



# Reflections on the ‘Administrative, Not Constitutional’ Character of EU Law in Times of Crisis

by

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## Abstract

As is broadly recognized, the realm of administrative power greatly expanded over the course the twentieth century (particularly after 1945). This essay argues that this expansion, along with differential conceptions of legitimacy deeply bound up with it, are crucial to understanding not just the modern administrative state but also the nature of EU governance and the law governing its operation. Despite a dominant paradigm that seeks to understand EU governance in autonomously democratic and constitutional terms, the legitimacy of integration as a whole has remained primarily ‘administrative, not constitutional’. The EU’s normative power, like all power of an ultimately administrative character, finds its legitimacy primarily in legal, technocratic and functional claims. This is not to deny that European integration involves ‘politics’ or has profound ‘constitutional’ implications for its member states or citizens. The ‘administrative, not constitutional’ paradigm is meant only to stress that the ultimate grounding of EU rulemaking, enforcement, and adjudication comes closer to the sort of administrative legitimacy that is mediated through national executives, national courts, and national parliaments to a much greater extent than the dominant paradigm supposes. This is the reality that the ‘administrative, not constitutional’ paradigm on EU law has always sought to emphasize, and it is one that is particularly pertinent to the integration process in times of crisis. It is unsurprising, in these circumstances, that the public law of European integration has continually resorted to mechanisms of nationally mediated legitimacy in order to ‘borrow’ legitimacy from the national level. Unless and until Europeans begin to experience democracy and constitutionalism in supranational terms, the ‘administrative, not constitutional’ paradigm suggests that the EU’s judicial doctrines must be adjusted. The purpose should be to address the persistent disconnect between supranational regulatory power and its robust sources of democratic and constitutional legitimacy on the national level.

## Keywords

administrative power, democracy, constitutionalism, EU governance, mediated legitimacy



## Introduction

Allow me to ask the reader to reflect for a moment, by way of introduction, on the differences between the legitimacy of a ‘constitutional’ legislature (say, a national parliament) and that of a merely ‘administrative’ body (say, an executive department or, in more recent times, an independent agency). In modern governance, both types of institutions are generally experienced as legitimate producers of rules of general and prospective application, albeit in different contexts and under different constraints. The rules produced by administrative bodies are, legally at least, generally experienced as inferior to, indeed even dependent upon, the rules produced by legislatures. For lawyers, this is a straightforward question of the hierarchy of norms. But behind that sense of normative hierarchy is in fact a complex socio-historical phenomenon of legitimacy that is anything but straightforward. The rules produced by administrative bodies—‘regulations’, ‘ordinances’, ‘statutory instruments’, as the case may be—may in the lawyer’s mind be self-evidently subordinate to ‘legislation’. But we also know that, as an historical matter, the realm of administrative power greatly expanded over the course the twentieth century (particularly after 1945), in a way that has significantly altered, and perhaps even diminished, the role of national parliaments. What do these broader socio-historical shifts suggest about the differential legitimacy of rulemaking in these different types of bodies, administrative and constitutional?

As this essay seeks to show, this question is crucial to understanding not just the modern administrative state but also the nature of EU governance and the law governing its operation. The emergence of the EU over the last six and a half decades presents a fascinating case study in legal and political change in which varying conceptions of legitimacy—administrative, democratic and constitutional—have played a crucial role. As a consequence, to understand the nature of EU governance and law we must confront the variable nature of legitimacy in more theoretical depth. In particular, we must pay special attention to *mediated legitimacy*, which serves as a bridge between the modern administrative state and European integration.



## 1. Administrative versus democratic and constitutional legitimacy

Let us begin with a schematic overview of the possible types of legitimacy of administratively produced norms as a way of exploring the variable character of legitimacy in modern governance more generally.

First, administratively produced norms are generally experienced as at least *legally* legitimate when they are understood to remain within the substantive and procedural constraints of the enabling legislation and the constitution. Furthermore, these norms are often experienced as *technocratically* legitimate when they are seen as the product of administrative expertise derived from informed evidence gathering and reason-giving (by contrast, norms produced by constitutional legislatures are not, generally speaking, subject to the same expertise-based constraints). Additionally, administrative rules are experienced as *functionally* legitimate in the face of the perceived incapacity of constitutional legislatures to produce norms of the scope and depth needed to address ‘modern problems’—a claim often used to justify delegations of normative and regulatory power to supposedly more capable administrative actors.<sup>1</sup> This functional necessity is also often at the heart of the willingness to confer normative *autonomy and independence* on administrative bodies, at least when the technocratic justification combined with the desire to insulate from ‘politics’ is also strong (factors felt acutely but not exclusively in the realm of central banking, for example).<sup>II</sup>

Despite the force of these alternative claims of administrative legitimacy—legal, technocratic, and functional—they have arguably not been sufficient to give legitimacy to administrative rulemaking along one final dimension: *democracy*. The national legislature remains the presumptive expression of this particular form of legitimacy, a privileged role derived from eighteenth and nineteenth century developments and often inscribed in the constitution itself. This is not a normative claim – regarding the nature of democracy in some idealized or scholarly conception – but rather a socio-historical one, about the manner in which people actually *experience* democracy in a pragmatic, if admittedly imperfect sense. Over the course of the twentieth century, increasingly plebiscitarian ‘chief executives’ (heads of state or government) undoubtedly became a competing source of this

sort of experiential democratic legitimation in many systems, particularly in providing hierarchical oversight or control within the burgeoning administrative sphere. Nonetheless, nearly all constitutional systems continue to reserve at least one core normative domain to the legislature: *the power to define the precise circumstances of compulsory societal mobilization*, whether human (defence or policing) or fiscal (taxing, spending, and borrowing). In this crucial domain, robust democratic and constitutional legitimacy via the historically ‘constituted’ legislature continues to be experienced as essential; mere administrative or even plebiscitarian executive legitimacy would not be enough. Courts and court-like bodies, like the French *Conseil d’Etat*, also play an important democratizing role here, by policing the constitutional boundary between democratic politics (legislative and executive) and the realm of administrative actors, while also defending individual rights.

## 2. Mediated legitimacy and the boundary between democratic politics and administrative power

We live, or at least hope we still live, in an age where democracy is the ultimate legitimating baseline of modern governance. Administrative norms are generally not experienced as *democratically* legitimate in themselves, particularly if they are produced with some measure of autonomy and independence from hierarchical political control. Moreover, even if not legally mandated (as with independent agencies), such autonomy is in some sense unavoidable, simply by virtue of bureaucratic density and complexity. Lacking democratic and constitutional legitimacy of their own, administratively produced norms are normally experienced as at best *derivative* of the legitimacy of democratic and constitutional institutions that reside elsewhere in the system.

The struggle to define a workable, pragmatic boundary between democratic politics and administrative power – one cognizant of our underlying socio-historical experiences but yet sensitive to the functional demands of modern governance – was in fact central to the evolution of public law in the North Atlantic world over the course of the twentieth century (Lindseth 2004). The great achievement of postwar governance was to develop an institutional and legal formula that, on the national level at least, could help to reconcile the growth of administrative governance with a historically recognizable, if evolving, experience of democratic self-government grounded in the classic *trias politica*, and notably

the elected legislature. Together the political summit of the executive, legislatures as well as courts and court-like review bodies each played a crucial role in legitimizing the output of the administrative sphere in democratic terms. The term of art that we can use to refer to this legal-historical reconciliation is the *postwar constitutional settlement of administrative governance*.

The essence of that settlement was this: even as functional and technocratic demands continued to impel ever greater delegations of normative power to administrative bodies, '[t]he branches of government that enjoyed constitutional legitimacy inherited from the past—whether democratic (i.e. executive or legislative) or judicial—became conduits through which the legitimacy of the new forms of administrative governance could be *mediated*' (Lindseth 2004:1415). How did mediated legitimacy work? Not necessarily through direct control, particularly where claims or simply the realities of administrative autonomy have been strong. In fact, autonomy is often the very purpose of delegation, if not also its inevitable side-effect, given the diffusion and fragmentation of normative power in modern governance. We must thus dispense with an idealized understanding of a 'Westphalian' principal with unbridled control over administrative agents or power to direct regulatory outcomes within a particular territory. This is an ahistoric reading of state sovereignty if there ever was one (see Sheehan 2006), as well as a caricature of the principal-agent relationship that is far from the actual historical reality. Instead, mediated legitimacy in modern administrative governance is more often accomplished through looser forms of supervision, coordination, or what an American administrative lawyer would call 'oversight' (see, e.g., Strauss 2007).

Mediated legitimacy and associated forms of oversight have been deeply bound up with the changing nature of public law under the postwar constitutional settlement. Public law has become less a system of rules demarcating seemingly clear lines between 'valid' and 'invalid' exercises of authority, as classical understandings of the *Rechtsstaat*, *l'Etat de droit*, or the Rule of Law might have demanded (cf. Young 2000:1594). Instead, public law has evolved toward something more focused on 'the allocation of burdens of reason-giving' (Somek 2004:58), or, as European scholars are increasingly calling it, 'accountability'. As Benz, Harlow, and Papadopoulos put it (2007:445), accountability is 'a process of communication in which information is transferred and reasons for policies discussed', which in turn serves as 'a significant institutional element of effective and legitimate



organisations...accepted by every discipline as an essential aspect of principal–agent theory’.

Such accountability mechanisms may be understood as a system of ‘resistance norms’, operating ‘as a “soft limit” which may be more or less yielding depending on the circumstances’, to borrow a powerful distinction first advanced by Ernest Young (2000:1504). Rarely do these norms prevent the exercise of delegated authority outright; rather, they serve to raise the costs to the agent of using that power (cf. Stephenson 2006, 2008), while having the added benefit of simultaneously reducing the information costs to the principal, thus enabling more effective oversight. In this way, oversight serves to maintain a legitimating connection between the burgeoning, often autonomous realm of administrative governance and the ‘paradigmatic function’ of the historical institutions of constitutional government—legislative, executive, and judicial—that we inherit from the past (Strauss 1987:493).

### 3. Relevance to the competing paradigms: the ‘administrative, not constitutional’ character of European integration

At this point, the reader may want to press the question: What do these various forms of legitimacy in modern administrative governance—most importantly *delegation constraints* and *mediated legitimacy*—have to do with the topic of this Special Issue: understanding the competing paradigms in EU law in times of crisis?

The answer is simple, even if the theoretical argument is ultimately complex: Despite a dominant paradigm that seeks to understand the EU in autonomously democratic and constitutional terms, the legitimacy of EU governance as a whole remains primarily ‘administrative, not constitutional’ (Lindseth 2010). The EU’s legitimacy, in other words, is derivative of the member states, *qua* constitutional ‘principals’, which choose to delegate regulatory and disciplinary power to EU institutions to act as its ‘agents’. This is not to deny that European integration involves ‘politics’ or has profound ‘constitutional’ implications for its member states or citizens (so too did the expansion of administrative power on the national level over the course of the twentieth century, by the way). Indeed, it is important to remember that the postwar constitutional settlement of administrative governance was a tremendous achievement after the catastrophe of 1914-45 (Lindseth



2004). The ‘administrative, not constitutional’ label is meant only to stress that the legitimacy of EU rulemaking, enforcement, and adjudication comes closer to the sort of administrative legitimacy that is mediated through national executives, national courts, and national parliaments to a much greater extent than is commonly supposed. In that respect, European integration can be said to build upon the postwar constitutional settlement, even as it also disrupts it in significant ways, by virtue of seeking to translate that settlement into workable supranational terms.

The strongest indicator of the EU’s lack of autonomous democratic and constitutional legitimacy is so fundamental that it is puzzling why EU legal scholarship so often ignores it. I am referring to the unwillingness of Europeans to grant EU institutions *any macroeconomically or geopolitically significant powers of compulsory mobilization of fiscal or human resources*. These sorts of powers, as noted above, remain the core attribute of national parliaments even in the era of administrative governance and is also the strongest indicator of their privileged position as sources of democratic and constitutional legitimacy in modern governance. The EU’s autonomous fiscal resources are limited to a supranational budget amounting to roughly one per cent of the aggregated Gross National Income (GNI) of the member states, and only a small portion that budget is derived from the EU’s ‘own resources’ (most importantly, customs duties as well as a small percentage of the VAT collected at the national level). The remainder is derived from member state contributions, which are politically negotiated and derived from resources mobilized nationally. Beyond this limited fiscal dimension, there is the near total absence of any autonomous mobilization of human resources in the crucial domains of policing or defense, apart from limited staff available for border-control support via Frontex as well as even more restricted policing and defense coordination via entities like Europol and the European Defence Agency (EDA).<sup>111</sup> All other mobilization of fiscal and human resources in the EU ultimately depends on the more robust democratic and constitutional legitimacy of national parliaments, a limitation that has had a real impact on EU capacities in the face of various recent crises—the Eurozone, refugees, and terrorism. Without such legitimacy, the EU becomes a primarily normative, regulatory entity—a powerful one to be sure, but nonetheless one whose authority depends almost entirely on the member states to mobilize the resources needed to enforce its norms.



The EU's normative power, like all power of an ultimately administrative character, finds its legitimacy primarily in legal, technocratic and functional claims. The EU benefits in particular from the need to coordinate a range of regulatory policies across multiple member states. This coordination demands delegation from the national to the supranational level in order to produce rules to further the policy goals of integration among the member states themselves—what Fritz Scharpf (1999) effectively alluded to when he famously spoke of the EU's 'output legitimacy'. In this way, the EU's supranational system of governance exists as a kind of hyper-powerful agency exercising delegated normative and regulatory power conferred upon it by multiple national constitutional principals. These principals have, for sound functional reasons, committed themselves to the surveillance of 'pre-commitment' agents at the EU level—e.g. the Commission, the Court of Justice of the European Union (CJEU), and the European Central Bank (ECB)—in order to make integration a functioning reality and not just a legal fiction.<sup>IV</sup>

In pursuing its mandate, the EU possesses a degree of electoral legitimacy through the European Parliament (EP), as well as some indirect electoral legitimacy through the Council (again, Scharpf's 'input legitimacy'). The EU's problem, however, is neither inputs nor outputs but *demos*-legitimacy: Europeans have not yet come to experience its regulatory apparatus as the expression of an identity between a population—a historically coherent *demos*—and a set of institutions that is perceived as the *demos*'s 'own', constituted over time for the purposes of self-government. Again, the strongest indicator of this lack of *demos*-legitimacy is the EU's lack of autonomous legitimate compulsory mobilization powers, human and fiscal. In this and in other crucial respects, the EU remains primarily derivative of national *demos*.

This sort of historically constructed identity between ruling institutions and the ruled is the ultimate foundation of democratic and constitutional legitimacy in modern governance, one that makes true solidarity (not to mention compulsory mobilization) possible on a socio-political scale. Whereas the EU's output legitimacy might create a sense of 'government *for* the people' and its input legitimacy a sense of 'government *by* the people', what the EU lacks is a sense of an identity-based 'government *of* the people'. As Kalypso Nicolaidis has stressed (2004:102), the EU is thus primarily 'a community of projects, not a



community of identity'. It is *demoi*-cratic rather than democratic, with a democratic legitimacy polycentrically distributed among the member states.

It is unsurprising, in these circumstances, that the public law of European integration has continually resorted to mechanisms of nationally mediated legitimacy—executive, legislative, and judicial—in order to ‘borrow’ legitimacy from the national level. National executives were the primary source of this mediated legitimacy for much of integration history, by way of the Council of Ministers and the European Council. However, over the last several decades, national high courts and eventually even national parliaments have become increasingly important sources as well (see generally Lindseth 2010). Indeed, EU public law has long heavily depended on cooperation of national courts, and this is something they have generally been willing to provide subject to more recent outer limitations designed to protect the democratic character of national government (very much in keeping with the judicial role under the postwar constitutional settlement).<sup>v</sup> As for national parliaments, establishing forms of mediated legitimacy—in the sense of information flows and oversight—have arguably been the principal motivation behind national parliamentary scrutiny mechanisms in the EU context.<sup>vi</sup> These mechanisms target not merely the actions of national executives operating at the EU level but also the supranational regulatory output of EU institutions themselves, through the so-called early warning mechanism (EWM) established in the Treaty of Lisbon.

The purpose of the mechanism of nationally mediated legitimacy is to address, *not* a democratic deficit as it is commonly called, but a *democratic disconnect* at the heart of the integration process. My insistence on this alternative conceptual vocabulary is deliberate. The ‘deficit’ view implies that the legitimacy challenge is simply one of institutional engineering: how to ensure broader powers for the elected EP (or perhaps for the electorate itself through the European Citizens’ Initiative) in order to make up for the legitimacy shortfall that prevents the EU from becoming an autonomous level of democratic and constitutional governance in a quasi-federal system (for a critique, see Weiler 2011). The ‘disconnect’ view, by contrast, stresses the dynamic at the heart of the EU’s ultimately ‘administrative, not constitutional’ character: the separation of regulatory *power* from democratic *legitimacy* in EU governance. The challenge facing the EU is not one of fixing a ‘deficit’ but overcoming, in a more socio-political way, the ‘disconnect’ between the EU’s regulatory power and its sources of democratic and constitutional legitimacy at



the national level. The ‘disconnect’ view derives from an empirically based historical recognition that, at this point in Europe’s development, such democratic and constitutional legitimacy at the EU level is lacking. Consequently, European elites cannot easily engineer that legitimacy into existence, as the ‘deficit’ claim implies, at least in the short or intermediate term.

#### 4. ‘Coming to terms’ with EU law... *despite* what EU judges, lawyers, and law professors maintain

So how shall we ‘come to terms’ with this complex reality of governance in the EU? We should understand the phrase ‘coming to terms’ in two senses that play off each other in interesting ways. The first is nominal: Literally, how shall we name what we see? What is the conceptual vocabulary that best captures the character of the EU system of governance, with its fundamental disconnect of regulatory *power* and democratic and constitutional *legitimacy*?

If we regard this nominal challenge in strictly legal terms and, more importantly, give the pronouncements of the CJEU and sympathetic legal commentators the dispositive role in our determination, then the response is clear: The EU is a ‘constitutional’ level of governance in its own right, with the EU treaties serving as a ‘constitutional charter of a Community based on the rule of law’.<sup>VII</sup> The implication is that the centralized rulemaking process in the EU—in which the Commission ‘proposes’ and the Council and EP together ‘dispose’ in various ways—is also of a ‘constitutional’ character, serving as the EU’s ‘legislature’. In this view, the EU’s ‘administrative’ sphere begins where this ‘legislative’ sphere ends.

The other sense of ‘coming to terms’, however, looks beyond the nominal and legal and moves into the sociological and historical domains. It recognizes that ‘coming to terms’ entails a deeper process of reconciliation in which European public law at all levels (national and supranational) confronts a feature of EU governance that the nominal constitutional discourse either elides or outright ignores. The problem with the nominal constitutionalism of the Court of Justice and legal commentators is that it proceeds ‘as if’ the EU possesses this robust form of legitimacy in its own right, in defiance of the EU’s



actual socio-historical character (Lindseth 2016). In ‘coming to terms’ with *this* reality, we must do more than name it; rather, we must also understand how European law, both national and supranational, has evolved as a consequence of the EU’s fundamentally ‘administrative, not constitutional’ character. From this socio-historical perspective, the analytical focus must necessarily move beyond the nominal constitutionalism of the CJEU and sympathetic legal commentators to a more comprehensive understanding of the EU’s legal and institutional development as a novel instance of regulatory power beyond the confines of the state.

What this less CJEU-centric analysis tells us is that, *despite* what EU judges, lawyers, and law professors maintain, there are numerous features of EU public law—notably, *nationally grounded resource mobilization* and *nationally mediated legitimacy*—that are not merely in tension with, but also that directly contradict, the dominant constitutionalist paradigm of EU law. From its earliest articulation, the administrative perspective sought to understand EU law in terms of the tensions raised in this conflict between the EU’s constitutionalist logic and its administrative character:

Regardless of the scale or constitutionalist pretense of an international regulatory organization, without this cultural foundation of democratic legitimacy, all we are left with, from the standpoint of popular perception, is a technocratic body—a supranational administrative agency—with an attenuated relationship to the perceived ultimate source of the agency’s normative powers: the participating states severally as representatives of their ‘sovereign’ peoples. The temptation to ignore this attenuated relationship, perhaps to read it out of the problem ... in my view simply lays the groundwork for serious, on-going democratic-legitimacy problems in supranational bodies (Lindseth 1999:736).

Over the last decade and a half, it has become increasingly clear how much these ‘on-going democratic-legitimacy problems’ also directly negate the ‘constitutionalist pretense’ of the EU. The emergence of genuine constitutional legitimacy is, in the modern era, intimately linked to the socio-political and socio-cultural underpinnings of democratic sovereignty itself (Ackerman 1991; Rubinfeld 2001). As Neil MacCormick (1999:173) has taught us, this emergence is tied to the sense that a particular political community, as a collectivity, sees itself as ‘*entitled* to effective organs of political self-government’ through institutions that the community then constitutes for this purpose. At the heart of this peculiarly modern notion of democratic self-government is the legitimate capacity to



extract and redirect fiscal and human resources on a societal scale. Constitutionalism is anchored in this capacity, dividing powers and protecting rights in order to subject compulsory mobilization to the rule of law.

Perhaps, then, it is time to abandon that ‘constitutionalist pretense’ of the EU, regarding it as an ‘infant disease’ à la Pescatore (1983). Where would that lead us? As the bullet points set out below suggest, this could certainly have a major impact on how the CJEU should approach its job. (Indeed, this has always been the primary purpose of the administrative perspective, not simply to change our descriptive understanding but also our legal framework for interpreting EU action.) To regard the EU as primarily administrative (or ‘sub-constitutional’) need not mean abandoning the functional concerns over legal diversity or weakening protection of fundamental rights. But it would involve heightened sensitivity to the risks of supranational encroachments on national democracy, entailing a much more explicit balancing of the functional demands of ‘pre-commitment’ against the rights of the various European demoi to continuing democratic self-government.

This interpretive shift could manifest itself legally in several possible ways:<sup>VIII</sup>

- Policing the boundaries of competences conferred on the EU with much greater rigour, in recognition that these sorts of constraints are a typical feature of modern administrative governance and must be enforced in the interest of democracy;
- Within the boundaries of power indisputably conferred on the EU, taking a much more demanding approach with regard to the principle of subsidiarity, both in terms of substance and procedure, enforcing the requirements of the Subsidiarity Protocol rather than following the CJEU’s own highly deferential jurisprudence on the question;
- As to any ambiguities with regard to the appropriate legal basis for EU legislation, favouring interpretations that maximize national democratic rights (i.e., unanimity bases—to the extent they still exist—over qualified-majority voting bases);
- Adopting a more cautious attitude toward further ‘agencification’, which, despite obvious functional benefits, also further attenuates the chain of democratic and constitutional legitimacy flowing from the national level (a concern that extends to Treaty-based expert bodies like the ECB);



- Tempering significantly claims to EU law ‘autonomy’, recognizing that a certain amount is necessary (and intended) in order for bodies like the CJEU to fulfil their ‘pre-commitment’ function but rejecting claims of autonomy as a license to ignore or modify constraints imposed by the member states in their role as constitutional principals in the EU legal system;<sup>IX</sup>
- Finally, and most importantly, abandoning any notion of constitutional ‘supremacy’—rhetorically or legally—particularly with regard to the relationship between EU law to national constitutional law. Supremacy should be replaced by a principle of ‘strong deference’ from the national to the supranational level, one that would recognize, on the one hand, national openness to EU law as well as the functional demands of supranational ‘pre-commitment’ but, on the other hand, enforce ultimate limits on any such deference/openness flowing from the need to preserve the essence of democratic and constitutional government on the national level.

One can relate this argument to the debate over the impact of Article 4(2) TEU, which sets out the EU’s obligation to respect member-state ‘national identities, inherent in their fundamental structures, political and constitutional’. On the one hand, the call for a principle of ‘strong deference’ is in line with those who argue that Article 4(2), in exceptional circumstances, negates any claim to the ‘absolute primacy’ of EU law (Bogdandy and Schill 2011). On the other hand, it also concurs with those who argue that Article 4(2) should also deeply influence the resolution of more routine disputes, such as those dealing with the scope of EU competences relative to the member states or the application of the principle of subsidiarity (Guastaferrò 2012).

These proposals also find resonance in the European jurisprudence of the German Federal Constitutional Court, particularly in its elaboration of the so-called *Demokratieprinzip*,<sup>X</sup> most recently in the judgment disposing of the *Gauweiler* challenge to the ECB’s OMT program.<sup>XI</sup> But we should not fall prey to the notion that such ideas are only the luxury for the emerging German hegemon in the integration process. Rather, as Kalypso Nicolaïdis has rightly noted (2012:265), ‘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’. The *Demokratieprinzip*, in both its



substantive and procedural dimensions, is one of those democratic defence mechanisms. In the face of the dangers of juristocratic and technocratic overreach in an EU of a still fundamentally ‘administrative’ character, we should recognize that what is jurisprudentially good for the German ‘goose’ should also be good for the Greek, Irish, Portuguese, Italian, or Spanish, etc., ‘gander’. The *Demokratieprinzip*, along with the administrative perspective it reflects, is particularly necessary today to counteract the claims of a ‘*gouvernement des juges (or des experts)*’ in the EU (Tuori 2015:172).

## 5. Conclusion: beyond ‘as if’ constitutionalism in EU law

Dani Rodrik, a development economist, has in effect conceptualized some of the tensions we see in European integration through what he calls the ‘Globalization Trilemma’ (Rodrik 2011). This model holds that democracy is only compatible with global economic integration if democracy can be supranationalized as well; otherwise, the form of governance that results will be experienced as fundamentally technocratic and the negation of democracy on the national level (see, e.g., Rodrik 2016; see also Bartl 2017). This is the reality that the administrative paradigm on EU law has always sought to address, and it is particularly pertinent to the integration process in times of crisis.<sup>xii</sup> Rather than indulging in an ‘as if’ nominal constitutionalism (Lindseth 2016), we should confront the EU as it actually is: ‘administrative, not constitutional’. Unless and until Europeans begin to experience democracy and constitutionalism in supranational terms, EU governance will persist as a *gouvernement des juges* and *des experts* lacking in robust legitimacy of its own, at least to the extent commensurate with its increasingly ambitious goals (currency union, Schengen, defence and security cooperation). It is function of the ‘administrative law, not constitutional’ paradigm to demand the adjustment of the EU’s judicial doctrines, to address this ‘new dimension to an old problem’ (Lindseth 1999:630)—the separation of regulatory power from its robust sources of democratic and constitutional legitimacy on the national level.

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origins of this contribution in an orally-delivered lecture, I have kept the citations to a minimum. Interested readers can consult my work in the ‘Sources Cited’ for additional citations.

<sup>I</sup> For classic statements of this type of functional legitimacy, see Landis 1938; Willis 1933. For more recent discussions, see Lindseth 2015; Loughlin 2005.

<sup>II</sup> See, e.g., *Brunner v. European Union Treaty* (the German Maastricht Decision), 12 Oct. 1993, BVerfGE 89, 155, [1994] 1 CMLR 57, 33 ILM 388 [1994], specifically at 439 (rationalizing transfer of control over monetary policy to the European Central Bank ‘in order to ensure that currency is not vulnerable to pressure groups or to holders of public office seeking re-election’).

<sup>III</sup> Just prior to the submission of this article, a cohort of nineteen member states (including France, Germany, Italy and Spain) announced efforts to create a Cooperative Financial Mechanism, or CFM, to provide funding for joint military projects. The details will be negotiated over the next year but according to published reports, contributions will be voluntary and the monies in the fund will be owned by national governments (Emmott 2017). Aside from the voluntary contributions, therefore, the contemplated model would seem to follow that of the European Stability Mechanism (ESM), which was established to financial assistance to member states of the Eurozone in financial difficulty. See generally ‘European Stability Mechanism’ <https://www.esm.europa.eu> accessed 19 May 2017.

<sup>IV</sup> This is in keeping with the role of delegation on the national level. On the relationship between national and supranational forms of delegation as pre-commitment mechanisms, see Majone 1998.

<sup>V</sup> For a review of some of the leading cases, see Lindseth 2010, ch 4. See also *Gauweiler (OMT)*, BVerfG, 2 BvR 2728/13 (June 21, 2016), para. 142 (surveying the case law) [http://www.bverfg.de/e/rs20160621\\_2bvr272813.html](http://www.bverfg.de/e/rs20160621_2bvr272813.html) accessed 19 May 2017.

<sup>VI</sup> For more detail, see the extended discussion in Lindseth 2017.

<sup>VII</sup> Case 294/83, *Parti écologiste ‘Les Verts’ v. Parliament*, 1986 E.C.R. 1339, 1365 para. 23.

<sup>VIII</sup> These bullet points draw from the more detailed analysis set out in Lindseth 1999 and 2010, which include citations to cases whose outcome would have been different had the ECJ adopted this approach.

<sup>IX</sup> For a contrary view from a strongly constitutionalist perspective, see Halberstam 2015.

<sup>X</sup> For a brief analysis, see Lindseth 2014:553–55.

<sup>XI</sup> BVerfG, Urteil des Zweiten Senats vom 21. Juni 2016 - 2 BvR 2728/13 [http://www.bverfg.de/e/rs20160621\\_2bvr272813.html](http://www.bverfg.de/e/rs20160621_2bvr272813.html). For analysis, see Peter L Lindseth, ‘Meanwhile, in Germany...the OMT Ruling of the German Constitutional Court’, *EUtopia Law* (23 June 2016) <https://eutopialaw.com/2016/06/23/meanwhile-in-germany-the-omt-ruling-of-the-german-constitutional-court>.

<sup>XII</sup> As Yanis Varoufakis, the former Greek finance minister, famously reported of his meetings with the Eurogroup in 2015, Wolfgang Schäuble made clear, on behalf of the creditor countries, that ‘we can’t possibly allow an election to change anything. Because we have elections all the time, there are 19 of us, if every time there was an election and something changed, the contracts between us wouldn’t mean anything’ (Varoufakis 2015). Similarly, Jean-Claude Juncker, the Commission President, famously proclaimed in response to the Syriza election victory in January 2015: ‘*Il ne peut y avoir de choix démocratique contre les traités européens*’—‘There can be no democratic choice against the European treaties’ (Mével 2015).

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