy agenda would be managed by the member states (all member states believed it should), but *how* it would be managed—whether unilaterally by a single member state exercising a veto under a unanimity regime, or collectively by the Council using consensus politics, albeit in the shadow of qualified-majority voting. This outcome nevertheless still defied the predictions of the neofunctionalists, who had foreseen a Commission-led, technocratic process of “spill over” from one domain to the next, inexorably driving the process of European integration forward beyond its original core mandate.⁸⁵ The emergent structure of shared national executive oversight via the Council—which “corresponded neither to the more ambitious federal dreams nor to the pure intergovernmentalism of the French President”⁸⁶—was in fact deeply tied to the diffusion and fragmentation of normative power in an era of administrative governance.

The culmination of this institutional reinforcement of national-executive oversight at the supranational level would occur just under ten years later, in 1974, in a development with significant long-term effects for the political life of European integration. At the initiative of French President Valéry Giscard d’Estaing and German Chancellor Helmut Schmidt, the heads of state and government of the Member States formed themselves into the “European Council”—a body initially outside the confines of treaty law⁸⁷—to serve as a forum for the chief executives of the Member States to decide on the future direction of integration policy. Assembling in (then) semi-annual summit meetings, the purpose of the European Council was to provide political guidance to Europe’s supranational regulatory process. In its seemingly blatant intergovernmentalism, the European Council appeared to federalists and other pro-Europeans as a fundamental reversal of the progress toward integration. This view assumed, however, that the most important measure of such progress was the degree of supranational normative autonomy in Community decision-making.

The more persuasive historical interpretation is that, “rather than reversing the process of European integration,” the establishment of the Council “actually signific[d] a wish to extend Community decision-making to new areas in response to changes in national policy objectives arising from the fundamental change in economic circumstances of the western European countries after 1974.”⁸⁸ The establishment of the European Council suggested that, for the process of European integration to have any hope of continued development with the end of the three decades of steady postwar expansion (the

⁸⁵ This contradiction is something that neofunctionalist theorists themselves were compelled to recognize. See, e.g., Ernst B. Haas, *The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing*, in *Regional Integration: Theory and Research* 3 (Leon N. Lindberg & Stuart A. Scheingold eds., 1971).

⁸⁶ N. Piers Ludlow, *The Eclipse of the Extremes: Demythologising the Luxembourg Compromise*, in *Crises and Compromises: The European Project 1963-1969*, at 247, 257 (Wilfried Loth ed., 2001).

⁸⁷ The European Council would not be formally established until the Single European Act of 1986.

⁸⁸ Alan S. Milward & Vibeke Sørensen, *Interdependence or Integration? A National Choice*, in Alan S. Milward et al., *The Frontier of National Sovereignty: History and Theory 1945-1992*, at 1, 24-25 (1993).

“trentes glorieuses”), clear *political* backing by the national chief executives would be needed. Technocratic policy development in the Commission (the “Community model”), even under ministerial supervision in the Council of Ministers, would not be enough; some form of leadership by heads of state or government was required.

The long-term consequences of the establishment of the European Council would be profound, despite the shift to qualified-majority voting in the Council of Ministers in an increasing number of domains, along with an increasing role of the European Parliament over the last several decades. The meetings of the European Council have become the political focal points of the EU’s political calendar. As Jacques Delors, Commission President from 1985 to 1995, wrote in the early 2000s, “the European Council plays—and should continue to play—an irreplaceable role in the recurrent efforts to develop a politically integrated Europe.”⁸⁹ As two leading integration scholars put it around the same time, “the European Council has, for over a quarter of a century, fixed the agenda of the Union, especially as the EU has moved beyond the specific tasks laid down in the original treaties. Nothing decisive has been initiated without its approval.”⁹⁰ Indeed, after its formalization in the Treaty of Lisbon in 2009, the European Council emerged as the EU’s “principal decisionmaker” in the context of the Eurozone Crisis, eclipsing the Commission, which “no longer [serves] as agenda setter and initiator of legislation.”⁹¹

V.

The Eurozone crisis has in some sense served once again to demonstrate, contrary to both functionalist and neofunctionalist hopes, that there is “a line in the sand beyond which only governments can set priorities and act.”⁹² The Commission’s inability to move beyond its subordinate role to the Council demonstrates the extent to which much the postwar functionalists had miscalculated in believing that a supranational technocratic body could effectively operate without “some over-all political authority above it,” as David Mitrany had hoped for such organizations.⁹³ The experience with the Organization for Economic Co-operation and Development (OECD), which loomed in the background of institutional politics in the European Community in the 1960s, had provided the first demonstration of this point. As a purely technocratic body, the OECD had evolved into nothing more than “a forum for registering international agreements made elsewhere, in-

⁸⁹ Jacques Delors, Foreword to Philippe Schoutheete & Helen Wallace, *The European Council*, Groupement d’Études et de Recherches Notre Europe, Research and European Issues No. 19 (Sept. 2002) (http://www.notre-europe.eu/uploads/tx_publication/Etud19-en.pdf).

⁹⁰ Schoutheete & Wallace, *supra* note 89, at 10.

⁹¹ Stefano Micossi, *The Eurozone Crisis and EU Institutional Change: A New CEPR Policy Insight*, VoxEU.org (Apr. 15, 2013) (<http://www.voxeu.org/article/eurozone-crisis-and-eu-institutional-change-new-cepr-policy-insight>).

⁹² Jean Pisani-Ferry, *Whose Economic Reform?*, Project Syndicate, 2013 (<http://www.project-syndicate.org/commentary/the-purpose-and-strategy-of-structural-reform-by-jean-pisani-ferry>).

⁹³ See *supra* note 35 and accompanying text.

creasingly of a minor kind.”⁹⁴ In contrast with the OECD, the European Community emerged as it did—i.e., with national executives providing essential political leadership within the Council—as “a total rejection of integration within [the] particular political framework” exemplified by the OECD.⁹⁵ Integration has required, and indeed still requires, national executive leadership.

Should this outcome surprise us? It should *not* if we recognize that, over the course of the twentieth century (including during the emergency that confronted Roosevelt under the New Deal), the forms of administrative governance—of which European integration is a particular, supranationalized type—have never been solely determined by functional factors, contrary to the hopes of a mid-century theorist like David Mitrany or a political operator like Jean Monnet.⁹⁶ We now know, from historical experience, that the question of optimal institutional design in an era of administrative governance—i.e., the quest for balance between administrative autonomy and political oversight—is deeply bound up with struggles over institutional control and conceptions of legitimacy.⁹⁷ The struggle to find a balance between supranational autonomy and national executive oversight, one could say, is an analogue to the formalist-functionalist debate in United States public law—though, as Peter Strauss long ago taught us, this debate in fact involves a “foolish inconsistency.”⁹⁸ In reality, the historical problem has been to find ways of allowing functional autonomy to evolve (within limits) while also reconciling that evolution to constitutional forms. Or, as Professor Strauss put it more eloquently, it has been a question of “maintaining the connection between each of the [constitutional] institutions and the paradigmatic function which it alone is empowered to serve, while also retaining a grasp on government as a whole that respects our commitments to the control of law.”⁹⁹

This problem is a challenging enough within the confines of a single administrative state, with its already significant functional diffusion and fragmentation of normative power. But in taking this diffusion and fragmentation beyond the confines of the nation-state, as the process of European integration has done, this challenge has been transformed into one of “maintaining the connection” between agents operating at the

⁹⁴ Milward, *supra* note 59, at 207 (referring to the OECD’s forerunner, the OEEC).

⁹⁵ *Id.* at 209.

⁹⁶ Even today, for the most sophisticated constitutional theorists of the EU, the evolution of European public law and supranational authority ultimately is a question of the functional demands of interdependence as they perceive them. See, e.g., Miguel Poiars Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, Robert Schuman Centre for Advanced Studies, Global Governance Programme, RSCAS Policy Paper 2012/11 (Oct. 2012) (http://cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS_PP_2012_11rev.pdf?sequence=1); for a commentary, see Peter Lindseth, *Thoughts on the Maduro Report: Saving the Euro Through European Democratization?*, EUTopialaw.com (Nov. 13, 2012) (<http://www.eutopialaw.com/2012/11/13/1608/>).

⁹⁷ See generally Lindseth, *supra* note 5; Lindseth, *supra* note 16.

⁹⁸ Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488 (1987).

⁹⁹ *Id.* at 493.

supranational level and a series of principals spread *among* various Member States. In the first instance, it fell to national executives, via the Council of Ministers and later the European Council, to develop mechanisms to legitimize this new, supranationalized form of denationalized administrative governance in a hierarchical-political sense. Eventually, however, as my book *Power and Legitimacy: Reconciling Europe and the Nation-State* has outlined in some detail, national high courts and national parliaments would seek their own legitimizing role in the process of supranational administrative governance as well.¹⁰⁰ In so doing, despite the claims of postwar functionalism, the public law of European integration has embedded supranational regulatory power within a framework of legitimating mechanisms mediated to a significant degree through democratic and constitutional bodies on the national level. These mechanisms strive to balance the evident functional and political demands for supranational regulatory solutions, on the one hand, with the continued cultural attachment to the nation-state as the primary locus of democratic and constitutional legitimacy in Europe, on the other. Put another way, these mechanisms establish a legitimating framework within which the otherwise undoubted complexity of Europe's policy-making processes—characterized by significant amounts of functionally autonomous regulatory power, distributed across multiple levels of governance—can operate *without evident democratic and constitutional legitimacy of their own*, at least as classically understood.

Stressing nationally grounded legitimating mechanisms is not to deny that European integration has also come rely on other controls operating at the supranational level. These include not just decisions of the supranational judiciary—a crucial driver of the integration process—but also mechanisms of hierarchical oversight within the European Commission itself, scrutiny by the European Parliament, as well as increased transparency and participation rights for outsiders in supranational policy processes. Over time, some of these more supranationally oriented controls (via the European Parliament perhaps, or perhaps via a genuinely democratic supranational executive) may gain an independent capacity to legitimize the regulatory output of European institutions in an autonomously democratic and constitutional sense, without national mediation of the type my work has described. As a historian, I will leave it to more forward-thinking legal and political theorists to reflect on how and when this autonomous supranational legitimacy might take hold, commensurate with the autonomous regulatory power that European institutions undoubtedly exercise.

But until that future moment, my historian's sensibility suggests that European integration will continue to be experienced—as one of the great supporters of the project once put it—as a largely “bureaucratic affair run by a faceless, soulless Eurocracy in Brussels.”¹⁰¹ In the face of such a perception, national mechanisms—notably national executive oversight, together with national parliamentary scrutiny and national judicial

¹⁰⁰ See generally Lindseth, *supra* note 5, chs. 4-5.

¹⁰¹ Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Speech at Humboldt University in Berlin (May 12, 2000) (http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3745).

review—will remain essential to the democratic and constitutional legitimation of supranational governance in Europe. To borrow an apt phrase from Robert Dahl, these national legitimating mechanisms can be seen as efforts to reduce the “costs to democracy”¹⁰² that inevitably flow from the transfer of regulatory power outside the traditional confines of representative government on the national level. They are part and parcel of the complex process of institutional change across three dimensions—functional, political, and cultural—without which European integration cannot achieve a durable institutional settlement going forward.

¹⁰² Robert Dahl, Can International Organizations Be Democratic? A Skeptic’s View, in *Democracy’s Edges* 19, 34 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).