Special Book Review Symposium
Power and Legitimacy

Türküler Isiksel*

Peter L. Lindseth. *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press), 2010, 364 p.

At least since the publication of Joseph Weiler's article 'The Transformation of Europe',[1] the constitutional perspective on European law has reigned supreme. In Weiler's much-cited words,

> The constitutional thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law.[2]

To be sure, there have also been memorable and valiant defenses of the treaty model, many of them from national constitutional tribunals and justices from their ranks. However, they have not dampened the enthusiasm of legal theorists at having uncovered a new, postnational form of constitutional practice in the European Union. Peter Lindseth's new book, on the other hand, will.

According to Lindseth, the widespread practice of considering the European legal order in constitutional terms entails a 'category mistake' because

> [t]he legitimation of supranational regulatory power (its 'mandate,' so to speak) has never been successfully located supranationally … Rather, it has been located, how-

*Türküler Isiksel is Assistant Professor of Political Science at Columbia University. The author would like to thank the Robert Schuman Centre of the European University Institute, in particular its director, Stefano Bartolini, for hosting a panel on Peter L. Lindseth's book, Power and Legitimacy, of which the present symposium is an outcome. She also wishes to acknowledge the terrific intellectual environment provided by the Schuman Centre's Global Governance Programme, where her stay as a Jean Monnet Fellow during the 2010-2011 academic year made possible, among other things, the preparation of this review.

[1] J.H.H. Weiler, 'The Transformation of Europe', 100(8) *Yale Law Journal* (1991) p. 2403-2483.

[2] J.H.H. Weiler, 'The Reformation of European Constitutionalism', 35(1) *Journal of Common Market Studies* (1997) p. 97-131, at p. 7.

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> ever tenuously, in the enabling treaties themselves, akin to enabling legislation on the national level, empowering the supranational exercise of regulatory discretion within the capacious limits defined by those treaties. (p. 19)

The constitutional approach ill fits the existing institutional configuration of the European Union, Lindseth argues, because it attributes to supranational institutions a self-legitimating capacity which they have simply never had. In its stead, Lindseth presents a rigorously argued and historically substantiated case as to why we ought to think of European integration in terms of an alternative model: that of administrative delegation. As such, his theory represents one of the most systematic interventions in the recent administrative turn in global governance studies, whose aim has been to recast our understanding of postnational legal forms using conceptual tools inherited from domestic administrative law.[3]

The central reference point of the book is what Lindseth calls 'the postwar constitutional settlement of administrative governance,' (chapter 2) a process by which European nation-states have carved out a constitutional niche for the delegation of policy tasks to administrative bodies, subject to parliamentary authorization, executive oversight, and judicial scrutiny. Starting from the 19th century origins of administrative governance, the author provides an overview of how this process unfolded in the UK, France and Germany, taking us through its dramatic wrong turn during the interwar years and its culmination in a workable balance between democratic accountability and administrative independence in the postwar period. This domestic model serves as the touchstone for Lindseth's argument that rather than being a *de novo* constitutional project, European integration represents a supranational complement to the emergence of domestic regulatory institutions. In three exhaustively documented chapters devoted to the role of national executive, judicial, and legislative institutions in the supranational architecture (chapter 3-5), Lindseth seeks to show that notwithstanding its extensive norm-making authority, European supranationalism reflects the administrative governance paradigm insofar as its legitimacy derives primarily from the oversight exercised by member state institutions.

The attention Lindseth pays to the oversight role fulfilled by national parliaments and executives is particularly lacking in most studies in the constitutional

[3] *See* especially, the contributions in Benedict Kingsbury et al. (eds.), 68(3-4) *Law and Contemporary Problems* special issue on 'The Emergence of Global Administrative Law' (2005); Nico Krisch and Benedict Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order', 17(1) *European Journal of International Law* (2006) p. 1-13, as well as other contributions in the same issue; Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale Law Journal* (2006) p. 1490-1562; Damian Chalmers, 'Administrative Globalisation and Curbing the Excesses of the Nation State', in Christian Joerges and E.U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford, Hart Publishing 2006).

vein. In the author's view, scholars of European law tend to arrive at a constitutional characterization of the EU precisely because they restrict their regard to its juridical dimension. That dimension, Lindseth contends, cannot be considered in abstraction from the mechanisms of executive and legislative delegation that have always sustained it. Put differently, supranational law should not be treated as if it is floating in a void when it is ensconced in an institutional framework that also features equally important legislative and executive checks, all of which (so the author argues) conform to the logic of administrative delegation.

Skeptics will wonder whether this ground has not been covered by the respective works of Andrew Moravcsik,[4] Giandomenico Majone,[5] and Hans Peter Ipsen,[6] all of whom have described supranational institutions as exercising regulatory tasks of a specialized nature assigned to them by their principals, the member states. Often mentioned in the same breath is the corollary of this thesis; namely that supranational institutions require no freestanding democratic legitimation of their own. Lindseth's position compares favorably to this classic position on a number of critical points, which are highlighted in the book. First, the author emphasizes that his account of delegation does not imply that member states retain control of supranational institutions in a strong sense; rather, he is careful to speak of 'oversight' of the kind found in domestic administrative governance. Lindseth recognizes that supranational institutions require a considerable measure of independence from member state interference if they are to function properly, and works into his theory the attenuated (but not quite autonomous) nature of supranational authority (p. 26). This also enables the author to finesse the classical impasse between intergovernmentalists, who assert that integration proceeded in line with member state preferences at every significant turn, and neofunctionalists, who argue that supranational institutions quite often steered the course of integration away from those express preferences. For Lindseth, the key to the success of supranationalism in Europe is the fact that member states settled for an institutionalized oversight role while granting circumscribed authority to commitment institutions such as the Commission and the Court (p. 111). (Others might ask

[4] Andrew Moravscik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40(4) *Journal of Common Market Studies* (2002) p. 603-624. Also, Andrew Moravcsik, 'Is There a "Democratic Deficit" in World Politics? A Framework for Analysis', 39(2) *Government and Opposition* (2004) p. 336-363.

[5] Giandomenico Majone, 'The European Community: An "Independent Fourth Branch of Government"?', EUI Working Paper SPS No. 93/9 (1993); Giandomenico Majone, 'The Rise of the Regulatory State in Europe', 17(3) *Journal of Public Policy* (1994) p. 77-101; Giandomenico Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth* (Oxford, Oxford University Press 2005).

[6] Hans Peter Ipsen defined the EEC as a 'purposive association' that plugged into the sovereign democratic frameworks of member states. *See* Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, J.C.B. Mohr 1972).

whether the sweet spot proposed by Lindseth was not already occupied by Alec Stone Sweet's account of supranational institutions as exercising a form of *trusteeship*.)[7]

Second, Lindseth's approach does not have the apolitical tenor for which many have criticized Majone's earlier work.[8] The author neither assumes nor eulogizes a kind of technocratic Eden where all policy tasks delegated to administrative institutions admit of Pareto-superior solutions. He is explicit about the deeply political, rather than 'merely' functional or technocratic nature of delegated decision-making, acknowledging that it is shot through with messy political choices that require redistributing resources, allocating risks, and choosing among conflicting interests. In fact, it is precisely because of its inalienable political nature, Lindseth argues, that delegated authority requires the continued sanction of national institutions in order to be perceived as legitimate.

Third, Lindseth rejects the claim, famously defended by Moravcsik[9] (and earlier by Majone)[10] that the legitimation problems that beset supranational delegation are no different than those to which domestic non-majoritarian institutions are vulnerable. In Lindseth's view, this underestimates the challenges of coordination that confront member states when they attempt to check the power of supranational institutions. The author takes seriously the problem posed by the existenceof a vastly greater number of 'veto players'[11] at the supranational level compared to the domestic level, as a result of which the decisions of supranational institutions become deeply entrenched and the competences entrusted to them are virtually irretrievable. Although reining in an errant independent agency at the national level usually involves mobilizing one legislature and executive, reversing the ECJ takes a treaty amendment to be coordinated among 27(+) principals. *Herren der Verträge*, indeed.

Lindseth's chapter on national judiciaries, whom he regards as guardians of the distinction between delegated versus comprehensive authority, covers a critical point of contention between the administrative and constitutional models. On

[7] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford, Oxford University Press 2004).

[8] *See* especially, Christian Joerges, 'The Law in the Process of Constitutionalizing Europe', EUI Working Paper (2002); Christian Joerges and Michelle Everson, 'Law, Economics and Politics in the Constitutionalization of Europe', in Erik Oddvar Eriksen et al. (eds.), *Developing a Constitution for Europe* (London, Routledge 2004).

[9] Moravscik, *supra* n. 4; Andrew Moravcsik, 'Europe without Illusions: A Category Error', 112 *Prospect* (2005).

[10] Giandomenico Majone writes: 'The problem of the "democratic deficit" of the Community is by no means unique… In reality, it is a problem common to all non-majoritarian institutions – independent regulatory agencies but also courts and central banks.' Majone, *supra* n. 5, at p. 2.

[11] George Tsebelis, 'Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism', 25(3) *British Journal of Political Science* (1995) p. 289-325.

the one hand, the author recognizes what national constitutional courts have also acknowledged, namely that in order to be able to discharge their mission, European institutions require 'strong deference' on the part of domestic judiciaries (chapter 4.2). However, as many national courts have unequivocally stated in recent years, deference has its limits. Among others, German, Spanish, Danish, and Czech constitutional courts have indicated where they consider those limits to lie and Lindseth, for the most part, agrees with them (chapter 4.3). While this may be one way to answer the always-lurking question of the bounds of supranational authority, however, it does not address an underlying analytical puzzle: at what point can citizens be said to lose meaningful oversight of delegated authority? Put crudely, what is the metric by which national constitutional courts themselves make a determination regarding whether the transfer of competences has gone so far as to mar 'the constitutional assumption of a democratic system of government,' to paraphrase the Danish Supreme Court?[12]

To be clear, that question is essential not only for resolving questions of constitutional scope in a pluralistic legal context, but also for making a cogent analytical distinction between the administrative and constitutional paradigms. When does the attenuation of the link between the respective loci of regulatory power and popular sovereignty lead to a failure of the delegation model? What is the threshold at which a satellite breaks out of orbit and becomes a planet of its own? These are hard questions, and Lindseth diligently engages with them in the book. Fortunately for him, the threshold question cuts both ways: advocates of a constitutional perspective on the EU must also systematically explain just *how autonomous* European law must be before it can be considered a freestanding constitutional order, and whether anything short of an Ackermanian 'constitutional moment' for Europe would do.[13]

To draw this distinction, Lindseth looks to (among others) the French constitutional tradition: while the constitution of the Fourth Republic gave the National Assembly the sole right to pass general laws, it gradually had to make room for a parliamentary prerogative to delegate the implementation of those laws. As a historian, Lindseth expertly documents how this distinction was a contextual response to the executive's excesses in stripping the legislative powers of representative assemblies during the interwar period. Such sensitivity towards the evisceration of the people's lawmaking authority predates modern administrative governance; in fact, it echoes one of the central dilemmas of democratic theory. Troubled by this problem, Jean-Jacques Rousseau famously rejected the idea that the will of a sovereign composed of self-ruling citizens could be represented by

[12] *Carlsen*, Case I-361/1997, cited at p. 136.
[13] Bruce Ackerman, *We the People. Volume I: Foundations* (Cambridge, MA, Belknap Press 1993).

anyone other than the people themselves:[14] 'Sovereignty cannot be represented for the same reason that it cannot be alienated … the [general] will does not admit of being represented: either it is the same or it is different; *there is no middle ground*.'[15] In the *Social Contract,* lawmaking is synonymous with the sovereign will of the people and can never be entrusted to an institution other than the general will: the moment it is, the people ceases to be sovereign (that is, free) and becomes subject to a power other than itself. (In this respect, Art 13 of the 1946 French Constitution shows its Rousseauian pedigree: 'The National Assembly alone votes the law. It cannot delegate this right.')

Nevertheless, Rousseau recognized the impossibility of assemblies of citizens attending to every minute affair of state. For this reason, he distinguished between representation and delegation, arguing that the latter (unlike the former) involves no exercise of what he called 'legislative power' and serves merely as executor to the general will.[16] The metaphor he used was of his resolving to walk towards an object, and his feet actually carrying him there.[17] 'The public force… has to have its own agent which unites and puts it to work in accordance with the directives of the general will (…)'[18] He used the term 'executive power' to describe the authority of institutions charged with implementing the sovereign's will, a category that would include contemporary administrative institutions as well as the modern executive branch.

Given the all-encompassing authority with which Rousseau vests the popular sovereign, and given his repudiation of all institutions that might usurp or subvert the general will, some have regarded his idea of delegated executive power as a grudging concession to the imperative of effective rule. For one thing, Rousseau draws the distinction between sovereign and executive authority in a deceptively simple way: '[executive] power consists solely in particular acts which are not

[14] My claim, which I can only crudely outline here, is that Rousseau's rejection of representation does not sit well with his concomitant acknowledgment of the role of delegated power under the social contract. This is partly based on the argument I make in this essay that delegation does, in fact, entail a significant exercise of legislative will that cannot be traced back to the demos except in a very tenuous way (a disconnect which Rousseau identified with representative government and which led him to repudiate representation). Delegation is just as likely to detract from popular sovereignty as the kind of representation Rousseau feared. For an elegant exposition of Rousseau's use of these concepts, *see* Nadia Urbinati, *Representative Democracy. Principles and Genealogy* (Chicago, University of Chicago Press 2006), especially ch. 2. Urbinati reconstructs Rousseau's distinction between delegated and sovereign authority as an analytically coherent one, while ultimately rejecting his non-representative conception of popular sovereignty (at p. 77-78).

[15] Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (ed.) Victor Gourevitch (Cambridge, Cambridge University Press 1997), Book III, ch. 15, para. 5, at p. 114, emphasis added.

[16] Rousseau, *supra* n. 15, Book III, at p. 82.

[17] Rousseau, *supra* n. 15, Book III, para. 2, at p. 82.

[18] Rousseau, *supra* n. 15, Book III, para 4, at p. 82.

within the province of the law.'[19] By contrast, '[t]he object of the laws is always general,'[20] and as such, exercises of delegated power do not count as legislation. Still, Rousseau recognizes the problem of keeping general and particular acts discrete as far as 'really existing' republics are concerned: for instance, when the sovereign appoints magistrates to populate the government, is this not a particular act rather than general lawmaking?[21] Rousseau dismisses this dilemma with reference to an 'astonishing', 'apparently contradictory' moment of 'sudden conversion': having made the law, the citizens transform themselves into their own magistrates and can then tend to the *application* of the law.[22] To appease those who might be skeptical of his hattrick, Rousseau points to the English House of Commons, which he says switches between its roles as sovereign or executive on a daily basis. And yet, if the general and the particular are so easily interchangeable, what guarantees that wielders of delegated authority will steer clear of extra-democratic exercises of will?

This minor detour through the *locus classicus* of modern democratic theory is meant to sharpen the deep difficulty inherent in reconciling delegated power with democratic government, a problem with which Lindseth's theory, like Rousseau's, must grapple: when does delegated authority shade into general lawmaking and, if such a boundary exists (as indeed it must if we are to meaningfully distinguish regulation from law-making), how do we know when we have stepped over it? Lawyers are used to invoking the idea of *Kompetenz-Kompetenz* or the authority to determine the bounds of one's own authority as the relevant category in making this determination. Unfortunately, *Kompetenz-Kompetenz* is also a notoriously difficult attribute to pinpoint (just ask the ECJ, or the German Federal Constitutional Court). Since very early on in the history of the Communities, the competences of the supranational institutions have outstripped those explicitly delegated to them, while formal member state ratification has had to play catch-up. The more vague the enabling act (and treaties, as everyone knows, can be among the least precise of laws), the more problematic it gets to distinguish between borrowed and originary norm-making authority, and the more difficult it is to assert that the people retain the latter while their agents are restricted to the former.

In drawing that distinction, Lindseth directs us towards the source of authority: he argues that however extensive and consequential the legislative powers of supranational institutions, they will remain 'administrative, not constitutional' as long as their legitimation remains mediated by member state institutions. Although shedding his predecessors' modesty about the political salience of administrative

[19] Rousseau, *supra* n. 15, Book III, para 3, at p. 82.
[20] Rousseau, *supra* n. 15, Book II, ch. 6, para. 6, at p. 67
[21] Rousseau, *supra* n. 15, Book III, ch. 17, para. 3, at p. 117.
[22] Rousseau, *supra* n. 15, Book III, ch. 17, para. 5, at p. 117.

governance enables Lindseth to propose a more capacious model of delegated authority, however, the Rousseauian problem still presents itself: how can citizens (or their representatives) be sure that they are still the fount of legislation, at least of the legislation that *counts*? The analytical task of drawing delegation's outer limits is also laden with normative importance for gauging the quality of democratic self-government.

To be fair, Lindseth's aim is to provide a 'descriptive and analytical' alternative to the constitutional model of European supranationalism rather than a prescriptive one (p. 227). The book is intended as a corrective to what the author argues is the faulty historiography underpinning public law discourse on European integration, rather than as a(nother) treatise on what supranational democracy should become. Nevertheless, the administrative model also implies its own normative answer to the much discussed 'question of standards'[23] by which to assess the legitimacy of supranational institutions. The book, to its credit, is forthright in acknowledging this. The EU must be viewed in accordance with administrative rather than constitutional expectations of legitimacy, Lindseth submits, because the latter rest on a distorted understanding of Europe's institutional architectonic. As an example of such distortion, he points to the now-saturated debate on the democratic deficit, arguing that it presumes 'an implicit quasi-federal understanding of European governance, rather than one more cognizant of its fundamentally administrative character' (p. 226). In Lindseth's view, it is futile to expect norm-making at the European level to elicit democratic authorization directly from some European *pouvoir constituant*, which we now realize – after a failed constitutional convention – we cannot summon by incantation. Rather, we must recognize that supranational institutions borrow their legitimacy from national institutions much as the moon borrows its light from the sun. Citizens are willing to accept them because and only insofar as their democratically elected representatives have authorized them. The author interprets recent developments, not least the failure of the Constitutional Treaty, as an indication that the pendulum of European integration has once again swung away from the federal vision.[24]

However, because the book's argument implies that what should be the correct model of European governance is also the most apposite for characterizing the institutions in existence, it can at times err on the side of understating the legitimacy crisis currently haunting supranationalism in Europe. Put differently, the robust conceptual framework with which Lindseth makes sense of the European project leads us to expect a much rosier European Union than what we find when we turn to the mood of public dissatisfaction arguably prevailing in most member

[23] Majone, *supra* n. 5, at p. 5-28.

[24] Not surprisingly, the fortunes of European integration theories have shadowed those of integration itself, with perhaps a few years' lag.

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states (a vague measure to be sure). Thus, if the book's descriptive thesis is accurate, and the EU's institutional set-up *does* reflect a model of borrowed and conditional legitimacy which emanates from the member states, and if this is also how citizens would like the Union to function, then why don't citizens endorse the existing institutional structure? If Europeans are no longer content with the kind of oversight national institutions are exercising, then either member state governments are doing a poor job of informing their citizens about how well the mechanisms of delegation actually work, *or* the mechanisms have ceased to function and citizens are correct in their sense of runaway European institutions. In this book, Lindseth does not convey a sense of European integration having grossly overreached its mandate; to the contrary, he would like to prove the enduring perspicacity of the administrative model. If that model is apt, however, what explains sustained public discontent with the institutions that exist? By contrast, if the model is no longer current, then shouldn't we be talking about another model?

Lindseth interprets the increasingly Eurosceptical clamors of electorates as a demand that supranational institutions take their domestic sources of legitimation more seriously. He prefers to speak of a 'democratic disconnect' (p. 261), which he uses to denote the lack of synchronicity between, on the one hand, the 'structural-functional' demands for integration that issue from the cross-border nature of policy challenges, and on the other, the political and cultural pressures that push back against the institutions that would answer those demands (p. 13-14). While the constitutionalist perspective recommends transferring the institutional trappings of democratic self-government to the supranational level in order to address this problem, Lindseth emphasizes reinvigorating the EU's existing, nationally rooted oversight mechanisms.

Nevertheless, this normative prescription seems to militate against the book's descriptive thesis that European law and supranational authority more generally may still be comprehended as a kind of borrowed or delegated authority. In fact, if supranational institutions were still able to 'pass' as administrative institutions in the public eye, life would be easier. It is precisely because citizens no longer find the oversight exercised in their name by national institutions to be adequate that scholars have gone on a Promethean search for a direct mode of legitimation for the EU (a search Lindseth argues is futile and misinformed). For this reason, the administrative framework gives off an anachronistic flavor even though Lindseth's analysis is meticulously up-to-date:[25] the democratic legitimacy question became

[25] Lindseth is aware that his argument may be perceived this way, and in fact opens the book with a proud epigraph from Ernest Renan: 'The best way of being right in the future is, in certain periods, to know how to resign oneself to being out of fashion.'

intractable precisely when electorates woke up to the fact that the EU was no longer merely exercising delegated functions. That was about two decades ago.

In sum, the EU may not have autonomous or 'originary' constitutional legitimacy of the Philadelphian sort, but its derivative mechanisms of legitimacy are also under tremendous strain. Existing forms of national oversight have proven unequal to the task of producing a supranational political order that citizens can regard as having been authorized by them. At the end of the book, the question which remains on the table for other scholars to ponder is: what to do with regimes that do not enjoy the kind of primary democratic or 'cultural' legitimacy that Lindseth and others understand to be essential to constitutional orders, but which, at the same time, have the kind of political salience, autonomous legal status and indigenous logics of operation that preclude their authority from being meaningfully described as delegated or derivative? Why insist, as a matter of fact, that genuine lawmaking power (as opposed to mere delegated authority) can *only* originate in democratic conferral?

Lindseth has been alive to these questions and has articulated his thesis consistently since his 1999 Columbia Law Review article.[26] And yet, the disordered institutional reality of the EU intrudes on the most cogent of theories. I will give one last example here. In the book, Lindseth has surprisingly little to say about the role that the European Parliament (EP) ought to have in the contemporary European Union,[27] even though he makes clear what role it does not, cannot, and should not fulfill (that of a primary federal legislature). Does the derivative nature of the EU's legitimacy mean that direct mechanisms of democratic legitimation – including the EP – are superfluous and misplaced, in addition to lacking true political salience? If it is a category mistake to attribute stand-alone constitutional/democratic status to the EU,[28] was it also a category mistake to allow direct elections to the Parliament; or, for that matter, to introduce the status of Union citizenship and the rights of political participation appended to it? After all, domestic administrative institutions do not usually come with parliamentary assemblies equipped with legislative powers or their own regimes of electoral rights. If these institutions *do* have a rightful place in the supranational democratic

[26] Peter L. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community', 99(3) *Columbia Law Review* (1999) p. 628-738.

[27] At p. 229-230 Lindseth writes that the EP serves as a 'highly instrumental form of representation, useful in bringing public opinion and perhaps even various interests to bear on supranational policy processes,' and that it also has a role to play in 'supervising the Commission,' 'forging compromises among disparate cross-national interests,' and serving as a 'designated agent' for national parliaments. Nevertheless, Lindseth has dealt more extensively with the EP in previous works. *See* esp. Lindseth, *supra* n. 26; Peter L. Lindseth et al., *Administrative law of the European Union. Oversight* (Chicago, ABA Section of Administrative Law and Regulatory Practice 2008).

[28] The interchangeability of those two concepts in this context is proposed by Lindseth, at p. 14.

architecture, has the EU's character as a system of borrowed legitimation become much less straightforward and more 'hybrid' since (at least) the Treaty of Maastricht?

If our quest is for a systematic, elegant, and compelling theory of European integration that performs consistently on both the descriptive and the normative planes, then *Power and Legitimacy* is one of the best examples of its kind. If the present author's experience is any guide, scholars of a constitutional persuasion will find themselves reopening a case they thought they had won.

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