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Peter L. Lindseth

Equilibrium, Democracy, and Delegation:
On the 'Administrative, not Constitutional'
Legitimacy of European Integration

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TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW: A THEORETICAL PERSPECTIVE

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On the 'Administrative, not Constitutional'
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Prologue:

**Towards a Multipolar Administrative Law:
A Theoretical Perspective**

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive “machines” and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging “multipolar administrative law”, where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20th century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens’ participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer’s “ultimate frontier” is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law’s tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law (*“Verwaltungsrecht als konkretisiertes Verfassungsrecht”*), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (<http://www.irpa.eu/gal-section/a-multipolar-administrative-law/>). The seminar, entitled “Toward a Multipolar Administrative Law – A Theoretical Perspective”, took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

Sabino Cassese, *Italian Constitutional Court*
Giulio Napolitano, *University of “Roma Tre”*
Lorenzo Casini, *University of Rome “Sapienza”*

**EQUILIBRIUM, DEMOI-CRACY, AND DELEGATION:
ON THE ‘ADMINISTRATIVE, NOT CONSTITUTIONAL’
LEGITIMACY OF EUROPEAN INTEGRATION**

Peter L. Lindseth*

Abstract

To argue, as this contribution does, that European integration enjoys an “administrative, not constitutional” legitimacy is to take a position in obvious tension with the deeply-rooted conceptual framework—what we might call the “constitutional, not international” perspective—that has dominated European public-law scholarship over many decades. Rather than viewing the administrative alternative as an outright rejection of all that has come before it, however, one can in fact see it as providing the legal-historical micro-foundations for certain better-known theories of European legal integration. I am referring in particular to Joseph Weiler’s classic theory of European “equilibrium” (now updated as “constitutional tolerance”), as well as Kalypso Nicolaïdis’s more recently developed “demoi-cratic” theory of European governance (on which this contribution focuses in particular). The central idea behind the administrative interpretation—the historical-constructivist understanding of “delegation” and the essential balance it demands between supranational regulatory power and national democratic and constitutional legitimacy—directly complements both theories. This alternative interpretation suggests how the balance between the national and supranational, as well as the nationally mediated legitimacy that is essential to integration’s sustainability, in fact have their origins in the historical evolution of administrative governance over the course of the twentieth century.

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This contribution 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 possible 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.

Integration's grounding in the history of administrative governance helps to explain certain crucial but often overlooked aspects of European public law, most importantly the role of oversight by national constitutional bodies—executive, legislative, and judicial—in the legitimation of the integration process. Moreover, the administrative perspective also provides helpful insight into how the theories of European “equilibrium” and “demoi-cracy” might be legally operationalized in service further European reform, particularly in the context of the still-unresolved Eurozone crisis.

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 centrepiece 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 or democratic and constitutional sense—“based on the separation of powers”—

¹ D. Hipp and T. Darnstädt, “Der Bundesstaat ist ein Irrtum”, *Der Spiegel*, 23 December 2011, <www.spiegel.de/spiegel/print/d-83328883.html>, visited on 17 August 2013. 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 D. Hipp and T. Darnstädt, “It is a Mistake to Pursue a United States of Europe’: SPIEGEL Interview with Ex-German High Court Justice”, *Spiegel Online*, 28 December 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>, visited on 17 August 2013. For more analysis, see P. Lindseth, “Understanding the German Constitutional Fault Lines in the Eurozone Crisis: *Der Spiegel*’s Interview with Udo Di Fabio”, *Eutopialaw.com*, 12 January 2012, <www.eutopialaw.com/2012/01/12/understanding-the-german-constitutional-fault-lines-in-the-eurozone-crisis-der-spiegels-interview-with-udo-di-fabio/>, visited on 17 August 2013.

² Compare, most recently, J. Habermas, “Democracy, Solidarity and the European Crisis”, Lecture at KU Leuven, Belgium, 26 April 2013, <www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/en/democracy-solidarity-and-the-european-crisis>, visited on 17 August 2013 (“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, J. Habermas, *The Crisis of the European Union: A Response* (Polity, 2012). In the midst of the Eurozone crisis, *Der Spiegel* has focused regularly on the views of Habermas. See, e.g., G. Diez, “Habermas, the Last European: A Philosopher’s Mission to Save the EU”, *Spiegel Online*, 25 November 2011, <www.spiegel.de/international/europe/habermas-the-last-european-a-philosopher-s-mission-to-save-the-eu-a-799237.html>, visited on 18 August 2013. See also T. Darnstädt, *et al.*, “Citizens of the EU: How to Forge a Common European Identity”, *Spiegel Online*, 12 February 2011, <www.spiegel.de/international/europe/citizens-of-the-eu-how-to-forge-a-common-european-identity-a-800775.html>, visited on 18 August 2013; T. Darnstädt, *et al.*, “Phoenix Europe: How the EU Can Emerge from the Ashes”, *Spiegel Online*, 18 November 2011 <www.spiegel.de/international/europe/phoenix-europe-how-the-eu-can-emerge-from-the-ashes-a-797626.html>, visited on 18 August 2013; and T. Darnstädt, *et al.*, “The Great Leap Forward: In Search of a United Europe”, *Spiegel Online*, 24 November 2011, <www.spiegel.de/international/europe/the-great-leap-forward-in-search-of-a-united-europe-a-799292.html>, visited on 18 August 2013.

if only retrograde actors like the German high court and Udo Di Fabio (or indeed Angela Merkel for that matter)³ would clear the way.

The conservatism of Di Fabio in matters European cannot be denied⁴—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

Although the German Constitutional Court is often cited as the very bastion of judicial Euroscepticism in the EU,⁷ 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 Eurosceptical or even or 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 well as Kalypso Nicolaïdis and her more recently developed “demoi-

³ See J. Habermas, “Merkel’s European Failure: Germany Dozes on a Volcano”, *Spiegel Online*, 9 August 2013, <www.spiegel.de/international/germany/juergen-habermas-merkel-needs-to-confront-real-european-reform-a-915244.html>, visited on 18 August 2013.

⁴ See, e.g., U. 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>, visited on 17 August 2013.

⁵ *German Lisbon Decision*, 2 BvE 2/08, 30 June 2009 <www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>, visited on 17 August 2013.

⁶ Hipp and Darnstädt, *supra* note 1.

⁷ See, e.g., D. Halberstam and C. Möllers, “The German Constitutional Court Says ‘Ja zu Deutschland!’, 10:8 *German Law Journal* (2009), pp. 1241–57.

⁸ See, e.g., J.H.H. Weiler, “The Community System: The Dual Character of Supranationalism”, 1:1 *Yearbook of European Law* (1982) pp. 267–306; J.H.H. Weiler, “The Transformation of Europe”, 100 *Yale Law Journal* (1991) pp. 2403–2483; J.H.H. Weiler, “Federalism Without Constitutionalism:

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 a positive analysis of what a sustainable form of integration in fact requires. 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 contribution 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—“plural”, “multilevel”, “heterarchical”, or otherwise—to describe European integration. I recognize that this argument runs contrary to the deeply rooted constitutionalist framework in European public-law scholarship that has developed over many decades. The problem with a constitutionalist perspective is not some failure to accurately describe certain features of European legal integration, particularly in

Europe’s Sonderweg”, in K. Nicolaïdis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford; New York: Oxford University Press, 2001) p. 54; J.H.H. Weiler, “In Defence of the Status Quo: Europe’s Constitutional Sonderweg”, in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the Nation-State* (Cambridge: Cambridge University Press, 2003) p. 7; J.H.H. Weiler, “Prologue: Global and Pluralist Constitutionalism—Some Doubts”, in G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge, Eng.: Cambridge University Press, 2012) p. 8.

⁹ See, e.g., K. Nicolaïdis, “The New Constitution as European ‘Demosi-cracy’?”, 7:1 *Critical Review of International Social and Political Philosophy* (2004) pp. 76–93; K. Nicolaïdis, “We, the Peoples of Europe . . .”, 83:6 *Foreign Affairs* (Nov.–Dec., 2004) pp. 97–110; K. Nicolaïdis, “Trusting the Poles? Constructing Europe through Mutual Recognition”, 14:5 *Journal of European Public Policy* (2007) pp. 682–698; K. Nicolaïdis, “Sustainable Integration: Towards EU 2.0?”, 48 *JCMS: Journal of Common Market Studies* (2010) pp. 21–54; K. Nicolaïdis, “Germany as Europe: How the Constitutional Court Unwittingly Embraced EU Demoi-cracy: A Comment on Franz Mayer”, 9:3–4 *International Journal of Constitutional Law* (2011) pp. 786–792; K. Nicolaïdis, “The Idea of European Demoi-cracy”, in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012) p. 247; K. Nicolaïdis, “European Demoi-cracy and Its Crisis”, 51 *JCMS: Journal of Common Market Studies* (2013) pp. 351–369. Others have of course also advanced the idea of Europe as a “demoi-cracy”; see, e.g., S. Besson, “Deliberative Demoi-cracy in the European Union: Towards the Deterritorialization of Democracy”, in S. Besson and J. L. Marti (eds.), *Deliberative Democracy And Its Discontents* (Ashgate Publishing, Ltd., 2006) p. 141; F. Cheneval and F. Schimmelfennig, “The Case for Demoi-cracy in the European Union”, 51:2 *JCMS: Journal of Common Market Studies* (2012) pp. 334–350. However, Nicolaïdis’s work arguably both initiated this line of thinking and represents its most sustained development; hence the focus on her work here.

relation to public international law.¹⁰ 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 supranational institutions were a site of such authority in their own right, apart from the member states that created them.

If “there is no convincing account of democracy without demos”, as Weiler has 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 have fully one without the other.¹² This fact has a clear bearing on the scope of authority that supranational institutions can legitimately exercise without autonomous democratic (and hence “constitutional”) legitimacy of their own.¹³ To ignore the limits of the autonomous legitimacy in European governance leads to an unreflective (but unfortunately persistent) overestimation of the sort of regulatory power that can sustainably be delegated to the supranational level. This is something that the Eurozone crisis is sadly 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

My second aim with this contribution is related to the first but very much in keeping with the focus of this symposium. Rather than deploying the traditional constitutionalist vocabulary to describe integration, I argue that European governance can better be understood as an exemplar of “multi-polar administrative law”—or, as I

¹⁰ See *infra* notes 30, 47-48 and accompanying text.

¹¹ J.H.H. Weiler, “The Geology of International Law – Governance, Democracy and Legitimacy”, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), p. 560.

¹² See *infra* notes 312-345 and accompanying text.

¹³ See *infra* notes 36-38 and accompanying text.

¹⁴ See P. Lindseth, “The Eurozone Crisis, Institutional Change, and ‘Political Union’”, in F. Allen, *et al.* (eds.), *Political, Fiscal, and Banking Union in the Eurozone?* (Philadelphia: Wharton Financial Institutions Center Press, 2013) p. 149.

have put it elsewhere, as an “administrative, not constitutional” phenomenon.¹⁵ The bluntness of this tag-line, I admit, has sometimes caused confusion and diverted attention from the legal-historical nuance on which the interpretation is based.¹⁶ This in turn has given rise to a perception that my argument is, in some manner, “all or nothing”, existing in its own splendid isolation from more mainstream legal theories of integration, a point raised both in the conference leading to this symposium as well as elsewhere.

Hence my third aim with this contribution: 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. In this regard, I return again to the notions of European equilibrium/constitutional tolerance 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.¹⁷ 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.¹⁸ My aim is to show that the central idea behind the administrative interpretation of integration—the historical-constructivist understanding of “delegation”—also provides a direct complement to the equilibrium and demoi-cratic

¹⁵ See generally P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford; New York: Oxford University Press, 2010).

¹⁶ *Ibid.* In addition, see, e.g., P. Lindseth, “Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community”, 99 *Columbia Law Review* (1999) pp. 628–738; P. Lindseth, “‘Weak’ Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union”, 21:1 *Oxford Journal of Legal Studies* (2001) pp. 145–163; P. Lindseth, “Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity”, in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe’s Integrated Market*, (Oxford: Oxford University Press, 2002) p. 139; P. Lindseth, “The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s”, 37 *Loyola of Los Angeles Law Review* (2003) pp. 363–406.

¹⁷ See P. Lindseth, “Disequilibrium and Disconnect: On Weiler’s (Still Robust) Theory of European Transformation”, UConn School of Law Working Papers No. 2013/01, 9 May 2013, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2270119>, visited on 17 August 2013, forthcoming in abbreviated form in M. Wind and M. P. Maduro (eds.), *The Transformation of Europe—Twenty Years On* (Cambridge University Press).

¹⁸ Nicolaïdis, “The New Constitution as European ‘Demosi-cracy’?”, *supra* note 9, p. 86; Nicolaïdis, “We, the Peoples of Europe . . .”, *supra* note 9, p. 104; Nicolaïdis, “Sustainable Integration”, *supra* note 9, p. 44; Nicolaïdis, “Germany as Europe”, *supra* note 9, p. 788; Nicolaïdis, “The Idea of European Democracy”, *supra* note 9, p. 248; Nicolaïdis, “European Democracy and Its Crisis” *supra* note 9, p. 354.

theories of Weiler and Nicolaïdis. Moreover, it provides guidance into how those theories might be operationalized in service further European reform, in view of the essentially “administrative, not constitutional” character of European integration.

1. 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.¹⁹ Much less than any “easy” engineering of a European federal state (per the implication of Di Fabio’s interviewers),²⁰ a sustainable form of European governance in fact has entailed a difficult process of reconciliation: On the one hand, integration has needed to meet the functional and idealist demands for integration; on the other, it has also needed to satisfy historical commitments to constitutional democracy in a historically recognizable (and hence still national) sense.

This has been no easy balance to strike. My research suggests that a crucial if imperfect avenue of that reconciliation has been an array of legal and political mechanisms—most importantly forms of legitimating oversight by national constitutional bodies—that have attempted to bridge the disconnect between supranational regulatory power and national democratic and constitutional legitimacy. These mechanisms include, most importantly, collective oversight of the supranational policy process by national executives,²¹ judicial review by national high courts with respect to certain core democratic and constitutional commitments,²² and increasingly recourse to national parliamentary scrutiny of supranational action, whether of particular national executives individually or of supranational bodies more broadly.²³ The emergence of these practices over the last half century reflect a convergence of

¹⁹ See generally Lindseth, *supra* note 15.

²⁰ See *supra* note 1 and accompanying text.

²¹ See generally Lindseth, *supra* note 15, ch.3.

²² *Ibid.*, ch.4.

²³ *Ibid.*, ch.5.

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.²⁴

From an administrative perspective, the existence of national oversight mechanisms should not be understood as either anomalous or a sign of crisis in the European system.²⁵ Rather, it has been precisely through their development over time that European public law has worked to reconcile the largely functional (though often also political) demands for 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, and reason-giving/accountability) as opposed to outright “control”.²⁶

The aptness of such an “administrative” framework for analyzing European governance does not flow from the nature of the power exercised (political vs. technical)—supranational regulatory power is obviously deeply political, in the sense of dealing with the allocation of scarce resources or contests over values, as is most regulatory power in modern administrative governance.²⁷ What in fact defines an administrative regime, regardless of its location (within or beyond the state), is the *separation* of norm-production from institutions that embody or express the capacity of a historical political community to rule itself in a strongly-legitimated, i.e., “democratic” and “constitutional” sense, whether legislative, executive, or judicial. What administrative bodies lack, despite their autonomous regulatory *power*, is autonomous democratic and constitutional *legitimacy* to exercise that power without some mechanisms of oversight by strongly-legitimated bodies residing elsewhere (what I call

²⁴ *Ibid.*, ch.2.

²⁵ See, e.g., G. Majone, *Dilemmas of European Integration: the Ambiguities and Pitfalls of Integration by Stealth* (Oxford; New York: Oxford University Press, 2005), p. 64 (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”).

²⁶ See *infra* notes 62-70 and accompanying text. See also Lindseth, *supra* note 15, pp. 21-23.

²⁷ Lindseth, *supra* note 15, p. 35.

“mediated legitimacy”).²⁸ 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”.²⁹

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.³⁰

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. That is, 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. What is lacking, 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

²⁸ See *ibid.*, pp. 88–90; for the national origins of mediated legitimacy in the twentieth-century administrative state, see P. Lindseth, “The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s”, 113 *The Yale Law Journal* (2004) pp. 1341–1415.

²⁹ A. Menon and S. Weatherill, “Legitimacy, Accountability, and Delegation in the European Union”, in A. Arnall and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002), p. 118.

³⁰ See, e.g., J.H.H. Weiler and J. Trachtman, “European Constitutionalism and Its Discontents”, 17 *Northwestern Journal of International Law and Business* (1996–1997) pp. 354–397.

Lincoln's famous formulation.³¹ Following the leads of Jed Rubenfeld³² and Bruce Ackerman,³³ we should recognize that constitutional legitimacy and democratic self-government are inextricably connected in the modern era. They are tied to the construction of a polity's historical identity as a self-governing people over time, and thus they emerge together, broadly speaking. From this perspective, it is profoundly difficult to claim that the EU has an autonomously constitutional character if Europeans refuse to grant it autonomous democratic legitimacy, unmediated through the member states. Regardless of any legal, technocratic, input, output, or even "messianic"³⁴ legitimacy that the integration process might otherwise possess, what integration lacks, for the present, is the necessary sense of European governance *of* a historically cohesive polity—*i.e.*, "Europe" as a collectivity. 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"³⁵—is not a matter of definitional fiat. Rather, it is derived 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, and thus European elites cannot easily engineer it into existence, at least in the short or intermediate term.

From this perspective, therefore, although European integration can sustain a great deal of autonomous regulatory *power* at the supranational level, there are limits to what it can reasonably sustain given the lack of autonomous democratic and constitutional *legitimacy*. Indeed, this is something that the Eurozone crisis is

³¹ P. Lindseth, "Of the People: Democracy, the Eurozone, and Lincoln's Threshold Criterion", 22 *Berlin Journal* (2012) pp. 4–7.

³² J. Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001).

³³ B. Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991).

³⁴ J.H.H. Weiler, "The Political and Legal Culture of European Integration: An Exploratory Essay", 9:3–4 *International Journal of Constitutional Law* (2011) pp. 678–694.

³⁵ N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford; New York: Oxford University Press, 1999), p. 173.

demonstrating in a highly acute way. As Stefano Bartolini presciently warned in 2005 (i.e., well before the onset of the crisis), “the risk of miscalculating the extent to which true legitimacy surrounds the European institutions and their decisions . . . may lead to the overestimating of the capacity of the EU to overcome major economic and security crises”.³⁶ Certain kinds of power still require strongly-legitimated institutions of outright “government”.³⁷ 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 per cent of European GDP that is the current EU budget).³⁸ 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 (as of this writing in August 2013) 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, particularly in the domain of rights-protection and the disciplining of democratic externalities of

³⁶ S. Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring Between the Nation State and the European Union* (Oxford: Oxford University Press, 2005), p. 175.

³⁷ Cf. J. Pisani-Ferry, “Whose Economic Reform?”, *Project Syndicate*, 30 July 2013, <<http://www.project-syndicate.org/commentary/the-purpose-and-strategy-of-structural-reform-by-jean-pisani-ferry>>, visited on 22 August 2013 (referring to “a line in the sand beyond which only governments can set priorities and act”).

³⁸ Cf. P. Krugman, “What a Real External Bank Bailout Looks Like”, *Conscience of a Liberal*, 17 July 2012, <krugman.blogs.nytimes.com/2012/06/17/what-a-real-external-bank-bailout-looks-like/>, visited on 17 August 2013.

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.³⁹ This ignores the complex interplay between the functional, political and cultural dimensions of institutional change⁴⁰ 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.⁴¹ 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”.⁴² Nicolaïdis, for her part, has long presented her demoi-cratic theory of integration as a “depart[ure] from mainstream constitutional thinking” on the EU.⁴³

2. Understanding the Administrative Character of Integration within a Historical-Constructivist Principal-Agent Framework

The caution of Weiler and Nicolaïdis in the face of *both* statist and constitutionalist thinking, I would argue, is justified by the deeply unequal distribution of what I call “legitimacy resources” in the integration process.⁴⁴ This is an empirical reality that strongly pro-integration advocates, whether statist or constitutionalist, often ignore by focusing solely on the functional demands of interdependence as the main driver and

³⁹ See, e.g., M. P. 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, <network.globalgovernanceprogramme.eu/wp-content/uploads/2012/10/report.pdf>, visited on 17 August 2013; for a commentary see P. Lindseth, “Thoughts on the Maduro Report: Saving the Euro Through European Democratization?”, *EUtopialaw.com*, 13 November 2012, <www.eutopialaw.com/2012/11/13/1608/>, visited on 17 August 2013.

⁴⁰ Lindseth, *supra* note 15, pp. 13-14.

⁴¹ See, e.g., European Commission, “A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate”, COM/2012/0777 final, 2013, <www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF>, visited on 17 August 2013.

⁴² Weiler, “Prologue”, *supra* note 8, p. 12.

⁴³ Nicolaïdis, “The New Constitution as European ‘Demoi-cracy’?”, *supra* note 9, p. 84; Nicolaïdis, “We, the Peoples of Europe . . .”, *supra* note 9, p. 102.

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.⁴⁵ It is for this reason that European governance is better described as *polycentric* in terms of the loci of democratic and constitutional legitimacy, stressing the difficulties of shifting a similar legitimacy to the supranational level.⁴⁶

To my mind, the idea of supranational “constitutionalization”, in whatever form, is based on a partly valid⁴⁷ 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 what we might call the “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, a process subject to the same 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

⁴⁴ See generally Lindseth, *supra* note 15, pp. 52–53.

⁴⁵ 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.

⁴⁶ Lindseth, *supra* note 15, p. 265.

⁴⁷ 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, p. 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”).

exercise of delegated power—the EU enjoys much more autonomy, as is well known, which in turn intensifies the challenge of legitimation in its case.

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).⁴⁸ 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.⁴⁹ 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.⁵⁰ 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.⁵¹ The “composite” nature of this system, as Sabino Cassese⁵² and Armin von Bogdandy⁵³ have for example argued, cannot be denied. But in political-cultural terms, the imbalance in legitimacy resources in European governance ensures

⁴⁸ Majone, *supra* note 25, p. 7.

⁴⁹ E. Rubin, “Law and Legislation in the Administrative State”, 89 *Columbia Law Review* (1989) pp. 380–385 (describing “transitive” versus “intransitive” legislation).

⁵⁰ Lindseth, *supra* note 15, pp. 54–55.

⁵¹ See P. Lindseth, “Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance”, in F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) p. 107.

⁵² S. Cassese, *The Global Polity: Global Dimensions of Democracy and the Rule of Law* (Sevilla: Global Law Press, 2012), p. 23.

⁵³ A. von Bogdandy and P. Dann, “International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority”, 9:11 *German Law Journal* (2008) pp. 2013–2039.

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)⁵⁴ as well as to the recognition of the fundamentally “demoi-cratic” character of European integration (per Nicolaïdis).⁵⁵ Or, alternatively, as I would put it, because constitutional legitimacy is distributed *among* the constituted bodies of the Member States, supranational institutions remain “administrative, not constitutional”.⁵⁶ By this I mean that, even as European institutions exercise significant and often autonomous regulatory power, they exist in a political-cultural sense in a derivative, delegated, agency relationship with their polycentric constitutional principles on the national level. 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.⁵⁷

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.⁵⁸ 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

⁵⁴ Weiler, “In Defence of the Status Quo”, *supra* note 8.

⁵⁵ See, e.g., Nicolaïdis, “The Idea of European Demoicracy”, *supra* note 9; Nicolaïdis, “European Demoicracy and Its Crisis”, *supra* note 9.

⁵⁶ Lindseth, *supra* note 15, p. 53.

⁵⁷ See *supra* notes 21–24 and accompanying text.

⁵⁸ See, e.g., M. Rosenfeld, “Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity”, 32 *Cardozo Law Review* (2011) pp. 2339–2367; M. Rosenfeld, “The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics”, 33 *Cardozo Law Review* (2012) pp. 1937–1970.

examination.⁵⁹ If we recast the challenge of reconciling “government” and “governance” as one of reconciling strongly-legitimated democratic and constitutional “government” and diffuse and fragmented administrative “governance”, then European integration becomes, in important respects, a “new dimension to an old problem”.⁶⁰

The core of that problem is “delegation” (or “conferral” as it is now called in the European treaties).⁶¹ 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.⁶² 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.⁶³ Giandomenico Majone’s effort to capture the sometimes extreme independence of certain agents by introducing the sub-category of “trustee” is analytically helpful.⁶⁴ But it also risks

⁵⁹ This approach has admitted affinity to the groundbreaking work of Giandomenico Majone. See G. Majone, “The European Community: An ‘Independent Fourth Branch of Government?’”, in G. Brüggemeier (ed.), *Verfassungen für ein ziviles Europa* (Baden-Baden, Germany: Nomos, 1994), p.23. 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 G. Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards”, 4:1 *European Law Journal* (1998), pp. 5–28. 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 Lindseth, “Democratic Legitimacy”, *supra* note 16, pp. 657–59, 684–91, and 696; Lindseth, *supra* note 15, pp. 36–37; see also *infra* notes 61–70 & 92–105 and accompanying text.

⁶⁰ Lindseth, “Democratic Legitimacy”, *supra* note 16, p. 630.

⁶¹ See Articles 5 TEU and 7 TFEU.

⁶² See generally J. Sheehan, “Presidential Address: The Problem of Sovereignty in European History”, 111:1 *American Historical Review* (2006) pp. 1–15.

⁶³ See Lindseth, *supra* note 15, pp. 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., D. Curtin, “Holding (Quasi-)Autonomous EU Administrative Actors to Public Account”, 13:4 *European Law Journal* (2007) pp. 524–525. For reflections on the continuing limited capacities of principals to exercise “control” over agents in modern administrative states, see M. Thatcher, “The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe”, 18:3 *Governance* (2005) pp. 347–373; see also M. Thatcher and A. Stone Sweet, “Theory and Practice of Delegation in Non-Majoritarian Institutions”, 25:1 *West European Politics* (2002) p. 6 (discussing how, in situations of administrative complexity, “the analyst cannot assume that principals can control agents”).

⁶⁴ See G. Majone, “Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance”, 2 *European Union Politics* (2001), pp.103–22.

diverting attention from the need to explore the complex, historically constructed character of principal-agent relationships in European governance.⁶⁵ 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.⁶⁶ Such disaggregated governance did not emerge only recently, as a consequence of globalization, as Anne-Marie Slaughter has suggested.⁶⁷ 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” bodies of representative government on the national level, including to both IOs and supranational bodies in the EU.⁶⁸

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”.⁶⁹ In the context of European integration, reliance on such looser 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.⁷⁰ Oversight (but not necessarily control) by national constitutional bodies—executive, legislative,

⁶⁵ See, e.g., *infra* notes 92-105 and accompanying text

⁶⁶ See W. Novak, “The Myth of the ‘Weak’ American State”, 113 *American Historical Review* (2008) p. 763; cf. also C. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade after World War I* (Princeton, N.J.: Princeton University Press, 1975), and M. Lodge, “Regulation, the Regulatory State and European Politics”, 31:1–2 *West European Politics* (2008) p. 285.

⁶⁷ See A.-M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

⁶⁸ For a description, see Lindseth, *supra* note 17.

⁶⁹ P. Lindseth *et al.*, *Administrative Law of the European Union: Oversight*, G. Bermann, C. Koch, and J. O’Reilly (eds.) (Chicago, IL: ABA Publishing, 2008); see also P. Strauss, “Forward: Overseer, or ‘the Decider’? The President in Administrative Law”, 75 *George Washington Law Review* (2007) pp. 696–760.

⁷⁰ Cf. G. Eley, “The Social Construction of Democracy in Germany, 1871-1933”, in G. Andrews and H. Chapman (eds.), *The Social Construction of Democracy, 1870-1990*, (New York: New York University Press, 1995), p. 110 (referring to “the constitutional frameworks fashioned [throughout Europe] in the 1860s” as “remarkably resilient”).

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 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 27 member states.⁷¹ 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.⁷² By contrast, the historical-constructivist understanding of the EU as a denationalized form of administrative governance is deeply cautious about such engineering and instead stresses the ultimate need for constraints on the scope of authority delegable to the supranational level. Such constraints are something that the legal literature on integration largely ignores, although they are arguably implicit in both Weiler’s conceptions of European equilibrium/constitutional tolerance as well as Nicolaïdis’s notion of the EU as a demoi-cracy.⁷³

The purpose of such 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.⁷⁴ Without such limits on delegation (and even often with them), the danger is of a kind of

⁷¹ Lindseth, *supra* note 15, pp. 253–256.

⁷² See *supra* note 41 and accompanying text; see also Lindseth, *supra* note 14, pp. 155–156.

⁷³ But see K. Nicolaïdis, “Conclusion: The Federal Vision Beyond the State”, in K. Nicolaïdis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford; New York: Oxford University Press, 2001), p. 439 (analogously suggesting the need for such constraints, albeit within a conceptual framework of federalism beyond the state).

⁷⁴ For further elaboration of this point in relation to integration, see P. Lindseth, “Author’s Reply: ‘Outstripping’, or the Question of ‘Legitimate for What?’ in EU Governance”, 8:1 *European Constitutional Law Review (EuConst)* (2012), p.153–164.

Weberian nightmare—supranational technocratic domination without the possibility of any kind of legitimation via representative government.⁷⁵ I take up this idea in greater detail in the next section, as part of the discussion of the relationship between the administrative interpretation and Nicolaïdis’s demoi-cratic theory more specifically.

3. From a Constructivist History of Administrative “Delegation” to a “Demoi-cratic” Theory of the European Project

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”,⁷⁶ Nicolaïdis has been acutely aware of the polycentric (she would say “multicentred”)⁷⁷ character of the European system. She thus questions the dominant image of verticality in European integration (decisions made “*by* Brussels”)⁷⁸ in favor of one stressing “horizontal transfers of sovereignty between demoi and their representative institutions”⁷⁹ (i.e., decisions made “*in* Brussels as well as elsewhere around Europe”).⁸⁰ The purpose of such transfers (or “delegations” to use the administrative term) is cooperation and coordination among constitutional principles—i.e., national “demoi and their representative institutions”—and not to realize a vertical, state-like system.

For this reason Nicolaïdis concludes, for both practical and normative reasons, that European integration depends crucially on legitimacy mediated through national constitutional bodies.⁸¹ As she puts it: “Europe’s demoicracy operates in the shadow of national representative democracy, with indirect accountability as its primary focus”.⁸²

⁷⁵ Lindseth, *supra* note 15, p. 264.

⁷⁶ Nicolaïdis, “The Idea of European Demoicracy”, *supra* note 9, p. 248.

⁷⁷ Nicolaïdis, “The New Constitution as European ‘Demoi-cracy?’”, *supra* note 9, p. 85; Nicolaïdis, “We, the Peoples of Europe . . .”, *supra* note 9, p. 104.

⁷⁸ Nicolaïdis, “The New Constitution as European ‘Demoi-cracy?’”, *supra* note 9, p. 85 (emphasis in original).

⁷⁹ Nicolaïdis, “The Idea of European Demoicracy”, *supra* note 9, p. 270.

⁸⁰ Nicolaïdis, “The New Constitution as European ‘Demoi-cracy?’”, *supra* note 9, p. 85 (emphasis in original).

⁸¹ See Nicolaïdis, “European Demoicracy and Its Crisis”, *supra* note 9, p. 364 (“*Guiding Principle 6 (Mediation): In a Demoicracy, the Enforcement of Common Disciplines Requires Strong, Legitimate Domestic Mediation*”) (emphasis in original).

⁸² *Ibid.*, p. 364.

Nicolaïdis further recognizes that “democratic legitimacy cannot be separated from identification if not identity”.⁸³ 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”.⁸⁴ Hence, therefore, the ultimate impetus behind much of European cooperation is functional: It is “a community of projects, not a community of identity”.⁸⁵

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”.⁸⁶ Similarly, an administrative interpretation of integration—particularly in its emphasis on historically constructed delegation, shared oversight, and mediated legitimacy among multiple constitutional principles—is formulated in opposition not only to European federalists/constitutionalists but also hard-core Eurosceptics.⁸⁷ The former are inclined to reject the administrative interpretation because, by stressing the role of shared oversight among constitutional principals at the national level, it reflects the EU’s distance from attaining an autonomous constitutional legitimacy of a supranational “federal” government, unmediated through the member states. Eurosceptics also find the administrative perspective objectionable, however, because the shared national oversight essential to integration can never satisfy the expectation of outright “control” that Eurosceptics (wrongly) assume is true even within the modern administrative state. That the resulting institutional apparatus leaves both European federalists/constitutionalists and Eurosceptics unsatisfied may be an indication that the EU, qua system of supranational administrative governance, strikes a pragmatic balance between the needs of integration, on the one hand, and the preservation of some political-cultural semblance of democratic sovereignty on the national level, on the other.

⁸³ Nicolaïdis, “Germany as Europe”, *supra* note 9, p. 790.

⁸⁴ Nicolaïdis, “The Idea of European Demoi-cracy”, *supra* note 9, p. 256.

⁸⁵ Nicolaïdis, “We, the Peoples of Europe . . .”, *supra* note 9, p. 102.

⁸⁶ Nicolaïdis, “European Demoi-cracy and Its Crisis”, *supra* note 9, p. 353.

⁸⁷ This paragraph draws from Lindseth *et al.*, *supra* note 69, p. 142.

The central instrument of that pragmatic balance is the member states' delegation of disciplinary and regulatory power to designated agents on the supranational level, to make coordination and cooperation among dispersed constitutional principles a functional reality and not just a legal fiction. However, as Nicolaïdis has also stressed, here clearly echoing Weiler, this delegation is "voluntary and differentiated rather than essentialist and holistic",⁸⁸ referring to 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 democracy 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".⁸⁹ 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".⁹⁰ 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.⁹¹

The interesting question from a historical perspective (one that my constructivist framework seeks to bring to the surface)⁹² is this: What antecedent legal- and political-

⁸⁸ Nicolaïdis, "We, the Peoples of Europe . . .", *supra* note 9, p. 104; *see also* Weiler, "In Defence of the Status Quo", *supra* note 8, p. 23.

⁸⁹ Nicolaïdis, "The Idea of European Democracy", *supra* note 9, p. 265, citing Weiler, "The Transformation of Europe", *supra* note 8.

⁹⁰ B. de Witte, "Sovereignty and European Integration: The Weight of Legal Tradition", in A.-M. Slaughter, A. Stone Sweet, and J. Weiler (eds.), *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in Its Social Context*, (Oxford: Hart, 1998), p. 303.

⁹¹ *See* Weiler, "In Defence of the Status Quo", *supra* note 8, p. 9 (referring to the "bottom-to-top hierarchy of authority and real power", i.e., legitimacy, in European integration).

⁹² Lindseth, *supra* note 15, pp. 54–55.

cultural developments in Europe made this voluntary delegation/pre-commitment possible? What was, in other words, its constructivist “logic of appropriateness”?⁹³

Demoi-cratic theory points to the standard explanation, in which integration “resulted from a unique historical context”, i.e., 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”.⁹⁴ This explanation—based as it is on the catastrophe of 1914-1945 as well as the emergence of the United States as Western Europe’s protector thereafter—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 by which this taming was made possible.⁹⁵

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, a period of “significant acceleration” in administrative governance, to borrow the words of Sabino Cassese.⁹⁶ The first was the ascendancy of centralized elected assemblies (parliaments and the like), which became the core institutions of “representative government” in democratizing nation-states of

⁹³ J. March and J. Olsen, “The Logic of Appropriateness”, Centre for European Studies, University of Oslo, ARENA Working Papers, WP 04/09 <www.arena.uio.no/publications/wp04_9.pdf> visited on 3 July 2009.

⁹⁴ Nicolaïdis, “European Demoicracy and Its Crisis”, *supra* note 9, p. 360.

⁹⁵ Cf. E. Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge, MA: Belknap Press, 2005); and E. Borgwardt, “Re-examining Nuremberg as a New Deal Institution: Politics, Culture, and the Limits of Law in Generating Human Rights Norms”, 23 *Berkeley Journal of International Law* (2005), pp. 401–462; *see also* Lindseth, *supra* note 15, p. 153.

⁹⁶ S. Cassese, “The Rise of the Administrative State in Europe”, 60:4 *Rivista Trimestrale di Diritto Pubblico* (2010) p. 981.

the North Atlantic in the nineteenth century.⁹⁷ (Of course, full democratization, defined in terms of extension of suffrage to all adult citizens equally, regardless of economic status, religion, race, or gender, would only come much later.)⁹⁸ The second in some sense emerged out of the first and was born of the growing recognition over 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”.⁹⁹ 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.¹⁰⁰

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 and 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

⁹⁷ Cf. Eley, *supra* note 57, pp. 106–115.

⁹⁸ For a useful summary for Europe, see C. Tilly, *Contention and Democracy in Europe, 1650-2000* (New York: Cambridge University Press, 2003), pp. 213–217 (“A Rough Map of European Democratization”).

⁹⁹ J. Landis, *The Administrative Process* (New Haven; London: Yale University Press; Oxford University Press, 1938), p. 1.

¹⁰⁰ For a suggestive overview of trans-Atlantic developments in “social politics”, see D. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998). For corresponding shifts in law and legal thought, cf. D. Kennedy, “Three Globalizations of Law and Legal Thought: 1850-1968”, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: a Critical Appraisal* (Cambridge; New York: Cambridge University Press, 2006) p.19. On the complex interplay between democratization, regulation, and administration in modern societies, see also P. Rosanvallon, *L’Etat en France de 1789 à Nos Jours* (Paris: Seuil, 1990), pp. 276–280. 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 B. Kingsbury *et al.*, “The Emergence of Global Administrative Law”, *Law and Contemporary Problems* 68 (2005) pp. 15–61; S. Cassese, “What Is Global Administrative Law and Why Study It?”, in S. Cassese, *et al.*, *Global Administrative Law: An Italian Perspective*, Robert Schuman Centre for Advanced Studies, Global Governance Programme, RSCAS Policy Paper 2012/04, p. 1 <www.cadmus.eui.eu/bitstream/handle/1814/22374/RSCAS_PP_2012_04.pdf?sequence=1>, visited on 17 August 2013; see also J. Cohen and C. Sabel, “Directly-Deliberative Polyarchy”, 3:4 *European Law Journal* (1997) pp. 767–768. For a critique of this approach, see *infra* nn.117-119 and accompanying text.

constitutional *triumph* after a period of extraordinary upheavals.¹⁰¹ It is this constitutional achievement that the administrative perspective on integration (now understood within a broader framework of constitutional tolerance and demoi-cracy) 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 the parliament as the strongly-legitimated constitutional principal inherited from the nineteenth century. The legislature would 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.

This process of settlement, however, was not static; indeed, it continues to this day both 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 (and below) 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.¹⁰²

¹⁰¹ See generally Lindseth, “The Paradox of Parliamentary Supremacy”, *supra* note 16; see also Lindseth, *supra* note 15, ch. 2.

¹⁰² 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, pp. 13–14.

But again, it must be stressed: this sort of mediated legitimacy (essential, I would say, to both equilibrium/democracy as well as the administrative perspective) does not mean *control*, or at least not necessarily.¹⁰³ Whether cast in terms of administrative “delegation” or democratic “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 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 clearly the case 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 great 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;¹⁰⁴ and it is also perhaps the most important value-added of the administrative perspective for equilibrium and democratic theory, particularly with regard to advancing our understanding the role of national high courts in policing the bounds of constitutionally acceptable delegation.¹⁰⁵ 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.¹⁰⁶

¹⁰³ See *supra* notes 63-70 and accompanying text.

¹⁰⁴ See *generally* Lindseth, *supra* note 28.

¹⁰⁵ See *generally* Lindseth, *supra* note 15, ch.4.

¹⁰⁶ *Carlsen and Others v. Rasmussen*, case no. I-361/1997 of 6 April 1998, 1998 *UfR* 800, reprinted in Andrew Oppenheimer, *The Relationship Between European Community Law and National Law: The Cases*, 2 Vols. (Cambridge ; New York: Cambridge University Press, 1994/2003), vol. 2, p. 191.

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—that is, a better definition of 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.¹⁰⁷ What an administrative perspective on integration highlights is the legal-historical underpinnings of these delegation constraints and, in this way, makes the distinction between legitimating oversight and outright control more intelligible. Mere “oversight” is an acceptable means of legitimation *within* those domains that are understood as amenable to delegation under the postwar constitutional settlement (dynamically evolving, of course). Only when delegation moves *beyond* those domains does the need for genuine democratic and constitutional “control” kick in; i.e., in those domains where transfer of authority is understood to threaten the continuing democratic character of the state itself.

This perspective helps to explain some of the most notorious (particularly German) judicial decisions on European integration,¹⁰⁸ especially in their articulation of the so-called *Demokratieprinzip* in the context of the Eurozone crisis. In my reading of the German decisions arising out of the crisis¹⁰⁹ (admittedly as an outsider, always subject to correction), the *Demokratieprinzip* has both a substantive and procedural dimension. The former seeks to define the outer bounds of constitutionally permissible delegation, generally defined in terms of maintaining the national parliament’s budgetary autonomy.¹¹⁰ The latter focuses on the nature of national — particularly

¹⁰⁷ See Lindseth, *supra* note 15, pp. 86–87, 133–134, 184–185.

¹⁰⁸ See generally *ibid.*, ch.4.

¹⁰⁹ *Greek Bailout Decision*, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, 7 September 2011, <www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html>, visited on 17 August 2013 (2011); *Bundestag Right of Participation/EFSF*, 2 BvE 8/11, 28 February 2012, <www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-014en.html> visited 17 August 2013; *Bundestag Right of Information ESM/Euro Plus Pact*, 2 BvE 4/11, 19 June 2012, <www.bundesverfassungsgericht.de/en/press/bvg12-042en.html> visited on 17 August 2013 (2012); *Rejection of Temporary Injunctions ESM/Fiscal Compact*, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, 12 September 2012, <www.bundesverfassungsgericht.de/en/press/bvg12-067en.html> visited 17 August 2013.

¹¹⁰ See, in particular, the *Greek Bailout Decision*, *supra* note 95, para.124 (“if supranational legal obligations were created without a corresponding decision by the free will of the Bundestag, then the

parliamentary — oversight which is constitutionally mandated in order to legitimize otherwise delegable powers.¹¹¹ In my view, as I have stressed elsewhere, this German jurisprudence in fact expresses more general principles regarding the relationship between democracy and delegation that should be available to any national high court in a demoi-cratic (i.e., administrative) Europe, not just in the “core” but also in the “periphery”.¹¹²

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.¹¹³ 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. 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”.¹¹⁴ I would submit that the *Demokratieprinzip*, in both its substantive and procedural dimensions, should be viewed precisely as one of those demoi-cratic defense

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.

¹¹¹ See especially *Bundestag Right of Participation/EFSF*, *supra* note 95; and *Bundestag Right of Information ESM/Euro Plus Pact*, *supra* note 95.

¹¹² P. Lindseth, “Greek ‘Sovereignty’ and European ‘Democracy’—a Bit of a Walk-back, Due to Some ‘Colossal’ Concerns”, *EUTopialaw.com*, 15 February 2012, <www.eutopialaw.com/2012/02/15/greek-sovereignty-and-european-democracy-a-bit-of-a-walk-back-due-to-some-colossal-concerns/> visited 17 August 2013.

¹¹³ Nicolaïdis, “The Idea of European Demoicracy”, *supra* note 9; Nicolaïdis, “European Demoicracy and Its Crisis”, *supra* note 9.

¹¹⁴ Nicolaïdis, “The Idea of European Demoicracy”, *supra* note 9, p. 265.

mechanisms (or what I have called elsewhere “resistance norms”)¹¹⁵ against the dangers of supranational-technocratic overreach. Jurisprudentially, what is 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,¹¹⁶ she extensively explores both the procedural and substantive constraints on technocracy needed to legitimize the regulatory output of such regimes. Although in this context Nicolaïdis and Shaffer came to the conclusion that an increase in accountability through traditional administrative law mechanisms would be adequate (they were writing as part of the then-nascent Global Administrative Law (GAL) project), they 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”.¹¹⁷

In my experience, the heart of the “administrative law construct” is fundamentally *about democracy*, as I always tell my students on the first day of the semester in administrative law. Thus, I have also found the apparent “reluctance and constraint” that Nicolaïdis and Shaffer perceive in GAL to be puzzling. Nicolaïdis and Shaffer were reacting not to an “administrative law construct” per se but rather to a version of that construct that has manifested itself in the work of those seeking to advance the idea of a “global” administrative law. The GAL perspective may be, to borrow a phrase from Alexander Somek, a world of “administration without sovereignty”,¹¹⁸ in which administrative governance is analyzed as a functionally

¹¹⁵ See Lindseth, *supra* note 15, pp. 47-48. I owe this concept to E. Young, “Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review”, 78 *Texas Law Review* (2000), pp. 1549–1614.

¹¹⁶ K. Nicolaïdis and G. Shaffer, “Transnational Mutual Recognition Regimes: Governance Without Global Government”, 68:3/4 *Law and Contemporary Problems* (2005) pp. 263–317.

¹¹⁷ *Ibid.*, p. 314 (emphasis in original).

¹¹⁸ A. Somek, “Administration Without Sovereignty”, in *The Twilight of Constitutionalism*, P. Dobner and M. Loughlin (eds.) (Oxford; New York: Oxford University Press, 2010) p.267.

autonomous reality without reference to 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 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. That reconciliation is accomplished not merely through procedural mechanisms to promote technocratic accountability—arguably the GAL focus. It is also through the antecedent constitutional definition of the proper boundaries between democracy and administration / legislation and regulation / government and governance—that is, the proper scope of “delegation” in a modern regime that we still struggle to experience as “democratic”.¹¹⁹

4. Beyond Theory: Possible Contributions of an Administrative Perspective to the Mechanics of Sustainable Demoi-cratic Governance in Europe

The question of delegation constraints in European 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 more generally. 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.¹²⁰ 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.¹²¹

¹¹⁹ See generally Lindseth, *supra* note 51.

¹²⁰ Nicolaïdis, “The Idea of European Demoicracy”, *supra* note 9; Nicolaïdis, “European Demoicracy and Its Crisis”, *supra* note 9; see also Nicolaïdis, “Sustainable Integration”, *supra* note 9.

¹²¹ “Understanding the EU and its Crisis through the Lens of Demoicracy: A Conversation”, NYU Law School, 7-8 March 2013.

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.¹²² Indeed, one specific means for “ensur[ing] *democratically* sustainable integration”,¹²³ according to Nicolaïdis, is mediated legitimacy: “National 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”.¹²⁴ Although she might define mediated legitimacy more broadly than I would (moving beyond historically “constituted” bodies *per se*), the overlap between our views nevertheless 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.¹²⁵ What follows is a brief overview of issues on which demoi-cratic and administrative theorists of integration might collaborate in the future.

Consider, first, 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 made a cornerstone of his analysis of integration.¹²⁶ An EU “constitutionalist” might point out that what Americans call the nondelegation doctrine “has not proven a full-fledged workable doctrine of containment” of technocratic power even in the United States.¹²⁷ This point ignores the fact that delegation constraints are generally much more vigorously enforced on the national level in Europe than in the US.¹²⁸ More importantly, it ignores how

¹²² See generally Nicolaïdis, “Sustainable Integration”, *supra* note 9.

¹²³ Nicolaïdis, “European Demoicracy and Its Crisis”, *supra* note 9, p. 364 (emphasis added).

¹²⁴ *Ibid.*

¹²⁵ P. Lindseth, “‘Demoicracy’ Follow-up: Reflections on the Legal and Institutional Implications of the Concept”, *Europæus/law*, 19 March 2013, <www.europaeuslaw.blogspot.com/2013/03/demoicracy-follow-up-reflections-on.html>, visited on 17 August 2013.

¹²⁶ Weiler, “The Community System”, *supra* note 8; Weiler, “The Transformation of Europe”, *supra* note 8. See also Lindseth, *supra* note 17.

¹²⁷ D. Halberstam, “Rescue Package for Fundamental Rights: Comments by Daniel Halberstam”, *Verfassungsblog*, 22 February 2012, <www.verfassungsblog.de/de/rescue-package-for-fundamental-rights-comments-by-daniel-halberstam/>, visited on 17 August 2013.

¹²⁸ U. Kischel, “Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law”, 46 *Administrative Law Review* (1994) p. 239 (“the striking down of statutes on delegation grounds [in Germany] is considered a normal event that frequently occurs”). See also Lindseth, *supra* note 15, p. 134.

constitutional delegation constraints in the US do not merely operate as a basis for a frontal attack but as a canon of construction in the face of interpretations that raise nondelegation concerns.¹²⁹ The use of nondelegation as an interpretive principle reflects a constitutional preference for interpretations of positive law that seek to ground fundamental normative decisions in representative institutions. In the integration context, given the polycentric distribution of ultimate legitimacy in representative institutions on the national level, the use of nondelegation as an interpretive constraint thus becomes emphatically a demoicratic principle as well.

Consider also subsidiarity, which demoicratic theory, like the administrative interpretation, also identifies as crucial to achieving balance in the integration process.¹³⁰ I have long argued that, from an administrative perspective, the European courts should regard subsidiarity as an interpretive principle akin to the nondelegation doctrine in the US, the aim being to avoid open-ended transfers of normative power to the weekly-legitimated institutions of European governance on the supranational level.¹³¹ Unfortunately, the subsidiarity jurisprudence of the European Court of Justice is, to put it bluntly, an embarrassment.¹³² It has consistently ignored demands from the member states for more vigorous enforcement, if not on substantive grounds, then at least on procedural ones.¹³³ 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.¹³⁴ This would aim at verifying “whether the institutions themselves examined the possibility of alternative remedies at

¹²⁹ See P. Lindseth, “Rescue Package for Fundamental Rights: Further Comments from Peter Lindseth”, *Verfassungsblog*, 28 February 2012, <www.verfassungsblog.de/de/rescue-package-for-fundamental-rights-further-comments-from-peter-lindseth/>, visited on 17 August 2013., citing C. Sunstein, “Nondelegation Canons”, *University of Chicago Law Review* 67 (2000) pp.315–343; J. Manning, “The Nondelegation Doctrine as a Canon of Avoidance”, 2000 *The Supreme Court Review* (2000) pp. 223–277.

¹³⁰ See, e.g., Nicolaïdis, “European Democracy and Its Crisis”, *supra* note 9, p. 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”).

¹³¹ Lindseth, “Democratic Legitimacy”, *supra* note 16, p. 641.

¹³² For a discussion, see Lindseth, *supra* note 15, pp. 197–198.

¹³³ See *ibid.*, pp. 198–201.

¹³⁴ Lindseth, “Democratic Legitimacy”, *supra* note 16, pp. 717–118; Lindseth, *supra* note 15, p. 196.

or below the Member State level”,¹³⁵ rather than providing judges the opportunity to substitute their own judgment for that of political decision makers.

Consider, as well, 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.¹³⁶ There was even a time when some commentators regarded such reforms as a possible non-hierarchical means of “constitutionalizing” the EU.¹³⁷ Charles Sabel and his many co-authors have made these sorts of procedures the cornerstone of their concept of “directly-deliberative polyarchy”,¹³⁸ which they cast as a “radical, participatory democracy with problem-solving capacities useful under current conditions and unavailable to representative systems”.¹³⁹ These academic musings aside, the key point is this: Proposals for greater transparency and participation read like they are drawn from a treatise in modern administrative law precisely because their object is an essentially administrative—in the sense of delegated and derivative—rulemaking system (the EU).¹⁴⁰ Perhaps more importantly from a demoi-cratic perspective, transparency and participation rights in supranational policy processes reinforce democratically legitimate oversight by representative government on the national level—i.e., mediated legitimacy—by reducing information costs and allowing traditional democratic principles to more effectively oversee their increasingly far-flung

¹³⁵ G. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States”, 94 *Columbia Law Review* (1994) p. 391.

¹³⁶ See, e.g., F. Bignami, “The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology”, 40 *Harvard International Law Journal* (1999) pp. 451–515.

¹³⁷ C. Joerges and J. Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, 3:3 *European Law Journal* (1997) pp. 273–299; M. Everson, “The Constitutionalization of European Administrative Law: Legal Oversight of a Stateless Internal Market”, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999) p.281.

¹³⁸ C. Sabel and J. Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, 14:3 *European Law Journal* (2008) pp. 313–315; C. Sabel and W. Simon, “Epilogue: Accountability Without Sovereignty”, in G. De Burca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford; Portland, OR: Hart Publishing, 2006), p. 402.

¹³⁹ Cohen and Sabel, *supra* note 100, p. 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, p. 260.

¹⁴⁰ Lindseth, “‘Weak’ Constitutionalism?”, *supra* note 16, p. 157.

administrative agents, whether within or beyond the state.¹⁴¹ 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.¹⁴²

Consider, finally, the question of conflicts between the national and supranational legal orders, i.e., the knotty issue of *Kompetenz-Kompetenz*. Notably through the work of Christian Joerges,¹⁴³ we are increasingly appreciating European legal integration in terms of the conflict of laws. Here too there is a potential administrative-law analogue from which demoi-cratic theory might draw: a European Conflicts Tribunal (ECT) inspired by the *Tribunal des conflits* in the French system.¹⁴⁴ The 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.¹⁴⁵ The differences between the two proposals, however, are not merely semantic but also jurisdictional and remedial.¹⁴⁶ From an administrative perspective, private parties should have standing to invoke the jurisdiction of the ECT. Additionally, subject to an administrative-style “exhaustion of remedies” requirement (demanding a decision of 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 an essential “political” check in the process.

For some observers, this sort of political 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

¹⁴¹ See generally Lindseth, *supra* note 15, pp. 261–262.

¹⁴² *Ibid.*, pp. 199–201.

¹⁴³ See, e.g., C. Joerges, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, LEQS Paper No. 28, 1 April 2013, <papers.ssrn.com/sol3/papers.cfm?abstract_id=1723249>, visited on 17 August 2013.

¹⁴⁴ For the most complete outline of the proposal, see Lindseth, “Democratic Legitimacy”, *supra* note 16, pp. 726–734.; for a more abbreviated discussion, see Lindseth, *supra* note 15, pp. 275–277.

¹⁴⁵ See, e.g., Weiler and Trachtman, *supra* note 30, pp. 391–392; J.H.H. Weiler, “The Reformation of European Constitutionalism”, 35 *Journal of Common Market Studies* (1997) p. 127.

¹⁴⁶ See Lindseth, “Democratic Legitimacy”, *supra* note 16, pp. 729–734.

legitimacy and therefore “sustainable integration”.¹⁴⁷ As the late Neil MacCormick recognized, “not all legal problems can be solved legally” and that 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”.¹⁴⁸ Or 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”.¹⁴⁹ 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”.¹⁵⁰

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”.¹⁵¹ But so too is modern administrative governance, properly understood. 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 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

¹⁴⁷ Cf. Nicolaïdis, “Sustainable Integration”, *supra* note 9.

¹⁴⁸ N. MacCormick, “The Maastricht-Urteil: Sovereignty Now”, 1:3 *European Law Journal* (1995) p. 265.

¹⁴⁹ Nicolaïdis, “Germany as Europe”, *supra* note 9, p. 791.

¹⁵⁰ *Ibid.*

¹⁵¹ Nicolaïdis, “Sustainable Integration”, *supra* note 9, p. 41.

instruments of democratic and constitutional legitimacy in the face of functional pressures to diffuse and fragment regulatory power in the administrative state. On the other hand, the postwar settlement necessarily needed to constrain the power of these very same parliaments in order to achieve this strengthening; that is, it needed to prohibit 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 imperilled 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 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.¹⁵²

European democracy builds on a similar paradox. As Nicolaïdis put it recently: “Paradoxically, the transformative logic of European democracy . . . owes its radical nature to the conservative refusal to do away with the core tenet of nation-state-based democracy”.¹⁵³ And it is through this refusal that Nicolaïdis sees the potential for integration to act, 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”.¹⁵⁴ In short, 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. To succumb to those demands unreflectively, to allow regulatory power to be delegated to an unlimited extent, is in fact to imperil the essential “equilibrium” that Weiler long ago perceived as the essential foundation of integration.

¹⁵² See Lindseth, *supra* note 28, p. 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”).

¹⁵³ Nicolaïdis, “The Idea of European Democracy”, *supra* note 9, p. 274.

¹⁵⁴ Nicolaïdis, “Sustainable Integration”, *supra* note 9, p. 41.

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”.¹⁵⁵ This blithe dismissal of the European nation-state as a political-cultural locus of self-government constitutes 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. Perhaps 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,¹⁵⁶ is effectively to “turn ‘unity in diversity’ into the core normative basis for sustainable integration”.¹⁵⁷ So too, I would submit, is the purpose of the administrative character of European governance: It has been through the adaptation of the legitimating mechanisms and normative principles of the postwar constitutional settlement that Europe has arguably found its way, pragmatically, to an institutional formula that conforms to the aspiration of unity-in-diversity. Unity is achieved by way of shared institutions whose character is fundamentally administrative, in the sense of operating on behalf of a set of polycentric constitutional principles on the national level, in a nevertheless 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.¹⁵⁸ Diversity is preserved, however, precisely

¹⁵⁵ Habermas, “Democracy, Solidarity and the European Crisis”, *supra* note 2.

¹⁵⁶ See, e.g., Weiler, “The Community System”, *supra* note 8, p. 293.

¹⁵⁷ Nicolaïdis, “Sustainable Integration”, *supra* note 9, p. 47.

¹⁵⁸ See *supra* notes 27-29 and accompanying text.

because ultimate legitimation (if not control) of this delegated system of regulatory power remains in the polycentric “constituted” bodies of self-government on the national level, whether executive, legislative, or judicial. In this way, European public law is struggling to find a way to reconcile the disconnect between regulatory power and democratic and constitutional legitimacy, and to maintain the connection to strong expressions of democratic self-rule on the national level in what is otherwise, functionally, a multilevel and, indeed, a multipolar system of administrative governance.

