

The Reformation of European Administrative Law

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Private rights of action, expanded legal standing, improved participation rights in agency proceedings, independent advocacy agencies. An American lawyer would immediately jump to the conclusion that I am referring to that period of "ferment"¹ in American administrative law dating back to the mid-1960's and famously captured by Richard Stewart in his article "The Reformation of American Administrative Law."² Rather, these are procedural mechanisms that have been used by the European Community in the past decade to ensure enforcement of specific Community policies by national administrations and courts. By requiring Member States to allow private parties access to national agencies and courts when Community policy is implemented, the argument goes, individual rights are improved and Community law enforced, thanks to the millions of private attorneys general thereby enlisted.

The harmonization of national administrative law promises to have profound consequences for domestic policymaking and the constitutional balance of power among national parliaments, governments, and courts. Recent legal scholarship has focused on the harmonization of national procedure through the case law of the European Court of Justice.³ In this paper, I cast the net more widely, to include harmonization of procedure through Community legislation, namely directives. Judicial and legislative harmonization of national administrative law are part of the same phenomenon and should be examined as such. Once considered together, I argue, the possible effects of procedural harmonization for the Community and the Member States come into focus. First, drawing on American literature that critically assesses similar developments in American administrative law, I suggest that expanded access to courts and administrative agencies might impair the quality of administrative policymaking in the Member States. Interest groups might distort the policymaking process, courts might unduly interfere with expert agencies, and agency action might be delayed. Second, again relying on the American reaction to the "ferment" of the 1960's and 1970's, I argue that the direction which Community harmonization has taken might compromise the constitutional powers of national parliaments and governments over state administration, to the advantage of national courts. If true, this would suggest yet another facet of what William Wallace has called "the sharing of sovereignty" in Europe⁴: Member States share sovereignty not only when policy is made in Brussels but also when they implement such policies at home,

¹ Peter L. Strauss et al., Gellhorn and Byse's Administrative Law 486 (9th ed. 1995).

² Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

³ For an exception, see Joanne Scott, Flexibility, "Proceduralization", and Environmental Governance in the EU in Constitutional Change in the EU: From Uniformity to Flexibility 259 (Gráinne de Búrca & Joanne Scott, eds. 2000)

⁴ William Wallace, The Sharing of Sovereignty, XLVII Political Studies 503 (1999).

for their internal constitutional arrangements, through which national sovereignty is constituted, are shifted as a consequence of their membership in the Community.

I. Judicial Harmonization of National Administrative Law

Over the past forty years, the Court of Justice has striven to make Community law effective through an extensive system of judicial remedies in national courts.⁵ Some lawyers might be surprised to hear this system of remedies called administrative law. Nonetheless, Community law in national courts typically involves individual challenges to state action or inaction, litigation that falls squarely within the purview of administrative law. Indeed, even when litigation involving Community law is between two private parties, the need to rely on Community law, as opposed to national law implementing Community obligations, is the result of the state's breach of its duties under Community law.

The doctrines of direct effect and supremacy came first in the system of judicial remedies. In a long line of cases, the Court of Justice established that Community treaties, secondary legislation, and implementing rules confer rights upon which individuals may rely in national administrative and judicial proceedings and that such rights take precedence over conflicting national law. Then came the harmonization of the different elements of procedure that would enable national courts to afford adequate remedies for the breach of Community rights. Reluctant to dictate national procedure, the Court initially set very loose standards: national remedies for violation of Community rights had to be available on the same terms as remedies for violation of national rights and could not be so restrictive as to strip the right of all content.⁶ Over time, however, the demands of effective protection of Community rights and uniform application of Community law have led the Court to set down common, Community standards for national remedies in a variety of areas: amount of damages awards available for breaches of Community law,⁷ statutes of limitations for claims based on a national government's breach of Community law,⁸ and interim relief from measures allegedly in breach of Community law.⁹ Most significantly, the Court has found that national courts must allow actions for damages against Member States in violation of their Community obligations.¹⁰ With each new Community remedy, the Court has closed off the possibilities for national escape from Community obligations and has turned up the pressure on Member States to faithfully implement Community law.

This system of remedies has signified changes for national systems of administrative and constitutional law. To start with direct effect and supremacy, it is

⁵ For an excellent overview, see Francis Snyder, *The Effectiveness of European Community Law*, 56 *Modern Law Review* 19, 40-47 (1993).

⁶ Case 33/76, *Rewe v. Landwirtschaftskammer Saarland*, [1976] ECR 1989.

⁷ Case C-271/91, *Marshall v. Southampton and South West Area Health Authority II*, [1993] ECR I-4367.

⁸ Case C-208/90, *Emmott v. Minister for Social Welfare*, [1991] ECR I-4269.

⁹ Cases C-143/88 & C-92/89, *Zuckerfabrik Süderdithmarschen*, [1991] ECR I-415.

¹⁰ Cases C-6 & 9/90 *Francovich and Bonifaci v. Italy*, [1991] ECR I-5357. For a good overview of the Court's recent case law in this field, see Takis Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down*, 38 *Common Mkt. L. Rev.* 301 (2001).

commonly observed that courts in many Member States were given, for the first time, the power to review parliamentary acts and not apply them in the event of a conflict with Community law. Less commonly observed is the effect that direct effect has had on the powers of courts with respect to their national executive branches. The doctrine of direct effect has enabled individuals to go directly to court to enforce Community law against state and private actors under circumstances where, had the substantive law been national law, they would have had to rely on administrative enforcement.

The reliance on courts at the expense of national parliaments and ministries is illustrated by the application of direct effect in the equal protection area. In *Defrenne*, the Court held that the Treaty provision requiring that Member States ensure "the application of the principle that men and women should receive equal pay for equal work" could serve as the grounds for a Belgian lawsuit by an employee who claimed that her employer was guilty of wage discrimination.¹¹ Under the law of any number of the Member States, such a statement of broad principle, without any provision for judicial remedy, would not constitute sufficient basis for suit. In all likelihood, statutory or regulation elaboration of the principle and the remedial scheme would be the necessary precursors for an individual remedy.

For a variation on the same theme, take *Foster v. British Gas*.¹² In that case, the Court held that a Community directive on equal treatment of men and women in the workplace had direct effect against British Gas, which was deemed a public body for purposes of vertical direct effect. Yet the Directive envisioned a complex administrative scheme in which discrimination in hiring, promotion, working conditions, and vocational training was more carefully defined and a specific agency was charged with enforcement. Whereas a similar domestic scheme might very well only permit individuals to seek judicial review of agency enforcement decisions and only on very limited grounds, with direct effect individuals could go straight to court to enforce the terms of the Directive as they--not a national parliament or administrative agency--saw fit. In other words, to overcome national recalcitrance and render Community law effective, the Court of Justice put policymaking in the hands of litigants and the courts.

Direct effect has elicited little criticism from the legal community.¹³ By contrast, the Court's expansion of Community law to cover national procedure has been controversial for a number of reasons. The first goes to the Court's original reluctance to enter the remedies area and accounts for the continuing ambiguity in its case law. In the classic scheme, the Community confers the right and the Member States provides the remedy. Member States exercise their sovereign powers by implementing and enforcing Community policies. The Court's harmonization of national rules of procedure disrupts this constitutional balance. When the Court dictates the type of cases that national courts

¹¹ Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne*, [1976] ECR 455 (ex-art. 119).

¹² Case C-188/89, *A. Foster and Others v. British Gas plc*, [1990] ECR I-3313.

¹³ Since direct effect applies in situations where Member States have breached their duties under Community law, the lack of concern for the possible impact on the authority of national parliaments and governments is understandable.

must hear and the type of remedy that national courts must afford, it encroaches upon Member States's sovereignty.

The second source of skepticism has been the possible impact of judicial harmonization on national systems of administrative and constitutional law. Carol Harlow suggests that the Court's single-minded concern with making Community law effective has led the Court to disregard potential clashes between this new system of law and national traditions.¹⁴ Harlow illustrates the serious constitutional implications of mere "procedural" rules for national political systems with a couple of recent cases. For instance, in *Factortame III*, the Court of Justice held in favor of an action for damages against the British parliament for enacting a statute on fishing rights that violated the Community's common fisheries policy.¹⁵ Given the British parliament's monopoly of public authority under the constitutional principle of parliamentary sovereignty, liability for legislative acts had previously been unthinkable.

According to Harlow, harmonization by the Court of legal principles and judicial procedure risks uprooting national constitutional arrangements.¹⁶ Each of the Community's national constitutions guarantees accountable government, limited public power, and rule of law, yet each defines such ideals idiosyncratically and promotes such ideals through unique principles and institutions that are embedded in a broader social context. Change the principle or the institution and you threaten the ideal, not only because you alter the content of "accountability," "rule of law" or "limited government" but because the social and cultural context no longer supports the ideal. As Harlow puts it:

Law . . . is one of a number of pathways which link and provide access to, a society's social and political systems. One of the key functions of administrative law is to provide the citizen with these pathways. In no society does law have a monopoly, but in some societies it is less highly prized than others. It has, for example, been said that "the idea that there could be any state activity which may not be challenged in court is alien to German law." Other societies . . . evince a distinct preference for alternative dispute-resolution, as in the robust Scandinavian ombudsman tradition. One cannot be sure what will result from blocking one of the pathways or widening another. Complaints may be diverted into a system where they cannot be appropriately handled or they may dry up altogether. Damage may then be caused to the political culture, ultimately impinging on a society's concept of citizenship.¹⁷

In this passage and elsewhere, Harlow criticizes the Court for creating a rigid system of judicial sanctions that supplants distinct national methods of ensuring

¹⁴ Carol Harlow, *Voices of Difference in a Plural Community*, Harvard Working Paper 3/00, 23 (2000).

¹⁵ Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. German & R. v. Secretary of State for Transport, ex parte Factortame Ltd.*, [1996] ECR I-1029.

¹⁶ Harlow, *Voices of Difference in a Plural Community* at 13.

¹⁷ *Id.* at 13-14

government accountability.¹⁸ Her concern is that the transplant might prove inoperable in certain national contexts yet at the same time displace domestic systems of government responsibility, thereby compromising the principles of limited government and accountability. My point is slightly different, although closely related. Even though transplants – direct effect, harmonized judicial procedure, and government liability – might be used to ensure that national governments respect Community law, the consequences for domestic constitutional and administrative law could still prove troublesome. The responsibility of national parliaments and government ministries to formulate policy, in this case policy adapting Community norms to specific national contexts, is assumed by litigants and courts. Yet courts might not have the institutional capacity to make such decisions or might not have the national constitutional authority to do so. Other institutions which, for reasons of good administration or constitutional legitimacy, have traditionally ensured accountability, institutions such as the ombudsman in Scandinavian traditions or ministerial responsibility in most parliamentary systems, may be replaced.

II. Legislative Harmonization of National Administrative Law

In a series of directives, Member States have been required to adapt their national administrative law to Community standards when implementing Community environmental, consumer protection, privacy, and other policies. This form of administrative law reform is invisible because it occurs piecemeal. Rather than a single Court of Justice opinion announcing state liability for non-compliance with Community law, legislative harmonization occurs sector-by-sector and is idiosyncratic in each sector. Nonetheless, each of the reforms discussed below affects one of the four central elements of national administrative law identified by John Bell, that is, administrative institutions, administrative procedures, procedures for judicial review and basic values governing the administration.¹⁹

As in the sphere of judicial harmonization, the rationale for reform is always the same: guaranteeing the rights of European citizens and improving enforcement of Community law. Typical is the preamble to the Commission's proposal on strengthening the directive on public access to environmental information:

Giving public access to environmental information is essential to achieve [the Treaty aim of promotion of a high level of protection and improvement of the quality of the environment]; it contributes to a raising of public awareness of and interest in environmental matters and so to a more efficient public participation in the making of environmental decisions which affect their lives. A better informed public is able to carry out a more effective control of public authorities as they carry out their

¹⁸ Carol Harlow, *Francovich and the Problem of the Disobedient State*, 2 *Eur. L. J.* 3 (1996).

¹⁹ John Bell, *Mechanisms for Cross-fertilization of Administrative Law in Europe* in *New Directions in European Public Law* 147, 165 (Jack Beatson & Takis Tridimas, eds. 1998).

duties in the environmental field, thus securing full and effective enforcement of EC environmental law.²⁰

In the following section, I review briefly each of the major areas of procedural reform. In each instance, I consider the extent to which such reform actually requires a change in national administrative law and the impact that such reform might have on domestic policymaking and constitutional relations between courts and executive branches. I also outline the research agenda necessary to see whether these hypotheses are borne out by the reality of transformation in the Member States.

A. Associational standing

Primarily in the area of consumer protection, a number of directives have required Member States to allow representative organizations, i.e. consumer associations, to enforce the terms of such directives in either administrative or judicial proceedings. Associational standing overcomes the hurdles that exist to defending diffuse interests in the legal system. The individual harm from, say, a defective toaster, a polluting smokestack, or a certain dress code, might not be significant enough for any single victim to bring suit. Nonetheless, collectively, the harm to the class of victims is significant. Conferring standing to organizations that represent such interests is one way to ensure that injury of the diffuse sort will be addressed by the legal system.

As early as 1984, Member States were instructed to ensure that "persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising" could bring legal or administrative actions to stop such advertising either in court or in an administrative forum.²¹ In 1998, the Parliament and Council passed a directive that addresses the enforcement of consumer rights more broadly.²² Under the European Injunction Directive, either independent consumer protection agencies or consumer associations with a "legitimate interest" may bring administrative or legal actions to enjoin private parties from infringing the terms of various consumer protection directives.

In the anti-discrimination area, civil rights organizations have been guaranteed the right to bring suits to enforce the terms of the Community's anti-discrimination directives. As long as such an organization has a "legitimate interest" in enforcing the anti-discrimination provisions of the relevant directives, it may bring either an administrative or legal action on the behalf of a victim of discrimination or intervene in such an action.²³

²⁰ Proposal for a Directive of the European Parliament and of the Council on public access to environmental information, COM(2000) 402, 2000 O.J. (C337E) 156.

²¹ Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, 1984 O.J. (L 250) 17, art. 4.1.

²² European Parliament and Council Directive 98/27/EC on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 15.

²³ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22, art. 7.2; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303) 16, art. 9.

Encouragement of private enforcement actions by interest group organizations has not been confined to "hard" law. For instance, the Commission has encouraged consumer groups to use existing national procedure to bring competition cases domestically against infringing companies.²⁴

On their face, these provisions bear some resemblance to the Court's system of judicial remedies. Like direct effect and harmonized judicial remedies, standing for consumer and civil rights organizations puts into place private attorneys general who will enforce Community law where government ministries fail to take action. Scratch the surface, however, and significant differences emerge. Certain features of these directives permit national authorities to exercise control over enforcement decisions. Most notably, the European Injunction Directive allows Member States to designate a government agency as opposed to consumer organizations as responsible for enforcing Community consumer protection policy.²⁵ The United Kingdom, Denmark, and Ireland have taken this route.

Other features of the associational standing provisions enable national governments -- as opposed to courts -- to retain primary responsibility for interpretation and implementation of policy. The directives require access to *either* an administrative or a judicial forum. A Member State that designates an administrative forum only loses control over the initiation of enforcement actions, not over policymaking. To take the employment discrimination example, although an administration cannot control what actions for employment discrimination will be brought, it does retain power over the definition of "discrimination."

Finally, the directives leave the definition of associational standing to national law and therefore allow Member States to significantly restrict the public's involvement in enforcement. Most of the associational standing provisions contain the proviso that representative organizations have a "legitimate interest" in the action, a criterion that is left to each Member State to define as it wishes. In Italy, for instance, consumer associations must satisfy a number of conditions, including an organizational history of at least three years, a membership threshold of approximately 28,400, and representation in at least five regions.²⁶ As a result, consumer associations without party or union ties find it difficult to qualify.²⁷ By contrast, the certification process for consumer associations in Germany appears less restrictive. Associations are only required to have over seventy-five members or to operate as parent organizations for other consumer groups.²⁸

The associational standing provisions do not require Member States to throw open the administrative door to interest groups and other members of the public or to hand

²⁴ Deborah Hargreaves, *Consumers Urged to Sue Cartels*, Financial Times, Oct. 18, 2000, at 3 (competition commissioner Mario Monti, however, acknowledged that there were "legal obstacles" to such lawsuits).

²⁵ Note, however, that such agencies must be "independent" as will be discussed below.

²⁶ *Disciplina dei diritti dei consumatori e degli utenti*, Legge 30 luglio 1998 n. 281, art. 5.2.

²⁷ Eugenio Sacchetti, *Azione giudiziarie e legittimazione processuale: Ecco le nuove armi delle associazioni di difesa*, Il Sole-24 Ore, Aug. 29, 1998, at 63.

²⁸ Harald Koch, *(Non-class) Group Litigation under EU and German Law*, 11 *Duke J. Comp. Int'l L.* (2001) (forthcoming)

over policy implementation to their national courts. Depending on how Member States choose to transpose these provisions, national ministries and agencies may retain significant power over when and how to enforce Community policy. Therefore, an answer to the question of whether, in fact, interest groups and courts have been empowered at the expense of national administrations will require significant further research on implementation in each of the Member States.²⁹

The variety of possible approaches to implementation suggests another line of inquiry that must be pursued before any claim can be made as to transformation of national administrative law. The associational standing provisions might simply reflect, not transform, national administrative law traditions and therefore bring about no changes in existing institutional arrangements for policy enforcement and implementation. In such an event, there would be no cause for concern over the impact of procedural harmonization, or at least this form of procedural harmonization, on national administrative and constitutional law.

B. Participation rights in administrative proceedings

The role of the public and courts in national administrative proceedings might also be altered by Community legislation harmonizing and expanding individual rights of participation. The value of administrative process depends on the type of administrative action in question. Generally, individual rights in agency decisionmaking are thought to guarantee that results will be fair for those directly implicated by the outcome. In agency action involving broad-ranging policy decisions, participation rights ensure that administrators cannot hide behind claims of expertise and science and will be held loosely accountable to the public, courts, and ultimately legislators.

One of the most significant areas in which the administrative process has been harmonized is the environment. Under the Environmental Impact Assessment (EIA) Directive,³⁰ Member States are required to assess the environmental impact of various projects and activities before giving government authorization. The Directive allows the public significant opportunities to participate in the administrative process. First, the public has a right to the information provided by the developer on the likely environmental effects of the project.³¹ Second, the public must be allowed to "express an opinion" before the project is authorized.³² Third, national administrations are under a

²⁹ Given the enormity of such an undertaking, I plan to examine one country in each of the four different traditions of administrative law identified by John Bell: French-influenced systems, Germanic systems, common law systems and the Netherlands, and Scandinavian systems. See John Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe* in *New Directions in European Public Law* 149-50 (Jack Beatson & Takis Tridimas, eds. 1998).

³⁰ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, 1985 O.J. L 175 (40). The Integrated Pollution Prevention and Control Directive contains similar provisions on public participation. See Council Directive 96/61/EC, 1996 O.J. L 257 (26).

³¹ *Id.* at art. 6.

³² *Id.*

duty to "take into consideration" the views expressed by the public.³³ Last, Member State administrations are required to explain the reasons for a decision to grant or deny authorization and to describe the measures that will be taken to minimize the environmental consequences, if any, of the project.³⁴ In Member States where judicial review is available, this latter provision facilitates challenges by individuals alleging that the administration's environmental impact assessment was inadequate or that the administration's decision violated a substantive guarantee under national administrative law of reasoned decisionmaking.

The provision for public involvement in environmental decisionmaking is complemented by a Community right to environmental information. Under the Environmental Information Directive, national administrative authorities must furnish individuals with information related to the environment when so requested.³⁵ Individuals are entitled to such information regardless of whether they can show any particular interest in the information or special purpose for making the request. National agencies may turn down information requests based on a number of reasons, including national security or confidential commercial information. In doing so, however, they must give reasons, thus facilitating subsequent judicial review of whether the administration's decision was well-founded.³⁶ An individual who has unsuccessfully applied for information related to the environment, has the right to seek review of that decision in a judicial or administrative forum.³⁷

Thus, in the area of environmental policy, individuals, environmental groups, and firms are guaranteed participation in the national administrative process as well as access to the information necessary for effective participation in the process. The Commission described the relationship between these rights in its proposal for amendments to the Environmental Information Directive:

An applicant may seek access to environmental information for the purpose of using it within the framework of a public consultation procedure, e.g. the one laid down by [the EIA Directive] . . . In accordance with the subsidiarity principle, it is up to the Member States to lay down the deadlines within which the public has to present its comments.

It should be first of all be noted that, in order to ensure an effective and meaningful participation of the public, [the EIA Directive lays] down a list of minimum information on the project or on activity subject to the consultation process which has to be made available to the public. The

³³ Id. at art. 8, as amended by Council Directive 97/11/EC on the assessment of the effects of certain public and private projects on the environment, 1997 O.J. L 73 (5), art. 1.10.

³⁴ Id. at art. 9, as amended by Council Directive 97/11/EC on the assessment of the effects of certain public and private projects on the environment, 1997 O.J. L 73 (5), art. 1.11.

³⁵ Council Directive 90/313/EEC on the freedom of access to information on the environment, 1990 O.J. L 158 (56), art. 3.1.

³⁶ Id. at art. 3.4.

³⁷ Id. at art. 4.

public may however seek additional environmental information related to the project or the activity on the basis of the provisions of Directive 90/313/EEC³⁸

These directives envision a greater role for members of the public in environmental policymaking at the expense of government discretion. The more a national ministry must "take into consideration" the views of environmental groups, competitor firms, and other interested members of the public, the less that national ministry may independently evaluate the scientific data and assess the consequences of any given project or activity. Like the associational standing directives, however, the EIS and Environmental Information Directives confer a considerable amount leeway in domestic implementation and therefore the extent of public participation may vary considerably. National administrations may involve environmental groups only at a very late stage in the approval process, when the decision has effectively already been made. Or national administrations may give very summary reasons for their approval decisions, failing to disclose the scientific uncertainties and value judgments that had to be resolved in making the decision. As with associational standing, therefore, further research is needed on national implementation.

The extent to which courts take on a more significant role in policing the administrative process as a result of the directives remains to be seen. Disappointed environmental groups are not guaranteed the right to seek judicial review of agency authorization decisions or denials of environmental information.³⁹ Most national systems of administrative law, however, do allow for review of this type of agency decisionmaking. The requirement that public authorities "give consideration" to views expressed by environmental groups in the administrative process and that they specifically articulate the reasons upon which their decisions are based might lead to more searching judicial review. For instance, an environmental group that believes the seriousness of the project's impact on surrounding wildlife was not appreciated can make the procedural argument that the agency breached its duty to "give consideration" and can make the substantive argument that the agency's decision, by failing to give adequate weight to the effect on wildlife in its statement of reasons, did not satisfy reasonableness standards. Therefore, these directives might lead to a certain increase in judicial interference with administrative policymaking.

As with associational standing, the extent to which access to information and widespread public participation in the administration of environmental law represents a novelty in national systems is unclear. Recent studies of national adaptation to Community environmental policy, suggest that, at least in some countries, this legislation has required significant overhaul of national administrative processes to render it more open and participatory. Christoph Knill and Andrea Lenschow have found that, in Germany, both the Environmental Information Directive and the Environmental Impact

³⁸ COM(2000) 402, at *11.

³⁹ Under current Commission proposals, however, litigants would be guaranteed the right judicial review of authorization decisions, permitting decisions, and denials of environmental information.

Assessment directives run counter to entrenched administrative procedure and practice.⁴⁰ According to Knill and Lenschow, administrative accountability is largely conceived as entailing administrative responsiveness to the government rather than responsiveness to the general public. Individual rights in the administrative process are thought to operate only in quasi-adjudicatory proceedings and not in administrative action involving broader public policy issues (the *Rechtsstaat* principle). Implementation of the environmental directives in Germany, therefore, has been poor.⁴¹ By contrast, according to Knill and Lenschow, the directives did not require significant change in Britain.⁴²

C. Independent agencies

In a number of Community policy areas, independence has been required of national authorities charged with implementation and enforcement. Independence serves different functions depending on the policy area. In consumer protection, privacy, and anti-discrimination, independence guarantees that national authorities will vigorously enforce Community law for the benefit of protected classes, regardless of political considerations. Independence ensures that administrative agencies will always serve as advocates for victims of fraud, privacy violations, or discrimination, regardless of shifting national political priorities. In industries that have recently been deregulated or that are en route to deregulation, namely telecommunications and postal services, independence protects against favoritism of public firms. The concern is that, if government ministries with historical responsibility for the sector and with ties to the former government monopolists were entrusted with liberalizing the sector, they would favor the state entity to the disadvantage of private operators. Lastly, in certain areas, there is consensus that good policymaking requires expertise free from any value judgments. Decisionmakers therefore are insulated from daily pressure from elected politicians. Such is the case for monetary policy and Member States' central banks.

Independence could have consequences for the constitutional authority of national governments. In most democratic constitutions, presidential and parliamentary, administrative accountability is guaranteed through a hierarchical relationship between a popularly elected government and the state's administrative apparatus.⁴³ Administrators are instructed by the government and, should they nonetheless depart from the government's agenda, are subject to removal. This is not to say that hierarchy is the only form of administrative accountability: large portions of administrative law deal with accountability through judicial review of agency action. Nonetheless, hierarchy is

⁴⁰ See Christoph Knill & Andrea Lenschow, *Adjusting to EU Environmental Policy: Change and Persistence of Domestic Administrations in Transforming Europe* 116, 128 (Maria Green Cowles et al., eds. 2001).

⁴¹ Additionally, Knill and Lenschow have found that German resistance to implementation of the EIS directive can be traced to the fragmentation of environmental policymaking at the regional level (where project authorizations are handled) among offices responsible for different facets of environmental protection (air, water, and soil). See *id.* at 128-29.

⁴² See *id.* at 134.

⁴³ See Robert O. Keohane & Joseph S. Nye, Jr., *Democracy, Accountability, and Global Governance*, Paper prepared for the University of California Institute on Global Conflict and Cooperation Conference on "Globalization and Governance," La Jolla, California, March 23-24, 2001, at 4.

significant, and independence breaks the chain-of-command between elected government and state administration.

As in the other areas of legislative harmonization, the claim that independence may undermine the authority of national executive branches to coordinate and direct policymaking, must first come to grips with the variation in national implementation. Only in the case of central banks does Community law define independence. Otherwise, as with associational standing and participation in administrative proceedings, the Member States have significant freedom in setting the conditions that enable administrators to "independently" implement Community policy. For instance in the consumer protection area, where Britain has chosen to implement the Injunction Directive by authorizing an independent public authority to bring enforcement actions, the UK Director General of Fair Trading is appointed by the Secretary of State for Trade and Industry for a fixed, renewable term of five years. Yet even though the Director is responsible for initiating enforcement actions, the ultimate decision as to whether the action will be brought rests with the Secretary for Trade and Industry, a cabinet-level appointment. Thus the question remains as to whether implementation of Community consumer policy in Britain is truly independent or whether it continues to be influenced by national government priorities.

Whether agency "independence" will require innovation in domestic systems of administrative law also depends on the existing balance between executive departments and independent agencies in the Member States. As classic parliamentary systems, most continental European countries rely heavily on the government ministry model of administrative organization.⁴⁴ Independence from the government cabinet is unusual. France and Germany, however, have a fair amount of experience with independent agencies but, at least in France, independent agencies do not have the same rulemaking and enforcement powers exercised by government ministries. Again, extensive research is necessary.

III. The Reformation of American Administrative Law

In the following section, I give an overview of similar developments in American administrative law. Since these reforms date back to almost three decades ago, they have spawned an extensive literature assessing their impact on both the quality of administrative policymaking and the constitutional balance of power between the electorally accountable branches -- the President and Congress -- and the judicial branch. After giving the overview, therefore, I canvass the most salient objections to administrative law reform. My purpose in reviewing the reactions from political scientists, economists, and constitutional scholars is not to enter the debate myself, although, to some extent this is inevitable. Rather, I wish to make use of the American experience in suggesting possible ramifications of harmonization of national administrative law in the European Community.

⁴⁴ Istituto della Enciclopedia Italiana, Autorità Indipendenti, IV Enciclopedia Giuridica I (1995).

In the United States, the decade spanning the late 1960s and early 1970s was a revolutionary one for administrative law. Through a combination of judge-made case law and congressionally enacted legislation, the model that had shaped American administrative state since the New Deal was cast away and a new one put in its place.⁴⁵ The old model characterized Congress as instructing agencies through statutes, agencies as staffed by professional technocrats, with the skills and experience needed to implement broad policy instructions in the complex, modern economy, and courts as policing agencies to ensure fealty to statutory commands and prevent agencies from invading individuals' traditional common law rights. In this model, public participation was funnelled through Congress, at the front-end of the administrative process. Individuals and their interest group representatives could freely pressure and lobby members of Congress, had some opportunity for participation, although far more restricted, in the agency decisionmaking process, and could only go to court under certain, limited circumstances.

By contrast, in the new model, Congress was generally considered incapable of giving clear instructions to administrators and when it did, was biased in favor of "special interests." Agencies were charged with normative decisions that defied easy answers from the experts and were vulnerable to "capture" by the very industries they were supposed to regulate. The only institution to come out unscathed in the new model was the judicial branch. Courts were independent and therefore well-placed to ensure that administrative decisionmaking was done in the "public" interest, not biased in favor of a few, special interests.⁴⁶ The role of the public in the administrative process changed along with this changing perception of institutional capacity. No longer was interest representation limited to Congress. Rather, in the new model, the public was to have full access to administrative agencies -- to fend off capture by the few -- and was to be able to freely call upon the courts to police renegade administrators.⁴⁷

To an abstract model of administrative law corresponds a set of concrete judicial doctrines, statutory provisions, and modes of analysis that constitutes the administrative lawyer's toolkit. By 1975, that toolkit looked very different than it had a decade earlier. In the brief account that follows, the innovations of the period are broken down by phase of the administrative process: initiation of administrative action, agency proceedings, judicial review of agency action, and broadly applicable transparency measures.

First, the decision to undertake administrative action, traditionally the monopoly of the state, was opened to the public. A number of decisions gave individuals the right

⁴⁵ See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975) (describing transmission belt, expertise, and interest representation models of administrative law); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984) (describing different models justifying administrative power).

⁴⁶ On the transformation of attitudes toward administration and the role of courts, see Martin Shapiro, *Who Guards the Guardians* (1988); Bruce A. Ackerman & William T. Hassler, *Clean Coal, Dirty Air* (1987); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 Vand. L. Rev. 1389 (2000).

⁴⁷ For an excellent overview of the expanded role of private parties in administrative proceedings, see Strauss, Gellhorn & Byse's *Administrative Law* at 464-509 (9th ed. 1995).

to sue other private parties directly in court for violations of agency-administered statutes, side-stepping the discretion previously vested in administrative agencies to decide whether and how to enforce statutory schemes.⁴⁸ Courts showed themselves far more willing than before to imply so-called private rights of action in statutes where Congress had said nothing about allowing individual suits for statutory violations. At about the same time, it also became more common for Congress to expressly authorize private enforcement of complex statutory schemes: a number of environmental statutes were written to give "any citizen" the right to go to court to sue private parties or government agencies for violating the statute. Courts also began to entertain suits designed to force agencies to initiate regulatory proceedings.⁴⁹ This willingness to recognize private rights of initiation again ran counter to the received wisdom that the decision between action or inaction was a matter entirely for agency discretion.

Second, courts extended the right to participate in agency proceedings to new parties and proceedings. Although in the past certain agencies had been fairly generous in granting private parties intervention rights in proceedings initiated by the agency or another party, the decisions of the time universalized such rights so they would apply regardless of the specific agency or type of proceeding.⁵⁰ Additionally, courts required far more extensive consultation of the public in rulemaking proceedings that had been the case in the past.⁵¹ Lastly, in a line of cases that have been dubbed the New Due Process, the Supreme Court held that entire realms of agency action, previously highly discretionary with little room for individual participation, were subject to the stringent procedural requirements of agency adjudication.⁵² As a result, in taking decisions on matters such as welfare benefits, agencies had to afford recipients a trial-type process, including notice of agency reasons and an oral hearing.

Third, judicial review of agency action was strengthened. Through the law of standing, Congress and the courts expanded litigants' right of access to courts to challenge agency action. As described above, Congress enacted statutes contemplating suits by "any citizen," not only to enforce statutes against private parties but also to obtain judicial review of contested agency decisions. For their part, the courts were ready to grant standing to organizations suing on the behalf of their members⁵³ and allow parties who were not beneficiaries of a given statutory scheme to nonetheless challenge agency decisions under that statutory scheme.⁵⁴ Moreover, judicial review of agency action became far more demanding than in the past, earning the label "hard look review."

⁴⁸ See *J.I. Case v. Borak*, 377 U.S. 426 (1964).

⁴⁹ See *Dunlop v. Bachowski*, 421 U.S. 560 (1975); Stewart, *The Reformation of American Administrative Law* at 1755; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1193, 1218 n.100.

⁵⁰ See *Office of Communications of the United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (D.C. Cir. 1966); Stewart, *The Reformation of American Administrative Law* at 1751.

⁵¹ See Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 *Harv. Int'l L.J.* 451, 474-76 (1999).

⁵² See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁵³ See Stewart, *Reformation* at 1743.

⁵⁴ See *Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970) (establishing "zone of interests" test for standing).

Agency decisions that would have easily withstood judicial scrutiny in the past were overturned.

Finally, greater public involvement in the agency process and tougher judicial review were promoted in a series of statutes on open government. These statutes made it easier for individuals to obtain information from administrative agencies which in turn enabled them to ask harder questions about agency decisionmaking. Most important was the Freedom of Information Act, which establishes a presumption that government agencies will disclose documents if so requested, regardless of whether the requesting party can show any specific interest.⁵⁵ In the same family of statutes are the Government in the Sunshine Act,⁵⁶ which requires meetings held by multi-member agencies (generally independent agencies) to be open to the public, and the Federal Advisory Committee Act,⁵⁷ which sets openness standards for executive branch advisory committees.

Over the past twenty years or so, this transformation of the administrative process has been the object of extensive critical assessment. The commentary has taken two forms. One strand focuses on the reforms' effect on administrative efficiency and policy quality. The other concerns the constitutional ramifications of the new administrative law.

I first address the effects on the quality and pace of administrative policymaking.⁵⁸ As outlined above, one of the principal reasons for turning to a new model of administrative law was the concern that the administrative state operated to the benefit of a small set of privileged, generally producer, interests at the expense of more widely held interests such as the environment, consumer protection, and equal protection. Several studies conducted since then, however, have shown that notwithstanding the greater openness to "public" interests, the administrative process, at least in some instances, has continued to work to the advantage of "special" interests. According to this scholarship, no amount of access, judicial review, and openness can overcome Olson's collective action problem.

The so-called public choice critique has been received with skepticism in many quarters. Public interest groups defend the Freedom of Information Act, citizen suits, notice and comment rulemaking, and judicial review as critical to the pursuit of collective values. A number of scholars have argued that the collective action problem is endemic to liberal democracy and that a more open administrative process, at the very least attenuates the imbalance of interest representation.

⁵⁵ See 5 U.S.C. § 552(b). Originally passed in 1966, it was significantly amended in 1974 and 1976. See P.L. 93-502, 94th Cong. 1st Sess (1974); Government in the Sunshine Act, P.L. 94-409, § 5(b), 90 Stat. 1247 (1976).

⁵⁶ See 5 U.S.C. § 552b.

⁵⁷ See Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. II §§ 1-15).

⁵⁸ For a review of the relevant literature, see Bignami, *The Democratic Deficit in European Community Rulemaking* at 496-506. For a discussion of these concerns with specific reference to private rights of action and rights of initiation, see Stewart & Sunstein, *Public Programs and Private Rights* at 129-93, 1303, 1320.

Another feature of the criticism that focuses on policy quality is disappointment with judicial review. To put it bluntly, a number of commentators believe that courts have made bad decisions. In the new model, courts were put in the position of reviewing normative and scientific decisions that had previously been left almost entirely to agencies. According to the critique, courts do not have the expertise to make the scientific decisions and are misled by ad hoc attacks from disappointed industry and advocacy groups. As for value judgments, these commentators argue that courts are poorly situated to mediate among competing interests and advance public values. Unlike agencies, they cannot coordinate policy and make strategic decisions as to the allocation of limited public resources.

Again, the critique is disputed. Defenders of courts maintain that even though courts might sometimes get it wrong, on balance their contribution is valuable: courts not only catch administrative stupidity but lift the technocratic veil and force agencies to articulate decisions so that they can be debated in the public arena.

The least controversial element in this line of criticism is the reforms' effect on administrative efficiency. It has been convincingly shown that, on balance, administrative law reform has rendered the administrative process more cumbersome. Providing for new procedural guarantees in rulemaking and administrative adjudication as well as responding to information disclosure requests have placed a significant drain on public resources. More disturbing is the effect on the pace of agency decisionmaking. Especially in rulemaking, the requirements of extensive public comment and thorough response from officials, together with the high probability of reversal or remand upon review in court, has made it far more difficult to undertake agency action.

To summarize this line of criticism in its most extreme form, the contention is that administrative law reform compromised policy output. Agency action was delayed for no good reason. Decisions that required expert application of vague statutory mandates and coordination of overall policy objectives were subject to interference from inexperienced courts and unaccountable, special interest litigants.

I now turn to the constitutional objections to administrative law reform, namely encroachment on the executive branch's constitutional powers. In American constitutional law, the powers of the President over government administration derive from the text of the Constitution in combination with the theory of separation of powers. As should come as no great surprise, the constitutional text drafted in 1787 does not give much guidance as to the respective roles of Congress, the President, and the judiciary in controlling the modern administrative state. Given the thinness of the text, there is significant difference of opinion over whether, constitutionally, Congress may itself assume the power to direct government administration or vest that power in the courts or whether such supervision falls exclusively to the President. At the heart of the debate is the anachronism of a constitution that envisions three principal institutions--Congress, the Presidency, and the courts--at a time when a fourth institution--administrative agencies--has become equally important for governance.

Those who take the side of President in the constitutional debate over control of government administration have opposed many of the procedural innovations of the 1960's and 1970's on the grounds that they undermine the President's constitutional powers and expand those of the judiciary. The Supreme Court, led by Justice Scalia, has significantly restricted the scope of statutory citizen suit provisions on the grounds that such provisions impermissibly expand judicial power and interfere with the executive branch's enforcement prerogatives.⁵⁹ In this line of cases, the Supreme Court has developed constitutional standing doctrine so as to limit Congress's ability to allow "any citizen" to enlist the judiciary in enforcing statutory terms or challenge administrative action. Private rights of initiation have also been restricted by the Supreme Court to protect the prosecutorial discretion constitutionally vested in the executive branch.⁶⁰

The Court has also cut back on judicial review of agency action, again in the name of the executive branch's constitutional prerogatives. In the landmark *Chevron* case, the Supreme Court attempted to curb increasingly searching review of agency decisions in the federal courts of appeals.⁶¹ The Court held that, in the interpretation of agency-administered statutes, where Congress had failed to speak to the "precise question at issue" courts were to defer to "permissible" agency interpretations. This decision was driven by constitutional allocation of powers between the President and the courts. Where a statutory provision was vague and thus implementation a question of policy choice rather than strict statutory construction, the matter was for the electorally accountable executive branch and not the courts:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interest, but not on the basis of judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁶²

The same concern for the executive branch's constitutional powers has led to developments in the Supreme Court's approach to independent agencies. Independent agencies were not part of the "ferment" of the 1960's and 1970's, except to the extent that

⁵⁹ See Robin Kundis Craig, Will Separation of Powers Challenges "Take Case" of Environmental Citizen Suits? Article II, Injury-In-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation, 72 U Colo. L. Rev. 93, 93-95 (2001).

⁶⁰ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁶¹ See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁶² *Id.* at 865.

government agencies created to champion unrepresented interests, namely the Consumer Product Safety Commission and the Equal Employment Opportunity Commission, were organized as independent agencies. To the contrary, independent agencies have a long history that goes back to the very first federal administrative agency, the Interstate Commerce Commission established in 1887. Nevertheless, independent agencies are included in this discussion because of the prominence of "independence" in Community legislation affecting national administrative law and because of commonalities in the Supreme Court's case law.

In the United States, independent agencies derive their independence from the President's inability to remove agency officials based on policy differences. Even though this limits the President's ability to control government administration, in 1935, the Supreme Court held that one such agency, the Federal Trade Commission, was constitutional and ever since, the common wisdom has been that independent agencies are constitutional.⁶³ In 1988, however, the Supreme Court suggested that Congress may not have the power to restrict the President's authority and that the President may not be limited to removal of agency heads based on incapacity or misfeasance.⁶⁴ As with citizen suits, rights of initiation, and judicial review, the Supreme Court's opinion turned on the President's constitutional prerogatives in directing and supervising the work of government administration.⁶⁵

IV. The Reformation of European Administrative Law?

How likely is it that interest group capture, policymaking by judges, and administrative gridlock will result from the harmonization of Community law? To what extent might the transformation of administrative law in the Member States represent a constitutional shift from electorally accountable governments to courts in directing government administration? To offer a preliminary answer to these questions, I attempt to gage the magnitude of reform in the European Community by comparing the different elements of harmonization with their American analogues.

I first turn to the judicial harmonization of administrative law in the European Community. In this area, Community law bears significant resemblance to American's reformed model of administrative law. Loosely speaking, direct effect can be compared to private rights of action for agency-enforced statutes. Both enable a private party to go directly to court to sue for a statutory violation rather than rely upon an agency for enforcement, even though the directive or the statute contemplates a regulatory scheme administered by a government agency. To be sure, direct effect applies in a more limited set of cases: individuals may sue the government or another state actor ("vertical" direct effect), but not other individuals ("horizontal" direct effect). By contrast, in the United States, suits brought by private parties under regulatory statutes are typically brought against other individuals and operate to supplement agency enforcement. Another

⁶³ See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁶⁴ See *Morrison v. Olson*, 487 U.S. 654 (1988).

⁶⁵ In his dissent, Justice Scalia squarely takes the position that independent agencies with powers that come within the "core powers" of the President are unconstitutional.

doctrine developed by the Court of Justice, state liability for breaches of Community law, however, may be construed as a substitute for the lack of horizontal direct effect of directives. Therefore, to the extent that state liability serves as an incentive system to obtain domestic implementation of Community law where Community law applies between two individuals, it rounds out the analogy between the Community's harmonized system of judicial remedies and private rights of action in the United States.⁶⁶

Next I consider the legislative harmonization of administrative law in the Member States. Associational standing might lead to more suits against firms guilty of consumer fraud under Community law. Yet, the requirement of a "legitimate interest" under national law means that Member States can restrict standing significantly. Under the American test for associational standing, a consumers' organization would only need to show that one of its members had suffered injury, or indeed if the organization were suing under the Consumer Product Safety Act it could simply invoke the Act's citizen suit provision.⁶⁷ Across the Atlantic, in, say, Italy, that same consumers' organization would have to show that it had over 28,000 members. In sum, it is still far easier for individuals and their organizations to go to court in the United States than in the European Community.

Of all the areas in which legislative harmonization has occurred, participation and information rights in environmental decisionmaking most closely resemble the American equivalent, that is, notice and comment rulemaking.⁶⁸ As in notice and comment rulemaking, the public is informed of projects proposed for government approval and the possible environmental consequences of the project.⁶⁹ The public may comment on the environmental soundness of the project and the national agency must, in granting or denying approval, give reasons. When a private party is not satisfied with the administrative record disclosed by the agency in the course of the proceeding, the party may file an information request, as commonly occurs in the United States through Freedom of Information Act requests. Notwithstanding these similarities, the failure to require judicial review and, in those countries where judicial review is available, the application of fairly deferential standards of review, will likely limit the role of the public and courts by comparison with the U.S. Without the prospect of reversal for failing to consider an objection from a member of the public, member state authorities are unlikely to take the same care in responding to comments from the public before approving

⁶⁶ Strictly speaking, state liability does not have an obvious American equivalent. To an American lawyer, indeed, state liability for violations of Community law seems draconian. The Court, however, has limited the scope of the doctrine. Damages against Member States are awarded only if the breach is "sufficiently serious," as would be failure to comply with a Court judgment condemning the Member State or a clear violation of a point of law established in the Court's case law. See cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. German & R. v. Secretary of State for Transport, ex parte Factortame Ltd.*, [1996] ECR I-1029, para. 55-57.

⁶⁷ Consumer Product Safety Act of 1972 § 2064.

⁶⁸ This should not come as a surprise since environmental impact statements as a policy tool originated in the United States, where they are subject to notice and comment requirements. See Peter S. Mennell & Richard B. Stewart, *Environmental Law & Policy* 901 (1994).

⁶⁹ For a complete description of notice and comment rulemaking, see Bignami, *The Democratic Deficit in European Community Rulemaking* at 472-76.

projects. And in no Member State is judicial review of administrative decisionmaking in the environmental field as tough as in the United States.

Lastly, the requirement of independence in administration of Community policy is so loosely defined that it is difficult to draw any significance from text of the directives. The operation of the UK Director General of Fair Trading, however, suggests that national governments may retain powers of control and supervision even when the agency is "independent." As with the other types of administrative reform identified in this paper, extensive research on national implementation is necessary.

Before coming to any conclusion as to the magnitude of these reforms, it should be remembered that, in theory, the Community standards for national administrative law apply only where the substantive rights are based on Community law. Government authorities are liable exclusively for breaches of Community law, not national law. Consumer associations have standing only when they sue to enforce Community consumer rights, not national law on consumer protection. The right to participate in administrative proceedings and seek information is guaranteed only when a national administration applies Community environmental standards, not when it formulates domestic environmental policy.

If theory were practice, this would significantly limit the impact of harmonization. Yet it is difficult to believe that courts and administrative agencies can compartmentalize to the extent the theory requires. Community law on procedure and remedies might influence cases and administrative proceedings based completely on national substantive law. Commentators have suggested that in Britain this has occurred in the state liability area.⁷⁰ As John Bell puts it:

There is the question of how far national legal systems are prepared to have a two-speed justice--one set of standards when EC or ECHR law applies and one for purely domestic cases. No legal system seems willing to tolerate this, unless it believes the external norm to be fundamentally wrong.⁷¹

Future research should explore whether procedural "creep" is occurring in areas where the substantive legal principles and duties are exclusively national.

To conclude, the changes worked by Community harmonization fall short of America's reformed model of administrative law. Even setting aside the important

⁷⁰ See Paul Craig, *The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?* in *New Directions in European Public Law* 83-89 (Jack Beatson & Takis Tridimas, eds. 1998) (describing dissatisfaction with limited government liability under English law and suggesting new approach based on ECJ state liability cases); John Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe* at 161. Bell also suggests that the French law on remedies against the administration has been influenced by ECJ decisions. Moreover, he notes that the concept of "legitimate expectations," has similarly spread into purely national administrative law.

⁷¹ John Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe* at 160.

questions of national implementation of Community standards and the extent to which Community standards depart from current national practice, it is clear that, compared to the United States, the change required of Member States has been relatively modest. The spectre of special interest groups, inept and unaccountable courts, and incapacitated agencies is a cautionary note for the future, not a danger of the here-and-now. Likewise, only over time might the cumulative effect of these and other reforms threaten the constitutional authority of parliaments and governments over state administration.

V. Postscript: Other Sources of Convergence

Domestic systems of administrative law are subject to a variety of influences, only one of which is the law of the European Community. State liability, associational standing, rights to comment in agency proceedings, and independent agencies might be the effect of pressures for change coming from sources other than the Community. In other words, the Court of Justice case law and Community directives might themselves be product of pressure from elsewhere or might constitute one of many influences on domestic systems, all of which happen to be pointing toward greater involvement of the public and courts in administrative policymaking and independence of administrative agencies. Indeed, European Community law, whether it be judge-made or legislative, generally finds its roots in national legal concepts and therefore, inevitably, a "Community" norm will have a national source.⁷² For instance, the ubiquitous proportionality principle in the Court's doctrine derives from German administrative law.

John Bell has identified a number of possible sources of convergence other than Community law: common national political agendas, international treaties, borrowing from other systems in judicial opinions and legislation, academic writing and education, and exchange among lawyers, judges, administrators, and legislators from different countries.⁷³ In the field of administrative law, there are a few especially important sources of convergence. On the national level, privatization has led to common administrative structures. For instance, the requirement of "independence" for telecommunications regulators might derive from common national trajectories of state ownership followed by privatization and the need to divorce the regulator from the state's proprietary interests as a telecommunications operator. Domestically, European countries have also witnessed a common drive toward more open government and codes of administrative procedure creating formal legal rights.⁷⁴

Internationally, the European Convention on Human Rights has been an important source of convergence. For instance, it contains norms on access to government information and the duty of administrators to engage in reasoned decisionmaking. International environmental conventions have also been influential. For instance, recent Commission initiatives to amend the directives on participation and information rights in environmental decisionmaking have been spurred by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

⁷² Id. at 161.

⁷³ Id. at 152-64.

⁷⁴ Id. at 153.

Environmental Matters (1998), to which the Community and the fifteen Member States are parties. The causal arrow is further complicated by the fact that the Community's Environmental Information Directive served as the inspiration for the first draft of the Convention.⁷⁵

What if, after further research, it appears that Community harmonization is a symptom rather than a cause of convergence in the organization of the administrative state and the relationship between citizens and their governments? The observations on the possible impact on the quality of administrative output and the constitutional authority of parliaments and governments would remain the same. They would simply apply to the wide array of forces that have produced convergence and not to Community law specifically. However, if indeed Community harmonization does not have a significant effect on domestic systems of administrative and constitutional law, then it would be pointless to draw any normative lessons for the future development of Community law.

⁷⁵ Proposal for a Directive of the European Parliament and of the Council on public access to environmental information, COM(2000) 402, 2000 O.J. C 337E (156) at *2.