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**Ideas, Interests, and  
Institutional Change:  
The European Commission Debates the  
Delegation Problem**

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## **Ideas, Interests, and Institutional Change: the European Commission Debates the Delegation Problem**

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**Ideas, Interests and Institutional Change:  
The European Commission Debates the Delegation Problem**

**Giandomenico Majone\***

**Abstract**

The forthcoming Commission White Paper on Governance devotes a good deal of attention to the possibility of delegating rule-making powers to independent European agencies. The extensive debate stimulated by the preparation of this document has revealed deep differences of opinion. The orthodox doctrine, stubbornly defended by the Legal Service, holds that such delegation would upset the balance of power among EC institutions, reduce the Commission's ability to fulfill its duties under the treaties, and ultimately undermine the constitutional foundations of the Community. By contrast, the reformers maintain that the received view on delegation is by now completely outdated, and that the principle of institutional balance should be interpreted dynamically. These officials work at the cutting edge of regulatory policy and hence are particularly concerned about the loss of status and credibility of the Commission. A career in an independent European agency is viewed as a promising alternative.

The discourse of both reformers and defenders of the status quo depends crucially on the concept of institutional balance. I argue that this concept can be properly understood only in the context of the venerable theory of mixed government. This suggests that the European Community is not so much *sui generis* as the latter-day version of a pre-modern model of governance.

**1. *Introduction: Reasons and Causes***

When we ask why a particular policy or institutional change took place, two alternative interpretations of that "why" present themselves. We may be asking what reasons were advanced by the innovators in order to justify accepting that particular innovation. Alternatively, we may be asking not about justificatory reasons, but about causal factors (power, interests, imitation, ideational factors) influencing or determining change.

The central question in causal explanations of the role of ideas in the political or policy process is: do ideas have an impact on political outcomes, and if so, under what conditions? (Goldstein and Keohane, 1993: 11). Causal explanations focus attention on the pre-decision stage.

They may show that ideas were important in clarifying objectives, defining the range of possibilities for action, or helping to select a particular outcome in the absence of a unique solution.

I submit that this is not the only way of analyzing the impact of ideas on the political process. Because politics is made of language, arguments are used at every stage of the process. Even when a decision is best explained by the actions of particular interest groups, those who seek to justify the decision must appeal to the intellectual merits of the case (Majone, 1989).

Perhaps these are only rationalizations, but even rationalizations are important because they become an integral part of public discourse and thus affect subsequent political developments. Students of policymaking know only too well that ideas and analyses are often used to justify decisions already taken. When the arguments are based on considerations different from those that led to the decision, they are usually dismissed as attempts at “rationalization”. However, this criticism, even if it may be justified in particular cases, misses the point that post-decision arguments can have rationally defensible uses in the overall process of policy development.

To see how widespread is the use of post-decision arguments in all spheres of public life, notice that most legal systems allow the opinion stating the reasons for a judicial decision to follow rather than precede the decision. Such procedural rules must appear absurd to somebody who assumes that a judicial opinion is an accurate description – a causal explanation – of the decision process followed by the judge in coming to a conclusion. If, however, the opinion is viewed as a report of justificatory arguments expressed in the objective categories of legal discourse, then the appeal to legal and logical considerations which possibly played no role in the actual decision process becomes quite understandable (Wasserstrom, 1961).

The fact that post-decision arguments are used in very different contexts – they play an important role even in the natural sciences (Majone, 1989: 30-31) – is an indication that such arguments may serve important social functions beyond providing mere “rationalizations” for politically or bureaucratically determined positions. In fact, three such functions are particularly relevant to our discussion.

First, post-decision arguments serve to *rationalize policy* in the sense of providing a conceptual foundation for a set of otherwise discrete and disjointed decisions. Moreover, since policies exist for some time, new arguments are constantly needed to give the policy components

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greater internal coherence and a better fit to an ever-changing environment. The relevance of economic analysis to an antitrust policy initially conceived primarily as a *political* response to excessive market power, can be explained in such terms (Majone, 1996).

Second, post-decision arguments serve to *institutionalize ideas*. Herbert Stein's observation that "without Keynes, and especially without the interpretation of Keynes by his followers, expansionist fiscal policy might have remained an occasional emergency measure and not become a way of life" (Stein, 1984: 39), captures the essence of the process. In a similar vein, Garrett and Weingast (1993) have shown how the idea of mutual recognition became institutionalized through the jurisprudence of the European Court of Justice and several documents of the Commission. Rather than disclosing new possibilities, institutionalized ideas only codify initial practice; at the same time, however, they serve to rationalize, evaluate and transform such practice (Krasner, 1993; Majone, 1989: 146-149).

The third, and arguably the most important, function of justificatory arguments is to *transform a single play into a sequential game* by making communication among the players possible. Only the judge's written opinion, not his decision as such, allows interested parties to make further moves such as appealing the decision. It is important to note that in this as in other legal proceedings such as constitutional judicial review, the issue is what reasons *can* be given, even if those reasons are entirely *post hoc*. This suggests that the purpose of the giving reasons requirement is less to improve the quality of a single decision than to facilitate the development of the entire process (the same is true of the reasons-giving requirement of the Treaty of Rome, Article 190, now Art. 253 EC).

## 2. *The EC as a Mixed Polity*

This paper examines the discourses about delegation currently being developed within the Commission. The delegation of regulatory powers to independent European agencies is one of the central issues of the White Paper on Governance which the Commission intends to publish in July, 2001. In the process of elaboration of the White Paper different ideas are being debated concerning

the doctrinal justification of the score of agencies established during the last decade, and about the appropriate scope of delegation in the future.

The concept of institutional balance plays a key role in this debate, but the true significance of this concept cannot be appreciated without a clear understanding of the particular constitutional nature – at once archaic and post-modern – of the EC. It is well known that the system designed by the framers of the founding treaties is not based on the principle of separation of powers. One of the characteristic features of the EC is the impossibility of mapping functions onto specific institutions. Thus the EC has no legislature but a legislative process in which different institutions have different parts to play. Similarly, there is no identifiable executive, since executive powers are exercised for some purposes by the Council acting on a Commission proposal; for other purposes (e.g., competition policy) by the Commission; and overwhelmingly by the member states in implementing European policies on the ground (Dashwood, 1996: 127).

The rejection of the principle of separation of powers may seem obvious, given the founding fathers' belief in the model of parliamentary democracy and cabinet government. Yet, the violation of the principle is much more far-reaching in the case of the European Communities than in any parliamentary system of West Europe. For example, the Commission's monopoly of legislative initiative – the fact that other institutions cannot legislate in the absence of a prior proposal by the Commission – has no counterpart at the national level. In principle, the Commission cannot be compelled to submit a proposal, except in those exceptional cases in which the Treaty imposes an obligation to legislate.

Also the role of the Commission in the judicial process has no counterpart in modern parliamentary systems. In the event that the Commission finds that the European Parliament, the Council or certain bodies such as the European Central Bank, have infringed Community law, it may bring an action for annulment or for failure to act in the Court of Justice.

The principle of separation of powers is again violated where the Council – the main Community legislator – performs executive tasks without being subject to political supervision. In fact, if the Council itself undertakes implementation or makes it subject to a comitology procedure which results in the power of implementation reverting to it, it becomes impossible for the European Parliament to exercise political control. By adopting a vague piece of legislation and then giving it a completely different scope, the Council could evade involvement of the EP in the legislative process.

Although the Court of Justice may find against such a practice, the EP lacks the necessary means of political control, unless the substance of the provision falls under the co-decision procedure (Lenaerts and van Nuffel, 1999: 467). On the other hand, the executive function performed by the Commission is compatible with its role in the legislative process since that function consists mainly of its right to initiate legislation – an important point in the current debate on delegation.

A common place in the discourse on the constitutional architecture of the EC is the conclusion that the Community is *sui generis*. This resigned comment reveals limited knowledge of the history of political ideas. History and political philosophy know many types and theories of governance besides separation-of-powers and parliamentary systems. Among these other possibilities, the theory of mixed or balanced government – a theory upheld by thinkers from Aristotle to eighteenth-century constitutional theorists – is especially relevant to the present discussion.

Although by the nineteenth century this theory seemed to have lost its relevance for Western political thought, in the previous century through its expression in the English constitution it attained a vitality and prominence it had not had since antiquity. In fact, as Gordon Wood reminds us, most Americans set about the building of their new states in 1776 within the confines of the theory of mixed government (Wood, 1998 [1968]: 199).

To quote another eminent historian of the American constitution:

American ideas of the executive developed within the two broad paradigms that eighteenth-century commentators employed to explain why Britain's "boasted" constitution had attained its liberty-preserving stability. The first and more important was the ancient theory of mixed government that Charles I invoked in *His Majesties Answer to the XIX Propositions of both Houses of Parliament* (1642); the second was the newer idea of the separation of powers that received its classic statement in Montesquieu's *De l'esprit des lois* (1748). ... The English theory of mixed government held that the presence *in the legislature* of the three estates of monarchy, aristocracy, and people would prevent the constitution from degenerating into the corrupt forms of tyranny, oligarchy, or anarchy. By contrast, separation of powers emphasized the qualitatively distinct *functions* performed by the legislative,

executive, and judicial departments of government (Rakove, 1997: 245-246; emphases in the original, footnotes omitted).

The persuasiveness of the theory of the mixed polity depended on its ability to involve in the government all of the social orders of the body politic – to combine in the polity the “powers of society”, and not simply governmental functions. This is why for the Anti-Federalists the great vice of the scheme of checks and balances proposed by the framers of the federal constitution was that it lacked the *social* sources of stability that mixed government ascribed to the mixed constitution; and why “the real balances and checks” of the British constitution seemed to Patrick Henry far superior to the mere “checks on paper” the American constitution proposed (cited in Rakove, 1997: 271-272).

It seems unlikely that the framers of the treaties establishing the European Communities were familiar with the constitutional discourse of seventeenth-century England or eighteenth-century America, but the outcome of their deliberations shows that they made a conscious choice between two distinct conceptions, that of separating the functional branches of government, and that of mixing the estates of the polity in the legislature; where the three estates are not, of course, the Crown, Lords and Commons, but the national governments, the supranational institutions, and the “peoples of the States brought together in the Community” (Article 20 of the ECSC Treaty, Art. 107 of the EAEC Treaty, Art. 137 of the EEC Treaty), represented – at least virtually – first in the Common Assembly and then in the European Parliament. Hence Community decision-making is designed to reconcile “national” and “common” interests through interaction between the Council, the Commission and the European Parliament (Lenaerts and van Nuffel, 1999: 413). In such a scheme, as in any other mixed polity, the balance between institutions is essential. The rule that “each institution shall act within the limits of the powers conferred upon it by this Treaty” (Article 7 (1), ex Art. 4 (1), EC Treaty) must be read in the light of the principle of institutional balance. This means that each institution (1) has the necessary independence in exercising its powers; (2) must respect the powers of the other institutions; and (3) may not unconditionally assign its powers to other institutions or bodies (ib.: 414). The centrality of the norm of institutional balance is what makes the delegation problem particularly troublesome in the EC.



### 3. *The Non-Delegation Doctrine in the EC*

The traditional position of the Commission with respect to this problem has been strict adherence to a non-delegation doctrine largely based on the principle of institutional balance (see below). This is shown, for example, by the Commission's rejection of all proposals to establish an independent European Cartel Office, advanced by the German and other governments on several occasions since the late 1960s.

Also in the United States the non-delegation doctrine, based in this case on the principle of separation of powers, has enjoyed widespread acceptance for several decades. However, by the time the Federal Trade Commission was established in 1914, the agency received essentially a blank check authorizing it to eliminate unfair competition. The New Deal agencies received even broader grants of power to regulate particular sectors of the economy "in the public interest". The last time the Supreme Court used the non-delegation doctrine was in 1935, when in *Schechter Poultry* it held the delegation in the National Industrial Recovery Act unconstitutional.

The doctrine against delegation unraveled in the U.S. because the practical case for allowing regulatory discretion is overwhelming. Such pragmatic considerations are not ignored by the Commission, and in particular by its Legal Service, the main defender of the non-delegation doctrine. They are simply considered not as important as the preservation of institutional balance and, in the final analysis, of the powers given to the Commission by the treaties.

It is often assumed that the so-called Meroni doctrine is the main legal obstacle to the delegation of rule-making powers to independent European agencies. Indeed, this doctrine, dating from 1958 (case 9/56 *Meroni v. High Authority* [1957-8] ECR 133) and relating specifically to the ECSC Treaty, remains "good law", applies by analogy to all European treaties, and acts as a barrier to the delegation of powers to institutions not named within the European treaties. In the Court's reasoning, the Commission could, in fact, delegate tasks to administrative agencies, but such a delegation was subject to strict constraints:

- delegation might only relate to powers which the Commission itself possesses;
- such delegation must be limited to the preparation and performance of executive acts alone;

- as a consequence of this, independent bodies may not be afforded any discretionary powers;
- the Commission must consequently retain oversight of the delegated activities and will be held responsible for the manner in which it is performed;
- finally, such a delegation must not disturb the institutional balance within the Community (Lenaerts, 1993; Everson and Majone, 1999).

In subsequent decisions the ECJ reaffirmed its position that the Community legislator cannot delegate rule-making powers to outside bodies, while making clear that such powers are included in the executive competences which the Council normally delegates to the Commission. From this jurisprudence, and its own reading of the treaties, the Commission's Legal Service concludes that Community law prohibits the delegation of rule-making authority to a European agency: such a delegation would reduce the competences of the Commission and thus upset the balance of power among EC institutions.

In the opinion of a number of analysts and Commission officials, the legal obstacles represented by *Meroni* and related ECJ decisions could be overcome by adding to Article 4 (now Art. 7) of the EC Treaty, which lists the "institutions" of the Community, a paragraph or a new article empowering the legislator to establish other "bodies" whenever necessary. After all, this is precisely what was done at Maastricht when Articles 4 a (now Art. 8) and 4 b (now Art. 9) were added in order to set up two new bodies: the European Central Bank and the European Investment Bank.

The Legal Service finds this view too simple, if not simplistic: an isolated amendment of the treaty to make possible the delegation of rule-making powers to independent agencies would necessarily entail a change in the balance of power among Community institutions. Moreover, even a partial reduction of its rule-making capacity would in the long run negatively affect the Commission's technical expertise and thus its ability to perform other essential functions, in particular the exercise of its monopoly of legislative initiative. Such changes must undermine the foundations of the system created by the Treaty of Rome, and hence should be preceded by a constitutional agreement about the future of the EC institutions (personal interview, February 27, 2001).

On the other hand, the score of agencies that have been established so far do not alter the institutional balance since they do not possess rule-making authority. Even the European Agency for the Evaluation of Medicinal Products (EMA), which comes closest to being a fully fledged regulatory body, does not take decisions concerning the safety and efficacy of new medical drugs, but submits opinions concerning the approval of such products to the Commission, which takes the final decision, at least formally.

Of the new agencies only two, the Office for Harmonization in the Internal Market (Trademark Office) and the Community Plant Variety Office, have been authorized to make final determinations. The justification is that these agencies apply EC law in narrow technical fields, and in a way that does not involve the exercise of political discretion. Their task consists only in verifying that an application for a trademark or for the registration of a plant variety satisfies the requirements of the relevant Community regulations. The future European Agency for Aviation Safety should follow the same model, at least as far as the certification of air-worthiness is concerned.

In the case of the much debated agency for food safety, the institutional balance is formally preserved by separating risk evaluation, supposedly a technical task not involving the exercise of discretion, from risk management. According to the regulation approved at Nice in December 2000, the latter activity, which includes standard setting, is reserved to the Commission, while the agency's authority is limited to the scientific determination of risk. However, as the experience of the United States and other countries shows, the separation of risk evaluation and risk management is rather artificial, and creates a number of conceptual and practical problems.

In general, the attempt to preserve at all costs the rule-making powers of the Commission is producing increasingly complex and sub-optimal institutional designs. Efficiency, transparency and accountability are being sacrificed on the altar of institutional balance. For these, as well as more practical reasons, a growing number of Commission officials take a less restrictive view of delegation.

## 1. *The Pro-Delegation Faction*

As noted, the Commission – supported and inspired by its Legal Service – has traditionally adhered to a strict non-delegation doctrine. Any doctrinal deviation, it was feared, would entail the loss of treaty-based and judicially affirmed rule-making powers. The principle of institutional balance, interpreted statically in spite of vastly expanded Community competences, provides the crucial rationalization of the traditional position

However, the situation is changing, especially since the debacle of the Santer Commission. Several Commission departments now openly advocate the creation of European agencies with clear discretionary powers and operating in close cooperation with the national regulators. Even the powerful Directorate General for Competition recently proposed close cooperation with national authorities in order to ensure more effective implementation of Articles 81 and 82 of the Treaty (Commission, 1999). There are also indications that President Prodi initially supported the establishment of European agencies with powers of rule-making and enforcement, but had to modify his position following objections from the Legal Service. One should compare, for example, Prodi's speech on food safety to the European Parliament of October 1999 with the White Paper on food safety (Commission, 2000).

Several factors explain the new, more pragmatic stance. First, the limitations of a purely legislative approach to market integration has become increasingly clear since the commitment to complete the internal market by 1992. Steeped in the legalistic tradition of continental Europe, the Commission used to be more interested in the rewarding task of new rules rather than in the thankless and politically costly task of implementing existing ones. Today there is much greater awareness of the importance of effective enforcement, as shown by such documents as the Commission's reports on "Better Lawmaking" – a notion which includes better implementation – and the successive *Reviews of the Internal Market*. As a consequence, the lack of an adequate administrative infrastructure at the European level is perceived as a serious obstacle to the completion of the internal market.

The shortcomings of the traditional approach are particularly clear in areas such as transport, energy, telecommunications, financial services, food safety. Not surprisingly, the departments responsible for these policy areas (especially the Directorate General for Transport) have endorsed the creation of fully fledged European agencies. The reformers are not yet strong enough to overcome the resistance of the traditionalists – Transport had to withdraw its original proposal of a

European Aviation Safety Authority – but feel that time is working in their favor (personal interviews, Brussels, February, 2001).

Another related issue is the serious credibility problem of EC-style regulation. This problem is symbolized by the recurrent food scares, and perhaps even more by official reactions such as the refusal of the German and French governments to abide by the decision of the Commission to lift the ban on exports of British beef. The BSE (“mad cow” disease) crisis not only revealed the failure to establish a stable and internationally credible community of scientific experts on food safety, but also exposed serious inadequacies in the overall coordination of European policies on agriculture, the internal market and human health. The comitology system, with its division of scientific tasks between committees of national experts dealing with individual issues of animal and human health, has been identified as contributing to the dangerous confusion between the pursuit of market or agriculture policy aims and the protection of human health.

The credibility crisis of EC regulation is certainly not limited to food safety. Thus, the present system of telecoms regulation suffers from a number of serious shortcomings: imprecise obligations and pricing rules for interconnection; inadequate mechanisms of dispute resolution; low credibility of some national regulators in terms of both expertise and political independence; poor coordination among national regulators and between them and the Commission. Here, as in many other areas, the basic problem is the mismatch between highly complex regulatory tasks and available administrative instruments. This mismatch has become a distinctive feature of EC-style regulation. An increasing number of Commission officials and industry representatives feel that the situation can only be improved by creating stronger and more autonomous regulatory institutions at European level.

Finally, the resignation of the Santer Commission and the continuous loss of prestige and influence of the institution – so visible at recent European summits and in the outcomes of the latest treaty negotiations – have produced a deep sense of frustration and insecurity. To ambitious technocrats, now working in various services of the Commission and with a long career still in front of them, an independent European agency promises a safe haven where their expertise can find recognition, without sacrificing their privileges as international functionaries.

The new attitude finds expression in the arguments advanced by the pro-delegation faction within the Commission. These arguments may be grouped around four or five main themes (Yatanagas, 2001; personal interviews, Brussels, various times; Majone, 2000).

The first theme concerns the shortcomings of the present system of internal delegation. Under this system, the rule-making powers delegated by the Council to the Commission are controlled by a multitude of committees of national experts, while until recently the European Parliament had no role in the process. National experts are naturally inclined to place national before of Community interests – as was amply demonstrated by the BSE affair. These experts – who tend to be, in Gouldner’s terminology, “locals” rather than “cosmopolitans” (Majone, 2000) – have few incentives to develop a sense of loyalty toward the committee to which they are temporarily assigned, or to establish their international reputation. Moreover, the Commission must often ratify committee decisions that it cannot adequately evaluate for lack of the necessary scientific expertise.

Again, the comitology system suffers from a serious lack of transparency and accountability. Although the work of the committees affects the economic, health and other interests of all the citizens of the EU, it is largely unknown to them. Thus the system contributes in a significant way to the “democratic deficit” of Community institutions.

A second theme is the widening gap between the administrative, financial and cognitive resources of the Commission and the growing complexity of the regulatory tasks of the Community. Although the Commission may be viewed as a super-agency, it has reached the limits of its regulatory capacities. The first European agencies, of a purely advisory or executive nature, and the more recent creation of quasi-regulatory bodies in such areas as the licensing of biotechnology products and trademarks, represent imperfect attempts to fill these material and cognitive gaps. The persistent demand for independent bodies with all the powers needed to regulate civil aviation, food safety, telecommunications, energy markets and financial services, indicates a widespread feeling that the Community regulatory process is still in need of far-reaching reforms.

At the same time, the growing politicization and parliamentarization of the Commission reduces its credibility as an independent regulator, without enhancing its democratic legitimacy. The ever closer involvement of the European Parliament in the legislative process, its right to approve the Commission and its programs represent a shift toward a parliamentary form of government, with the Commission assuming the role of the executive branch, but having its monopoly of legislative initiative eroded by the co-decision procedure.

Concerning the constitutional principle of institutional balance, the reformers argue that the principle has changed dramatically since 1951, when the Paris Treaty established the Coal and Steel

Community. Thus, the ECSC Treaty is much more supranational than the Treaty of Rome – especially as regards the powers of the executive – albeit in a limited sector of the economy. Subsequent amendments – from the Single European Act to the Treaty of Nice – have continued to modify the substantive meaning of “institutional balance”. It follows that the principle has to be interpreted dynamically rather than as a rigid prohibition, forbidding any modification of the original allocations of powers among Community institutions. Interpreted dynamically the notion of institutional balance has to do less with preserving the competences and privileges of the different institutions – their “liberties”, as medieval political philosophers would say – than with enhancing their loyal cooperation in the lawmaking process.

This brings us to a fourth line of argument in the pro-delegation discourse, dealing with the position of independent agencies in the institutional architecture of the Community. The creation of agencies with specific enabling statutes and clearly defined mandates, voted on the basis of the co-decision procedure by the EP and the Council on a proposal from the Commission, would not upset the distribution of powers. On the contrary, European agencies would help the Commission to better fulfill its main responsibilities by reducing its administrative and technical overload. Also, agencies would facilitate cooperation between national and Community institutions by establishing close links with the corresponding national authorities, or organizing European regulatory networks. This would give a broader and richer meaning to Article 10 (ex Art. 5) of the EC Treaty, which imposes a duty of legal cooperation and mutual trust between national and Community institutions.

As expert, politically independent bodies anxious to establish their international reputation, agencies would be better able to restore the credibility of the Community regulatory process, to the benefit of all EC institutions. In short, according to the pro-delegation faction agencies, far from disturbing the present institutional architecture, would actually maintain and even strengthen it, by adapting it to a constantly changing task environment.

A final theme in the reformers’ discourse is the frequent reference to the experience of the American regulatory state. What attracts most attention is not the organizational structure of federal agencies, commissions and boards – institutions of a mature federal system based on the separation of powers, and as such ill adapted to a system of mixed government, where the equivalent of federal pre-emption is limited to the small area of total harmonization. Rather, interest focuses on the procedural and substantive means used to keep agencies accountable and responsive to the

concerns of the citizens, without interfering in their day-to-day decision-making: procedural requirements, such as those imposed by the U.S. Administrative Procedure Act and other statutes; legislative oversight by specialized congressional committees; mechanisms of executive control, such as the Office of Management and Budget; public participation and monitoring by interest groups; professionalism and peer review, and so on. The American experience helps the advocates of delegation to argue that carefully designed and suitably constrained agencies not only do not disturb the balance of powers among EC institutions, but would actually contribute to greater transparency and accountability of the Community policymaking process.

## *2. Conclusion*

The title of this paper indicates its limits. The aim has been simply to outline the discourses of the supporters and opponents of the delegation of rule-making powers to independent agencies. A full discussion of the delegation problem in the EC would require further research into several additional topics, such as the position of other actors – national administrations, Council of ministers, European Parliament and Court of Justice –, the politics of institutional choice, and the functioning of the comitology system.

The digression on the nature of the EC as a mixed polity – another topic which certainly deserves separate treatment – was made necessary by the central role which the principle of institutional balance plays in the discourse of both opponents and supporters of delegation. Although the principle has a certain intuitive appeal, it gets very easily confused with the very different notion of separation of powers. I have suggested that the constitutional meaning of institutional balance can be properly appreciated only within a model of mixed government.

As one reviews the arguments of both factions within the Commission, the strong and weak points of each quickly become apparent. The dynamic view of institutional balance meets the need of adapting the constitutional architecture and the policies of the Community to an ever-changing political and economic environment. The importance attached by the pro-delegation faction to institutional design and to the possibility of disciplining agency discretion by a variety of procedural mechanisms, contrasts with their opponents' silence on these topics, and their ignorance of, or lack



of interest in, relevant international experience as well as the most recent research on delegation and agency problems.

On the other hand, the no-delegation faction makes an important point when it argues that the transfer of rule-making powers to new independent bodies requires more than a piecemeal adaptation of the treaties. For several decades piecemeal institutional engineering has been the usual response to new problems. Too often, the result has been an increase in the opacity of the decision-making process and a further obfuscation of already unclear lines of responsibility. The problem is, of course, that the member states still disagree too much about the ultimate goal of the integration process to be able to agree on far-reaching constitutional reforms. At a minimum, however, the Commission should use its monopoly of policy initiation to make good its promise of “doing less, but doing it better”. Delegation problems would be less urgent in a leaner EC/EU.

Finally, if it is true that ideas are powerless unless they are fused with material interests (as Max Weber argued), it follows that our analysis of the delegation discourse would have been seriously incomplete without at least a brief reference to the material interests of both factions. The distinction, drawn at the beginning of this paper, between reasons and causes is methodologically significant precisely because it facilitates a more subtle understanding of the dialectic relationship between the order of ideas and the order of events.

## References

- Commission of the European Communities (1999) *White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*, COM (99) 101, final.
- Commission of the European Communities (2000) *White Paper on Food Safety* (1999) 719, final.
- Dashwood, Alan (1996) “The Limits of European Community Powers”, *European Law Review*, 21, 113-128.
- Everson, Michelle and Majone, Giandomenico (1999) “The Role of Specialized Agencies in Decentralizing EU Governance: General Principles”. Florence: European University Institute, mimeo.

- Garret, Geoffrey and Weingast, Barry R. (1993) "Ideas, Interests and Institutional Change: Constructing the European Community's Internal Market", in Goldstein and Keohane (1993), 173-206.
- Goldstein, Judith and Keohane, Robert O., eds. (1993) *Ideas and Foreign Policy*. Ithaca, N.Y.: Cornell University Press.
- Krasner, Stephen D. (1993) "Westphalia and All That", in Goldstein and Keohane (1993), 235-264.
- Lenaerts, Koen (1991) "Some Reflections on the Separation of Powers in the European Community", *Common Market Law Review*, 34, 11-35.
- Lenaerts, Koen and Van Nuffel, Piet (1999) *Constitutional Law of the European Union*. London: Sweet and Maxwell.
- Majone, Giandomenico (1989) *Evidence, Argument and Persuasion in the Policy Process*. New Haven, CT.: Yale University Press.
- Majone, Giandomenico (1996) "Public Policy and Administration: Ideas, Interests and Institutions", in Goodin, Robert E. and Klingemann, Hans-Dieter, eds., *A New Handbook of Political Science*. Oxford: Oxford University Press, 610-627.
- Majone, Giandomenico (2000) "The Credibility Crisis of Community Regulation", *Journal of Common Market Studies*, 38, 273-302.
- Rakove, Jack N. (1997) *Original Meanings*. New York: Vintage Books.
- Stein, Herbert (1984) *Presidential Economics*. New York: Simon and Schuster.
- Wasserstrom, Robert A. (1961) *The Judicial Decision*. Stanford, Calif.: Stanford University Press.
- Wood, Gordon S. (1998 [1968]) *The Creation of the American Republic, 1776-1787*. Chapel Hill, N.C.: The University of North Carolina Press.
- Yataganas, Xenophon A. (2001) "Delegation of Regulatory Authority in the European Union". Cambridge, MA.: Harvard University, mimeo.