## Articles

# Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration

*By Peter L. Lindseth*[*]

**Abstract**

*As my work has argued previously, European integration enjoys an "administrative, not constitutional" legitimacy. This view is in obvious tension with the deeply-rooted conceptual framework—what we might call the "constitutional, not international" perspective—that has dominated the public-law scholarship of European integration over many decades. Although the alternative presented in my work breaks from that traditional perspective, we should not view it as an all-or-nothing rejection of everything that has come before it. The administrative alternative can be seen, rather, as providing legal-historical micro-foundations for certain theories that also emerged out of the traditional perspective even as they too are in tension with it. I am referring in particular to Joseph Weiler's classic notion of European "equilibrium"—now updated as "constitutional tolerance"—as well as Kalypso Nicolaïdis's more recently developed theory of European "demoi-cracy" on which this article focuses in particular. The central idea behind the "administrative, not constitutional" interpretation—the historical-constructivist principal-agent framework rooted in delegation, as well as the balance demanded between supranational regulatory power and national democratic and constitutional legitimacy—directly complements both theories. The administrative alternative suggests how the relationship between national principals and supranational agents is one of "mediated legitimacy" rather than direct control. It has its origins in the evolution of administrative governance in relation to representative government over the course of the twentieth century (indeed before). By drawing on the normative lessons of that history—notably the need for some form of national oversight as well as enforcement of outer constraints on supranational delegation in order to preserve national democratic and constitutional legitimacy in a recognizable sense—this article serves an additional purpose. It suggests how theories of European equilibrium and demoi-cracy might be translated into concrete*

* Olympiad S. Ioffe Professor of International and Comparative Law, University of Connecticut School of Law. This article builds on a very different paper presented at the "Toward a Multipolar Administrative Law" conference at NYU in September 2012. It attempts to respond to the detailed and generous comments from Joseph Weiler, my primary discussant, as well as those from Sabino Cassese, Giulio Napolitano, Kalypso Nicolaïdis, and Niels Peterson, among others. The discussions with Nicolaïdis, in particular, began an ongoing conversation about the relationship between my "administrative" perspective on the EU and her "demoi-cratic" theory, something that this paper seeks to foster and continue. Of course, as always, any errors or mischaracterizations of the views of others are entirely my own responsibility.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

*legal proposals for a more sustainable form of integration over time—a pressing challenge in the context of the continuing crisis of European integration.*

## A. Introduction

"Wouldn't it be easier to form a European federal state, one that is democratic and based on the separation of powers?"[1] This question formed the centerpiece of an interview in *Der Spiegel* with Udo Di Fabio on the occasion of Di Fabio's retirement from the German Federal Constitutional Court in December 2011. In its mixture of functionalism and political idealism, the question exhibited a mindset regarding European integration that, within Germany at least, one often associates with Jürgen Habermas.[2] It was functionalist in the implicit assumption—hard to deny—that transcending the limited capacities of individual nation-states has been a major impetus behind the construction of supranational governance in Europe. It was nonetheless politically idealistic in the presumption—much more questionable—that the resulting system of governance could somehow un-problematically legitimize itself in a novel, state-like, democratic and constitutional sense—"based on the separation of powers"—if only retrograde actors like the German

[1] Dietmar Hipp & Thomas Darnstädt, *Der Bundesstaat ist ein Irrtum*, DER SPIEGEL (Dec. 23, 2011), www.spiegel.de/spiegel/print/d-83328883.html. The quotations are from my own translation of the original German rather than from the version on *Der Spiegel*'s online English site, which contains a number of strange and misleading choices by the translator. *See* Dietmar Hipp & Thomas Darnstädt, *SPIEGEL Interview with Ex-German High Court Justice: "It is a Mistake to Pursue a United States of Europe,"* SPIEGEL ONLINE (Dec. 28, 2011), www.spiegel.de/international/germany/spiegel-interview-with-ex-german-high-court-justice-it-is-a-mistake-to-pursue-a-united-states-of-europe-a-805873.html. For more analysis, see Peter Lindseth, *Understanding the German Constitutional Fault Lines in the Eurozone Crisis: Der Spiegel's Interview with Udo Di Fabio*, EUTOPIALAW.COM, (Jan. 12, 2012), www.eutopialaw.com/2012/01/12/understanding-the-german-constitutional-fault-lines-in-the-eurozone-crisis-der-spiegels-interview-with-udo-di-fabio/.

[2] *See, e.g.*, Jürgen Habermas, Lecture at KU Leuven, Belgium: Democracy, Solidarity and the European Crisis (Apr. 26, 2013), www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/en/democracy-solidarity-and-the-european-crisis ("the steering capacities which are lacking at present, though they are functionally necessary for any monetary union, could and should be centralized only within the framework of an equally supranational and democratic political community"). *See*, *more generally*, JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (2012). In the midst of the Eurozone crisis, *Der Spiegel* has focused regularly on the views of Habermas. *See, e.g.*, Georg Diez, *Habermas, the Last European: A Philosopher's Mission to Save the EU*, SPIEGEL ONLINE (Nov. 25, 2011), www.spiegel.de/international/europe/habermas-the-last-european-a-philosopher-s-mission-to-save-the-eu-a-799237.html; *see also* Thomas Darnstädt et al., *Citizens of the EU: How to Forge a Common European Identity*, SPIEGEL ONLINE, (Feb. 12, 2011), www.spiegel.de/international/europe/citizens-of-the-eu-how-to-forge-a-common-european-identity-a-800775.html; Thomas Darnstädt et al., *Phoenix Europe: How the EU Can Emerge from the Ashes*, SPIEGEL ONLINE, (Nov. 18, 2011) www.spiegel.de/international/europe/phoenix-europe-how-the-eu-can-emerge-from-the-ashes-a-797626.html; Thomas Darnstädt et al., *The Great Leap Forward: In Search of a United Europe*, SPIEGEL ONLINE, (Nov. 24 2011), www.spiegel.de/international/europe/the-great-leap-forward-in-search-of-a-united-europe-a-799292.html.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

high court and Udo Di Fabio, or indeed Angela Merkel for that matter,[3] would clear the way.

The conservatism of Di Fabio in European matters cannot be denied[4]—he was, after all, the author of the Court's *Lisbon Decision* in June 2009.[5] And unsurprisingly, given the precarious state of the common currency at the end of 2011, it was precisely the Court's judgment regarding the Lisbon Treaty, and more specifically its import for the developing Eurozone crisis, that Di Fabio's interviewers most wanted to discuss. The response that Di Fabio gave to this particular question, however, is hard to characterize as essentially conservative, even if it clearly ran contrary to the assumptions of his journalistic interlocutors: "The attempt to follow the federal state model, I think, is a mistake . . . . A European federal state, which supposedly would solve all problems, could give rise to even greater difficulties than the current Union with its many weights and counterweights that make a balance possible."[6]

The German Constitutional Court is often cited as the very bastion of judicial Euroskepticism in the EU.[7] Nevertheless, this particular assessment of the prospects of a European federal state by one of the Court's intellectual leaders of the last decade should not be seen as necessarily Euroskeptical or even hostile to integration. Indeed, a similar view is arguably shared by any number of eminent integration theorists whose credentials as pro-Europeans are impeccable. I am thinking, in particular, of Joseph Weiler and his classic theory of European "equilibrium," now updated as "constitutional tolerance,"[8] as

---

[3] *See* Jürgen Habermas, *Merkel's European Failure: Germany Dozes on a Volcano*, SPIEGEL ONLINE (Aug. 9, 2013), www.spiegel.de/international/germany/juergen-habermas-merkel-needs-to-confront-real-european-reform-a-915244.html.

[4] *See, e.g.*, Udo Di Fabio, *Die Zukunft einer stabilen Wirtschafts- und Währungsunion: Verfassungs- sowie europarechtliche Grenzen und Möglichkeiten*, STIFTUNG FAMILIENUNTERNEHMEN (May 2013), www.familienunternehmen.de/media/public/pdf/studien/Studie_Stiftung_Familienunternehmen_Die-Zukunft-Europas_ebook.pdf.

[5] Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvE 2/08 (June 30, 2009), http://www.bundesverfassungsgericht.de/en/decisions.html.

[6] Hipp & Darnstädt, *supra* note 1.

[7] *See, e.g.*, Franz Mayer, *Rebel Without a Cause: A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L.J. 111 (2014); *Drifting Into Politics: Is Germany's High Court Anti-European?*, SPIEGEL ONLINE (Mar. 13, 2014), www.spiegel.de/international/germany/the-eu-critical-course-of-the-german-high-court-a-958018.html; Daniel Halberstam & Christoph. Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 GERMAN L.J. 1241 (2009).

[8] *See*, *e.g.*, J.H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267 (1982) [hereinafter *The Community System*]; J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403–83 (1991) [hereinafter *The Transformation of Europe*]; J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 54 (Kalypso Nicolaïdis & Robert Howse eds., 2001); J.H.H. Weiler, *in Defence of the Status Quo: Europe's*

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

well as Kalypso Nicolaïdis and her more recently developed "demoi-cratic" theory of European integration.[9] In their shared rejection of a "statist" teleology for integration, neither Weiler nor Nicolaïdis are driven by a normative conservatism in the vein of Di Fabio. Rather, their views derive from what they believe to be a sustainable form of integration at this point in Europe's history. Even though European governance might well be a complex, even messy proposition, both Weiler and Nicolaïdis recognize that it has developed in that way precisely to accommodate the deeply pluralistic, multi-centered and multi-level character of the European continent. This is something that Di Fabio's interviewers—indeed, European policy makers more generally—ignore at their peril.

My aim in this article is three-fold. First, similar to Weiler's and Nicolaïdis's shared rejection of a statist teleology in European integration, I want to argue that we should be equally hesitant about deploying a "constitutionalist" terminology—whether qualified as "plural," "multilevel," "heterarchical," or otherwise—to describe European integration. This argument admittedly runs contrary to the deeply rooted constitutionalist framework in European public-law scholarship that has developed over many decades—what we might call the "constitutional, not international" perspective.[10] The problem with a constitutionalist perspective is not some failure to accurately describe certain features of European legal integration, particularly in relation to public international law. Rather, the problem is in the license that "constitutional" terminology gives to those who are prepared to assume what is fundamentally in doubt in the integration process: the capacity of European supranationalism to legitimize an ever-increasing range of regulatory powers in autonomously democratic and constitutional terms—"a European federal state"—as if

---

*Constitutional Sonderweg, in* EUROPEAN CONSTITUTIONALISM BEYOND THE NATION-STATE 7 (J.H.H. Weiler & Marlene Wind eds., 2003) [hereinafter *In Defence of the Status Quo*]; J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism—Some Doubts*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM 8 (Gráinne de Búrca & J.H.H. Weiler eds., 2012) [hereinafter *Prologue*].

[9] *See*, *e.g.*, Kalypso Nicolaïdis, *The New Constitution as European 'Demoi-cracy'?*, 7 CRITICAL REV. INT'L SOC. & POL. PHIL. 76 (2004) [hereinafter *The New Constitution as European 'Demoi-cracy'?]*; Kalypso Nicolaïdis, *We, the Peoples of Europe . . .*, 83 FOREIGN AFF. 97 (2004) [hereinafter *We, the Peoples of Europe]*; Kalypso Nicolaïdis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, 14 J. EUR. PUB. POL'Y 682 (2007); Kalypso Nicolaïdis, *Sustainable Integration: Towards EU 2.0?*, 48 J. COMMON MKT. STUD. 21 (2010) [hereinafter *Sustainable Integration*]; Kalypso Nicolaïdis, *Germany as Europe: How the Constitutional Court Unwittingly Embraced EU Demoi-cracy: A Comment on Franz Mayer*, 9 INT'L J. CONST. L. 786 (2011) [hereinafter *Germany as Europe*]; Kalypso Nicolaïdis, *The Idea of European Demoicracy*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 247 (J. Dickson & P. Eleftheriadis eds., 2012); Kalypso Nicolaïdis, *European Demoicracy and Its Crisis*, 51 J. COMMON MKT. STUD. 351 (2013). Others have of course also advanced the idea of Europe as a "demoi-cracy"; *see*, *e.g.*, Samantha Besson, *Deliberative Demoi-cracy in the European Union: Towards the Deterritorialization of Democracy, in* DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 141 (Samantha Besson & José Luis Marti eds., 2006); Francis Cheneval & Frank Schimmelfennig, *The Case for Demoicracy in the European Union*, 51 J. COMMON MKT. STUD. 334 (2012); Richard Bellamy, *"An Ever Closer Union Among the Peoples of Europe": Republican Intergovernmentalism and Demoicratic Representation Within the EU*, 35 EUR. INTEGRATION 499 (2013). Nicolaïdis's work arguably both initiated this line of thinking and represents its most sustained development; hence the focus on her work here.

[10] *See infra* notes 35, 55–56 and accompanying text.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

supranational institutions were a site of such "constitutional" authority in their own right, apart from the member states that created them. The current crisis in the Eurozone, and the evident limits to the policy response that the crisis has repeatedly demonstrated, are concrete manifestations of the conceptual mismatch between the dominant "constitutional" public-law discourse and the current realities of European governance.

If "there is no convincing account of democracy without demos," as Weiler once rightly put it,[11] I would assert that there is also not a convincing account of a European "constitutionalism" in the most robust sense of the term and ultimately for similar demos-based reasons. At their core, democracy and constitutionalism are conjoined in the modern age—you cannot fully have one without the other—at least as it relates to the mobilization of a polity's taxing, spending, borrowing capacity (leaving aside the even more difficult question of assembling and projecting military power). The creation of a supranational "democracy" and "constitutionalism," at least ones capable of autonomously mobilizing societal resources in a legitimate fashion, is not merely a question of legal engineering through, say, more powers to the European Parliament or legally transforming the Commission into some kind of European government. Rather, it is ultimately a question of socio-political identity—government "of" a people historically conscious of itself as such, and hence willing to share its resources through institutions of self-government "constituted" for that purpose.

In the European system, despite the significant shift in certain kinds of regulatory power to the supranational level (often with significant, if sometimes obscured, redistributive consequences), this sort of identity and legitimacy still remains the province of the historically "constituted" bodies of the nation-state, whether legislative, executive, or indeed judicial.[12] In this way, the EU's own legitimacy—legal, technocratic, even as an instrument of peace—should not be understood as that of an autonomous democratic and constitutional "principal" in its own right; rather, it has the legitimacy of a functionally powerful and quasi-autonomous "agent" (to adopt the language of principal-agent theory).[13] This is something that the Eurozone crisis is repeatedly demonstrating, particularly with regard to taxing, spending, and borrowing authority, to the shock and dismay of many idealistic supranational "constitutionalists" in the Habermas vein.[14]

---

[11] J.H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 560 (2004).

[12] *See infra* notes 37–40 and accompanying text.

[13] *See infra* notes 44–46 and accompanying text.

[14] *See* Peter Lindseth, *The Eurozone Crisis, Institutional Change, and "Political Union*," *in* POLITICAL, FISCAL, AND BANKING UNION IN THE EUROZONE? 149 (F. Allen et al. eds., 2013).

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

My second aim with this article is related to the first. Rather than deploying the traditional constitutionalist vocabulary to describe integration, I argue that European governance, qua agent and not principal, can better be understood as a supranational extension of administrative governance as it emerged over the course of the twentieth century—or, as I have put it elsewhere, as an "administrative, not constitutional" phenomenon.[15] In using this label I do not mean to deny the deeply political, rather than supposedly merely technical, character of European regulatory power. Instead, I simply use this rubric to stress that that European supranationalism shares a fundamental characteristic with administrative authority everywhere: the separation of regulatory *power* from its ultimate sources of democratic and constitutional *legitimacy* in the most robust sense of the term—which, in the case of the EU, remain fundamentally national. The diffusion and fragmentation of regulatory power beyond the confines of strongly-legitimated, historically "constituted" bodies of representative self-government on the national level is the very essence of modern administrative governance, whether within or beyond the state.[16] Despite the traditional constitutionalist vocabulary to describe integration, the deeper grammar of EU public law reflects integration's ultimately administrative character—that is, its lack of autonomous democratic and constitutional legitimacy—even as supranational institutions exercise extensive normative power and for sound functional and political reasons.

The seeming bluntness of the "administrative, not constitutional" tagline, I admit, has sometimes caused confusion and diverted attention from the legal-historical nuance that my work attempts to outline in detail.[17] This in turn has given rise to a perception that my argument is, in some manner, an "all-or-nothing" rejection of all that has come before it, existing in its own splendid isolation from more mainstream legal theories of integration. Hence my third aim with this article: to demonstrate that an "administrative, not constitutional" characterization of European integration provides important historical micro-foundations for several better known and more widely adhered to theories.

---

[15] *See generally* PETER LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE (2010). Portions of this article are drawn from *Power and Legitimacy* and are used with permission.

[16] *See infra* notes 31–34 and accompanying text.

[17] *See generally* Lindseth, *supra* note 15; *see also*, *e.g.*, Peter Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628 (1999) [hereinafter *Democratic Legitimacy*]; Peter Lindseth, *"Weak" Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union*, 21 OXFORD J. LEGAL STUD. 145 (2001) [hereinafter *"Weak" Constitutionalism?]*; Peter Lindseth, *Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 139 (Christian Joerges & Renaud Dehousse eds., 2002); Peter Lindseth, *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, 37 LOY. L.A. L. REV. 363 (2003); Peter Lindseth, *Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance*, *in* REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW 107 (Fabrizio Cafaggi ed., 2006) [hereinafter *Agents Without Principles*].

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

In this regard, I return again to the notions of European equilibrium and demoi-cracy of Weiler and Nicolaïdis. I have already written in detail elsewhere about what I see as the basic complementarity—despite obvious semantic differences—between Weiler's theory and my own.[18] Consequently, my focus here will be primarily on Nicolaïdis's conception of demoi-cracy, albeit always with an eye to Weiler's theoretical insights from which Nicolaïdis draws admitted inspiration.[19] My aim is to show that the central idea behind the administrative interpretation of integration—the historical-constructivist understanding of *delegation* from national constitutional *principals* to quasi-autonomous supranational *agents*—also provides a direct complement to the equilibrium and demoi-cratic theories of Weiler and Nicolaïdis. Moreover, it provides guidance into how those theories might be legally operationalized in service of further European reform, in view of the essentially "administrative, not constitutional" character of European integration. This is a particularly pressing concern in light of the recent *OMT Reference* of the German Federal Constitutional Court,[20] a topic I take up in the final section of this article. In that regard, I revive my earlier call for the establishment of a "European Conflicts Tribunal" to adjudicate judicial disputes over the scope of supranational competence, an idea drawn from the French administrative tradition.[21]

### B. Beyond Statist—and Constitutionalist—Interpretations: On the Separation of Power and Legitimacy in European Governance

By recognizing the complexity of European integration and the necessary balance between national and supranational, the theories of Weiler and Nicolaïdis are reflective of a legal-historical dynamic that my research suggests has been central to the evolution of European public law for over a half-century.[22] Much less than any "easy" engineering of a European federal state—per the implication of Di Fabio's interviewers[23]—a sustainable form of European governance in fact has entailed a difficult process of reconciliation: On the one

---

[18] *See* Peter Lindseth, *Disequilibrium and Disconnect: On Weiler's (Still Robust) Theory of European Transformation* (U. Conn. Sch. of L. Working Papers No. 2013/01, 2013), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2270119 (forthcoming in abbreviated form in THE TRANSFORMATION OF EUROPE—TWENTY YEARS ON (Marlene Wind & Miguel Poiares Maduro eds.)).

[19] *The New Constitution as European 'Demoi-cracy'?*, *supra* note 9, at 86; *We, the Peoples of Europe*, *supra* note 9, at 104; *Sustainable Integration*, *supra* note 9, at 44; *Germany as Europe*, *supra* note 9, at 788; *The Idea of European Demoicracy*, *supra* note 9, at 248; *European Demoicracy and Its Crisis*, *supra* note 9, at 354.

[20] Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvE 2728/13 (Jan. 14, 2014) http://www.bundesverfassungsgericht.de/en/decisions.html.

[21] *Democratic Legitimacy*, *supra* note 17, at 726–34; *see also* LINDSETH, *supra* note 15, at 275–77.

[22] *See generally* LINDSETH, *supra* note 15.

[23] *See supra* note 1 and accompanying text.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

hand, the functional and idealist demands for integration must be met—hence demanding the shift in significant normative power to the supranational level; on the other hand, historical commitments to constitutional democracy on the national level must also be satisfied.

This has been no easy balance to strike. My research suggests that a crucial if imperfect avenue of that reconciliation has been the emergence of an array of legal and political mechanisms—most importantly forms of legitimating oversight by national constitutional bodies—to bridge the disconnect between supranational regulatory power and national democratic and constitutional legitimacy. The EU of course possesses other forms of legitimacy—legal, technocratic, even electoral in some sense, at least with regard to the European Parliament. But what the EU lacks is autonomous democratic and constitutional legitimacy in the most robust sense, for which it still depends on a legitimacy mediated through national institutions. The mechanisms of mediated legitimacy include, most importantly, collective oversight of the supranational policy process by national executives,[24] as well as judicial review by national high courts with respect to certain core democratic and constitutional commitments,[25] along with increasing recourse to national parliamentary scrutiny of supranational action, whether of particular national executives individually or of supranational bodies more broadly.[26] The emergence of these practices over the last half century reflect a convergence of European public law around the legitimating structures and normative principles of what I call the "postwar constitutional settlement of administrative governance," adjusted to the demands of European integration.[27]

From an administrative perspective on supranationalism, the existence of national oversight mechanisms should not be understood as either anomalous or a sign of crisis in the European system.[28] Rather, their development over time suggests how European public law has worked to reconcile the largely functional—though often also political—demands for autonomous policy solutions at the supranational level with the continued dominant cultural attachment to national institutions as expressions of constitutional self-government in the European system. Moreover, consistent with the administrative character of European governance, these national oversight mechanisms serve primarily the function of legitimation—in the sense of democratic connection, identity expression,

[24] *See generally* LINDSETH, *supra* note 15, at 91–132.

[25] Id. at 133–88.

[26] Id. at 189–250.

[27] Id. at 61–90.

[28] *See, e.g.*, GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH 64 (2005) (describing the imposition of national constraints on supranational autonomy as "the symptom of a deeper crisis: a growing mistrust between the member states and the supranational institutions").

and reason-giving/accountability—as opposed to outright "control."[29] It is only when supranational delegation cuts closest to the core of sovereignty in a historically recognizable sense—taxing, spending, and borrowing—that the need to retain some kind of outright "control" becomes most acute.[30]

The aptness of an administrative framework for analyzing European governance does not flow from the political versus technical nature of the authority delegated to the supranational level—a notoriously slippery distinction. Supranational regulatory power, no matter how seemingly technical, is obviously also deeply political; that is, it deals with the very essence of politics—the allocation of scarce resources or contests over values—as does most regulatory power in modern administrative governance.[31] What in fact defines an administrative regime, regardless of its location within or beyond the state, is not its political versus technical nature. Rather, it is the *separation* of regulatory power from institutions that embody or express the capacity of a historical political community to rule itself in a strongly-legitimated "democratic" and "constitutional" sense, whether legislative, executive, or judicial. What administrative bodies lack, whether within or beyond the state, is autonomous democratic and constitutional legitimacy to exercise their regulatory power without some mechanisms of oversight by strongly legitimated bodies residing elsewhere—what I call "mediated legitimacy."[32]

In its emphasis on the paradoxical autonomy and dependence of European governance, this administrative interpretation runs contrary to the idea, widespread among legal scholars, that European governance is built on a set of "institutions constitutionally separated from national legitimation processes."[33] By virtue of the separation of regulatory power from the historically constituted bodies of the nation-state, I assert that European governance as a whole—including the European Parliament as well as the European Court of Justice—is best understood as an extension of the forms of diffuse and fragmented administrative governance as they developed over the course of the twentieth century.[34]

---

[29] *See infra* notes 70–78 and accompanying text. *See also* LINDSETH, *supra* note 15, at 21–23.

[30] *See infra* notes 117–122 and accompanying text.

[31] LINDSETH, *supra* note 15, at 35.

[32] *See* id. at 88–90; for the national origins of mediated legitimacy in the twentieth-century administrative state, see Peter Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J. 1341 (2004). For a related view in the context of integration and the Eurozone crisis, see Fritz Scharpf, *Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis* (MPIfG Discussion Paper 12/6, 2012), www.mpifg.de/pu/mpifg_dp/dp12-6.pdf.

[33] Anand Menon & Stephen Weatherill, *Legitimacy, Accountability, and Delegation in the European Union, in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 113, 118 (Anthony Arnull & Daniel Wincott eds., 2002).

[34] *See generally* LINDSETH, *supra* note 15.

There can be no doubt that the growth of autonomous regulatory power at the supranational level has had profound constitutional implications for the EU's member states. The European treaties are legally entrenched like a constitution, both *de jure*—indeed, often by way of national constitutions—and *de facto*—because of the difficult process of amendment that stretches beyond the will of any single member state. The mechanisms of European public law both discipline certain negative externalities of national democracy and provide market actors a range of transnational rights and duties, all in order to construct a new market-polity transcending national borders. European public law also offers individual Europeans a set of citizenship rights beyond those derived from their national citizenship. This has all understandably given rise, over many years, to a conceptual vocabulary rooted in constitutionalism to describe the European legal and political order.[35]

Nevertheless, despite its seemingly constitutional features, the European legal and political order has had great difficulty being experienced as constitutional in the most robust sense of the term. Most importantly, European governance has struggled to be seen as the embodiment or expression of a historically cohesive political community ("Europe") capable of self-rule through institutions "constituted" for that purpose. The absence of this essential socio-political underpinning has in fact led to a fracturing of the scholarly conceptual vocabulary into multiple and ever more complex and varied "constitutionalisms."[36] But what is lacking in all these theories, aside from any defining "constitutional moment"—often illusory even within nation-states—is the necessary identity between European institutions and European citizens—the sense of government "of" a historically defined "people," to borrow language from Lincoln's famous formulation.[37] Following the leads of Jed Rubenfeld[38] and Bruce Ackerman,[39] we should recognize that constitutional legitimacy and democratic self-government are inextricably

[35] *See*, *e.g.*, J.H.H. Weiler & Joel Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354 (1996–97). Recent historical and sociological research has uncovered the extent to which the "constitutional" conceptualization was, from its inception, a conscious strategy by a transnational legal elite to legitimize the integration project. *See, e.g.*, Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-1965*, 21(3) CONTEMP. EUR. HIST. 237 (2012); Antoine Vauchez, *"Integration-Through-Law": Contribution to a Socio-History of EU Political Commonsense* (Robert Schuman Centre for Advanced Studies, EUI Working Papers, RSCAS 2008/10 2008) *available at* http://cadmus.iue.it/handle/1814/8307; Antonin Cohen, *Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s),* 32 LAW & SOC. INQUIRY 109 (2007).

[36] *See* Matej Avbelj, *Questioning EU Constitutionalisms*, 9 GERMAN L.J. 1 (2008).

[37] Peter Lindseth, *Of the People: Democracy, the Eurozone, and Lincoln's Threshold Criterion*, 22 BERLIN J. 4–7 (2012).

[38] JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001).

[39] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

connected in the modern era. Democratic and constitutional legitimacy are not simply a function of establishing electoral politics ("politicization") or instituting legal constraints on supranational or national authority ("integration through law"). Rather, democratic and constitutional legitimacy in the most robust sense is tied to the construction of a polity's historical identity as a self-governing people over time. Thus, democratic and constitutional legitimacy emerge together, broadly speaking.

From this perspective, it is profoundly difficult to claim that the EU has an autonomously *constitutional* character—no matter how creatively conceptualized—if Europeans refuse to grant it autonomous *democratic* legitimacy, unmediated through the member states. Regardless of any legal, technocratic, input, output, or even "messianic"[40] legitimacy that the integration process might otherwise possess, what it lacks, for the present, is the necessary sense of European governance of a historically cohesive polity ("Europe" as a collectivity).[41] For that particular form of legitimacy, European integration has depended, and continues to depend, on its more strongly legitimated member states, despite the extensive regulatory power transferred to the supranational level. In this sense, my effort to tie democratic and constitutional legitimacy ultimately to the identity of a historically self-conscious people—one that has come to see itself, in the words of Neil MacCormick, as "*entitled* to effective organs of political self-government"[42]—is not a matter of definitional fiat. Rather, it derives from an empirically based historical recognition that, at this point in Europe's development, this socio-political, socio-cultural dimension of legitimacy is lacking in Europe as a whole.[43] Consequently, European elites cannot easily engineer that legitimacy into existence, at least in the short or intermediate term; rather, the public law of European integration has needed to rely on mechanisms of nationally mediated legitimacy to supply the autonomous democratic and constitutional underpinnings that supranational governance otherwise lacks.

From this perspective, therefore, although European integration can sustain a great deal of autonomous regulatory power at the supranational level, there are ultimate limits to how much it can effectively sustain without autonomous democratic and constitutional legitimacy. This gives rise to what I call "delegation constraints," which the Eurozone crisis has been demonstrating in a highly acute way. As Stefano Bartolini presciently warned in 2005, "the risk of miscalculating the extent to which true legitimacy surrounds the European institutions and their decisions . . . may lead to the overestimating of the

[40] J.H.H. Weiler, *The Political and Legal Culture of European Integration: An Exploratory Essay*, 9 INT'L J. CONST. L. 678 (2011).

[41] Lindseth, *supra* note 37.

[42] NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 173 (1999) (emphasis added).

[43] *See generally* NEIL FLIGSTEIN, EUROCLASH: THE EU, EUROPEAN IDENTITY, AND THE FUTURE OF EUROPE (2008).

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

capacity of the EU to overcome major economic and security crises."[44] Certain kinds of power still require strongly legitimated institutions of outright "government." As the French economist Jean Pisani-Ferry has recognized, there is "a line in the sand beyond which only governments can set priorities and act."[45] When it comes to the sort of transnational taxing, borrowing, and spending authority that the Eurozone crisis seems to demand for the EU, the lack of robust democratic and constitutional legitimacy at the supranational level is a barrier to formulating policies with real macro-economic significance—not the one percent of European GDP that is the current EU budget.[46] Without these supranational fiscal capacities—and more importantly without the autonomous democratic and constitutional legitimacy to support them—the central instrument used to pay for the Eurozone crisis has necessarily been national austerity, combined with national pre-commitments to fiscal discipline enforced by supranational institutions. Conveniently, this combination of national austerity and supranational surveillance/discipline has to date made little or no redistributive demands on "Europe" as a collectivity; all essential costs—political and economic—are borne internally, by the individual states. This may well change, if the crisis once again intensifies. But the current approach ultimately relies on—and in fact validates—the democratic and constitutional legitimacy of national institutions as a central foundation of the European project.

Given this evident barrier to fully robust legitimacy in the EU, I am deeply hesitant to use the standard constitutional vocabulary to describe European public law, even as it otherwise clearly describes certain features of integration in the domain of rights-protection and the disciplining of democratic externalities of individual member states. Even for the most sophisticated constitutional theorists of the EU, the evolution of European public law and supranational authority ultimately is a question of the functional demands of interdependence as they perceive them.[47] This ignores the complex interplay

[44] STEFANO BARTOLINI, RESTRUCTURING EUROPE: CENTRE FORMATION, SYSTEM BUILDING, AND POLITICAL STRUCTURING BETWEEN THE NATION STATE AND THE EUROPEAN UNION 175 (2005).

[45] *Cf.* Jean Pisani-Ferry, *Whose Economic Reform?*, PROJECT SYNDICATE (Jul. 30, 2013), www.project-syndicate.org/commentary/the-purpose-and-strategy-of-structural-reofrm-by-jean-pisani-ferry.

[46] *Cf.* Paul Krugman, *What a Real External Bank Bailout Looks Like*, CONSCIENCE OF A LIBERAL (Jul. 17, 2012), krugman.blogs.nytimes.com/2012/06/17/what-a-real-external-bank-bailout-looks-like/.

[47] *See*, *e.g.,* Miguel Poiares Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, (Robert Schuman Centre for Advanced Studies, Global Governance Programme, RSCAS Policy Paper 2012/11, October 2012), cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS_PP_2012_11rev.pdf?sequence=1; for a commentary, see Peter Lindseth, *Thoughts on the Maduro Report: Saving the Euro Through European Democratization?*, EUTOPIALAW.COM (Nov. 13, 2012), www.eutopialaw.com/2012/11/13/1608/. For an effort to move beyond functional demands of interdependence as a basis of legitimate authority beyond the state—articulating the notion of "justice-sensitive externalities"—see Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 605 (2013). The theory of justice-sensitive externalities is interesting but limited. It ultimately grounds denationalized legitimacy in claims of fault or responsibility among states, grounded in violations of duties. This is no doubt important and can have significant redistributive consequences. *See* Peter Lindseth, *Fault, Not Solidarity: A Normative Argument to Save*

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

between the functional, political, and cultural dimensions of institutional change[48] and leads to the temptation to view European legitimacy as primarily a matter of institutional engineering, most often revolving around more powers for the European Parliament.[49] Perhaps tellingly, given their own misgivings about the capacities of such denationalized engineering, anti-statists like Weiler and Nicolaïdis have exhibited increasing caution in the face of constitutionalist claims for integration in their strongest form. "[C]onstitutional discipline without polity and without resembling the habits and practices of democratic legitimacy," Weiler has written recently, "are highly problematic . . . even in the EU—*a fortiori* outside it."[50] Nicolaïdis, for her part, has long presented her demoi-cratic theory of integration as a "depart[ure] from mainstream constitutional thinking" on the EU.[51]

### C. Understanding the Administrative Character of Integration: Delegation and the Historical-Constructivist Principal-Agent Framework

The caution of Weiler and Nicolaïdis in the face of both statist and constitutionalist thinking is justified, I would argue, by the deeply unequal distribution of what I call "legitimacy resources" in the integration process.[52] This is an empirical reality that strongly pro-integration advocates, whether statist or constitutionalist, often ignore by focusing

---

*the Eurozone*, EUTOPIALAW.COM (Jul. 30, 2012), eutopialaw.com/2012/07/30/fault-not-solidarity-a-normative-argument-to-save-the-eurozone/. But it is an insufficient basis to establish robust legitimacy for positive claims of solidarity between states in the absence of fault. As Kumm readily concedes, "those governing themselves within the framework of the state have a right not to be required to make themselves an instrument of the well-being of others." Kumm, *supra*, at 622. *But see id.* at 624 ("[t]he more dense and more demanding mutually agreed upon frameworks of cooperation are, the more demanding the justice obligations that flow from such a practice are"). While the latter statement is clearly directed at the EU, it is empirically questionable whether the theory could sustain denationalized taxing, spending, and borrowing power that resolving the Eurozone crisis in an optimal fashion may demand, which in turn would demand a true "constitutional" legitimacy for the EU in the fullest sense of the term. *See supra* note 14 and accompanying text.

[48] LINDSETH, *supra* note 15, at 13–14.

[49] *See*, *e.g.*, EUROPEAN COMMISSION, A BLUEPRINT FOR A DEEP AND GENUINE ECONOMIC AND MONETARY UNION: LAUNCHING A EUROPEAN DEBATE (2013), www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF.

[50] *Prologue*, *supra* note 8, at 12.

[51] *The New Constitution as European 'Demoi-cracy'?*, *supra* note 9, at 84; *We, the Peoples of Europe*, *supra* note 9, at 102.

[52] *See generally* LINDSETH, *supra* note 15, at 52–53. I did not formulate this concept with the notion of "symbolic capital" integral to Bourdieu's field theory in mind. Nevertheless, it is certainly sympathetic to that idea and points to the continuing strength of the national "field" in the process of European integration. In that regard, my administrative perspective is consistent with Antoine Vauchez's notion of European law as a "weak field." *See* Antoine Vauchez, *Introduction: Euro-lawyering, Transnational Social Fields and European Polity-Building*, *in* LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD 1–20 (Antoine Vauchez & Bruno de Witte, eds., 2013). On the application of field theory to European integration more generally, see DIDIER GEORGAKAKIS & JAY ROWELL, THE FIELD OF EUROCRACY: MAPPING EU ACTORS AND PROFESSIONALS (2013), as well as FLIGSTEIN, *supra* note 43.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

solely on the functional demands of interdependence as the main driver and justification for integration. Even as such pressures facilitate the flow of certain kinds of regulatory power to the supranational level—generally on a "pre-commitment" basis—the member states retain superior legitimacy resources by virtue of being expressions of collective self-government within historically constituted political communities.[53] It is for this reason that European governance is better described as *polycentric* in terms of the locus of democratic and constitutional legitimacy, stressing the difficulties of shifting a similar legitimacy to the supranational level.[54]

To my mind, the idea of supranational "constitutionalization," in whatever form, is based on a partly valid[55] but nevertheless incomplete historical perspective. The idea of supranational constitutionalization is rooted in the comparison of European institutions to the emergence of international organizations (IOs) over the course of the twentieth century. This perspective operates, we might say, along a dimension from public international law—IOs—to supranational constitutionalism—the EU—which, when applied to Europe, becomes the classic "constitutional, not international" framework. However, the EU and IOs can equally be seen—in fact, from an administrative perspective, should better be seen—as denationalized expressions of the functional diffusion and fragmentation of regulatory power away from the "constituted" bodies of self-government on the national level. As a consequence, the shift in normative power beyond the state, whether to the EU or an IO, is subject to a similar dynamic of political and cultural contestation over legitimacy that has characterized the evolution of administrative governance more generally. The key difference between the EU and IOs, from this perspective, is their relative degree of autonomous discretion in the exercise of denationalized regulatory power—the EU enjoys much more autonomy, as is well known, which in turn intensifies the challenge of legitimation in its case.

---

[53] This holds true even as several European states—e.g., Belgium—are finding it difficult to claim to represent a historically coherent political community, which in turn makes the claim of democratic and constitutional legitimacy vastly more difficult to sustain within those polities. The fact that, in certain member states, pressures exist to drive the institutional locus of legitimate governance *downward* from the state to the regional level—not just in Belgium, but also in Spain or the United Kingdom, for example—hardly supports the claim of democratic and constitutional legitimacy at the European level. If anything, such pressures reinforce the conclusion that democratic and constitutional legitimacy resides at the level of sub-European political communities, not at the level of the European transnational community.

[54] LINDSETH, *supra* note 15, at 265.

[55] Especially so with regard to international or supranational adjudicative authority in the protection of human rights against the excesses of state power. *See* Weiler, *supra* note 11, at 551 (referring to a third stratum "of [international] dispute settlement which may be called constitutional, and consists in the increasing willingness, within certain areas of domestic courts to apply and uphold rights and duties emanating from international obligations. The appellation constitutional may be justified because of the 'higher law' status conferred on the international legal obligation").

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

European integration undoubtedly owes its existence to treaties concluded under public international law, and in that sense European governance is clearly, at least in part, an international phenomenon. But the European treaties are also mechanisms to delegate regulatory power akin to a *loi-cadre* on the national level—a *traité-cadre* in the parlance of Giandomenico Majone.[56] The purpose of such "enabling legislation," if you will—whether national or supranational/international—is not to make rules but rather to create other institutions and confer power upon them to make rules.[57] This creation/conferral is then subject to substantive parameters and procedural mechanisms of oversight that operate as means of ensuring pre-commitment to a stream of regulatory choices generally in line with the original delegation.

Viewing the European treaties as enabling legislation and pre-commitment mechanisms in this way falls naturally into a principal-agent construct, albeit of a more historical-constructivist than purely rational-choice variety.[58] The historical foundations of this principal-agent relationship helps to explain the continued dependence of European public law on forms of legitimation still mediated through democratic and constitutional bodies on the national level in critically important respects. In the context of integration, democratic and constitutional bodies on the national level undoubtedly operate as plural nodes in a complex, multilevel, multipolar regulatory network.[59] The "composite" nature of this system, as Sabino Cassese[60] and Armin von Bogdandy[61] have for example argued, cannot be denied. But in political-cultural terms, the imbalance in legitimacy resources in European governance ensures that national constitutional bodies are experienced as the *privileged* nodes in that network—hence the persistent demand of some kind of mediated legitimacy—even as the functional demands of interdependence often run counter to that privileged status.

This unequal distribution of legitimacy resources then also gives rise both to the demand for "constitutional tolerance" among and toward the various member states (per Weiler)[62] as well as to the recognition of the fundamentally "demoi-cratic" character of European

[56] MAJONE, *supra* note 28, at 7.

[57] Edward Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380–85 (1989) (describing "transitive" versus "intransitive" legislation).

[58] LINDSETH, *supra* note 15, at 54–55. *See also infra* notes 69–78 and accompanying text.

[59] *See Agents Without Principals?*, *supra* note 17.

[60] SABINO CASSESE, THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW 23 (2012).

[61] Armin von Bogdandy & Philipp Dann, *International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority*, 9 GERMAN L.J. 2013 (2008).

[62] *In Defence of the Status Quo*, *supra* note 8.

integration (per Nicolaïdis).[63] Or, alternatively, as I would put it, because constitutional legitimacy is distributed *among* the constituted bodies of the Member States, even as regulatory authority is delegated to the supranational level—that is, the separation of *power* and *legitimacy*—European institutions remain, in their essence, "administrative, not constitutional."[64] By this I mean that European institutions, qua regulatory agents, exist in a derivative, delegated, agency relationship with their polycentric constitutional principals on the national level, at least in a political-cultural sense. This in turn gives impetus to the development a range of oversight mechanisms in European public law involving national executives, legislatures, and judiciaries, thus extending, however imperfectly, the "postwar constitutional settlement of administrative governance" to the supranational level.[65]

Admittedly, the claim that integration is "administrative, not constitutional" has caused some confusion among those not familiar with the law or history of administrative governance.[66] For that reason alone, the use of the administrative label might be amended or replaced, although I would argue for its continued utility, within a broader framework of demoi-cracy and constitutional tolerance. The reason is that it captures important elements of the complexity of reconciling "government" and "governance"—terms more familiar in this context—and shows how this challenge is not novel but has antecedents in the modern administrative state worthy of deeper examination.[67] If we recast the challenge of reconciling government and governance as one of reconciling strongly legitimated democratic and constitutional "government" with diffuse and fragmented administrative "governance," then European integration becomes, in important respects, a "new dimension to an old problem."[68]

---

[63] *See*, *e.g.,* Nicolaïdis, *The Idea of European Demoicracy*, *supra* note 9; Nicolaïdis, *European Demoicracy and Its Crisis*, *supra* note 9.

[64] LINDSETH, *supra* note 15, at 53.

[65] *See supra* notes 24–27 and accompanying text.

[66] *See, e.g.,* Michael Rosenfeld, *Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 CARDOZO L. REV. 2339 (2011); Michael Rosenfeld, *The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics*, 33 CARDOZO L. REV. 1937 (2012).

[67] This approach has admitted affinity to the groundbreaking work of Giandomenico Majone. *See* Giandomenico Majone, *The European Community: An "Independent Fourth Branch of Government?", in* VERFASSUNGEN FÜR EIN ZIVILES EUROPA 23 (Gert Brüggemeier ed., 1994). I certainly share with Majone the view that the nature and legitimacy of European power can best be measured against standards derived from modern administrative governance. *See* Giandomenico Majone, *Europe's "Democratic Deficit": The Question of Standards*, 4 EUR. L.J. 5 (1998). However, my work has tried to make clear that the claim in fact entails a good deal historical and legal complexity as to what those standards in fact demand. *See Democratic Legitimacy*, *supra* note 17, at 657–59, 684–91, 696; LINDSETH, *supra* note 15, at 36–37; *see also infra* notes 69–78, 102–15 and accompanying text.

[68] *Democratic Legitimacy*, *supra* note 17, at 630.

The core of that problem is delegation, or "conferral" as it is now called in the European treaties.[69] To understand, however, the way in which delegation has evolved as a constructivist normative-legal principle, we must dispense with an idealized understanding of a "Westphalian" state with unbridled power to direct regulatory outcomes within a particular territory, an ahistorical reading of state sovereignty if there ever was one.[70] This caricature is far from the actual historical reality, not just supranationally but also nationally. Delegation has evolved historically as a flexible principle, again both nationally and supranationally, in which the power of control, whether *de facto* or *de jure*, has often been greatly diminished, if sometimes nearly relinquished entirely, except in all but the most extreme circumstances.[71] Giandomenico Majone's effort to capture the sometimes extreme independence of certain agents by introducing the sub-category of "trustee" is analytically helpful.[72] But it also risks diverting attention from the need to explore the complex, historically constructed character of principal-agent relationships in European governance.[73] Twentieth-century governance in Europe, both within and beyond the state, has increasingly come to exhibit the seemingly "American" characteristics of disaggregation, decentralization, and interpenetration of public authority and civil society.[74] Such disaggregated governance did not emerge only recently, as a consequence of globalization, as Anne-Marie Slaughter has suggested.[75] Rather, it is deeply tied to the development of administrative governance over the course of the twentieth century—that is, to the diffusion and fragmentation of regulatory power *away* from the "constituted"

[69] *See* Consolidated Version of the Treaty on European Union art. 5, May 9, 2008, 2008 O.J. (C 115) 18 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union art. 7, May 9, 2008, 2008 O.J. (C 115) 53 [hereinafter TFEU].

[70] *See generally* James Sheehan, *Presidential Address: The Problem of Sovereignty in European History*, 111 AM. HIST. REV. 1 (2006).

[71] *See* LINDSETH, *supra* note 15, at 54–56. The capacity for hierarchical administrative control is generally overstated even within states, often on the basis of stylized principal-agent models. *See, e.g.,* Dierdre Curtin, *Holding (Quasi-)Autonomous EU Administrative Actors to Public Account*, 13 EUR. L.J. 523, 524–25 (2007). For reflections on the continuing limited capacities of principals to exercise "control" over agents in modern administrative states, see Mark Thatcher, *The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe*, 18 GOVERNANCE 347 (2005); *see also* Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation in Non-Majoritarian Institutions*, 25 W. EUR. POL. 1, 6 (2002) (discussing how, in situations of administrative complexity, "the analyst cannot assume that principals can control agents").

[72] *See* Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

[73] *See, e.g.*, *infra* notes 102–15 and accompanying text

[74] *See* William Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 763 (2008). *Cf. also* CHARLES MAIER, RECASTING BOURGEOIS EUROPE: STABILIZATION IN FRANCE, GERMANY, AND ITALY IN THE DECADE AFTER WORLD WAR I (1975); Martin Lodge, *Regulation, the Regulatory State and European Politics*, 31 W. EUR. POL. 280, 285 (2008).

[75] *See* ANNE-MARIE. SLAUGHTER, A NEW WORLD ORDER (2004).

bodies of representative government on the national level, including to both IOs and supranational bodies in the EU.[76]

In light of this diffusion of regulatory power, polycentric constitutional principals have needed to settle for something less than actual control over their agents—perhaps merely supervision, coordination, or what an American administrative lawyer would call "oversight."[77] In the context of European integration, reliance on such oversight over supranational agents—mediated legitimacy—has been essential to the reconciliation of now-Europeanized administrative governance with conceptions of still-national democratic and constitutional government inherited from the past. Mediated legitimacy via national oversight has provided an essential linkage between the diffuse and fragmented administrative governance in the EU and the "remarkably resilient" sources of democratic and constitutional legitimation on the national level.[78] Oversight (but not necessarily control) by national constitutional bodies—executive, legislative, and judicial—has provided the broad legitimating framework within which the Europe's complex policymaking processes—characterized by significant amounts of functionally autonomous regulatory power, distributed across multiple levels of governance—can operate without autonomous democratic and constitutional legitimacy, at least as classically understood.

To arrive at this conclusion, however, is not to ignore the real difficulties that arise when the locus of regulatory governance shifts beyond the confines of the state, thus greatly complicating the challenge of legitimation in an administrative sense. Not least among these complications is the vastly greater entrenchment of technocratic-regulatory power when democratic and constitutional legitimacy is dispersed among multiple principals in twenty-eight member states.[79] The traditional "constitutionalist" response to this challenge is, in some sense, to wish it away, or at least to place faith in the capacity of legal and institutional engineering in order to "democratize" and "constitutionalize" the supranational agent into a legitimate principal in its own right.[80] By contrast, the historical-constructivist understanding of the EU as a denationalized form of administrative governance is deeply cautious about such engineering. Instead, it stresses the ultimate

[76] For a description, see Lindseth, *supra* note 18.

[77] PETER LINDSETH ET AL., ADMINISTRATIVE LAW OF THE EUROPEAN UNION: OVERSIGHT (George. Bermann, Charles Koch & James O'Reilly eds., 2008); *see also* Peter Strauss, *Forward: Overseer, or "the Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[78] *Cf.* Geoff Eley, *The Social Construction of Democracy in Germany, 1871-1933*, *in* THE SOCIAL CONSTRUCTION OF DEMOCRACY, 1870-1990 90, 110 (George Andrews & Herrick Chapman eds., 1995) (referring to "the constitutional frameworks fashioned [throughout Europe] in the 1860s" as "remarkably resilient").

[79] LINDSETH, *supra* note 15, at 253–56.

[80] *See A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate*, *supra* note 49 and accompanying text; *see also* Lindseth, *supra* note 14, at 155–56.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

need for constraints on the scope of authority delegable to the supranational level, consistent with similar constraints that developed on the national level as they confronted equally demanding functional pressures for the diffusion and fragmentation of normative power in the administrative state.[81] Such constraints are something that the legal literature on integration largely ignores, reflecting the lack of understanding of the historical relationship between European integration and the postwar constitutional settlement of administrative governance on the national level.[82] Nevertheless, the need for such constraints is arguably implicit in both Weiler's conceptions of European equilibrium as well as Nicolaïdis's notion of the EU as a demoi-cracy.[83]

The purpose of delegation constraints is to preserve, in the face of the functional demands of interdependence, the political-cultural experience of constitutional self-government on the national level in a historically recognizable—if evolving—sense.[84] Without outer limits on delegation (and even often with them), the danger is of a kind of Weberian nightmare—supranational technocratic domination without the possibility of any kind of legitimation via representative government.[85] I take up this idea in the next section, as part of a more detailed discussion of the relationship between the administrative interpretation and Nicolaïdis's demoi-cratic theory specifically.

**D. From Administrative "Delegation" to Political "Demoi-cracy" in European Integration**

There are several traits that my administrative perspective and demoi-cratic theory obviously share. In her articulation of integration as a "demoicracy-in-the-making,"[86] Nicolaïdis has been acutely aware of the polycentric—she would say "multicentred"[87]—character of the European system. She thus questions the dominant image of verticality in

[81] *See supra* notes 114–117 and accompanying text.

[82] *See* LINDSETH, *supra* note 27 and accompanying text.

[83] *See* Kalypso Nicolaïdis, *Conclusion: The Federal Vision Beyond the State*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 439 (Kalypso Nicolaïdis and Rorbert Howse eds., 2001) (suggesting analogously the need for such constraints, albeit within a conceptual framework of federalism beyond the state).

[84] For further elaboration of this point in relation to integration, see Peter Lindseth, *Author's Reply: "Outstripping", or the Question of "Legitimate for What?" in EU Governance*, 8 EUR. CONST. L. REV. 153 (2012).

[85] LINDSETH, *supra* note 15, at 264. For a more sanguine but unconvincing counter perspective, see, e.g., Gráinne de Búrca, Robert Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT'L L. & POL. 723 (2013).

[86] *The Idea of European Demoicracy*, *supra* note 9, at 248.

[87] *The New Constitution as European 'Demoi-cracy'?*, *supra* note 9, at 85; *We, the Peoples of Europe*, *supra* note 9, at 104.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

European integration (decisions made "*by* Brussels"),[88] in favor of one stressing "horizontal transfers of sovereignty between demoi and their representative institutions"[89] (that is, decisions made "*in* Brussels as well as elsewhere around Europe").[90] The purpose of such transfers—or "delegations" to use the administrative term—is cooperation and coordination among constitutional principals (national "demoi and their representative institutions") and not to realize a vertical, state-like system.

For both practical and normative reasons, Nicolaïdis concludes that European integration depends crucially on legitimacy mediated through national constitutional bodies.[91] As she puts it, "Europe's demoicracy operates in the shadow of national representative democracy, with indirect accountability as its primary focus."[92] Nicolaïdis further recognizes that "democratic legitimacy cannot be separated from identification if not identity."[93] And the lack of a robust European identity means that "there is no EU-wide polity in which most citizens would be willing to accept to be subjected to the rule of a pan-European majority."[94] Therefore, the ultimate impetus behind much of European cooperation is functional. It is "a community of projects, not a community of identity."[95]

These various elements lead Nicolaïdis to define demoi-cracy as "a Union of peoples . . . who govern together, but not as one," and as a "third way against two alternatives which both equate democracy with a single demos, whether national or European."[96] Similarly, an administrative interpretation of integration—particularly in its emphasis on historically constructed delegation, shared oversight, and mediated legitimacy among multiple constitutional principals—is formulated in opposition not only to European federalists or constitutionalists but also hard-core Euroskeptics.[97] European federalists or constitutionalists are inclined to reject the administrative interpretation because it stresses shared oversight among constitutional principals at the national level. Euroskeptics, on the

[88] *The New Constitution as European 'Demoi-cracy'?*, *supra* note 9, at 85 (emphasis in original).

[89] *The Idea of European Demoicracy*, *supra* note 9, at 270.

[90] *The New Constitution as European 'Demoi-cracy'?*, *supra* note 9, at 85 (emphasis in original).

[91] *European Demoicracy and Its Crisis*, *supra* note 9, at 364 ("*Guiding Principle 6 (Mediation): In a Demoicracy, the Enforcement of Common Disciplines Requires Strong, Legitimate Domestic Mediation*") (emphasis in original).

[92] *Id.* at 364.

[93] *Germany as Europe*, *supra* note 9, at 790.

[94] *The Idea of European Demoicracy*, *supra* note 9, at 256.

[95] *We, the Peoples of Europe*, *supra* note 9, at 102.

[96] *European Demoicracy and Its Crisis*, *supra* note 9, at 353.

[97] LINDSETH ET AL., *supra* note 77, at 142.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

other hand, also find the administrative perspective objectionable precisely because that shared national oversight can never satisfy the expectation of outright "control" that Euroskeptics wrongly assume is essential to governance within the modern administrative state. If the resulting institutional apparatus leaves both European federalists/constitutionalists and Euroskeptics unsatisfied, this may simply be an indication that the EU, qua system of supranational administrative governance, has for much of its history struck a pragmatic balance between integration and national constitutional democracy.

The central instrument of that pragmatic balance has been the member states' delegation of disciplinary and regulatory power to designated agents on the supranational level, to make coordination and cooperation among dispersed constitutional principals a functional reality and not just a legal fiction. But as Nicolaïdis has also stressed—here clearly echoing Weiler—this delegation is "voluntary and differentiated rather than essentialist and holistic,"[98] rejecting more idealistic constitutionalist claims of the nature of supranational authority in the EU. Delegation to the EU is grounded in "the ideal of non-coercion, choice, or free association, the idea that peoples in a demoicracy merge their national democratic orders by choice, a choice that needs to be seen as ultimately reversible and where consent cannot be assumed as given once and for all."[99] In this sense, rather than a permanent transfer of "sovereignty," European integration entails a voluntary delegation of particular *Hoheitsrechte* ("sovereign rights"), as well as a pre-commitment to submit to the supranational discipline that this delegation entails. As Bruno de Witte has clarified, *Hoheitsrechte* is a term of art, referring to "the form in which sovereignty is exercised," which "should not be confused with sovereignty itself."[100] In the process of European integration, only normative power has been transferred, but the sovereign capacity for self-legitimation, embodied in the historically constituted bodies at the national level, has necessarily remained national.[101]

This insight leaves an interesting historical question unanswered, one that my constructivist framework seeks to bring to the surface.[102] What were the antecedent legal- and political-cultural developments in Europe that made this voluntary delegation or pre-

[98] *We, the Peoples of Europe*, *supra* note 9, at 104; *see also In Defence of the Status Quo*, *supra* note 8, at 23.

[99] *The Idea of European Demoicracy*, *supra* note 9, at 265 (citing *The Transformation of Europe*, *supra* note 8).

[100] Bruno de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, *in* THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 303 (Anne-Marie Slaughter et al. eds., 1998).

[101] *See In Defence of the Status Quo*, *supra* note 8, at 9 (referring to the "bottom-to-top hierarchy of authority and real power," e.g., legitimacy, in European integration).

[102] LINDSETH, *supra* note 15, at 54–55.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

commitment possible? What was, in other words, its constructivist "logic of appropriateness"?[103]

Demoi-cratic theory points to the standard explanation—that integration "resulted from [the] unique historical context" of postwar Western Europe, "for at no other time and place have such deeply entrenched if relatively recent constructs of 'nation-states' been so collectively bent on taming the nationalist beast, and been shielded in doing so, moreover, by a hegemon's security umbrella."[104] This explanation—based on the catastrophe of 1914–1945 and the subsequent emergence of the United States as Western Europe's protector—is undeniable. But it is also incomplete. European integration also emerged as a viable political project in the late 1940s and 1950s precisely because this was the moment in western history when the foundations of administrative governance on both sides of the North Atlantic were constitutionally reconciled in some reasonably stable way with the demands of representative government inherited from the past. In some sense, the standard thesis stressed by Nicolaïdis explains the emergence of the goal—nationalist "taming"—while the administrative thesis explains the mechanism that made this taming possible.[105]

The historiographical theory underlying the administrative thesis stresses two overarching and somewhat contradictory trends in the North Atlantic world over the course of the nineteenth and twentieth centuries. This was the crucial period of "significant acceleration" in administrative governance, to borrow the words of Sabino Cassese.[106] The first trend was the ascendance of centralized elected assemblies—parliaments and the like—which became the core institutions of "representative government" in the democratizing nation-states of the North Atlantic in the nineteenth century.[107] (Of course, full democratization, defined as the extension of suffrage to all adult citizens equally, regardless of economic status, religion, race, or gender, would only come much later.)[108] The second trend emerged out of the first and was born of the growing recognition over

[103] James March & Johan Olsen, *The Logic of Appropriateness* (Ctr. for Eur. Studies, Univ. of Oslo, ARENA Working Paper No. 04/09), www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04_9.pdf.

[104] *European Demoicracy and Its Crisis*, supra note 9, at 360.

[105] *Cf.* ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS (Belknap Press 2005); Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture, and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L. L. 401–62 (2005); *see also* LINDSETH, *supra* note 15, at 153.

[106] Sabino Cassese, *The Rise of the Administrative State in Europe*, 60 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 981 (2010).

[107] *Cf.* Eley, *supra* note 78, at 106–15.

[108] For a useful summary for Europe, see CHARLES TILLY, CONTENTION AND DEMOCRACY IN EUROPE, 1650-2000 213–17 (2003) ("A Rough Map of European Democratization").

the late-nineteenth and early-twentieth century that these assemblies, along with traditional executive and judicial bodies, were increasingly unable "to deal with modern problems."[109] Deeply functional in character, this second development was by no means confined to the United States, with its notorious dispersal of regulatory power. Rather, throughout the North Atlantic world, functional pressures led to the diffusion of regulatory power away from those same historically "constituted" bodies into an increasingly complex and variegated administrative sphere—often but not exclusively under the executive—in order to address the challenges that modern industrial (and later post-industrial) society posed.[110]

Over the first half of the twentieth century, this dispersion of authority was also a deeply destabilizing process, particularly with the demands of total war between 1914–1918 and 1939–1945 (punctuated, of course, by the Great Depression). From this perspective, the constitutional settlement of administrative governance that took hold after World War II—rooted in the normative-legal concepts of delegation and mediated legitimacy—was a constitutional triumph after a period of extraordinary upheavals.[111] It is this constitutional achievement that the administrative perspective on integration seeks to preserve. The elements of the postwar settlement allowed the functional diffusion and fragmentation to proceed within broad limits but linked the manifold exercises of regulatory power (at least in law) back to the historically "constituted" bodies of the state. Most importantly, these included the parliament as the strongly legitimated constitutional principal inherited from the nineteenth century. However, the elected assembly would eventually be complemented by an increasingly democratically legitimated chief executive, along with the courts acting as mechanisms to protect basic constitutional and legislative commitments through judicial review—the dynamic combination of which provided the essential elements of the postwar constitutional settlement.

---

[109] JAMES LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938).

[110] For a suggestive overview of trans-Atlantic developments in "social politics," see DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998). For corresponding shifts in law and legal thought, compare Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-1968*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006). On the complex interplay between democratization, regulation, and administration in modern societies, see also PIERRE ROSANVALLON, L'ETAT EN FRANCE DE 1789 À NOS JOURS 276–80 (1990). Indeed, some argue that over the last quarter century this process has now led to the emergence of an "administrative space" decoupled from the nation-state entirely, not merely regional in character (as in the EU) but also "global" in many respects. *See generally* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, *in* 68 L. & CONTEMP. PROBS. 15–61 (2005); Sabino Cassese, *What Is Global Administrative Law and Why Study It? in* GLOBAL ADMINISTRATIVE LAW: AN ITALIAN PERSPECTIVE 1 (Sabino Cassese, et al., eds., 2012) (Robert Schuman Ctr. for Advanced Studies, Global Governance Programme, RSCAS Policy Paper No. 2012/04), *available at* cadmus.eui.eu/handle/1814/22374; *see also* Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy,* 3 EUR. L.J. 767–68 (1997). For a critique of this approach, see *infra* notes 128–30 and accompanying text.

[111] *See generally* Lindseth, *The Paradox of Parliamentary Supremacy*, *supra* note 17; *see also* LINDSETH, *supra* note 15, at 61–90.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

This process of settlement, however, was not static. It in fact continues to this day within and beyond the state, as demoi-cratic theory also explicitly perceives. Both the reallocations of regulatory power—delegations—and the conceptions of legitimacy tied to representative institutions on the national level have necessarily adjusted in the face of the reciprocal demands of the other, in an intensely political-cultural process of contestation over values but also in deference to functional realities. The result has been an uneasy balance—"equilibrium" in Weiler's terminology—not merely in European integration but in administrative governance more generally. While the diffuse and fragmented administrative sphere came to exercise significant and often seemingly autonomous regulatory power of varying types (rulemaking, enforcement, adjudication), that sphere has never been understood, in political-cultural terms, as enjoying an autonomous democratic and constitutional legitimacy of its own, at least in a historically recognizable sense. Rather, the possessors of regulatory power have remained answerable, in terms of the rationality of their decisions and limits of their actions, to the oversight of historically "constituted" bodies in the nation-state, in order to satisfy these cultural demands for legitimacy.[112]

But again, this sort of mediated legitimacy—essential, I would say, to equilibrium, demoi-cracy, as well as the administrative perspective—does not mean control, or at least not necessarily.[113] Whether cast in terms of administrative "delegation" or demoi-cratic "shared governance," the purpose of this transfer of authority is often specifically to relinquish control—and for good reason. Given the challenges of cooperation or coordination among multiple constitutional principals, as well as the need to signal the credibility of legal and political commitments to the integration project, relinquishing control is often essential to getting anything accomplished transnationally at all. This is especially true with regard to the transfer of disciplinary and normative power to supranational institutions like the European Commission and the European Court of Justice. The recourse to such "commitment institutions" is entirely comprehensible within an administrative framework, without recourse to a constitutional overlay typical in the legal literature on integration.

As this constructivist understanding of administrative history also suggests, however, such delegation of disciplinary and normative power cannot be so extensive as to negate the existence of the democratic system on the national level, at least in a historically and culturally recognizable sense. This is the essential lesson of the postwar constitutional settlement.[114] And it is also perhaps the most important value-added of the administrative

[112] On the specific sense in which I am using the term "cultural" here, as well as my broader theory of institutional change, *see* LINDSETH, *supra* note 15, at 13–14.

[113] *See supra* notes 71–78 and accompanying text.

[114] *See generally* Lindseth, *supra* note 32.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

perspective for equilibrium and demoi-cratic theory, particularly with regard to advancing our understanding of the role of national high courts in policing the bounds of constitutionally acceptable delegation.[115] As the Danish Supreme Court (the *Højesteret*) put it nicely in 1998, the really difficult challenge for national high courts in European integration is in determining whether and how supranational delegation might imperil "the constitutional assumption of a democratic system of government" on the national level.[116]

Adding an administrative dimension to both equilibrium and demoi-cratic theory thus confirms the need for European public law to develop an integration analogue to the Italian *riserva di legge* or the German *Vorbehalt des Gesetzes* on the national level.[117] The aim of such an analogue would be to better define the domains of normative authority that must remain with the member states in order to preserve their autonomous democratic and constitutional character, even as they otherwise allow integration to proceed. An administrative perspective on integration highlights the legal-historical underpinnings of these delegation constraints and makes the distinction between legitimating oversight and outright control more intelligible. Mere "oversight" is an acceptable means of legitimation within those domains understood as amenable to delegation under the (admittedly evolving) postwar constitutional settlement. Only when delegation threatens the democratic character of the state in a historically or culturally recognizable sense does the need for genuine democratic and constitutional "control" kick in.

This perspective helps to explain some of the most notorious—particularly German—judicial decisions on European integration,[118] especially in how they have articulated the so-called *Demokratieprinzip* in the context of the Eurozone crisis. In my reading of the German decisions arising out of the crisis[119]—admittedly as an outsider, always subject to

---

[115] *See generally* LINDSETH, *supra* note 15, at 133–88.

[116] Carlsen v. Rasmussen, Case No. I-361/1997, 1998 *UfR* 800, *reprinted in* 2 ANDREW OPPENHEIMER, THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES 191 (2d ed. 2003).

[117] *See* LINDSETH, *supra* note 15, at 86–87, 133–34, 184–85.

[118] *See generally id.*, at 133–88.

[119] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 987/10 (Sep. 7, 2011), http://www.bundesverfassungsgericht.de/en/decisions.html [hereinafter *Judgment of Sept. 7, 2011*]; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvE 8/11 (Feb. 28, 2012), http://www.bundesverfassungsgericht.de/en/decisions.html [hereinafter *Judgment of February 28, 2012*]; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvE 4/11 (June 19, 2012), http://www.bundesverfassungsgericht.de/en/decisions.html [hereinafter *Judgment of June 19, 2012*]; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 1390/12 (Sept. 12, 2012), http://www.bundesverfassungsgericht.de/en/decisions.html; *OMT Reference*, *supra* note 20; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 1390/12 (Mar. 18, 2014), http://www.bundesverfassungsgericht.de/en/decisions.html.

correction—the *Demokratieprinzip* has both a substantive and procedural dimension. The former defines the outer bounds of constitutionally permissible delegation in terms of maintaining the national parliament's budgetary autonomy.[120] The latter focuses on the nature of national—particularly parliamentary—oversight that is constitutionally mandated in order to legitimize otherwise delegable powers.[121] This German jurisprudence expresses more general principles regarding the relationship between democracy and delegation that should be available to any national high court in a demoi-cratic—that is to say, "administrative"—Europe, not just in the "core" but also in the "periphery."[122]

Lurking in the background here is, of course, the increasingly important role of supranational technocracy in the Eurozone crisis—the European Central Bank (ECB) along with its fellow members of the "troika," the European Commission and the International Monetary Fund (IMF). In her writings about demoi-cracy, Nicolaïdis has rightly focused on the need to promote "transnational non-domination" in the integration process.[123] But what the Eurozone crisis may be revealing is the extent to which supranational technocracy can become—or at least can be perceived as becoming—an instrument of domination by the strong over the weak, by negating the democratic and constitutional integrity of the periphery via excessive denationalized technocratic control over their domestic policy making.[124] As Nicolaïdis has rightly noted, "the key in this context is to develop the capacity for each 'demos' to defend itself against domination through various representative, deliberative, and participatory channels."[125] I submit that the *Demokratieprinzip*, in both its substantive and procedural dimensions, is one of those demoi-cratic defense mechanisms, or what I have called elsewhere "resistance norms."[126]

---

[120] See, in particular, *Judgment of Sept. 7, 2011, supra* note 119, at para. 124 ("if supranational legal obligations were created without a corresponding decision by the free will of the Bundestag, then the parliament would find itself in the roll of a mere rubber-stamp [a *Nachvollzug*—literally a 're-enacting'] and could no longer exercise overall responsibility for spending policy within the framework of its budgetary rights"), as well as para. 125 ("in particular [the Bundestag] is not permitted, even by statute, to subject itself [*sich ausliefern*—literally to 'deliver itself up'] to any mechanism of financial effect, which—whether on the basis of its overall conception or an overall assessment of its individual measures—could lead to unclear burdens of budgetary significance, be they expenditures or revenue losses, without prior constitutive consent" of the Bundestag). Translation by author.

[121] *See especially Judgment of February 28, 2012, supra* note 119; *Judgment of June 19, 2012*, *supra* note 199.

[122] Peter Lindseth, *Greek "Sovereignty" and European "Democracy"—A Bit of a Walk-Back, Due to Some "Colossal" Concerns,* EUTOPIALAW.COM (Feb. 15, 2012), www.eutopialaw.com/2012/02/15/greek-sovereignty-and-european-democracy-a-bit-of-a-walk-back-due-to-some-colossal-concerns/.

[123] *The Idea of European Democracy*, *supra* note 9; *European Democracy and Its Crisis*, *supra* note 9.

[124] *See* Bellamy, *supra* note 9; *see also* Scharpf, *supra* note 32.

[125] *The Idea of European Democracy*, *supra* note 9, at 265.

[126] *See* LINDSETH, *supra* note 15, at 47–48. I owe this concept to Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549–1614 (2000).

In the face of the dangers of supranational-technocratic overreach, what is jurisprudentially good for the German "goose" should also be good for the Greek, Irish, Portuguese, Italian, or Spanish "gander."

Nicolaïdis is clearly attuned to the dangers of denationalized technocracy through her work on mutual-recognition regimes in global trade. For example, in a 2005 article co-authored with Gregory Shaffer,[127] she extensively explores both the procedural and substantive constraints on technocracy needed to legitimize the regulatory output of such regimes. In that particular context—writing as part of the then-nascent Global Administrative Law (GAL) project—Nicolaïdis and Shaffer came to the conclusion that an increase in accountability through traditional administrative law mechanisms would be adequate. Nevertheless, Nicolaïdis and Shaffer also wondered whether GAL's "focus on *administrative* law does not overly deemphasize political concerns in favor of technocratic ones. It appears, for example, that the framing paper [of the project] exhibits a certain reluctance and constraint in taking on the democracy agenda, possibly as a reflection of the administrative law construct itself."[128]

The heart of the "administrative law construct" is in fact fundamentally about democracy, regardless of how the GAL project has cast it. It is about the mechanisms that public law has developed over time to help reconcile the reality of diffuse and fragmented administrative "governance"—wherever located—with the historical commitment to democratic and constitutional self-"government" that we inherit from the past. Thus, I have also found the apparent "reluctance and constraint" that Nicolaïdis and Shaffer perceive in GAL to be puzzling, particularly in its failure to reflect explicitly on the scope of authority that can be exercised within the "global" administrative sphere consistent with the preservation of democracy on the national level. Thus, Nicolaïdis and Shaffer were in this instance arguably reacting not to an "administrative law construct" per se but rather to the version that has manifested itself in the GAL project. The GAL perspective may be, to borrow a phrase from Alexander Somek, a world of "administration without sovereignty"[129]—or, for that matter, democracy—in which administrative governance is analyzed as a functionally autonomous reality without any connection to representative self-government in a historically and culturally recognizable sense.

That is emphatically not my understanding of administrative law, "global" or otherwise. Administrative law is and should be about how we reconcile our ideals of democratic and

[127] Kalypso Nicolaïdis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 L. & CONTEMP. PROBS. 263–317 (2005).

[128] *Id.* at 314 (emphasis in original).

[129] Alexander Somek, *Administration Without Sovereignty*, *in* THE TWILIGHT OF CONSTITUTIONALISM? 267 (Petra Dobner & Martin Loughlin eds., 2010).

constitutional self-government with the diffuse and fragmented reality of regulatory power in the modern era, in which the danger of technocratic domination in a Weberian sense is quite real. Administrative law seeks to accomplish that reconciliation not merely through procedural mechanisms to promote technocratic accountability—arguably the GAL focus—but also through the antecedent constitutional definition of the proper boundaries between democracy and administration, legislation and regulation, government and governance. In the end, what we are seeking to understand is the proper scope of delegation in a modern regime that we still struggle to experience as democratic.[130] This concern is implicated as much when autonomous normative power is exercised by administrative actors within the state as it is when such actors exercise autonomous normative power beyond it.[131]

**E. Beyond Theory: Toward Sustainable Demoi-cratic and Administrative Governance for a Europe in Crisis**

The question of delegation constraints in European public law serves in some sense as a bridge between theory and practice, both for the administrative perspective as well as the equilibrium and demoi-cratic theories of European integration. In a similar direction, Nicolaïdis has recently published a series of articles exploring how demoi-cratic theory might be operationalized in service of European reform, particularly in the context of the Eurozone crisis.[132] She also co-hosted a workshop at NYU in March 2013—with Joseph Weiler—in which the question of practical implications was prominently on the agenda.[133]

The aim of all these efforts, I would suggest, is to define the contours of "sustainable integration," to borrow Nicolaïdis's own well-chosen phrase.[134] Indeed, one specific means for "ensur[ing] *democratically* sustainable integration"[135] (my emphasis) is, in fact, mediated legitimacy. According to Nicolaïdis, "[n]ational leaders, courts, ministries, parliaments, agencies, civil servants and non-governmental organizations must use their margin of manoeuvre to translate, transform and own collective EU disciplines."[136] Although she might define mediated legitimacy more broadly than I would—moving

[130] *See generally Agents Without Principals*, *supra* note 17.

[131] *Cf.* Scharpf, *supra* note 32.

[132] *The Idea of European Demoicracy*, *supra* note 9; *European Demoicracy and Its Crisis*, *supra* note 9; *see also Sustainable Integration*, *supra* note 9.

[133] Understanding the EU and its Crisis through the Lens of Demoicracy: A Conversation, NYU Law School, Mar. 7–8, 2013.

[134] *See generally Sustainable Integration*, *supra* note 9.

[135] *European Demoicracy and Its Crisis*, *supra* note 9, at 364.

[136] *Id.*

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

beyond historically "constituted" bodies per se—the overlap between our views suggests that there is a role for an administrative perspective in helping to concretize demoi-cracy's general normative outlook into more practical legal and institutional proposals.[137] What follows is a brief overview of a range of issues on which demoi-cratic and administrative theorists of integration might collaborate in the future.

Consider first, at a threshold level, the question of delegation constraints themselves. In the context of administrative governance beyond the state, the question of delegation constraints is intimately bound up with the essential equilibrium between national and supranational that Joseph Weiler long ago identified as a cornerstone of integration.[138] An EU "constitutionalist" might point out that what Americans call the non-delegation doctrine "has not proven a full-fledged workable doctrine of containment" of technocratic power even in the United States.[139] This claim ignores the fact that national legal orders in Europe enforce delegation constraints much more vigorously than does the US.[140] More importantly, it ignores how constitutional delegation constraints in the US do not merely provide a basis for a frontal attack on the constitutionality of enabling legislation; rather, such constraints also serve as a canon of construction in the face of legislative interpretations that raise non-delegation concerns.[141] The use of non-delegation as an interpretive principle reflects a constitutional preference for interpretations of positive law that ground fundamental normative decisions in representative institutions. In the integration context, such a canon invites the development of non-delegation principles in aid of treaty interpretation with an eye to the greater legitimacy resources of the member

[137] Peter Lindseth, *"Demoicracy" Follow-up: Reflections on the Legal and Institutional Implications of the Concept*, EUROPÆUS|LAW (Mar. 19, 2013), www.europaeuslaw.blogspot.com/2013/03/demoicracy-follow-up-reflections-on.html.

[138] *The Community System*, *supra* note 8; *The Transformation of Europe*, *supra* note 8. *See also* Lindseth, *supra* note 18.

[139] Daniel Halberstam, *Rescue Package for Fundamental Rights: Comments by Daniel Halberstam*, VERFASSUNGSBLOG (Feb. 22, 2012), www.verfassungsblog.de/rescue-package-fundamental-rights-comments-daniel-halberstam/#.U3doI1hdVqk.

[140] Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 239 (1994) ("the striking down of statutes on delegation grounds [in Germany] is considered a normal event that frequently occurs"). *See also* LINDSETH, *supra* note 15, at 134. *But see* Rob van Gestel, *The 'Deparliamentarisation' of Legislation: Framework Laws and the Primacy of the Legislature*, 9 UTRECHT L. REV. 106–22 (2013) (analyzing the Dutch case as a counter-example). But van Gestel also notes that the Dutch Constitution is not wholly devoid of delegation constraints, "such as Article 104 determining that imposed by the state shall be levied pursuant to an Act of Parliament" as well as "restrictions on delegation in the sphere of fundamental rights." *Id.* at 111.

[141] *See* Peter Lindseth, *Rescue Package for Fundamental Rights: Further Comments from Peter Lindseth*, VERFASSUNGSBLOG (Feb. 28, 2012), www.verfassungsblog.de/rescue-package-fundamental-rights-comments-peter-lindseth-2/#.U3dpFFhdVqk (citing Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315–43 (2000); John Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223–77 (2000)).

states. Given the polycentric distribution of ultimate legitimacy in representative institutions on the national level, the use of non-delegation as an interpretive constraint thus becomes emphatically a demoi-cratic principle as well.

Consider, second, the enforcement of the principle of subsidiarity. Demoi-cratic theory, like the administrative interpretation, identifies the principle as crucial to achieving balance in the integration process.[142] From an administrative perspective, however, subsidiarity should serve as precisely an interpretive principle akin to the non-delegation doctrine in the US, the aim being to avoid open-ended transfers of normative power to the weakly-legitimated institutions of European governance on the supranational level.[143] Unfortunately, the subsidiarity jurisprudence of the European Court of Justice is, to put it bluntly, an embarrassment.[144] It has consistently ignored demands from the member states for more vigorous enforcement, if not on substantive grounds, then at least on procedural ones.[145] Had the Court taken up the challenge for a more proceduralized review of subsidiarity, one could imagine an approach not unlike the so-called "hard look" doctrine in US administrative law.[146] A European "hard look" doctrine would aim at verifying "whether the institutions themselves examined the possibility of alternative remedies at or below the Member State level,"[147] rather than providing judges the opportunity to substitute their own judgment for that of political decision makers.

Consider, third, participation and transparency rights for outside parties in European governance. It has long been a staple of the European legal literature to look to American-style administrative procedure, with its extensive participation and transparency rights, as a means of promoting greater accountability at the supranational level in Europe.[148] There was even a time when some European commentators regarded such reforms as a possible non-hierarchical means of "constitutionalizing" the EU,[149] perhaps as a supplement to the

[142] *See, e.g., European Democracy and Its Crisis*, *supra* note 9, at 364. ("Subsidiarity under democratic interdependence calls for cities, regions and other sub-state entities to govern in horizontal consideration of each other. It may sometimes necessitate devolving back competences from the EU level").

[143] *Democratic Legitimacy*, *supra* note 17, at 641.

[144] For a discussion, see LINDSETH, *supra* note 15, at 197–98.

[145] *Id.* at 198–201.

[146] *Democratic Legitimacy*, *supra* note 17, at 717–18; LINDSETH, *supra* note 15, at 196.

[147] George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 391 (1994).

[148] *See, e.g.,* Francesca Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451–515 (1999).

[149] Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273–99 (1997); Michelle Everson, *The Constitutionalization of European Administrative Law: Legal Oversight of a Stateless Internal Market*, *in* EU COMMITTEES: SOCIAL REGULATION,

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

persistently demos-challenged European Parliament. Charles Sabel and his many co-authors have made these sorts of procedures the cornerstone of their concept of "directly deliberative polyarchy,"[150] which they once cast as a "radical, participatory democracy with problem-solving capacities useful under current conditions and unavailable to representative systems."[151]

There is a reason, however, that proposals for greater transparency and participation read like they are drawn from a treatise in modern administrative law. Their object is in fact a rulemaking system (the EU) that is, despite decades of legal commentary to the contrary, ultimately "administrative" in character—in the sense of being experienced as highly technocratic and delegated from, and thus derivative of, the more strongly-legitimated democratic and constitutional orders on the national level.[152] Thus, from a demoi-cratic perspective, transparency and participation rights in supranational policy processes should not be advocated merely because they are a "good thing" in themselves. Rather, they should be favored because they reinforce democratically legitimate oversight by representative government on the national level—in other words, mediated legitimacy—by reducing information costs and thus allowing traditional democratic principals to more effectively oversee, if not necessarily control, their increasingly far-flung administrative agents, whether within or beyond the state.[153] Indeed, in the late 1990s and early 2000s, administrative-type participation and transparency rights emerged as key elements of European governance primarily in response to pressures from the national level for more effective oversight and compliance with the principle of subsidiarity.[154] The Treaty of Lisbon advances this project considerably.[155]

---

LAW AND POLITICS 281 (Christian Joerges & Ellen Vos eds., 1999). More recently, see Dierdre Curtin et al., *Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda*, 19 EUR. L.J. 1–21 (2013).

[150] Charles Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 313–15 (2008).; Charles Sabel & William Simon, *Epilogue: Accountability Without Sovereignty*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 402 (Grainne De Burca & Joanne Scott eds., 2006).

[151] Cohen & Sabel, *supra* note 110, at 313. On the way in which Sabel and his co-authors seem to be backing away from this "democratic" claim in the strongest sense, see LINDSETH, *supra* note 15, at 260. For a recent, more nuanced statement, see Charles Sabel & Jonathan Zeitlin, *Experimentalism in the EU: Common Ground and Persistent Differences*, 6 REGULATION & GOVERNANCE 410, 424 (2012) (claiming not "to assert that current parliamentary institutions could not, [but] indeed probably would have to, play a role in a re-imagined form of representative democracy that can respond to the world as it is"). Moreover, Sabel and Zeitlin equally acknowledge, *id.* at 423–24, that interests, culture, and history "matter" in a manner that begins to approach the theory of institutional change outlined in LINDSETH, *supra* note 15, at 13–14.

[152] *"Weak" Constitutionalism?*, *supra* note 17, at 157.

[153] *See generally* LINDSETH, *supra* note 15, at 261–62.

[154] *Id.* at 199–201.

[155] *See* Curtin et al., *supra* note 149, at 5.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

Consider, finally, the question of conflicts between the national and supranational legal orders, that is, the knotty issue of *Kompetenz-Kompetenz.* This issue is obviously historically associated with the German Federal Constitutional Court, although other courts have made it clear that, at least in principle and indeed often in fact, they have concerns along these lines as well.[156] From its *Maastricht Decision* of 1993 to its *Lisbon Decision* of 2009, the German court issued a series of warning "barks" in the direction of the European Court of Justice on precisely the question of which body should possess ultimate competence to rule on the scope of supranational authority.[157] The *OMT Reference* of January 2014, however, suggests that the Court may finally be getting ready to "bite,"[158] finding that an action of a supranational institution (the ECB) is "manifestly" ultra vires, a violation of Germany's "constitutional identity," or both. The Court, however, has not bitten yet, choosing instead to issue a preliminary reference to the ECJ for its interpretation of the legal issues surrounding the ECB's OMT program. How should we interpret these developments from the perspective of demoi-cratic theory?

Despite some of the heated commentary to the contrary,[159] the *OMT Reference* can be taken to reflect an effort of the judges in Karlsruhe to "use their margin of manoeuvre to translate, transform and own collective EU disciplines" in a demoi-cratic sense, to borrow again the words of Nicolaïdis.[160] The Court is duty bound, by virtue of Article 101 GG (as interpreted by its prior case law), to acknowledge—procedurally—that the ECJ serves as the "lawful judge" (*gesetzlichen Richter*) within its delegated sphere of competence.[161] The

[156] For an overview, see LINDSETH, *supra* note 15, at 135–37, 270–72.

[157] For an overview, see id. at 168–87.

[158] *See generally* Peter Lindseth, *Barking vs. Biting: Understanding the German Constitutional Court's OMT Reference . . . and its implications for EU Reform,* EUTOPIALAW.COM (Feb. 10, 2014), eutopialaw.com/2014/02/10/barking-vs-biting-understanding-the-german-constitutional-courts-omt-reference-and-its-implications-for-eu-reform (drawing on Arthur Dyevre, *Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?* (June 15, 2012), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2084639.

[159] *See, e.g.,* Mayer, *supra* note 7, at 117 ("Considering the clear wording of the EU treaties and the role attributed to the ECJ as final arbiter, the *ultra vires* doctrine of the German Constitutional Court is . . . incompatible with Germany's obligations under EU law").

[160] *See supra* note 136 and accompanying text.

[161] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 687/85, BVERFGE 75, 223 (Apr. 8, 1987); [1988] 3 C.M.L.R. 1 (interpreting Article 101 of the Basic Law in the context of integration). But see the Court's judgment (First Senate) in *Antiterrordatei* [Counter-Terrorism Database], Case No. 1 BvR 1215/07, para. 91 (April 24, 2013) [hereinafter *Antiterrordatei*] (holding that the ECJ could not, by virtue of its expansive interpretation of its authority under Article 51 of the Charter of Fundamental Rights in *Åkerberg Fransson*, be deemed the "lawful judge" under Article 101 GG because the ECJ's interpretation of its own authority would constitute either an *ultra vires* act or potentially a violation of Germany's constitutional identity) (I thank Ingrid

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

Court is similarly duty bound to defer—substantively—to the ECJ's judgments within the sphere of competence legally delegated to the supranational level under the treaties.[162] These two duties merge into an administrative-style "exhaustion of remedies" requirement, as the German court put it in its *Honeywell* decision of 2010:

> Prior to [finding] an ultra vires act by European bodies and institutions, the [ECJ should] be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Art. 267 TFEU. . . . Ultra vires review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of European institutions and agencies have taken place outside the transferred powers. . . . This means that the act of authority of the European Union must be manifestly in violation of powers and that the impugned act is highly significant for the allocation of

---

Leijten of the Leiden University for bringing this passage to my attention). As summarized in the Court's English-language press-release:

> European fundamental rights are from the outset not applicable [to this case], and the European Court of Justice is not the lawful judge according to Art. 101 sec. 1 sentence 2 of the Basic Law (Grundgesetz – GG). The European Court of Justice's decision in the case Åkerberg Fransson (judgment of 26 February 2013, C-617/10) does not change this conclusion. As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order. The Senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax, and express no general view. The Senate's decision on this issue was unanimous.

FEDERAL CONSTITUTIONAL COURT - PRESS OFFICE, PRESS RELEASE NO. 31/2013 (Apr. 24, 2013) www.bundesverfassungsgericht.de/en/press/bvg13-031en.html. This would appear to be an application, albeit in the context of interpreting a judicial decision, of the so-called "nondelegation canons" that the U.S. Supreme Court sometimes finds it necessary to apply in the interpretation of statutes. *See generally* Sunstein, *supra* note 141. For the most famous example, see the "Benzene" decision, *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980). For a discussion of how this case might provide guidance in interpreting the scope of delegated normative power in the integration context, see *Democratic Legitimacy*, *supra* note 17, at 721.

[162] On the definition of that principle of deference and its limits in the case law of the German Federal Constitutional Court, see LINDSETH, *supra* note 15, at 133–88.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

> powers between the Member States and the Union . . . .[163]

This is a formula for fairly strong deference to the autonomous normative power of European institutions, notably the ECJ, consistent with the recognition of the primacy of European law within the scope of the delegation under the treaties. But that deference cannot be total. That is, *Kompetenz-Kompetenz* in an ultimate sense cannot belong to the ECJ, in view of the demoi-cratic—and hence constitutionally polycentric—character of the European system. As the *OMT Reference* further specified:

> With regard to [to the obligation to protect national democracy in] Art. 20 sec. 1 and 2 GG, [the Federal Constitutional Court's] review cannot be waived. Otherwise, the power to dispose of the fundamental aspects of the Treaties would be shifted in such a way to the institutions and other agencies of the European Union that their understanding of the law could result in an amendment of a Treaty or in an expansion of powers [i.e., *Kompetenz–Kompetenz*]. . . . Unlike the primacy of application of federal law in a federal state, the precedence of Union law, which is based on national legislation giving effect to it, cannot be comprehensive.[164]

---

[163] *OMT Reference*, *supra* note 20, at para. 24 (quoting *Honeywell*, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. BvR 2661/06, paras. 60–61 (July 6, 2010) (citations omitted), http://www.bundesverfassungsgericht.de/en/decisions.html).

[164] *Id.* at para. 26. Admittedly, from a separation of powers perspective, the German Constitutional Court must be careful to manage (and, if necessary) limit the standing doctrine under Article 38 GG. *Cf. Id*. at para. 19:

> Art. 38 sec. 1 sentence 1 GG does not extend this right any further and does not grant citizens a right to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them.

Nevertheless, the Court's more lenient standing doctrine in the integration is arguably justified. *See* LINDSETH, *supra* note 15, at 178:

> In the parliamentary systems of Europe, the legislative majority (even a coalition) will usually be hesitant to oppose the government's support for a European measure except in rare circumstances. Consequently, the incentive of other institutional players to mount a challenge is significantly weaker in the democracy-protection context, thus necessitating a more aggressive judicial role.

In short, the institutions of the EU, qua *agent*, derive their legal power not from an unmediated constitutional *principal*—a European "people"—as such. If that were the case, then the ECJ might have a claim to ultimate *Kompetenz-Kompetenz* as in a genuinely federal constitutional system. Rather, democratic and constitutional legitimacy in the EU is necessarily mediated through the historically "constituted" bodies on the national level, as one might expect in a demoi-cratic system, as well as in a system of supranationalized administrative governance, as this article has maintained. For purposes of European integration, the nationally "constituted" bodies are the democratic and constitutional principals—although they too, like European institutions themselves, are subject to the demands of fundamental rights. Consequently, "[f]rom an administrative perspective, the ECJ's claim of unchecked *Kompetenz-Kompetenz* should be rejected because it amounts to allowing the adjudicative branch of an administrative agency to act as the final and exclusive judge of the scope of the agency's own jurisdiction."[165]

But just because the demoi-cratic character of the EU means national high courts should possess ultimate *Kompetenz-Kompetenz* does not mean that any single one of them should exercise that authority in an unfettered manner, at least without certain procedural checks. In some of the more cogent critiques of the *OMT Reference* to date, the focus has not been on whether national judicial review should exist at all, but rather on what the standard of national judicial review should be—particularly in a case raising the complex line between economic and monetary policy.[166] What European public law needs in these circumstances is a specifically demoi-cratic mechanism to elaborate core legal principles such as the proper scope of review. Admittedly, the preliminary reference partially serves that purpose. But what European public law also needs is a mechanism that compels a national judicial body like the German Federal Constitutional Court into direct dialogue with its peers in other member states.

Notably through the work of Christian Joerges,[167] we are increasingly appreciating the problem of *Kompetenz-Kompetenz* in terms of the conflict of laws. If Joerges is correct on this (and I think he is), then here too there is a potential administrative-law analogue from which demoi-cratic theory might draw: a European Conflicts Tribunal (ECT) inspired by the

[165] *Democratic Legitimacy*, *supra* note 17, at 731. Compare also the discussion of *Antiterrordatei*, *supra* note 161, at para. 91.

[166] *See, e.g.,* Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 265 (2014); Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?,"* 15 GERMAN L.J. 343 (2014).

[167] *See, e.g.,* Christian Joerges, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form* (LEQS Paper, Nov. 28, 2013), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1723249.

*Tribunal des conflits* in the French system.[168] This idea bears admitted resemblance to Joseph Weiler's earlier proposal for a "Constitutional Council" to deal with questions of conflicts over *Kompetenz-Kompetenz* between the national and supranational level, particularly in its composition by judges of national high courts.[169] The differences between the two proposals, however, are not merely semantic but also jurisdictional and remedial.[170] From an administrative perspective, private parties should have standing to invoke the jurisdiction of the ECT. Additionally, subject to the administrative-style "exhaustion of remedies" requirement—demanding a decision on a preliminary reference by the ECJ before going to the ECT—there should be the possibility of appeal from an adverse ruling of the ECT to the European Council, constituting a demoi-cratic "political" check in the process.

For some observers, this sort of check might mean an unacceptable dose of intergovernmentalism in what should be a purely supranational judicial process. I would argue that, properly structured, the political check would promote mediated legitimacy and therefore more "sustainable integration."[171] As the late Neil MacCormick recognized, "not all legal problems can be solved legally" and resolving them, "or more wisely still, avoiding their occurrence in the first place, is a matter for circumspection and for political as much as legal judgment."[172] As Nicolaïdis has written, "[w]hat really matters in the EU is that the Member states and their agents have learnt to define their sovereign interests in ways that are compatible with each other and prone either to compromises or civilized agreements to disagree."[173] Hence both the judicial and political features of the ECT process: "Intergovernmentalism comes in many forms and should not be seen as antithetical to integration, either by Courts or by citizens."[174]

**F. Conclusion: From One Paradox to Another**

The EU is indeed, as Nicolaïdis has written, "a sophisticated, complex and messy system of shared governance requiring several hubs and not one."[175] But so too is modern

[168] For the most complete outline of the proposal, see *Democratic Legitimacy*, *supra* note 17, at 726–34; for a more abbreviated discussion, see LINDSETH, *supra* note 15, at 275–77.

[169] *See, e.g.,* Weiler & Trachtman, *supra* note 35, at 391–92; Joseph Weiler, *The Reformation of European Constitutionalism,* 35 J. COMMON MKT. STUDIES 127 (1997).

[170] *See Democratic Legitimacy*, *supra* note 17, at 729–34.

[171] *Cf. Sustainable Integration*, *supra* note 9.

[172] Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 265 (1995).

[173] *Germany as Europe*, *supra* note 9, at 791.

[174] *Id.*

[175] *Sustainable Integration*, *supra* note 9, at 41.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

administrative governance, properly understood.[176] National and denationalized forms of administrative governance each entail functionally diffuse and fragmented regulatory authority that is often autonomous from hierarchical control, sometimes *de jure* but always *de facto*, by virtue of institutional complexity and density. But that autonomous regulatory power is still dependent upon the historically "constituted" bodies of the nation-state for ultimate democratic and constitutional legitimacy. The purpose of the postwar constitutional settlement of administrative governance has been to reconcile the exercise of autonomous regulatory power—whether within or beyond the state—with conceptions of national democratic and constitutional legitimacy in a historically recognizable but still evolving sense.

To serve this aim of reconciliation, however, the postwar settlement involved a paradox. On the one hand, it sought to strengthen national parliaments as the core instruments of democratic and constitutional legitimacy in the face of functional pressures to diffuse and fragment regulatory power elsewhere. On the other hand, the postwar settlement necessarily needed to constrain the power of these very same parliaments in order to achieve this strengthening. How so? By prohibiting national parliaments from delegating regulatory power to an unlimited extent—or at least to the extent that functional demands might seem to require—because such an unlimited capacity to delegate imperiled the role of the legislature as the core instrument of democratic self-government in a historically recognizable, if evolving, sense. The postwar constitutional settlement thus recognized that there had to be a substantive reserve of governing authority (*riserva* or *Vorbehalt*) that the national parliament could not delegate, and that it was the function of national high courts, as separate instruments of legitimation, to police that reserve in the interest of preserving the democratic character of the postwar state.[177]

European demoi-cracy builds on a similar paradox. As Nicolaïdis put it recently: "Paradoxically, the transformative logic of European demoicracy . . . owes its radical nature to the conservative refusal to do away with the core tenet of nation-state-based-democracy."[178] And it is through this refusal that Nicolaïdis sees the potential for integration to act, again paradoxically, as a "power multiplier" for those same self-limiting states—but only if integration "ensures that those who are in charge in cities, districts, regions, countries and transborder areas are enabled by the collective [Europe] to act effectively by governing in partnership while still taking responsibility."[179] In short,

[176] *See Agents Without Principals?*, *supra* note 17.

[177] *See* Lindseth, *supra* note 32, at 1354 (the postwar constitutional settlement "required, paradoxically, the weakening of elected legislatures—through the imposition of delegation constraints—in order to ensure their place in an evolving, but still democratic, system of separation of powers").

[178] *The Idea of European Demoicracy*, *supra* note 9, at 274.

[179] *Sustainable Integration*, *supra* note 9, at 41.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

sustainable integration requires the preservation, not supersession, of the member states as genuine loci of democratic self-government and instruments of legitimation, even in the face of functional demands for ever-greater transfers of regulatory power to the supranational level, particularly in the context of the Eurozone crisis. To succumb to those demands unreflectively, to allow the delegation of regulatory power to an unlimited extent, is in fact to imperil the essential equilibrium that Weiler long ago perceived as the essential foundation of integration.

The danger today is that, in the context of a seemingly intractable Eurozone crisis, there are numerous distinguished advocates who, in the name of supranational "democracy" (not "demoi-cracy")—as well as the functional demands of the common currency as they perceive them—call for the complete subordination of the nation-state to a European political union. "The nation states can well preserve their integrity as states within a supranational democracy," says Jürgen Habermas, "by retaining both their roles of the implementing administration and the final custodian of civil liberties."[180] Perhaps so. But this dismissal of the European nation-state as a political-cultural locus of self-government is arguably a threat to sustainable integration in two ways. First, European integration exists to serve its constituent states and peoples as an agent of cooperation and coordination, not vice versa. Second, and more importantly, the constitutional role of the state is not merely to protect "civil liberties" but also to protect the rights of the national political community to democratic self-government in a historically recognizable sense. The ultimate paradox, then, is the failure of well-meaning advocates of European political union to comprehend this essential nature of European integration.

The aim of demoi-cratic theory, like that of equilibrium theory before it,[181] is effectively to "turn 'unity in diversity' into the core normative basis for sustainable integration."[182] So too, I would submit, is the aim of the administrative character of European governance. Through the adaptation of the legitimating mechanisms and normative principles of the postwar constitutional settlement, Europe has arguably found its way, pragmatically, to an institutional formula that conforms to the aspiration of unity-in-diversity. Europe achieves unity by way of shared institutions whose character is fundamentally that of an administrative agent, operating on behalf of a set of polycentric constitutional principals on the national level. The result is a deeply political and not merely technical system, one that deals directly with the regulatory allocation of scarce resources and contests over values, as in administrative governance more generally.[183] Nevertheless, Europe preserves

[180] Jürgen Habermas, Lecture at KU Leuven, Belgium: Democracy, Solidarity and the European Crisis (Apr. 26, 2013), www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/en/democracy-solidarity-and-the-european-crisis.

[181] *See, e.g., The Community System*, *supra* note 8, at 293.

[182] *Sustainable Integration*, *supra* note 9, at 47.

[183] *See supra* notes 31–34 and accompanying text.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press

its inherent diversity precisely because ultimate legitimation, if not always control, remains in the polycentric "constituted" bodies of self-government on the national level, whether executive, legislative, or judicial. That is the essence of the European project as ultimately "administrative, not constitutional." Appreciating its virtues as well as its constraints—the need for equilibrium, its foundations in demoi-cracy, its essentially administrative character—will be crucial to the task of extricating the integration project from its current crisis.

https://doi.org/10.1017/S2071832200019040 Published online by Cambridge University Press